

2006

## ***Grutter* at Work: A Title VII Critique of Constitutional Affirmative Action**

Jessica Bulman-Pozen  
*Columbia Law School*, [jbulma@law.columbia.edu](mailto:jbulma@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Education Law Commons](#), [Labor and Employment Law Commons](#), and the [Law and Race Commons](#)

---

### **Recommended Citation**

Jessica Bulman-Pozen, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L. J. 1408 (2006).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/1544](https://scholarship.law.columbia.edu/faculty_scholarship/1544)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

JESSICA BULMAN-POZEN

## *Grutter* at Work: A Title VII Critique of Constitutional Affirmative Action

**ABSTRACT.** This Note argues that Title VII doctrine both illuminates internal contradictions of *Grutter v. Bollinger* and provides a framework for reading the opinion. *Grutter*'s diversity rationale is a broad endorsement of integration that hinges on the quantitative concept of critical mass, but the opinion's narrow-tailoring discussion instead points to a model of racial difference that champions subjective decisionmaking and threatens to jettison numerical accountability. Title VII doctrine supports a reading of *Grutter* that privileges a view of diversity as integration and therefore cautions against the opinion's conception of narrow tailoring. *Grutter*, in turn, can productively inform employment discrimination law. The opinion reaffirms principles of contested Title VII precedent and suggests how employers might use affirmative action to meaningfully integrate their workforces.

**AUTHOR.** Yale Law School, J.D. expected 2007; University of Cambridge, M.Phil.; Yale University, B.A. Many thanks to David Pozen and Danielle Tarantolo for helpful comments and to Vicki Schultz for teaching that inspired this Note and generous suggestions throughout the writing process. I am especially indebted to Kenji Yoshino, whose guidance has been invaluable.



## NOTE CONTENTS

INTRODUCTION	1410
I. <i>GRUTTER'S</i> DIVERSITY	1413
A. The Compelling Interest: Diversity-as-Integration	1413
B. Narrow Tailoring: Diversity-as-Difference	1417
II. TITLE VII'S CRITIQUE OF <i>GRUTTER</i>	1420
A. Affirmative Action Under Title VII	1422
B. Title VII's Case for Integration	1424
1. Subjectivity and Numerical Accountability	1424
2. Subjectivity and Affirmative Action	1430
C. Reading <i>Grutter</i> Through the Lens of Title VII	1433
III. CONSEQUENCES FOR TITLE VII	1436
A. <i>Grutter's</i> Migration	1437
B. The Threat	1440
C. Making <i>Grutter</i> Work	1442
CONCLUSION	1447

## INTRODUCTION

*Grutter v. Bollinger*<sup>1</sup> transformed affirmative action jurisprudence. Resuscitating *Bakke*,<sup>2</sup> and renovating it in the process, *Grutter* has invigorated educational affirmative action programs and changed the terms of the affirmative action debate in other contexts, most notably employment. While the Court in the past twenty-five years has limited affirmative action to the strictly remedial context for public employers, and lent only slightly more leeway to private employers, *Grutter* promises to expand employers' range of legal justifications. The opinion introduces a rich understanding of diversity that emphasizes values of integration—guaranteeing and signaling that American institutions are open to all, facilitating cross-racial understanding, and breaking down stereotypes—for both particular institutions and society at large. *Grutter*'s diversity is not the diversity of difference that stands as an alternative to remediation, but rather a diversity of integration that extends the remedial rationale from backward-looking compensation to forward-looking solutions to racial segregation and hierarchy.

Because *Grutter*'s conception of diversity has remedial resonances and, even more so, because the opinion focuses on society's need for meaningful integration, the implications of *Grutter*'s holding cannot be contained by university walls. Yet while several scholars have asked whether courts will import *Grutter*'s diversity rationale into the employment context,<sup>3</sup> none has taken up the issue that formed the fault line between *Grutter* and its companion case, *Gratz v. Bollinger*<sup>4</sup>: narrow tailoring.<sup>5</sup> In this Note, I explore the

---

1. 539 U.S. 306 (2003).

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

3. 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 (2005); Michael L. Foreman et al., *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation's Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81 (2004); Allan G. King & Jeremy W. Hawpe, *Gratz v. Grutter: Lessons for Pursuing Diversity in the Workplace*, 29 OKLA. CITY U. L. REV. 41 (2004); Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451 (2004); Ronald Turner, *Grutter, The Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199 (2004); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter*, 92 KY. L.J. 263 (2003); Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093 (2004).

4. 539 U.S. 244 (2003).

5. See, e.g., Estlund, *supra* note 3, at 15 ("My focus here will be chiefly on the 'why'—on the justifications for affirmative action under *Grutter*. But the 'how' and the 'how much' . . . have important implications for workplace affirmative action as well."); Leach, *supra* note 3,

implications of *Grutter*'s narrow-tailoring discussion for employment discrimination law and further ask how employment discrimination law might guide interpretations of *Grutter*. Though *Grutter* sheds new light on the constitutionality of public employers' affirmative action programs, I focus on Title VII law, which covers both public and private employers and which many lower courts have interpreted as less permissive of nonremedial affirmative action.<sup>6</sup> I contend that Title VII illuminates *Grutter*'s internal contradictions and provides a framework for reading the opinion, and that *Grutter*, in turn, can productively inform employment affirmative action plans.

In Part I, I describe the tension in Justice O'Connor's *Grutter* opinion between two forms of diversity: diversity-as-integration and diversity-as-difference. Diversity-as-difference<sup>7</sup> understands racial diversity as a proxy for viewpoint diversity and stresses the educational value of interaction among students with different backgrounds and perspectives. Diversity-as-integration, by contrast, emphasizes our nation's history of racism, segregation, and inequality, and regards race not as a proxy for viewpoint but as itself the salient category: Racial diversity breaks down current barriers to equal opportunity both directly, by opening institutions to all racial groups and reducing de facto segregation, and indirectly, by bringing members of different races into sustained contact that challenges stereotypes and fosters interracial connectedness.<sup>8</sup> While *Grutter*'s compelling-interest discussion champions diversity-as-integration and the related quantitative concept of critical mass,

---

at 1100 ("This Note does not address the narrow-tailoring dimension of the strict scrutiny test, yet this is not to overlook its importance . . .").

6. Title VII exempts race from its bona fide occupational qualification (BFOQ) provision, which allows employers to rely on an employee's sex, religion, or national origin when it is necessary to the business's operation. 42 U.S.C. § 2000e-2(e) (2000). Thus, under Title VII, courts have struck down affirmative action plans that cast racial diversity as a business need. See, e.g., *Knigh v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157 (2d Cir. 1981); *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650 (5th Cir. 1980). But when similar plans have been challenged under the Constitution, some courts have accepted an operational need defense. See, e.g., *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002). See generally *Leach*, *supra* note 3 (discussing the tension between statutory and constitutional approaches to the "occupational need" defense). Notably, under Title VII, a valid affirmative action plan serves not as an affirmative defense but rather as a legitimate nondiscriminatory reason for the challenged employment decision, see *Johnson v. Transp. Agency*, 480 U.S. 616, 616 (1987), and, as I discuss, *Grutter*'s diversity rationale for affirmative action is significantly broader than the operational need defense, see *infra* Section I.A.
7. The phrase is Cynthia Estlund's. See, e.g., Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 82 (2000).
8. See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1196-97 (2002); Estlund, *supra* note 3, at 16-17.

the opinion's narrow-tailoring discussion insists on an individualized decisionmaking process that endorses diversity-as-difference.

To resolve this internal tension, I argue in Part II that Title VII doctrine<sup>9</sup> supports a reading of *Grutter* based on diversity-as-integration. *Grutter*'s narrow-tailoring discussion conflicts with standards that have shaped employment discrimination law. Whereas *Grutter* applauds individualized, subjective decisionmaking and seems to reject numerical accountability, courts evaluating Title VII claims have expressed skepticism about subjective decisionmaking, which is readily infected by bias, and have demanded numerical benchmarks. Title VII law's longstanding engagement with affirmative action has yielded the manifest imbalance standard, which requires that affirmative action plans use numerical goals pegged to labor markets.<sup>10</sup> Applying this logic to *Grutter* suggests a demographically derived standard for integration that falls between rigid quotas<sup>11</sup> and the opinion's inward-looking critical mass inquiry.

Finally, in Part III, I explore *Grutter*'s consequences for Title VII doctrine. While the opinion's narrow-tailoring analysis threatens employment discrimination law more than it threatens educational affirmative action, *Grutter*'s diversity-as-integration rationale and its attendant concept of critical

- 
9. My discussion of Title VII focuses on judicial interpretations of the statute, but as scholars have recognized, employment discrimination law is partially constructed by the interpretations of nonjudicial actors, such as employers, human resource managers, and academic commentators. Development of Title VII doctrine therefore reflects an elaborate process of both legal and cultural construal. See, e.g., Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) [hereinafter Edelman, *Diversity Rhetoric*]; Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) [hereinafter Edelman, *Symbolic Structures*]; Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management*, 41 AM. BEHAV. SCIENTIST 960 (1998).
  10. Title VII's manifest imbalance standard defines the background justification for affirmative action: An employer may implement a plan if there is a statistical disparity between the racial composition of the workforce and the relevant labor pool. An acceptable affirmative action plan will therefore have numerical goals and timetables designed to bring the workforce more in line with the local labor market. See, e.g., *Johnson*, 480 U.S. at 631-40.
  11. Rigid quotas are problematic not only for opponents of affirmative action but also for supporters. While numerical goals and benchmarks lie at the heart of effective affirmative action plans, strict quotas may undermine some of integration's central goals by stigmatizing affirmative action beneficiaries. See Marylee C. Taylor, *Impact of Affirmative Action on Beneficiary Groups: Evidence From the 1990 General Social Survey*, 15 BASIC & APPLIED SOC. PSYCHOL. 143 (1994) (stressing the difference between rigid quotas and using race as a plus factor); see also Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1259-70 (1998) (reviewing research suggesting that certain affirmative action plans may exacerbate intergroup bias and cause self-derogation among affirmative action beneficiaries).

mass reaffirm the broad view of Title VII that Supreme Court precedent sets forth, but that lower courts and Supreme Court dicta have since eroded. The diversity-as-integration rationale suggests that employers may implement affirmative action plans not only to compensate for their own past discrimination but also to rectify workforce imbalances, and that they may use general labor market figures to determine whether there are imbalances. In addition, *Grutter*'s critical mass standard complements the manifest imbalance inquiry and underscores that employment discrimination law would benefit from bringing *Grutter* to the workplace.

## I. GRUTTER'S DIVERSITY

The Supreme Court's opinion in *Grutter* has shifted the terms of an affirmative action debate long focused on the distinction between diversity and remedial rationales. Embracing the former, *Grutter* recasts diversity to encompass integration and therefore defines the diversity rationale not as an alternative to the remedial rationale, but as an extension of it.<sup>12</sup> When the Court turns to narrow-tailoring analysis, however, it relies on *Bakke*'s requirement of individualized consideration for every applicant, a constraint that emphasizes racial difference over meaningful integration.<sup>13</sup> This deep divide in the opinion is expressed in three interrelated tensions: While the compelling-interest discussion champions diversity-as-integration, the benefits of diverse institutions to society at large, and the use of critical mass to achieve integration, the narrow-tailoring discussion champions diversity-as-difference, the benefits of diversity only within institutions, and individualized consideration for each applicant that precludes attention to numerical benchmarks.

### A. *The Compelling Interest: Diversity-as-Integration*

In *Grutter*, a clear majority of the Court held for the first time that "student body diversity is a compelling state interest."<sup>14</sup> The Court drew on Justice Powell's *Bakke* opinion, but transformed as much as revived it. Powell argued that universities have a compelling interest in selecting students who will

---

12. See *infra* Section I.A.

13. See *infra* Section I.B.

14. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

contribute most to the “robust exchange of ideas.”<sup>15</sup> By using race as a proxy for viewpoint diversity, Powell articulated a conception of diversity-as-difference: Racial diversity was valuable inasmuch as it brought different perspectives to university classrooms and fostered lively discussion.

*Grutter* articulates a new conception of diversity-as-integration that conceives of both diversity and educational purposes more expansively than *Bakke*. Whereas *Bakke* assumed a link between race and viewpoint, at least in the aggregate,<sup>16</sup> *Grutter* relies in part on the very absence of such a nexus and champions intraracial diversity.<sup>17</sup> The opinion regards race not as a proxy for viewpoint, but as itself salient: More important than the likelihood that racial minorities will bring unique perspectives to the university is the recognition that race triggers stereotypes, prejudice, and isolation.<sup>18</sup> Despite emphasizing race as such, *Grutter*’s vision of what race means is deeply contingent. The opinion gestures toward a world in which racial diversity will simply yield “a student body that looks different.”<sup>19</sup> But *Grutter* acknowledges that this is not yet our world, for racial minorities are likely to have unique life experiences

- 
15. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (internal quotation marks omitted).
  16. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579-80 (1990) (discussing *Bakke*), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
  17. See, e.g., *Grutter*, 539 U.S. at 319-20, 333. Even when Justice O’Connor echoes *Bakke* in claiming that classroom discussion is more interesting when students have a variety of backgrounds, *id.* at 330, she emphasizes intraracial diversity: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is *one’s own, unique experience* of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Id.* at 333 (emphasis added).
  18. See *id.* at 330 (noting the problem of racial stereotypes); Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 28 (2004); Estlund, *supra* note 3, at 17; see also Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379 (2002) (discussing stereotype threat, which leads minority students to underperform because of concerns that their performance might confirm a negative stereotype about their racial group).
  19. *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996). *Hopwood* invoked this thin conception of race to reject the diversity rationale. See *id.*; Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29, 40-48 (Robert Post & Michael Rogin eds., 1998). But *Grutter* suggests that such a thin conception would be a significant accomplishment for equal protection. See *Grutter*, 539 U.S. at 333 (discussing the importance of eliminating racial stereotypes); cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (“[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous ‘melting pot’ do not identify essential differences among the human beings that inhabit our land.”).

“[b]y virtue of our Nation’s struggle with racial inequality.”<sup>20</sup> The opinion destabilizes views of racial difference not by embracing a thin conception of race or by demanding assimilation, but rather by emphasizing intraracial difference and casting the university as a locus of change where students of all races break down stereotypes and forge connections and new identities.<sup>21</sup>

Equally central to *Grutter*’s diversity-as-integration rationale is the Court’s belief that educational diversity will foster integration in society at large. *Grutter* posits that diverse universities are instrumental to realizing extrinsic social goals, such as preparing students to work in “an increasingly diverse workforce,”<sup>22</sup> participate as citizens in American society,<sup>23</sup> and serve as “leaders with legitimacy in the eyes of the citizenry.”<sup>24</sup> Integration signals that institutions and paths to leadership are open to members of all races, and this both bolsters the legitimacy of such institutions in the public eye and dynamically facilitates integration by suggesting to minorities that it is worthwhile to invest in their human capital.<sup>25</sup> Training its eye on “the dream of one Nation, indivisible,”<sup>26</sup> *Grutter* delivers on the promise of *Brown*, not the more limited promise of *Bakke*.<sup>27</sup>

*Grutter*’s rich understanding of diversity-as-integration generates two interwoven doctrinal innovations. First, the Court suggests that diversity and remediation need not be mutually exclusive rationales for affirmative action.<sup>28</sup>

---

20. *Grutter*, 539 U.S. at 338.

21. See *id.* at 330; Anderson, *supra* note 8, at 1207; Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 72 (2004).

22. *Grutter*, 539 U.S. at 330 (citation omitted).

23. *Id.* at 332.

24. *Id.*; see Anderson, *supra* note 18, at 23; Joel K. Goldstein, *Beyond Bakke: Grutter – Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 946–52 (2004); Robert C. Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 60 (2003). As Justice Scalia’s dissent underscores, these are not educational purposes in any narrow sense, *Grutter*, 539 U.S. at 347 (Scalia, J., concurring in part and dissenting in part), but because *Grutter* defines educational benefits broadly, it avoids the “ominous implications of Powell’s reasoning, which sharply separated social justice from educational aims,” Anderson, *supra* note 8, at 1217.

25. See Anderson, *supra* note 8.

26. *Grutter*, 539 U.S. at 332.

27. See Anderson, *supra* note 18, at 15; Goldstein, *supra* note 24, at 902; Linda S. Greene, *From Brown to Grutter*, 36 LOY. U. CHI. L.J. 1, 2 (2004).

28. Prior to *Grutter*, the diversity argument was regarded as an alternative to remedial arguments. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Hopwood v. Texas*, 78 F.3d 932, 948–49 (5th Cir. 1996).

*Grutter* infuses the diversity rationale with remedial justifications<sup>29</sup> and expands the remedial rationale in turn: Instead of looking to the past, *Grutter* looks to the future; instead of noting only the benefits that accrue to minority groups, *Grutter* notes the benefits to society at large; and instead of demanding that particular wrongdoers compensate particular victims, *Grutter* allows those in a position to facilitate integration to act affirmatively. This last point is *Grutter*'s second doctrinal innovation: The decision suggests a new openness to unit-level responses to racial inequality. Previous equal protection cases had insisted that institutions could not respond to societal discrimination because it was "too amorphous a basis" for remediation,<sup>30</sup> but *Grutter* suggests the relevant inquiry should be whether an institution is currently in a position to foster integration,<sup>31</sup> and it casts institutional initiatives as the most tenable solution to lingering segregation and inequality.

The concept of critical mass operationalizes *Grutter*'s commitment to diversity-as-integration by ensuring interracial representation and, especially, by facilitating cross-racial understanding and undermining stereotypes. The Court defines critical mass as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated" or "like spokespersons for their race."<sup>32</sup> As such, a critical mass guarantees that minority students are not "tokens" who are targets for biased judgment and particularly susceptible to performance pressures and demands either to conform or to fit stereotyped roles.<sup>33</sup> *Grutter* recognizes that a low number of minority students is not only a potential sign of discrimination but a cause of it,<sup>34</sup> so the presence of a critical mass at once evidences fair and open admissions policies and reduces discrimination. Although the opinion defines critical mass in qualitative terms, moreover, it is a fundamentally quantitative inquiry, and *Grutter*'s reliance on critical mass implicitly recognizes that the

---

29. Greene, *supra* note 27, at 16; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1538 (2004).

30. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

31. See Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1621 (2003); Greene, *supra* note 27, at 18.

32. *Grutter v. Bollinger*, 539 U.S. 306, 318-19 (2003).

33. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 242 (1977); Steele, *supra* note 18, at 423.

34. See, e.g., KANTER, *supra* note 33, at 242; Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385 (2003).

integrative project must employ the numerical goals that define remedial affirmative action.<sup>35</sup>

*B. Narrow Tailoring: Diversity-as-Difference*

While *Grutter*'s discussion of the law school's compelling interest suggests a model of diversity-as-integration, its narrow-tailoring analysis points in almost the opposite direction, toward a conception of diversity-as-difference that stresses individualized consideration and eschews numerical accountability. The opinion articulates several components of narrow tailoring,<sup>36</sup> but—as *Grutter*'s companion case, *Gratz*, highlights<sup>37</sup>—evaluating applicants as individuals is “paramount.”<sup>38</sup> Read together, the opinions demand flexible, holistic review of each applicant and proscribe racial quotas and mechanical bonuses for race.

The requirement that applicants be considered as individuals descends directly from Justice Powell's *Bakke* opinion, which argued that the “denial . . . of th[e] right to individualized consideration” was the “principal evil” of the medical school admissions program in question.<sup>39</sup> By embracing Powell's insistence that a school consider “all the ways an applicant might contribute to a diverse educational environment,”<sup>40</sup> *Grutter* also endorses his diversity-as-difference rationale<sup>41</sup> and the proxy relationship between race and diversity he identified—a search for diverse viewpoints, backgrounds, and experiences

---

35. See *infra* notes 122-131 and accompanying text for a more extensive discussion of critical mass.

36. See *Grutter*, 539 U.S. at 339-42.

37. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (striking down the University of Michigan's undergraduate admissions plan that gave a fixed bonus to every minority applicant).

38. *Grutter*, 539 U.S. at 337.

39. *Id.* (quoting *Bakke*, 438 U.S. at 318 n.52 (opinion of Powell, J.)); cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.”)

40. *Grutter*, 539 U.S. at 337; see also *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring) (“[T]he law school's admissions plan . . . enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class.”).

41. Cf. Post, *supra* note 24, at 71-72 (noting that *Grutter*'s requirement of individualized consideration must have “a different theoretical foundation” from the compelling-interest standard).

linked to race—rather than the direct consideration of race necessary to a diversity-as-integration plan.<sup>42</sup>

Paradoxically, even as *Grutter*'s narrow-tailoring discussion resists defining race in terms of a "specific and identifiable" contribution to diversity,<sup>43</sup> it demands an inquiry linked to a static view of racial identity: What diversity contribution will this student, because of characteristics associated with her race, rather than the fact that she is a racial minority, make to the class?<sup>44</sup> By focusing on viewpoint and background over race itself, admissions officers might admit only those minority students who appear to represent distinct experiences and perspectives, and this would constrain the diversity-as-integration project.

One might argue that such constraint is just the point: Individualized consideration does not derive from and facilitate the compelling interest; rather, the narrow-tailoring requirement limits the compelling interest to protect "individuals who are not members of the favored racial and ethnic groups."<sup>45</sup> By this account, considering applicants as individuals is not a means to realize a school's interest in racial diversity but rather a means to cabin it. Yet this is not how *Grutter* presents the relationship: "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."<sup>46</sup> Ironically, it is the individualized consideration *Grutter*'s narrow-tailoring prong demands that threatens to facilitate a stereotype-laden search for connections between race and viewpoint. Even assuming that narrow tailoring should constrain an

---

42. A recent First Circuit case underscores this characterization, interpreting *Grutter*'s emphasis on individualized consideration as a means to realize viewpoint diversity, even as it distinguishes the case at hand: "Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest." *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005).

43. *Gratz*, 539 U.S. at 271.

44. See *id.* at 272-73 (describing the touted Harvard College program, in which "the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it*" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (opinion of Powell, J.))); see also Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM / LEFT CRITIQUE* 38, 46-48 (Wendy Brown & Janet Halley eds., 2002). See generally RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2005).

45. *Grutter*, 539 U.S. at 341 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

46. *Grutter*, 539 U.S. at 333 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

institution's means, moreover, it must not undermine the compelling interest altogether,<sup>47</sup> and by substituting diversity-as-difference, *Grutter's* insistence on individual consideration threatens to undermine diversity-as-integration.

The tension between *Grutter's* compelling-interest and narrow-tailoring discussions is clearest in the opinion's treatment of numerical goals. While the compelling-interest discussion invokes critical mass—a decisively quantitative, if flexible, inquiry essential to realizing the opinion's remedial commitments—the Court then suggests that narrow tailoring does not permit sustained attention to the numbers. In response to the dissenters' strenuous objection that the law school's interest in critical mass renders its program a quota system, Justice O'Connor emphasizes that the admissions committee did not base decisions on numerical benchmarks; she does not challenge the dissenters' equation outright.<sup>48</sup> If the goal is diversity-as-integration that brings together meaningful numbers of racially diverse students, however, attention to the numbers should legitimate a plan, not invalidate it.

One thoughtful, if unsettling, reading regards *Grutter's* narrow-tailoring analysis as a political compromise that permits numerical benchmarks as long as institutions camouflage the value assigned to race and therefore minimize the threat of stigma and balkanization.<sup>49</sup> This interpretation is certainly plausible given that the law school program the Court upheld seems to incorporate numerical goals. But *Grutter's* legacy depends on both its holding and its reasoning, and courts and commentators have seized on the opinion's narrow-tailoring analysis.<sup>50</sup> This is, after all, the fault line between *Grutter* and

- 
47. See *id.* at 340 (holding that the law school need not use a lottery system or decrease its emphasis on GPA and LSAT scores because “these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both”).
48. See, e.g., *Grutter*, 539 U.S. 336 (noting that admissions officers “never gave race any more or less weight based on” daily reports that tracked the racial and ethnic composition of the class); see also *id.* at 318.
49. See Post, *supra* note 24, at 75; cf. Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 652-56 (2005) (recognizing, though not supporting, this “camouflage” approach). This approach suggests that visible bonuses for race engender stigma and resentment. *But cf.* Taylor, *supra* note 11 (finding that African-American recipients of affirmative action showed no negative effects regarding job satisfaction, life satisfaction, and in-group self-esteem and showed greater occupational ambition); Marylee C. Taylor, *White Backlash to Workplace Affirmative Action: Peril or Myth?*, 73 SOC. FORCES 1385 (1995) (finding that white employees in affirmative action firms are more supportive of race-targeted remedies and more likely to hold beliefs that justify intervention on behalf of minorities than white employees in firms without affirmative action).
50. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 377 F.3d 949, 965 (9th Cir. 2004) (“*Grutter* and *Gratz* shed much-needed light on the once crepuscular contours of the narrow tailoring test applicable to the non-remedial use of racial preferences in

*Gratz*.<sup>51</sup> Even though *Grutter*'s holding largely undermines the decision's narrow-tailoring approach, judicial opinions and academic commentary are taking the narrow-tailoring discussion on its own terms and privileging what *Grutter* says over what *Grutter* does.

The opinion therefore contains an unsettled tension between diversity-as-integration and diversity-as-difference, and between employing the benchmark of critical mass and relying on individualized consideration that eschews numerical accountability. To build the case for resolving this tension in favor of diversity-as-integration, I draw on Title VII law, which has long been skeptical of subjective decisionmaking in the absence of numerical accountability.

## II. TITLE VII'S CRITIQUE OF GRUTTER

*Grutter*'s insistence on individualized consideration not only creates a tension within the opinion, but also conflicts with the emphasis on objective decisionmaking and numerical accountability that long has guided employers' affirmative action plans under Title VII. Whereas Title VII cases express skepticism about subjective decisionmaking processes, which can readily be infected by bias, *Grutter*'s narrow-tailoring discussion lionizes Michigan Law School's flexible, individualized, and ultimately subjective evaluations as the touchstone of constitutional affirmative action; and whereas Title VII cases rely on numerical benchmarks to offer accountability, *Grutter*'s discussion condemns any meaningful attention to the numbers. In short, *Grutter*'s conception of narrow tailoring depends on the same unchecked subjective decisionmaking that, according to Title VII doctrine, invites bias.

In this Part, I offer a Title VII critique of *Grutter* that suggests we resolve the opinion's internal tension in favor of diversity-as-integration over diversity-as-difference. My claim is not that statutory and constitutional standards for affirmative action must be identical, though several Justices (including Justice O'Connor) and commentators have argued for a unified standard.<sup>52</sup> Rather, I argue only that statutory and constitutional standards for

---

educational admissions."); Tilles, *supra* note 3, at 461 ("If the doctrinal development of *Grutter* follows the same path as *Bakke*, we should expect to see a greater emphasis on individualized determinations and decision making . . ."); Turner, *supra* note 3, at 237 (warning not to "confuse the quantitative measurements common to remedial affirmative action with diversity's qualitative goals").

51. *Gratz* accepted diversity as a compelling interest. *Gratz v. Bollinger*, 539 U.S. 244, 268, 275 (2003).

52. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring) ("In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal

affirmative action are interrelated, and that Title VII law can help resolve *Grutter*'s own contradictions. Doctrinal lines between the Equal Protection Clause and Title VII, and between education and employment, have proven porous in past affirmative action jurisprudence,<sup>53</sup> and there is a longstanding tradition of drawing on statutory law to inform constitutional affirmative action law. *Wygant v. Jackson Board of Education*, a constitutional case involving school teachers, looked to the foundational Title VII case *United Steelworkers of America v. Weber*;<sup>54</sup> *Metro Broadcasting, Inc. v. FCC*, a constitutional case about broadcasting licenses, extensively invoked *Weber*'s progeny, *Johnson v. Transportation Agency*;<sup>55</sup> and, in *City of Richmond v. J.A. Croson Co.*, a constitutional contracting set-aside case, Justice O'Connor imported Title VII's prima facie standard to govern the equal protection firm-basis test for remedial affirmative action.<sup>56</sup> So too, Title VII affirmative action cases have repeatedly looked to constitutional principles; for example, *Johnson* drew on *Wygant*<sup>57</sup> and especially *Bakke*.<sup>58</sup> It is therefore likely that Title VII guidelines will bear on how courts interpret *Grutter* in future constitutional cases and that, in turn, *Grutter* will influence Title VII doctrine.

Moreover, my critique of *Grutter* focuses less on doctrine than on the opinion's policy implications. Broadly speaking, affirmative action programs under both Title VII and the Constitution seek to redress discrimination and foster integration.<sup>59</sup> Title VII cases, which have long grappled with integrative

---

Protection Clause."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290-91 (1986) (O'Connor, J., concurring) (same); *Johnson*, 480 U.S. at 665-66 (Scalia, J., concurring in part and dissenting in part) (arguing for a unified, strict standard); George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988); Ronald W. Adelman, Note, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56 FORDHAM L. REV. 403 (1987).

53. See generally Estlund, *supra* note 3, at 13 (discussing the permeability of these doctrines).
54. *Wygant*, 476 U.S. at 282 (plurality opinion) (citing *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979)).
55. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 596-97 (1990) (citing *Johnson*, 480 U.S. 616), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).
56. 488 U.S. 469, 500-02 (1989). Justice O'Connor discusses not only Title VII affirmative action cases, but also traditional Title VII discrimination cases including *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299 (1977). *Croson*, 488 U.S. at 500-02; see also *id.* at 542 (Marshall, J., dissenting) (discussing the relevance of *Johnson*, *Weber*, and *Teamsters*).
57. *Johnson*, 480 U.S. at 626, 640; see also *id.* at 650-55 (O'Connor, J., concurring).
58. *Id.* at 638; *id.* at 644 (Stevens, J., concurring); see also *Weber*, 443 U.S. at 216 (Blackmun, J., concurring).
59. See, e.g., Anderson, *supra* note 8.

affirmative action plans, suggest that subjective decisionmaking facilitates discrimination while numerical benchmarks cabin it, so these cases usefully forecast both the promise of *Grutter's* compelling-interest discussion and the threat of the opinion's narrow-tailoring discussion.

#### A. *Affirmative Action Under Title VII*

The Supreme Court has allowed private employers, whose practices are governed only by Title VII, more freedom to implement affirmative action programs than public employers, whose programs are governed by both Title VII and the Equal Protection Clause.<sup>60</sup> In its two cases considering voluntary affirmative action under Title VII, the Court has used a remedial paradigm but defined its borders generously: An employer may remedy the underrepresentation of a particular group in a traditionally segregated job category whether or not this underrepresentation is traceable to the employer's behavior.<sup>61</sup> That is, the employer may act to integrate its workforce.

The 1979 case *United Steelworkers of America v. Weber* upheld a collectively bargained plan that reserved half the openings in an in-plant craft training program for African-Americans until the percentage of African-American craftworkers in the facility approximated the percentage of African-Americans in the local labor force. The Court did not require a showing of past discrimination, but instead noted that the plan would "break down old patterns of racial segregation and hierarchy" and "eliminate a manifest racial imbalance."<sup>62</sup>

Similarly, in the 1987 case *Johnson v. Transportation Agency*,<sup>63</sup> the Court upheld an affirmative action plan designed to increase female representation among skilled craftworkers in Santa Clara. When the plan was drafted, "none of the 238 Skilled Craft Worker positions was held by a woman."<sup>64</sup> Noting that sex served as a plus factor in the selection of a woman, Diane Joyce, over the

---

60. See *Croson*, 488 U.S. at 491-92 (plurality opinion) (holding that, under the Constitution, public employers may act only to remedy their own past discrimination, or discrimination within their jurisdictions in which they have become "passive participant[s]").

61. *Johnson*, 480 U.S. 616; *Weber*, 443 U.S. 193. The Court has also considered court-ordered remedial affirmative action plans. *E.g.*, *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 444-79 (1986) (plurality opinion).

62. *Weber*, 443 U.S. at 208.

63. Although the agency was a government employer, the Court considered only a Title VII challenge.

64. *Johnson*, 480 U.S. at 621.

plaintiff as a road dispatcher,<sup>65</sup> the Court clarified what it had suggested in *Weber*: To justify an affirmative action plan, a private employer “need not point to its own prior discriminatory practices, nor even to evidence of an arguable violation on its part. Rather, it need point only to a conspicuous . . . imbalance in traditionally segregated job categories.”<sup>66</sup> Although the record showed repeated and ongoing discrimination against Joyce,<sup>67</sup> this factual predicate was not central to the Court’s holding. The Court demanded only that there be a manifest imbalance—an imbalance less than that necessary to support a prima facie case of discrimination against the employer.<sup>68</sup> Instead of insisting on a narrow compensatory role for affirmative action, *Weber* and especially *Johnson* conceived of remediation in terms of integration.<sup>69</sup> Considering effects more than purposes, the Court suggested that affirmative action plans were permissible if they integrated traditionally segregated job categories that remained imbalanced.<sup>70</sup>

---

65. *Id.* at 638. There is good reason to see Joyce’s selection not as a result of preference, but as nondiscrimination—any plus factor she received simply combated the “minus” factors to which she was subject as a woman. See *infra* note 67. Affirmative action plans often compensate for present discrimination. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (opinion of Powell, J.) (noting that when race is considered to cure biases, “it might be argued that there is no ‘preference’ at all”). Social psychologist Faye Crosby has argued that affirmative action is superior to other means of combating discrimination because it alone “does not rely on the aggrieved parties to come forward on their own behalf. Relying on victims to advocate for themselves is not a good policy, as many factors make it likely that victims will not speak up . . . .” Faye J. Crosby et al., *Understanding Affirmative Action*, 57 ANN. REV. PSYCHOL. 585, 592 (2006).

66. *Johnson*, 480 U.S. at 630 (internal quotation marks omitted).

67. *Id.* at 624 n.5.

68. *Id.* at 632.

69. This integrative paradigm was nonetheless consistent with remedial goals. For instance, the *Johnson* majority suggested that women would be craft-workers but for some discrimination that the agency had the power to correct. See *id.* at 634. But see *id.* at 668 (Scalia, J., concurring in part and dissenting in part) (“It is a ‘traditionally segregated job category’ not in the *Weber* sense, but in the sense that, because of longstanding social attitudes, it has not been regarded by women themselves as desirable work.”). Scalia articulates the “lack of interest” argument that Vicki Schultz has deconstructed. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

70. See *Johnson*, 480 U.S. at 630; see also *id.* at 642-46 (Stevens, J., concurring) (teasing out the majority’s suggestion that integrative effects, rather than a backward-looking purpose, would be the touchstone of acceptable affirmative action plans).

### B. Title VII's Case for Integration

If Title VII cases anticipated *Grutter's* attention to integration, their insistence on objectivity and numerical accountability suggests *Grutter* should be read to emphasize diversity-as-integration and critical mass, rather than diversity-as-difference. Title VII doctrine underscores that the individualized consideration *Grutter's* narrow-tailoring analysis demands would be counterproductive because it facilitates bias and stereotyping, threatens to reify racial difference, and might ultimately reduce attention to racial diversity and integration altogether.

#### 1. Subjectivity and Numerical Accountability

In the past twenty-five years, social psychologists have shown that implicit bias and stereotypical thinking reflect normal developmental processes: Stereotypes are mechanisms all people use to process information about other people, and, once in place, they bias judgment and decisionmaking, serving as schemas or prototypes that influence how information is perceived, interpreted, and remembered.<sup>71</sup> Stereotypes about racial minorities are particularly prevalent, especially among white Americans, who exhibit a strong implicit bias against nonwhites.<sup>72</sup> Thus, a white evaluator might perceive white candidates as more thoughtful, charismatic, or articulate than African-American candidates simply because of her preexisting biases.<sup>73</sup> Aversive racism theory, moreover, suggests that most people experience a conflict between their

---

71. See, e.g., Kerry Kawakami et al., *Automatic Stereotyping: Category, Trait, and Behavioral Activations*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 3 (2002); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88, 1199 (1995).

72. See, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147 (2004). Notably, racial minorities also harbor stereotypes about their groups. See *id.* at 148-49 (“[F]or members of disadvantaged social groups, implicit liking for the ingroup may sometimes be attenuated by the cultural construal of their group, whereas for members of advantaged groups, implicit liking for the ingroup may sometimes be exacerbated by the cultural construal of their group.”). For empirical work showing that implicit biases and stereotypic beliefs produce discriminatory judgments and behavior, see, for example, Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001); and Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 75 (2003).

73. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 343 (1987); see also Dasgupta, *supra* note 72, at 156.

egalitarian value systems and the prejudice they harbor due to historically and culturally racist contexts.<sup>74</sup> As a result, they are most likely to discriminate when there is another plausible explanation for their actions and discrimination will not threaten their nonprejudiced self-image, such as when an African-American candidate is marginally rather than obviously qualified.<sup>75</sup>

As many scholars and some courts have noted, psychological research on bias and prejudice has significant consequences for conceptions of illegal discrimination under Title VII.<sup>76</sup> To “abolish traditional patterns of racial segregation and hierarchy,”<sup>77</sup> the law must guard not only against conscious discrimination, but also unconscious discrimination. Social cognition theory suggests that biases are most likely to infect outcomes when practices involve unrestrained, subjective decisionmaking; and psychologists, sociologists, and human-resource managers accordingly have argued for formalized, objective personnel practices that constrain subjectivity in evaluations and decisions about hiring, job assignments, and promotion.<sup>78</sup>

The Supreme Court first discussed the dangers of subjective employment practices in the Title VII case *Watson v. Fort Worth Bank & Trust*.<sup>79</sup> Clara

- 
74. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000).
75. *Id.* at 318 (finding in both 1989 and 1999 that self-described nonracist white study participants made seemingly unbiased recommendations for obviously qualified African-American candidates but evaluated marginally qualified African-American candidates much more harshly than marginally qualified white candidates).
76. See, e.g., Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Krieger, *supra* note 71; Lawrence, *supra* note 73; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).
77. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979).
78. See, e.g., Brief for Amicus Curiae American Psychological Ass’n in Support of Respondent at 22–23, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167); Stéphane Baldi & Debra Branch McBrier, *Do the Determinants of Promotion Differ for Blacks and Whites? Evidence from the U.S. Labor Market*, 24 WORK & OCCUPATIONS 478 (1997); William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 127 (2000); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 325 (2000); see also 29 C.F.R. § 1607.5(b)(4) (1975) (amended by 43 Fed. Reg. 38,295, 38, 312, Aug. 25, 1978) (“In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias.”).
79. 487 U.S. 977 (1988). Earlier, in *General Telephone Co. of the Southwest v. Falcon*, the Court noted that in an across-the-board class action, plaintiffs might allege that an employer had a

Watson applied four times for supervisory positions at her bank and was repeatedly overlooked. In making promotion decisions, the bank had no formal criteria for evaluating candidates and instead relied on the “subjective judgment of supervisors.”<sup>80</sup> Noting both the potential for conscious discriminatory intent and “the problem of subconscious stereotypes and prejudices,”<sup>81</sup> the Court analyzed this undisciplined subjective decisionmaking system under Title VII’s disparate impact approach.<sup>82</sup>

Though decided as a disparate impact case, *Watson* might better have been considered a disparate treatment case.<sup>83</sup> The case hinged not on a neutral criterion that had a disparate effect on minority candidates, but rather on a process that engendered biased decisions; the evidence suggests that the bank’s subjective decisionmaking system facilitated discrimination against Watson based on her race. While the *Watson* Court used disparate impact analysis to get at disparate treatment, the Court noted that it generally had “used conventional disparate treatment theory . . . to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria.”<sup>84</sup>

Both disparate treatment and disparate impact lawsuits and personnel practices designed to bring firms into compliance with Title VII have helped to root out the discrimination that flourishes under subjective employment systems and to force objective standards and accountability. Every federal circuit court has recognized that subjective evaluations are particularly susceptible to abuse and infection by bias.<sup>85</sup> Several courts accept excessive reliance on subjective criteria as evidence supporting an inference of

---

“general policy” of employing “entirely subjective decisionmaking processes.” 457 U.S. 147, 159 n.15 (1982).

80. *Watson*, 487 U.S. at 982.

81. *Id.* at 990.

82. *Id.* at 990-91 (“If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.”).

83. The district court had addressed Watson’s claims under a disparate treatment standard and dismissed the action. *See id.* at 983; *see also* Green, *supra* note 76, at 141.

84. *Watson*, 487 U.S. at 988-89 (citing all of the Court’s significant disparate treatment cases to date); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36 (1989).

85. *See* Hart, *supra* note 76, at 767 & n.132 (citing cases).

discrimination,<sup>86</sup> and, in the past two decades, courts have certified at least twenty classes to challenge employer policies of subjective decisionmaking.<sup>87</sup>

Despite courts' skepticism about the practice, subjective decisionmaking is not prohibited under Title VII because it is not subjectivity per se that is harmful, but rather subjectivity infected by bias, and numbers serve a key evidentiary function: Courts can often gauge whether processes have been infected by considering the representation of various groups in the workforce.<sup>88</sup> Title VII standards suggest that an effective way to recognize potential disparate treatment is to compare the percentage of minorities in a job to the percentage in the relevant labor market.<sup>89</sup> Employers have leeway to explain disparities, but explanations that courts might otherwise accept can fall

- 
86. See, e.g., *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002); *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1129 (8th Cir. 1998); *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 798-99 (11th Cir. 1988).
87. Hart, *supra* note 76, at 787 & n.247 (citing cases); see also 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 212 (3d ed. 1996). Nonetheless, courts have been particularly deferential to employers' subjective determinations in cases involving white-collar jobs. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998).
88. See Green, *supra* note 76, at 141, 146; see also *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962) ("In the problem of racial discrimination, statistics often tell much, and Courts listen."), *aff'd*, 371 U.S. 37 (1962).
89. For instance, plaintiffs can make out a prima facie case of systemic disparate treatment through statistics showing a racial imbalance compared to the relevant labor market, see, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977), and plaintiffs bolster their cases of individual disparate treatment through strong statistical presentations, see, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiffs also most commonly make out disparate impact cases by showing selection rates for any racial group that are less than four-fifths the rate of the most successful group. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(d) (2005). See generally *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."). Although the Court has been more skeptical about the evidentiary function of numerical comparisons in the equal protection context, it has nonetheless drawn on Title VII cases to note the relevance of numerical imbalances to constitutional claims. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." (citing the foundational Title VII cases *Bazemore v. Friday*, 478 U.S. 385 (1986), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977))); see also *infra* note 184 and accompanying text (discussing *Croson*).

short if the employer has used a subjective decisionmaking process.<sup>90</sup> Although Title VII law is primarily concerned with fair processes, not outcomes,<sup>91</sup> numerical outcomes help courts determine whether processes have been influenced by bias.

Quantitative comparisons also serve a more immediate and internal checking function. Numerical representation offers valuable feedback to employers about whether their processes are fair or need adjustment. And managers are most likely to police their own biases when they know they will be held accountable for the outcomes of their decisions.<sup>92</sup>

In championing the use of both subjective criteria and a subjective decisionmaking process, *Grutter's* narrow-tailoring discussion departs from Title VII guidelines. The opinion approvingly notes that the law school considers applicants' "potential to contribute to the learning of those around them" and "to the well-being of others"<sup>93</sup>—two necessarily subjective determinations. Further, as a recent commentary points out, "the criteria for admission, including diversity, [a]re weighted subjectively, with no attempt to quantify their importance."<sup>94</sup> Ample research suggests that both forms of

---

90. See, e.g., *Lujan v. Walters*, 813 F.2d 1051, 1057 (10th Cir. 1987) (noting that the use of subjective criteria can create a strong inference of discrimination "if there is a showing of significant disparity in the representation of a particular group"). See generally 1 LINDEMANN & GROSSMAN, *supra* note 87, at 209 (collecting cases).

91. Thus, a plaintiff's prima facie disparate treatment case can be rebutted by a nonpretextual, legitimate nondiscriminatory reason for the decision, see, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and a prima facie disparate impact case can be rebutted by a showing that the challenged practice is job related and consistent with business necessity, see 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). See generally *Connecticut v. Teal*, 457 U.S. 440 (1982) (emphasizing the importance of fair processes over outcomes).

92. See, e.g., *Bielby*, *supra* note 78, at 123-26; *Reskin*, *supra* note 78, at 325; Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 227 (2000); cf. Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227 (1985) (suggesting that people express less bias when they know they will be accountable for their assessments).

93. *Grutter v. Bollinger*, 539 U.S. 306, 314-15 (2003) (internal quotation marks omitted). The admissions policy seems to render even one's diversity contribution a subjective criterion. See *id.* at 316.

94. *King & Hawpe*, *supra* note 3, at 44.

reliance on subjectivity—subjective criteria<sup>95</sup> and subjective weighting of these criteria for ultimate assessments<sup>96</sup>—may disadvantage minorities.

Yet this subjectivity goes unchecked in *Grutter*'s narrow-tailoring discussion because the Court rejects not only rigid quotas, but also more flexible forms of numerical accountability that might discipline such subjectivity.<sup>97</sup> Justice O'Connor significantly mutes the numerical basis of the critical mass standard and emphasizes the lack of other quantitative benchmarks. She relies, for example, on the fact that "the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year,"<sup>98</sup> and she notes that "[t]he Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected."<sup>99</sup> In a different context either of these statements would ring alarm bells: Why do the application and acceptance numbers differ so substantially? Why are minority applicants rejected when they perform well on two of the most objective admissions criteria (grades and tests)?<sup>100</sup> The anti-numbers emphasis of the narrow-tailoring discussion seems to welcome bias into subjective decisionmaking processes and undercut the opinion's commitment to meaningful integration.

- 
95. See, e.g., Philip Moss & Chris Tilly, "Soft" Skills and Race: An Investigation of Black Men's Employment Problems, 23 WORK & OCCUPATIONS 252 (1996) (finding that employers viewed black men as lacking in soft skills such as motivation and ability to interact well with customers and coworkers).
96. See, e.g., Dovidio & Gaertner, *supra* note 74 (finding that while study participants rated the objective qualifications of blacks and whites equivalently, they were nonetheless significantly more likely to recommend white candidates).
97. See *infra* Section II.C (describing such numerical accountability).
98. *Grutter*, 539 U.S. at 336.
99. *Id.* at 338.
100. Cf. Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 248 n.121 (2004) (arguing that *Grutter* may create an incentive for schools "to reject highly qualified minorities . . . to show that [they are] using highly individualized admissions standards"). But see Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 143-51 (2003) (challenging popular conceptions of "objective" merit, including standardized test scores and grades); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 214-17 (2004) (same). See generally DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 145 (1987) (arguing that institutions continually renegotiate definitions of merit to safeguard white racial status).

## 2. Subjectivity and Affirmative Action

Of course, *Grutter* is an affirmative action case. Perhaps the opinion's emphasis on subjective decisionmaking and its rejection of numerical accountability are unproblematic because an affirmative action plan itself checks stereotyping and prejudice and helps, rather than harms, minority applicants. Title VII doctrine is instructive about the importance of numbers to affirmative action plans as well as traditional discrimination lawsuits, however, and it highlights that without numerical accountability, subjectivity can cause affirmative action plans to exaggerate racial difference and, ultimately, reduce attention to racial diversity.<sup>101</sup> Because these problems frustrate the goals of affirmative action no matter the context, they are significant for education as well as employment, and for public as well as private institutions. Title VII doctrine therefore offers important lessons for affirmative action in the equal protection context.

Courts have long reviewed employment affirmative action plans in light of *Teamsters's* assumption that workforces should approximate labor forces;<sup>102</sup> when there is a stark imbalance, an employer can, and in some cases must, implement a program to eliminate this vestige of discrimination and segregation. Using numerical benchmarks based on local labor forces to guide employment decisions and evaluate progress guarantees integration and suggests that affirmative action is not a preference so much as a leveling of the playing field.<sup>103</sup> At the same time, numerical benchmarks ensure that employers grant "only those minority preferences necessary to further the plans' purpose."<sup>104</sup>

It is *Grutter's* ostensible rejection of quantitative measures that can constrain subjectivity, more than its embrace of subjective decisionmaking per se, that particularly distinguishes it from Title VII affirmative action cases. The promotion decision at stake in *Johnson*, for instance, was in some ways subjective,<sup>105</sup> but the affirmative action plan used numerical goals and

---

101. See *infra* notes 114-121 and accompanying text.

102. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

103. Cf. Spann, *supra* note 49, at 655-56 (arguing that nondiscrimination should lead to racial balance).

104. *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1564 (3d Cir. 1996).

105. *Johnson v. Transp. Agency*, 480 U.S. 616, 625 (1987) (quoting the director of defendant Transportation Agency as stating that he "tried to look at the whole picture, the combination of [Ms. Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that"); *id.* at 641 n.17 (citing the "standard tenet of personnel administration" that "final

timetables to constrain subjectivity and eliminate bias from employment decisions as much as possible.<sup>106</sup> As Joyce's case made clear, the agency's numerical benchmarking served as a check on a subjective system that was likely to disadvantage women and minorities. Thus, while the Court insisted that the county's plan was not intended to establish a work force "whose permanent composition is dictated by rigid numerical standards,"<sup>107</sup> an appreciation of the value of numerical benchmarks undergirds the entire decision.

By contrast, the absence of numerical accountability helps explain the holding in *Taxman v. Board of Education*,<sup>108</sup> which rejected a school board's affirmative action plan preferring minority teachers over equally qualified nonminority teachers in layoff decisions. The court held that Title VII proscribes diversity-based affirmative action plans because nonremedial purposes do not mirror the purposes of the statute,<sup>109</sup> but the opinion evidenced particular concern with the plan's lack of numerical basis. There was no racial imbalance to remedy because the percentage of African-American employees in the job category that included teachers exceeded the percentage of African-Americans in the available workforce.<sup>110</sup> As a consequence, the school policy was "devoid of goals and standards, [and was] governed entirely by the Board's whim."<sup>111</sup>

As *Taxman* suggests, the lack of a numerical check exacerbates problems of subjectivity. One might argue that affirmative action systems like those at stake in *Taxman* and *Grutter* use subjectivity to privilege, rather than discriminate against, minority applicants, and that such subjectivity is not problematic because it counterbalances discrimination. A subjective evaluation system might even provide an extra boost to minority candidates if decisionmakers use

---

determinations as to which candidate is "best qualified" are at best subjective." (quoting Brief for American Society for Personnel Administration as Amicus Curiae Supporting Respondents, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728160)).

106. *Id.* at 621-22; see *infra* note 187 (discussing the plan's numerical benchmarks).

107. *Johnson*, 480 U.S. at 641.

108. 91 F.3d 1547. *Taxman* was the most important circuit case to consider nonremedial affirmative action prior to *Grutter*. The Supreme Court granted certiorari, but civil rights groups intervened to settle the case prior to oral arguments and certiorari was dismissed. 522 U.S. 1010 (1997) (mem.); see Ronald Roach, *Bailing Out Piscataway School Board: Civil Rights Groups Avoid Possibility of Allowing Supreme Court To Make "Bad Law,"* BLACK ISSUES HIGHER EDUC., Dec. 11, 1997, at 12.

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

110. *Id.* at 1551, 1563.

111. *Id.* at 1564.

it to “create ‘leeway’ in promoting minorities.”<sup>112</sup> Of course, such leeway is itself problematic for those who fear employers and universities will select minorities at whim and “trammel the interests of” white applicants in the absence of strict numerical goals.<sup>113</sup>

Even one who dismisses the possibility of minority overrepresentation, however, should worry about unchecked subjectivity’s effects on racial integration. First, subjective decisionmaking threatens to reify culture-race,<sup>114</sup> rather than to deconstruct it, as *Grutter’s* diversity-as-integration rationale urges. Once decisionmakers are free to evaluate diversity contributions subjectively, they are likely to speculate about what perspectives and experiences racial identity signifies. Thus, an admissions committee may look for minority students who, in its eyes, particularly embody the African-American experience, or, on the contrary, seem to have different viewpoints from other minority students.<sup>115</sup> Race may therefore function as a plus factor for one applicant, but not for an equally qualified applicant. The underlying assumption of *Grutter’s* diversity-as-integration rationale, however, is that simply by being a racial minority one contributes to diversity, and, by being part of a critical mass, one helps to break down stereotypes and foster meaningful integration.

Moreover, even if admissions committees intend for affirmative action plans to check discrimination against minority applicants, only numerical goals, however loosely defined, can control decisionmakers’ unconscious prejudices and guard against minority underrepresentation. As psychological studies demonstrate, people often are not aware that they are discriminating; they believe that their bias-infused judgments are based on criteria other than race, and that the “minimally qualified underrepresented minority applicant[s]” *Gratz* disparages<sup>116</sup> are the most likely targets of such aversive racism.<sup>117</sup> The simple fact of an affirmative action plan therefore may not

---

112. *Bass v. Bd. of County Comm’rs*, 256 F.3d 1095, 1107 (11th Cir. 2001).

113. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

114. See Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 4 (1991) (setting forth a taxonomy of “status-race, formal-race, historical-race, and culture-race”); see also FORD, *supra* note 44.

115. *But cf.* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 678 (1998) (“Justice Powell’s [*Bakke*] opinion reads as if . . . institutional actors could reconsider each file against the entire pool so as to make incremental judgments about a particular applicant’s contribution to the overall objective of diversity. . . . [N]o competitive admissions system could be guided by this imprecise course of action.”).

116. *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003).

117. See, e.g., Dovidio & Gaertner, *supra* note 74, at 318.

counter discrimination, for the minority applicants in need of affirmative action—those who are marginally, not highly qualified—are likely to be perceived as significantly less qualified than their white peers.<sup>118</sup> An affirmative action program without benchmarks might even exacerbate minority underrepresentation by making institutions less vigilant.<sup>119</sup>

Given the dangers of undisciplined subjectivity, the best way to determine whether an affirmative action plan furthers the goal of diversity-as-integration is to look at how the plan is implemented, paying special attention to minority representation throughout an institution. For remedial plans under Title VII, courts look first to the manifest imbalance<sup>120</sup>—that is, they look to the numbers to determine whether affirmative action is warranted. Because diversity-based affirmative action that fosters integration has remedial effects, broadly defined, numerical representation should be a crucial data point.<sup>121</sup> It is the primacy of this sort of measure that *Grutter's* discussion of critical mass champions but that its narrow-tailoring analysis precludes.

### C. Reading *Grutter* Through the Lens of Title VII

Title VII doctrine not only highlights the shortcomings of *Grutter's* narrow-tailoring analysis but also offers a productive framework for interpreting the decision, at once suggesting that it is critical mass rather than individualized consideration that will best further the compelling interest in integration and fleshing out the concept of critical mass with its own manifest imbalance standard. Justice O'Connor's narrow-tailoring discussion treats critical mass as a qualitative concept, but Title VII suggests that a quantitative conception of critical mass is necessary to realizing the opinion's goals. While institutions can foster diversity-as-difference with no more than "[s]ome

---

118. See *id.* The unconscious racial bias and stereotyping underlying such evaluations will only be significantly reduced in response to more racially representative institutions; it is not nonracist attitudes that will reshape institutions, but rather representative institutions that will reshape attitudes. Brief Amicus Curiae of the American Psychological Association in Support of Respondents at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516).

119. Cf. Bielby, *supra* note 78, at 125 (“[A] company’s EEO efforts to advance minorities and women through the organization [often] contain more symbol than substance . . . .”); Edelman, *Symbolic Structures*, *supra* note 9, at 1542 (same).

120. E.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 631-33 (1987) (defining manifest imbalance as a conspicuous difference between an employer’s workforce demographics and the demographics of the general population or local labor market).

121. See Yelnosky, *supra* note 34.

attention to numbers,”<sup>122</sup> diversity-as-integration requires more: careful scrutiny of the numbers to ensure a population of minority students large enough to facilitate their well-being and representation within the institution and to reduce the discrimination that arises when minorities are tokens.<sup>123</sup>

If critical mass is a quantitative measure, however, no single number defines the concept, and social science research suggests guidelines ranging from fifteen to thirty-five percent minority representation.<sup>124</sup> Notably, most research on tokenism and critical mass has focused on women, and race may present a more complicated case.<sup>125</sup> First, there is reason to believe that critical mass turns on the representation of both specific racial minorities and underrepresented racial minorities generally—a live debate in *Grutter*<sup>126</sup>—because both tokens and dominants (members of the majority group who control an institution’s culture) are relevant. Female tokens and male dominants are inversely related, but race is not similarly binary. So while attention to the representation of each minority group remains important, universities should also consider the total percentage of minority students: A higher percentage will lessen white dominance and should also reduce discrimination, as psychological research suggests in-group favoritism may be a stronger source of discrimination than out-group devaluation.<sup>127</sup>

---

122. *Grutter*, 539 U.S. at 336 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (appendix to opinion of Powell, J.)).

123. See, e.g., KANTER, *supra* note 33, at 206-42; Yelnosky, *supra* note 34, at 1389-99.

124. Rosabeth Moss Kanter introduced the concepts of critical mass and tokens in her study of women working in a large corporation. She hypothesized that numbers affect organizational outcomes and argued that representation of less than fifteen percent creates “skewed groups” in which minorities are tokens; “tilted groups” have somewhat more equal distribution; and “balanced groups” include forty to fifty percent minority members. KANTER, *supra* note 33, at 208-09. Subsequent studies have refined but largely confirmed Kanter’s hypothesis. See Yelnosky, *supra* note 34, at 1391-92 & n.17; see also Brief for Amicus Curiae American Psychological Ass’n in Support of Respondent at 20, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167) (suggesting a guideline of fifteen percent); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 324 (1998) (suggesting a guideline of twenty-five percent).

125. See Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2379 (1994).

126. Compare *Grutter*, 539 U.S. at 375 (Thomas, J., dissenting) (“Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians.”), with *id.* at 380-81 (Rehnquist, C.J., dissenting) (“[T]he Law School seeks to accumulate a ‘critical mass’ of each underrepresented minority group.”).

127. See, e.g., Dasgupta, *supra* note 72, at 146-47; John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 25-28 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); Clark Freshman, *Whatever Happened to Anti-Semitism? How*

Moreover, given that underrepresented racial minorities are likely to remain skewed or tilted groups<sup>128</sup> even in the aggregate,<sup>129</sup> universities must remain vigilant about discrimination after they have implemented affirmative action plans. Here the Title VII literature is again instructive, for it stresses that power matters as well as numbers,<sup>130</sup> and employers must monitor minorities' well-being and progress within institutional hierarchies, not only hiring rates.<sup>131</sup> So too, a university must not stop its diversity-as-integration project with admissions decisions, but must strive to facilitate meaningful integration throughout the campus.

Reading *Grutter* through the lens of Title VII doctrine not only highlights the importance of critical mass to integration, but also offers a complementary standard for universities to consider – Title VII's notion of manifest imbalance. The close connection between integration and the manifest imbalance guideline Title VII case law stresses<sup>132</sup> suggests that universities striving for integration should consider not only critical mass, an intra-institutional figure, but also the broader population and applicant figures that ground the manifest imbalance standard.

Michigan Law School seemed to do just this, as Chief Justice Rehnquist's *Grutter* dissent underscores. Rehnquist questions why critical mass involves different benchmarks for different racial groups and argues that these disparate numbers reveal racial balancing for its own sake.<sup>133</sup> As the concept of manifest imbalance suggests, however, affirmative action plans aimed at integration must consider population dynamics to ensure participation by racial minorities and to signal that institutions are open to all. The very notions of

---

*Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 322-26, 352, 410-26 (2000).

128. See *supra* note 124 for a discussion of these terms.

129. For example, Michigan Law School averaged roughly fifteen percent total African-American, Hispanic, and Native-American student representation between 1987 and 1998. See *Grutter*, 539 U.S. at 389-90.

130. See, e.g., Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41 (2000); Janice D. Yoder, *Looking Beyond Numbers: The Effects of Gender Status, Job Prestige, and Occupational Gender-Typing on Tokenism Processes*, 57 SOC. PSYCHOL. Q. 150 (1994); Lynn Zimmer, *Tokenism and Women in the Workplace: The Limits of Gender-Neutral Theory*, 35 SOC. PROBS. 64 (1988).

131. See, e.g., Bielby, *supra* note 78, at 122-25; Lisa M. Lynch & Sandra E. Black, *Beyond the Incidence of Employer-Provided Training*, 52 INDUS. & LAB. REL. REV. 64 (1998) (discussing the importance of formal training for workplace advancement); Reskin & McBrier, *supra* note 92, at 214.

132. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 631-36 (1987); Estlund, *supra* note 3, at 37 (noting that critical mass and manifest imbalance are complementary concepts).

133. *Grutter*, 539 U.S. at 381-86 (Rehnquist, C.J., dissenting).

representation and legitimacy *Grutter* emphasizes demand that elite institutions such as universities at least loosely resemble society at large.<sup>134</sup> To render “the path to leadership . . . visibly open,” in the eyes of society, “to talented and qualified individuals of every race and ethnicity,”<sup>135</sup> and to encourage minorities to develop the human capital necessary to enter such institutions, minorities must be present not only in numbers that ensure they do not feel like tokens within the institution, but also in numbers that reflect their presence in the wider population.<sup>136</sup> Together, critical mass and manifest imbalance offer institutions striving for integration a set of numerical goals around which to build voluntary affirmative action plans.<sup>137</sup>

In sum, reading *Grutter* through the lens of Title VII supports *Grutter*'s diversity-as-integration rationale, not its competing diversity-as-difference discussion of narrow tailoring. In the following Part, I explore the consequences of this choice for Title VII.

### III. CONSEQUENCES FOR TITLE VII

Much as Title VII doctrine can guide interpretations of *Grutter*, so too can *Grutter* productively inform Title VII doctrine. The Court has not considered a private employer's affirmative action plan since 1987, and in the past two decades, both lower court decisions and Supreme Court dicta have chipped away at readings of *Johnson* that championed an integrative, rather than strictly remedial rationale for affirmative action.<sup>138</sup> As many scholars have noted,

---

134. See Estlund, *supra* note 3, at 37; cf. Anderson, *supra* note 18, at 32 (arguing that the differential representation of each disadvantaged group “is tied to the urgency of each group's need for integration—that is, the degree of severity of the segregation they suffer”).

135. *Grutter*, 539 U.S. at 332.

136. Cf. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 18-27, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (describing the military's race-conscious selection methods, including percentage goals for minorities based on their representation in the population).

137. A constitutional affirmative action case decided in the wake of *Grutter* points to this synergy between inward-looking critical mass and outward-looking manifest imbalance standards. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 21 (1st Cir. 2005) (upholding under *Grutter* a school district transfer plan calibrated around district demographics rather than a strict approximation of critical mass for each school).

138. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (noting that affirmative action plans must be “strictly reserved for remedial settings”); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 497 (3d Cir. 1999); *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557-58 (3d Cir. 1996).

*Grutter's* diversity rationale is likely to reshape Title VII law.<sup>139</sup> The opinion's characterization of this compelling interest as diversity-as-integration might lend new support to integrative readings of *Johnson*. But *Grutter's* narrow-tailoring discussion, which limits the operation of diversity-as-integration and champions diversity-as-difference, might migrate as well, threatening ideals of objectivity and numerical accountability central to employment affirmative action law.

#### A. *Grutter's Migration*

*Grutter* is almost certain to transform employment affirmative action law.<sup>140</sup> A strong case can be made for limiting the decision to university admissions: *Grutter* emphasizes the distinctive context of higher education and the particular deference the Court gives to academic decisions,<sup>141</sup> and universities have a unique claim to create positive externalities. But compelling reasons both internal and external to *Grutter* suggest that the decision's embrace of diversity and renewed support for affirmative action are likely to migrate: Doctrinal boundaries have been permeable in the Court's prior affirmative action jurisprudence; *Grutter's* holding is linked to broad social goals rather than specific educational outcomes; and the Court relies on businesses' amicus briefs to shape its constitutional commitments.

As I have noted, boundaries between statutory and constitutional standards and employment and educational contexts have been porous in the Court's affirmative action jurisprudence.<sup>142</sup> The clearest analogue for *Grutter* is *Bakke*, which "became the logical foundation to the development of the Supreme Court's approach to affirmative action in employment" in both the constitutional and Title VII contexts.<sup>143</sup> *Grutter's* diversity rationale has already begun to travel beyond higher education to elementary and high school education,<sup>144</sup> and it need not be so bounded. While *Grutter* makes much of the special deference the Court has traditionally awarded university academic

---

139. See, e.g., Estlund, *supra* note 3, at 4-5; Foreman et al., *supra* note 3, at 83-84; Tilles, *supra* note 3, at 463; Turner, *supra* note 3, at 237; White, *supra* note 3, at 264, 275.

140. See *supra* note 139.

141. See *Grutter*, 539 U.S. at 328-29.

142. See *supra* notes 52-58 and accompanying text.

143. Tilles, *supra* note 3, at 454; see, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring); *Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987); *id.* at 643-44 (Stevens, J., concurring).

144. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 377 F.3d 949, 962-64 (9th Cir. 2004).

decisions, for instance, the Court has also shown considerable deference to employer prerogatives in both statutory and constitutional contexts.<sup>145</sup>

A stronger reason for predicting *Grutter*'s migration is one internal to the decision. Because *Grutter* focuses on broad societal goals and not only pedagogical benefits, its holding is not closely tethered to educational institutions. The Court's emphasis on Michigan Law School's instrumental role in facilitating widespread participation in civic life<sup>146</sup> suggests that each institution that serves as a forum for civic participation has a compelling interest in including members of all racial and ethnic groups.<sup>147</sup> This is a source of much consternation to Justice Scalia, who argues that the Court's rationale could justify affirmative action by Michigan's civil service system and even private employers.<sup>148</sup> Despite his sarcastic tone, there is reason to believe Scalia's parade of horrors, for the Court's logic cannot be contained within university gates. Michigan's civil service system and private employers *are* in a position to foster the societal integration that lies at the heart of *Grutter*. As Cynthia Estlund has argued, integrated workplaces may "build interpersonal bonds, combat[] stereotypes, and promote[] understanding" more effectively than integrated college campuses, and produce similar "positive civic spillover for the whole society."<sup>149</sup>

Further, *Grutter* itself relies on the amicus briefs of major American businesses. While these briefs support affirmative action in education, not in employment per se, their language suggests they are laying the groundwork to justify workplace affirmative action. For instance, the brief of sixty-five major American businesses refers not simply to the importance of "individuals who have been educated in a diverse setting," but, in the same breath, to the importance within the workplace of "a diverse group of individuals" and "a

---

145. White, *supra* note 3, at 270-71.

146. *Grutter*, 539 U.S. at 330-32.

147. Post, *supra* note 24, at 61.

148. *Grutter*, 539 U.S. at 347-48 (Scalia, J., concurring in part and dissenting in part) ("If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a 'critical mass' that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to 'critical masses' of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also 'teach' good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring.").

149. Estlund, *supra* note 3, at 24-25. In an earlier article, Estlund made the broader case that workplace integration is salutary for the democratic project. Estlund, *supra* note 7, at 77.

racially diverse group of managers.”<sup>150</sup> One might argue that if universities have affirmative action programs, businesses will not need their own,<sup>151</sup> and this is certainly a hope of *Grutter*. But this vision does not recognize that most American workers, particularly minorities, have not graduated from college, let alone professional or graduate school.<sup>152</sup> University affirmative action programs can help combat the effects of discrimination and segregation, but they are not enough, at least in the twenty-five-year window *Grutter* provides,<sup>153</sup> to ensure workplace integration.

Regardless of whether the businesses’ briefs support a compelling interest in educational diversity or employment diversity, what is more important is that the Court is looking to private businesses to help it define constitutional commitments. Neither equal protection nor Title VII doctrine is independent from the values of nonjudicial actors.<sup>154</sup> *Grutter* interprets the Equal Protection Clause in light of the beliefs of major American companies, and this suggests courts might interpret Title VII in light of these same beliefs and legitimate diversity-oriented affirmative action plans in the employment context as well.

- 
150. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 7, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); see also Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 24, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516) (“[H]eterogeneous work teams create better and more innovative products and ideas than homogenous teams.”).
151. See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1749 (1996) (“Higher 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.”).
152. Roughly one-third of white Americans graduate from college, and the numbers are significantly lower for African-Americans (17.6%) and Hispanics (12.1%). Press Release, U.S. Census Bureau, *College Degree Nearly Doubles Annual Earnings*, Census Bureau Reports (Mar. 28, 2005), available at <http://www.census.gov/Press-Release/www/releases/archives/education/004214.html>. One might further argue that jobs that do not require a college education also should not need affirmative action programs to compensate for minorities’ lack of qualifications, but the “soft skills” that often determine hiring for such lower-level jobs are especially likely bases for racial discrimination. See Moss & Tilly, *supra* note 95.
153. *Grutter*, 539 U.S. at 343.
154. See Edelman, *Symbolic Structures*, *supra* note 9 (Title VII); Post, *supra* note 24, at 8 (Constitution).

### B. *The Threat*

Courts' attention to business demands for diversity need not lead to integrative affirmative action, however. At its best, "the business case for diversity"<sup>155</sup> emphasizes values of participation and legitimacy and champions integration.<sup>156</sup> But in its more limited articulation, the business case for diversity departs from *Grutter's* diversity-as-integration conception: Firms focus on organizational survival and profit, not civil rights commitments,<sup>157</sup> and their rhetoric suggests that they value difference of viewpoint, knowledge, and appearance above meaningful integration.<sup>158</sup> It is therefore possible that if *Grutter* migrates to the workplace, employers will implement affirmative action programs based on a view of diversity-as-difference.

This threat is all the more plausible if *Grutter's* narrow-tailoring discussion migrates at the expense of its diversity-as-integration rationale and emphasis on critical mass—a real possibility, given the attention that courts and commentators are paying to the narrow-tailoring prong.<sup>159</sup> Relying on individualized determinations, to the exclusion of numerical accountability, threatens affirmative action's success in the employment context even more than in the educational context. While university admissions officers make nuanced calculations for all applicants and lose authority over students once they are admitted, employers retain control over employees' responsibilities and advancement in the workplace. Allowing employers to use subjective assessments and disregard numerical benchmarks both to compose and to organize their workforces fosters a view of diversity-as-difference that limits employment opportunities by race.

First, a diversity-as-difference approach may lead employers to pigeonhole and segregate employees to capitalize on their diversity contributions. To

---

155. E.g., David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 (2004). See generally Edelman, *Diversity Rhetoric*, *supra* note 9 (discussing this instrumental form of affirmative action); Estlund, *supra* note 3, at 4 (same); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004) (same).

156. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 79, 86 ("The emerging paradigm . . . organizes itself around the overarching theme of integration. Assimilation goes too far in pursuing sameness. Differentiation, as we have shown, overshoots in the other direction.").

157. Edelman, *Diversity Rhetoric*, *supra* note 9, at 1618-21.

158. See Thomas & Ely, *supra* note 156, at 83-85.

159. See *supra* note 50.

exploit the “black market”<sup>160</sup> or the “Latino market,” employers often assign minority employees to serve minority communities. Seventy percent of retailers surveyed in a recent study admit to race-matching for their clients,<sup>161</sup> and the practice is also common at law firms.<sup>162</sup> Such race-matching not only evokes discredited customer preference arguments that long limited minorities’ opportunities,<sup>163</sup> but also generates new obstacles to integration. Though race-matching may increase minorities’ chances of being hired, so too does it increase racial segregation within firms,<sup>164</sup> suggest that minorities’ skill sets are relevant only to particular niches,<sup>165</sup> and justify assigning minorities to poorer segments of the market.<sup>166</sup> Employers may also give minorities particular assignments that limit their chances for institutional mobility or even place them in greater danger than their white colleagues. Several equal protection cases considering race- and ethnicity-based assignments<sup>167</sup> suggest the fluid connection between evaluating individuals’ diversity contributions as a matter of difference and funneling them into jobs that capitalize on these diversity contributions and hinder their advancement.<sup>168</sup> Relying on the individualized, subjective evaluation systems that *Grutter* endorses may exacerbate this problem because white employees are frequently promoted based on subjective

---

160. See Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542, 561 (2001).

161. Frymer & Skrentny, *supra* note 155, at 712-13.

162. See Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 742-43 (1997); Wilkins, *supra* note 155, at 1594-97.

163. Estlund, *supra* note 3, at 23 (discussing remarks by Deborah Malamud).

164. See Chambliss, *supra* note 162, at 743 (“The identification of minority lawyers with minority clients may itself become problematic, however, by increasing ethnic segmentation within the firms.”).

165. See, e.g., Thomas & Ely, *supra* note 156, at 84 (“Many organizations . . . have diversified only in those areas in which they interact with particular niche-market segments. In time, many individuals recruited for this function have come to feel devalued and used as they begin to sense that opportunities in other parts of the organization are closed to them.”).

166. See, e.g., Grodsky & Pager, *supra* note 160, at 561. See generally Frymer & Skrentny, *supra* note 155 (discussing the harms of instrumental affirmative action).

167. In *Perez v. FBI*, Latino officers complained of being segregated into Spanish-speaking jobs that led to fewer promotions. 707 F. Supp. 891 (W.D. Tex. 1988), *aff’d* 956 F.2d 265 (5th Cir. 1992). In *Patrolmen’s Benevolent Ass’n v. City of New York*, 74 F. Supp. 2d 321 (S.D.N.Y. 1999), and *Bridgeport Guardians, Inc. v. Delmonte*, 553 F. Supp. 601 (D. Conn. 1983), African-American police officers claimed they suffered a loss of status and were placed in difficult and dangerous high-crime areas due to their race.

168. See Frymer & Skrentny, *supra* note 155. When race is used in these instrumental ways, it begins to look like a BFOQ, and Title VII explicitly does not include a race BFOQ. See *supra* note 6.

assessments, while African-Americans tend to be promoted based on formal, objective criteria.<sup>169</sup>

Without numerical accountability, subjective assessments of diversity may even lead employers to overlook or mute the importance of racial diversity altogether. In addition to race and sex, the managerial literature emphasizes diverse attitudes, work styles, and communication skills, and even chattiness versus quietness.<sup>170</sup> If employers understand affirmative action as a quest for diversity “pursued and measured independently of race,”<sup>171</sup> they may cease to attend to racial integration, thus undermining goals of affirmative action and antidiscrimination law more generally, given that voluntary affirmative action is a means of staving off discrimination lawsuits.<sup>172</sup> Finally, to the extent employers rely on diversity-as-difference arguments and correlate race with other privileged attributes, they invite the “lack of interest” argument that certain racial minorities are not interested in particular jobs, no matter how high-paying, geographically convenient, or prestigious.<sup>173</sup>

### C. Making Grutter Work

While this specter of *Grutter*'s narrow-tailoring discussion hangs over workplace affirmative action, the opinion's compelling interest in diversity-as-integration instead points to an expansive vision of Title VII doctrine. *Grutter* returns the spotlight to Title VII's broad view of remediation, which prioritizes integration over compensation, and also suggests possibilities for employment discrimination law's future development. First, *Grutter*'s diversity-as-integration rationale seems to confirm that, under Title VII, employers may use affirmative action not only to redress their own past discrimination, but also to rectify workforce imbalances. The opinion similarly portends that employers might look to general labor market figures to determine whether there is an

---

169. See Baldi & McBrier, *supra* note 78, at 492-93; George Wilson et al., *Reaching the Top: Racial Differences in Mobility Paths to Upper-Tier Occupations*, 26 WORK & OCCUPATIONS 165, 179-80 (1999); see also Bielby, *supra* note 78, at 123; Reskin & McBrier, *supra* note 92, at 214, 226-27.

170. Edelman, *Diversity Rhetoric*, *supra* note 9, at 1616.

171. King & Hawpe, *supra* note 3, at 55.

172. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 209-11 (1979) (Blackmun, J., concurring); Edelman, *Diversity Rhetoric*, *supra* note 9.

173. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) (discussing “black and white career and entrepreneurial choices” and noting that “[b]lacks may be disproportionately attracted to industries other than construction”). See generally Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1126-27 (1992) (discussing the lack-of-interest argument).

actionable imbalance—a more generous comparator than the already-qualified labor market. Finally, following *Grutter*'s attention to critical mass, leadership, and legitimacy, employers might use affirmative action not only to hire a few minority candidates, but also to construct a meaningfully integrated workforce.

*Grutter*'s diversity-as-integration interest offers employers a diversity rationale that builds on, rather than departs from, past Title VII case law. Although *Johnson* suggested employers might rectify an unbalanced workforce without pointing to their own prior discriminatory practices, it nonetheless hewed to the remedial rationale. *Grutter* brings the diversity rationale in line with remedial objectives by emphasizing integration.

More specifically, *Grutter* provides support for unit-level responses to societal problems of segregation and hierarchy. Today, racial minorities remain significantly disadvantaged in labor markets,<sup>174</sup> and both businesses and jobs are racially segregated.<sup>175</sup> Such lingering, self-perpetuating segregation cannot be traced to any single source,<sup>176</sup> and traditionally the Court has proscribed government affirmative action plans responding to societal discrimination, which it views as “too amorphous a basis” for remediation.<sup>177</sup> But *Grutter* recognizes that schools, businesses, housing markets, government bodies, and other civic institutions are linked, and each can compound or help eliminate discrimination and segregation. Casting these institutions as connected pieces of a larger whole, the opinion focuses, in the words of one scholar, “on the condition of society and what affirmative action can do to help fix it, not what caused the condition.”<sup>178</sup> *Grutter* suggests that any institution in a position to further integration may act. Title VII has always been more accommodating of affirmative action than the Equal Protection Clause, however, and in this respect *Grutter*'s holding would simply support the generous reading of

---

174. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003); see also William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63, 70-81 (1998); Foreman et al., *supra* note 3, at 84-89; Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOC. PROBS. 433 (1991).

175. For instance, roughly sixty percent of white-owned firms in metropolitan areas where minorities live have no minority employees, while almost ninety percent of African-American-owned firms have workforces that are at least seventy-five percent minority. Anderson, *supra* note 8, at 1200.

176. See, e.g., Anderson, *supra* note 18, at 16-17; Shelly Lundberg & Richard Startz, *On the Persistence of Racial Inequality*, 16 J. LAB. ECON. 292 (1998).

177. E.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

178. Greenberg, *supra* note 31, at 1621.

*Johnson*: An employer integrating a conspicuously imbalanced job presumptively acts within the scope of Title VII.<sup>179</sup>

Still, *Johnson* was a stark case. There was not a single female skilled craftworker—the “inexorable zero” that always catches the Court’s eye<sup>180</sup>—so the Court never articulated how substantially the manifest imbalance standard departed from a suggestion of past discrimination.<sup>181</sup> The opinion therefore left two interrelated questions unanswered: What constitutes a manifest imbalance and how far may an employer go to rectify it? *Grutter* suggests answers to both: General labor market figures, and not only the already-qualified market, may be the relevant comparator; and employers may use affirmative action plans to attain a critical mass of minorities and meaningfully integrate the workforce.

Given Title VII’s emphasis on numerical accountability, employers and courts have long wrangled over the proper labor market to serve as a comparator. For skilled jobs, courts have generally used the qualified labor market, rather than the more generous total area labor market.<sup>182</sup> But this may simply replicate patterns of segregation, for discrimination can infect the labor market numbers being used as a neutral comparator. Thus, *Weber* used the entire area labor market as its baseline because, as the Court later recalled in *Johnson*,

the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser’s work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities.<sup>183</sup>

*Croson*, however, imported Title VII’s reliance on the relevant labor market into the equal protection context but insisted that only the qualified labor pool was relevant. It chastised the City of Richmond for using a figure that rested “upon the completely unrealistic assumption that minorities will choose a

---

179. See Estlund, *supra* note 3, at 36.

180. See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

181. Justice O’Connor’s *Johnson* concurrence argued that the numbers were strong enough to make out a *prima facie* case against the county. *Johnson v. Transp. Agency*, 480 U.S. 616, 656 (1987) (O’Connor, J., concurring).

182. See BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 811 & n.122 (3d ed. Supp. 2002) (collecting cases).

183. *Johnson*, 480 U.S. at 633 n.10.

particular trade in lockstep proportion to their representation in the local population."<sup>184</sup>

*Johnson* suggested that the difference between using qualified local labor market figures and total local labor market figures might be the difference between the Constitution's prima facie case standard and Title VII's more generous manifest imbalance standard,<sup>185</sup> but the *Johnson* Court was equivocal on this point. While the Court noted that in cases like *Weber*, which involved the selection of unskilled workers, the standard permitted comparison with the general labor force,<sup>186</sup> it repeated that for jobs demanding special training, the comparison should be only with the qualified labor force.<sup>187</sup>

*Grutter* suggests that the general area labor market, and not only the qualified labor pool, is a permissible comparator for voluntary affirmative action plans. The opinion's emphasis on participatory values implies that integration aimed at making institutions resemble local populations is a worthy goal.<sup>188</sup> Moreover, the choice of the relevant labor market reflects assumptions about the interests and aptitudes of various minority groups. Beliefs that members of different races have different talents and interests in the aggregate support the use of qualified labor market figures, while beliefs that members of different races would have similar aggregate aptitude for and interest in certain jobs but for discrimination and segregation support broader use of population figures in voluntary affirmative action plans.<sup>189</sup> *Grutter's* recognition of intraracial variability suggests greater similarity across racial groups, and this in turn supports the use of general labor market figures.<sup>190</sup> Most significant is

184. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (internal quotation marks omitted). *But see id.* at 541-43 (Marshall, J., dissenting) (noting that discrimination can limit minorities' ability to develop skills and suggesting that the relevant labor market should be the entire local labor force).

185. *See Johnson*, 480 U.S. at 633 n.10.

186. *Id.*

187. *Id.* at 632. Santa Clara had adopted general labor market figures for its long-term goals, but formulated its annual short-term goals in accordance with the qualified labor market, *id.* at 635, and it was these latter goals at stake in Joyce's hiring.

188. *Grutter* might even lend support to the use of national population figures, rather than local labor market figures, as this would more readily foster integration by ensuring that firms do not have an incentive to locate in areas with lower minority populations and encouraging minorities to live in all areas of the country. But this would represent a significant departure from Title VII law. *See* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1655-56 (1991).

189. *See id.* at 1656.

190. Assuming that affirmative action not only counteracts current discrimination but also compensates for lower qualifications stemming from past discrimination, raw aptitude may not be enough. But a recent study suggests that employers can train beneficiaries of

*Grutter's* acknowledgement of the legitimacy and signaling functions of integration. Workplace integration is not static but dynamic because it signals to racial minorities that jobs are open to them and it is worthwhile to invest in their human capital.<sup>191</sup> To encourage such investment, minorities must be present in institutions in significant numbers and not the potentially slight numbers that reflect qualified labor market figures.

Finally, *Grutter's* emphasis on critical mass suggests that employers might use affirmative action not only to hire a few minority applicants, but also to integrate their entire workforces. The concept of critical mass speaks to the instrumental values that affirmative action fosters—such as breaking down stereotypes and facilitating cross-racial understanding—and these values are no less important to the workplace than to the university.<sup>192</sup> Just as manifest imbalance can supplement critical mass in the constitutional context, then, the idea of critical mass can supplement manifest imbalance in the statutory context, and *Grutter* offers Title VII courts another numerical benchmark with which to evaluate integration.

This notion of critical mass instructs employers to look not only to the correspondence between their employees and the area labor market, but also to the internal composition of the workforce. Simply hiring one woman, as the transportation agency did in *Johnson*, would not be enough.<sup>193</sup> Even though this hire brought the workforce slightly more in line with the relevant demographics, it did not meaningfully further integration.<sup>194</sup> As *Grutter's* concern with racially diverse leadership and institutional legitimacy underscores, moreover, a critical mass of women or minorities in lower-level jobs is not sufficient: Employers must also strive for significant minority representation in upper-level jobs because “the chief mechanism of redistribution appears to be increased minority power.”<sup>195</sup>

---

affirmative action to compensate for lower qualifications, Harry J. Holzer & David Neumark, *What Does Affirmative Action Do?*, 53 *INDUS. & LAB. REL. REV.* 240, 269 (2000), and *Grutter's* emphasis on the ability of institutions to mold people offers some theoretical support for this proposition.

191. See, e.g., Darity & Mason, *supra* note 174, at 84; Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 *AM. ECON. REV.* 340, 342-45 (1983); Strauss, *supra* note 188, at 1626-27.

192. See Estlund, *supra* note 3, at 37.

193. Cf. KANTER, *supra* note 33, at 282 (arguing for batch hiring).

194. As the only woman in her position, Joyce was subject to discriminatory harassment. Susan Faludi, *Diane Joyce, Ms.*, Jan. 1988, at 62 (describing the harassment Joyce faced). See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683 (1998) (analyzing the harassment of women in male-dominated workplaces).

195. Chambliss & Uggan, *supra* note 130, at 62 (emphasis omitted).

Though it enriches the manifest imbalance standard, consideration of critical mass remains true to *Johnson's* demand that “sex or race . . . be taken into account in a manner consistent with Title VII’s purpose of eliminating the effects of employment discrimination.”<sup>196</sup> One goal of Title VII was the “prophylactic” objective that employers take affirmative steps to reduce discrimination in their workplaces.<sup>197</sup> Workplace integration mirrors this statutory purpose, for integration and discrimination are dynamically related. Discrimination causes underrepresentation, but so too, when minorities are underrepresented in a workforce or upper-level jobs, discrimination against them is more likely.<sup>198</sup> Maintaining integrated workplaces therefore “remove[s] barriers that have operated” to disadvantage minorities<sup>199</sup> and best realizes Title VII’s goals by shifting the focus of remediation to integration that ensures a better future.

## CONCLUSION

*Grutter* has recharged debates about affirmative action and opened the door for employers, as well as universities, to invoke diversity to justify their affirmative action plans. The opinion encompasses two distinct visions of diversity. The compelling-interest discussion champions diversity-as-integration—which casts racial diversity as a means to integrate civil society and facilitate cross-racial connectedness—and adopts the numerical standard of critical mass. *Grutter's* narrow-tailoring analysis, by contrast, embraces diversity-as-difference—which understands racial diversity as a proxy for different viewpoints and backgrounds—and relies on subjective, individualized consideration to achieve diversity.

Reading *Grutter* through the lens of Title VII doctrine helps resolve the opinion’s internal contradictions. Employment discrimination law has long attended to numerical representation and attempted to constrain subjectivity; this reading therefore privileges diversity-as-integration over diversity-as-difference and critical mass over undisciplined subjective decisionmaking. Title VII doctrine also complements the Court’s critical mass standard with its own

---

196. *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987).

197. *E.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *see* Yelnosky, *supra* note 34. The Court has increasingly emphasized this prophylactic purpose in holdings that encourage employers to take preventative measures to avoid workplace discrimination. *E.g.*, *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

198. *See, e.g.*, KANTER, *supra* note 33, at 208–42; Yelnosky, *supra* note 34, at 1389–99.

199. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

manifest imbalance standard and suggests a demographically derived benchmark for integration that falls between rigid quotas and the inward-looking critical mass inquiry.

Given *Grutter's* likely migration to the employment context, the stakes of this critique are high not only for equal protection law, but more still for Title VII doctrine. If employers rely on *Grutter's* narrow-tailoring discussion, they threaten to operationalize diversity-as-difference, and the diversity rationale may backfire: Workplaces will remain stratified as employers seek to capitalize on minorities' diversity contributions and perhaps mute the importance of racial diversity altogether. If, by contrast, employers rely on *Grutter's* compelling-interest discussion, they can make significant strides toward meaningful integration. The Court's embrace of diversity-as-integration reaffirms contested Title VII precedent and emphasizes individual institutions' responses to lingering racial segregation and hierarchy. The choice is stark. Warning against diversity-as-difference and fleshing out the diversity-as-integration argument, this Note suggests that each employer can help effect workplace and, ultimately, societal integration and thereby realize Title VII's fundamental commitments.