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What Diversity Contributes to Equal
Opportunity

Stephen M. Rich*

*University of Southern California Gould School of Law, srich@law.usc.edu

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Abstract

The ideal of diversity so pervades American public life that we now speak of diversity where we once spoke of equality. This Article rejects the dominant legal conception of diversity found in equal protection jurisprudence but not the relevance of diversity to the project of equal opportunity. In *Grutter v. Bollinger*, the Supreme Court endorsed diversity as a compelling governmental interest capable of justifying the use of racial preferences in public university admissions. However, rather than quieting public controversies about affirmative action, the decision has been a frequent target of legal and political attack, and its narrow focus on educational diversity leaves many questions unanswered concerning the value of diversity and the applicability of its rationale for status-based action outside of the educational context. This Article demonstrates that *Grutter* underserves the law's equality values by deferring to institutional constructions of diversity's benefits, naively equating the achievement of numerical diversity with the accomplishment of those benefits, and failing to distinguish between exploitative and egalitarian uses of diversity. These deficiencies obscure diversity's potential to reimagine the relationship between equal opportunity, individual achievement, and institutional design. The Article uses the managerial conception of diversity as a foil for the legal conception. On the one hand, proponents of diversity management in the business context seek to exploit workforce diversity for financial gain, and they reject the emphasis of affirmative action programs and civil rights enforcement on the achievement of integration for its own sake. On the other hand, however, proponents of diversity management sometime marshal the diversity ideal also in order to promote new institutional practices that extend to underrepresented persons equal opportunity for individual growth and advancement. The Article proposes a reconstruction of the diversity rationale to fulfill its potential as an instrument of equal opportunity, within and beyond the educational realm and in circumstances including, but not limited to, the implementation of affirmative action programs.

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[‡] Associate Professor of Law, Gould School of Law, University of Southern California. This Article has benefited from the comments of participants at the 2014 Annual Meeting of the Law and Society Association, the 2014 Labor and Employment Law Colloquium, Duke Law School's Culp Colloquium, and faculty workshops hosted by Minnesota Law School and American Law School. I give special thanks for the generous comments on early drafts provided by Joseph Blocher, Susan Carle, Jessica Clarke, Ariela Gross, Vicki Schultz, Neil Siegel, and Nomi Stolzenberg.

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INTRODUCTION

The ideal of diversity so pervades American public life that we now speak of diversity where we once spoke of equality. The impact of this shift is not well understood, and its trajectory has been difficult to predict. Part of the trouble comes in defining what sorts of diversity matter and why. This Article rejects the dominant legal

conception of diversity found in equal protection jurisprudence but not the relevance of diversity to the project of equal opportunity. In *Grutter v. Bollinger*,¹ the Supreme Court recognized student body diversity as a compelling interest, capable of justifying the use of racial preferences in university admissions, but the decision has been a frequent target of legal and political attack and its narrow focus on university admissions leaves many questions unanswered. This Article proposes a reconstruction of *Grutter*'s diversity rationale to fulfill its potential as an instrument of equal opportunity, including beyond the educational context and in the implementation of organizational policies and practices other than affirmative action. In order to achieve this goal, the Article argues that antidiscrimination law should distinguish between (i) exploitative conceptions of diversity that are orthogonal, or even hostile, to equality because they value diversity as a means to enhance institutional performance and (ii) conceptions of diversity that promote equal opportunity by reimagining the latter's relationship to individual achievement and institutional design. In practical application, these categories exist on a continuum. Some exploitative uses of diversity will, to varying degrees, also be equality advancing. Some egalitarian uses of diversity will also yield institutional benefits. In order for the law to judge which diversity measures along this continuum are permissible, it must confront the question that is at the heart of this Article, namely, *What is diversity's contribution to the project of equal opportunity?*

Philosophically, diversity contradicts basic principles of antidiscrimination law. It opposes colorblindness by advocating that, in certain circumstances, consideration of social statuses, such as race and sex, will be necessary in order to promote positive institutional outcomes and to permit fair and adequate consideration of each individual's potential to contribute to the achievement of institutional goals.² Diversity also deviates from an antisubordination interpretation of equality because, instead of directing institutions to present opportunities in a "vessel" that "all seekers can use"³ without producing any status-based disparate impact, it proposes that institutions adjust the manner in which they extend opportunities by taking relevant status-based differences into account.⁴ Practically, diversity has fluctuated between prolonging the life of remedial preferences and displacing them outright. *Grutter*'s endorsement of diversity

¹ 539 U.S. 306 (2003).

² See *infra* notes 271-272 and accompanying text.

³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (establishing that, by enacting Title VII of the 1964 Civil Rights Act, Congress intended that employers "may not provide equality of opportunity merely in the sense of the fabled offer of milt to the stork and the fox, but that "the vessel in which the milk is proffered be one that all seekers can use"); see also Stephen M. Rich, *Equal Opportunity, Diversity, and Other Fables in Antidiscrimination Law*, 93 *Tex. L. Rev.* 437, 439 (2014) (reviewing JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014)) (arguing that "in an era when workplace inequality still persists and 'diversity' has largely replaced equal opportunity in popular and legal discourse[,] the notion of an ideal vessel fair to all may appear more fanciful than the fable").

⁴ See *infra* notes 273-276 and accompanying text.

establishes qualified constitutional support for affirmative action in public university admissions, but it also displaces alternative remedial rationales and restrains the use of affirmative action programs in important ways.⁵ In business settings, managerial discourse has conceived of workforce diversity as a business resource and diversity management as the set of organizational practices necessary to render its strategic value. It has opposed diversity management to affirmative action, characterizing the latter as a remedial legal construct that has hampered organizational performance and held at bay the achievement of true “inclusion” for underrepresented persons in the workplace.⁶ The diversity management movement has yet to realize its once forecasted potential to transform how courts enforce antidiscrimination law in the workplace.⁷ It has, however, redirected corporate human resources and legal compliance efforts from affirmative action programs that measured success in terms of hiring goals to de-biasing, social networking, and personnel allocation policies that measure success simultaneously in terms of the achievement of particular business goals and, to a lesser extent, workforce demographics.⁸

Thus, both analytically and practically, diversity provides an imperfect and, at times, uncomfortable substitute for legal equality norms. Such obvious tensions between diversity and equality and such stark variation in the deployment of the diversity ideal might already have been expected to spark vigorous scholarly engagement with the question of diversity’s relationship to equal opportunity. Too often, however, the “familiar and comfortingly vague nomenclature of ‘diversity’”⁹ fosters a belief that the term serves as a “code word” for the very values that it displaces.¹⁰ It is as if diversity

⁵ See infra notes 47-59 and accompanying text.

⁶ See infra notes 162-169 and accompanying text.

⁷ See infra notes 133-135 and accompanying text.

⁸ See infra notes 170-181 and accompanying text. Diversity’s displacement of civil rights terms such as “affirmative action” and “equal opportunity” in managerial discourse has been well documented, see generally Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 *Am. J. Soc.* 1589 (2001), as has the displacement—or transformation—of corporate affirmative action programs by a wide assortment of diversity policies and initiatives, see generally FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 *Am. Behavioral Scientist* 960 (1998).

⁹ Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown**, 117 *Harv. L. Rev.* 1470, 1539-40 (2004) (“Although *Grutter* discusses the considerations of social justice and political legitimacy raised by a social order in which members of some groups are perpetually excluded from positions of national leadership, it refers to these concerns in the familiar and comfortingly vague nomenclature of ‘diversity.’”)

¹⁰ Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 64 (2003) (“In the years since *Bakke*, elite universities have become ever more committed to the goal of achieving a racially diverse student body. Although they tend to justify this commitment in terms of the educational benefits articulated by Powell, ‘diversity’ nevertheless still chiefly functions as ‘a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment.’” (quoting Sanford Levinson, *Diversity*, 2 *U. Pa.*

functions as a kind of intellectual Trojan horse—a vessel in which to carry forward a constellation of competing and often controversial equality values and objectives without exciting passionate resistance.¹¹ While in practice this is certainly true, from a normative standpoint it is problematic. Diversity is at best a flawed vessel, incapable of conveying equality norms without also transforming them. Diversity is most at odds with equality when it licenses institutions to exploit the value of social difference in satisfaction of their own self-interest without also requiring that policies implemented in the name of diversity contribute to the project of equal opportunity.

Of course, to the extent that the diversity rationale has prolonged the life of affirmative action in university admissions, affirmative action's contributions to equal opportunity are diversity's contributions. But to equate diversity with affirmative action is to take a superficial view, obscuring the work that diversity does to reshape our understanding of equality and denying diversity the potential to make unique and positive contributions to that understanding. Simply put, in order to obtain a more accurate understanding of the concept of diversity as it operates in today's society and as it may yet operate in the future, we need to look beyond its current role as a justification for affirmative action. And, in order to realize the full potential of its contributions to equal opportunity, diversity must be made to put equality first.

Critiques of diversity are abundant, without question.¹² The analysis offered here follows in the tradition of legal scholarship critiquing central concepts in antidiscrimination law doctrine so that we may appreciate how, in practice, those

Constl. L. 573, 601 (2000)); Jack Greenberg, *Diversity, the University, and the World Outside*, 103 Colum. L. Rev. 1610, 1618 (2003) (observing that for universities seeking to justify affirmative action "it is easier to speak of diversity" than to admit past discrimination in need of remedy).

¹¹ By concealing antisubordination values in language that suggests a commitment to formal equality, the diversity rationale avoids what constitutional scholar Reva Siegel has called the "hotter talk of group harm." Siegel, *supra* note 9, at 1478. It appears that Michigan Law School's legal team emphasized diversity over a remedial rationale for this very reason. See Diedre M. Bowen, *American Skin: Dispensing with Colorblindness and Critical Mass in Affirmative Action*, 73 U. Pitt. L. Rev. 339, 346 & n.20 (2011).

¹² Some scholars, for example, have criticized diversity as an incoherent concept that undermines antisubordination goals, see, e.g., Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 Ohio St. L.J. 669, 678 (2000); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 Stanford J. Civ. Rts. & Civ. Lib. 171, 176-78 (2005), and others that diversity puts too fine a point on social differences and thereby reinforces pernicious stereotypes, see, e.g., Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 U.C.L.A. L. Rev. 2059, 2066-67 (1996). Still others have argued that it is but another example of interest convergence in constitutional law, see, e.g., Derrick Bell, *Diversity's Distractions*, 103 Colum. L. Rev. 1622, 1624 (2003), or a mere "fig leaf to hide commitment to the status quo," Lani Guinier, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 196 (2003). Although the argument presented here bears some resemblance to the interest convergence thesis, undervalues the relationship that the diversity rationale portrays between institutional and public interests—a central concern of this Article—subsuming both under the concept of elite interests. As a consequence, the interest convergence thesis fails to distinguish between exploitative and egalitarian uses of race, as this Article advocates. See *infra* Part IV.B.

concepts have deviated from foundational equality norms and so that we may recommit them to the satisfaction of those norms.¹³ It is therefore not just a critique. The Article demonstrates that *Grutter*'s thin conception of diversity equates diversity with a quantifiable end-state and fails to distinguish between exploitative and egalitarian measures that an organization may implement to achieve that end-state. For these reasons, the decision undermines equal opportunity and has laid diversity on a weak foundation in need of rebuilding if the diversity rationale will continue to survive legal challenge and broaden to apply to other areas of public life. Preserving the diversity rationale as an instrument of equal opportunity and extending it beyond education require a thick conception of diversity that would distinguish between exploitative and egalitarian uses of diversity and incorporate a robust understanding of the relationship between diversity's benefits and the strategic deployment of institutional practices needed to secure those benefits.¹⁴ The Article proposes a reconstruction of the diversity rationale restricting the legal endorsement of diversity to measures that provide equal opportunities for individual achievement and advancement to all persons, regardless of their social status.¹⁵ Whether an institution's efforts also advance its self-interest should be of no moment to antidiscrimination law. Though such synergies may spur an institution to pursue diversity voluntarily, they do not establish that the institution's efforts are aligned with the law's purposes.

In *Grutter*, the Court evoked the special role of public education in promoting "good citizenship"¹⁶ and it sought to demonstrate a synergy between the University of Michigan Law School's institutional interests and more broadly dispersed public benefits by summoning the opinions of military and corporate leaders who had attested that a diverse educational experience assists in the preparation of students for work in the global economy and in affirming the legitimacy of the mechanisms by which our society

¹³ See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683 (1998) (arguing that federal agencies and lower courts hampered sex harassment doctrine from achieving its full transformative potential by imposing a limiting "sexual model" on the doctrine); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111 (1997) (arguing that, through restrictive interpretations of discriminatory purpose and suspect classification doctrine, equal protection jurisprudence had instead permitted status-enforcing state action to persist in new forms).

¹⁴ This distinction between "thick" and "thin" conceptions of diversity is inspired by the anthropologist Clifford Geertz' discussion of thick and thin "description"—itself modeled on the use of these terms by Gilbert Ryle—which distinguishes between superficial accounts of social behavior that capture only their form and descriptions that convey, and provide the social context from which one can understand, their meaning. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 4-10 (1973).

¹⁵ This Article therefore builds upon an argument that I have sketched elsewhere about the importance of "reestablishing a connection between diversity and equality." Rich, *supra* note 3, at 483-85 (arguing that a theory of equal opportunity that advises that opportunities should be structured to meet individual needs and to promote the cultivation of human potential is consonant with the concept of diversity and could be used to establish a productive connection between equal opportunity and diversity).

¹⁶ 539 U.S. at 330-32.

cultivates national leaders.¹⁷ The Court has yet to theorize from the connections that it drew between educational diversity and diversity in other areas how the diversity rationale might be adapted to justify race- and other status-based preferences outside of higher education. Doing so would invite important questions about the contextual nature of diversity's value, the limits of *Grutter*'s vision, and the stability of diversity as an organizing concept in antidiscrimination law. This Article answers these questions by arguing that commitment to the project of equal opportunity is the public interest that should ground the law's endorsement of diversity. That project is not satisfied by integration alone, and certainly not by "token" integration.¹⁸ It requires not just that opportunities be conveyed in "meaningful numbers,"¹⁹ but that the opportunities themselves also be substantively equal because they sustain the professional growth and advancement of all persons. The presumption that opportunities conferred on the basis of diversity are equally valuable makes sense in the context of university admissions. It does not work, however, when an organization has discretion to offer different opportunities to different individuals or when the opportunities extended to underrepresented persons, regardless of their formal identity to positions offered to others, in practice amount to dead-end jobs or a task assignments that block individual advancement and obscure future opportunities.

The subject of this Article is a matter of some urgency. Although diversity initiatives are widespread throughout corporate America, their legal status is ambiguous at best.²⁰ The most popular workplace diversity initiatives are not effective at increasing the representation of blacks and women at the management level of private firms.²¹ Even if such initiatives were presumed to be lawful, no legal guidance requires that they must be effective as instruments of workplace integration; and no legal guidance precludes firms from exploiting the signaling value of diversity in order to legitimize persistent inequalities or to disguise discrimination as feigned compliance.²² Moreover, corporate uses of diversity threaten *Grutter* by demonstrating that a diversity rationale that honors

¹⁷ Id. at 330-31 (citing amicus briefs filed by current and former military officers and Fortune 500 corporations).

¹⁸ Id. at 333 (accepting the law school's opinion that it needed a "critical mass" of minority students, because "diminishing the force of such stereotypes is both a crucial part of [its] mission, and one that it cannot accomplish with only token numbers of minority students").

¹⁹ Id. at 318 (defining critical mass as "meaningful numbers" of minority students).

²⁰ See *infra* notes 139-156 and accompanying text. For another discussion of the practical legal impediments to exploitative uses of race in employment that are intended to exploit the value of racial identity, see JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* 18-24 (2014).

²¹ See *supra* notes 177-181 and accompanying text.

²² See Stephen M. Rich, *Against Prejudice*, 80 *George Washington L. Rev.* 1 (2011) (introducing the concept of "discrimination as compliance," as a means to describe how diversity initiatives may operate to discriminate against minority workers by denying them opportunities under the cover of legal compliance).

exploitative uses of demographic diversity is untenable unless the coincidence of institutional and public interests is presumed.

Grutter itself remains under direct threat from legal and political action aimed to void its holding. Already, in *Fisher v. University of Texas at Austin*,²³ the Court raised the bar of strict scrutiny as applied to racial preferences in university admissions by requiring reviewing courts to “verify” that a university cannot achieve “sufficient diversity without using racial classifications.”²⁴ While the parties in *Fisher* continue their legal battle on remand from the Supreme Court,²⁵ new constitutional and statutory challenges have been filed against the use of racial preferences in university admissions,²⁶ and state laws have been passed banning state governments from using racial preferences, including in the state of Michigan where an amendment to the state’s constitution was passed by voters in response to *Grutter*.²⁷ Voting with the majority to uphold the Michigan initiative in *Schuette v. BAMN*,²⁸ Justice Kennedy portrayed the state’s ban on affirmative action as an expression of the electorate’s democratic freedom and argued that this freedom could not have been denied without robbing the electorate of its “capacity” and “duty . . . to learn from its past mistakes.”²⁹ With such doubts expressed about *Grutter*’s rationale both inside and outside the Court, there could scarcely be a more urgent time to offer an affirmative statement of diversity’s value.

Part I of this Article discusses *Grutter*’s diversity rationale, examining its reasoning and identifying important limitations. This part shows that *Grutter*’s diversity rationale is flawed because it fails to distinguish exploitative from egalitarian uses of diversity, collapses the achievement of student body diversity with the realization of particular benefits, and defers to educational institutions on the question of what those constitutionally salient benefits are. It also shows that *Grutter* and *Fisher* have unleashed a series of unanswered questions that threaten the longevity of the diversity rationale in

²³ *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

²⁴ *Id.* at 2418.

²⁵ See *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (5th Cir. July 15, 2014) (upholding summary judgment for the university).

²⁶ Complaint, *Students for Fair Admissions v. Harvard College*, Civ. Action No. ____ (filed Nov. 17, 2014, D. Mass.) (asserting statutory claims of purposeful race discrimination under Title VI of the 1964 Civil Rights Act against Harvard College arising from the use of a race-as-plus-factor admissions plan); *Students for Fair Admissions v. Univ. of North Carolina*, Civ. Action No. ____ (filed Nov. 17, 2014, M.D. N. Carol.) (asserting statutory and constitutional claims against the college alleging purposeful discrimination under Title VI and violations of equal protection under *Fisher*).

²⁷ Michigan’s law has been followed by the passage of similar initiatives in Arizona, New Hampshire, and Oklahoma for a total of ten states that have prohibited or restricted race-based affirmative action in public university admissions.

²⁸ *Schuette v. BAMN*, No. 12-682, slip op. (Apr. 22, 2014) (upholding Michigan’s 2006 “civil rights initiative, which amended the state constitution to prohibit the government from considering race).

²⁹ *Id.* at 16 (Kennedy, J., concurring).

its current form. Part II uses the managerial conception of diversity in order to illustrate additional ways in which *Grutter*'s approach is conceptually limited. Together, Parts I and II demonstrate that the potential contributions of diversity to the project of equal opportunity are obscured by the limits of *Grutter*'s vision. Part III argues that diversity also holds significant meaning for antidiscrimination law as an organizational motivation and strategy, and not just as an end-state. These additional dimensions of diversity come into focus when we begin to think about diversity independently of affirmative action, because the pursuit of benefits associated with diversity outstrips the stage at which an organization selects its members and requires the continuing coordination of organizational practices in order to be successful. *Grutter*'s conception of diversity is thin because it assumes end-state diversity coincides with the achievement of diversity's benefits and because it fails to provide a means to distinguish between exploitative practices that fulfill an institution's self-interest and egalitarian practices that provide public value. Part IV explains why these deficiencies in *Grutter*'s rationale underserve the law's commitment to equality and prevent its diversity rationale from expanding to social contexts beyond education, where the exploitative nature of institutional practices may be more concrete and the relationship between end-state diversity and diversity's public benefits may be more attenuated. This part concludes by proposing a reconstructed form of the diversity rationale that puts equal opportunity first and conceives of a productive role for diversity beyond affirmative action.

I. *GRUTTER*'S DIVERSITY

As the Court has cautioned, context matters.³⁰ We associate diversity with equality in legal discourse because the concept has been recruited to determine the constitutionality of race-based affirmative action. Although *Grutter* makes ambiguous overtures to integration, racial equity, and social mobility, fundamentally the Supreme Court explained its recognition of diversity as a compelling interest in terms that emphasize the uniqueness of the university context, including its uniqueness as a source of opportunity. *Grutter* displays deference to the law school's understanding that diversity contributed important benefits to its educational mission, but subsequent decisions have cabined that deference and called into question the Court's continuing commitment to *Grutter*'s diversity rationale. This Part will discuss *Grutter*'s diversity rationale and several questions made increasingly salient by the Court's subsequent decisions. These are unresolved questions which expose the superficiality of *Grutter*'s theory of diversity and foreshadow the sorts of difficulties that we should expect in future cases, including possibly outside the context of university admissions.

³⁰ *Grutter*, 539 U.S. at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

A. *Grutter* and Its Origins in Justice Powell's *Bakke* Opinion

Discussions of *Grutter* and its origins in Justice Powell's *Bakke* opinion appear frequently in constitutional scholarship.³¹ An exhaustive treatment of their relationship is therefore not warranted here. This section will begin instead by identifying certain limitations of *Grutter*'s diversity rationale that are traceable to Justice Powell's theory of educational diversity. *Grutter* inherits from Justice Powell's opinion an explanatory framework that depicts a special relationship between university education and diversity. Justice Powell first described the university's selection of a diverse student body as a matter of "academic freedom," protected by the First Amendment in order to preserve the integrity of the educational process.³² *Grutter* and *Fisher* have not retreated from this view.³³ *Grutter* refers to the practice of student selection as a matter of "educational autonomy,"³⁴ and it discusses the benefits of diversity in terms of diversity's contributions to the educational environment and to the learning experience.³⁵ In fact, *Grutter* deepens the Court's commitment to educational autonomy by establishing that a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer."³⁶ The Court had previously overruled its decision in *Metro Broadcasting, Inc. v. FCC*³⁷ withholding strict scrutiny from the federal

³¹ See, e.g., Post, supra note 10, at 56-70; Siegel, supra note 9, at 1538-44.

³² *Grutter*, 539 U.S. at 312. Post, supra note 10, at 59-60 (arguing that Powell's diversity holds a "value intrinsic to the educational process itself" because "education [is] a practice of enlightenment . . . that thrive[s] on the 'robust exchange of ideas'" (internal quotation marks omitted) (quoting Justice Powell)).

³³ *Grutter*, 539 U.S. at 330 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); *Fisher*, 133 S. Ct. at 2418 (agreeing that "[t]he academic mission of a university is 'a special concern of the First Amendment' and implicates 'the question of 'who may be admitted to study'").

³⁴ *Grutter*, 539 U.S. at 329 ("In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy . . ."); see also *id.* (stating the Court's "view that attaining a diverse student body is at the heart of the Law School's proper institutional mission"); *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) ("The academic mission of a university is 'a special concern of the First Amendment, [Bakke, 438 U.S.] at 312 [(opinion of Powell, J.)]. Part of 'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,' and this in turn leads to the question of 'who may be admitted to study.'" (internal quotation marks and citation omitted) (third alteration in original)).

³⁵ See, e.g., *Grutter*, 539 U.S. at 330-32 (listing among the "educational benefits that diversity is designed to produce" classroom improvements involving "cross-racial understanding," "livelier, more spirited" debate," and "promot[ing] learning outcomes"); *Bakke*, 438 U.S. at 312-13 (arguing that, in order to foster an educational "atmosphere of 'speculation, experiment and creation,'" the university must be permitted to select "those students who will contribute the most to the robust exchange of ideas"); *id.* (citing the "robust exchange of ideas" and "wide exposure to the ideas and mores of students as diverse as this Nation of many peoples" as educational and public benefits of student body diversity).

³⁶ *Grutter*, 539 U.S. at 328.

³⁷ 497 U.S. 547 (1990) (holding that the commission's "benign" use racial preferences should be reviewed under intermediate scrutiny).

government's efforts to maintain programming diversity by granting preferences to minority owners in the context of awarding broadcast licenses. In *Adarand Constructors, Inc. v. Pena*,³⁸ it concluded that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny" regardless whether they were intended to be benign.³⁹ *Grutter* adhered to *Adarand*'s principle of "consistency" in the constitutional review of racial classifications,⁴⁰ but deferred to the law school regarding its good faith assertion of an institutional need for diversity.

Grutter also adds to Justice Powell's articulation of diversity by ascribing to the "educational mission" of the law school⁴¹ the cultivation of "extrinsic social goods like professionalism, citizenship, and leadership."⁴² Thus, *Grutter* aligns with Justice Powell in perceiving a special relationship between education and diversity, but it departs by perceiving an additional constitutionally significant relationship, between education and democracy.⁴³ Justice Scalia replied that the "educational benefit" identified by the Court amounted to nothing more than "generic lessons in socialization and good citizenship . . . no less appropriate" for the contexts of public employment and even private employment.⁴⁴ The majority, however, did not draw those connections but instead relied on precedents that had long identified the cultivation of "good citizenship" and "civic participation" as constitutionally important qualities of public education.⁴⁵ Moreover, as discussed in the next two paragraphs, *Grutter* adopts a broad definition of diversity that transcends race and rejects remedying societal discrimination as a possible compelling interest. Each of these elements of the Court's reasoning suggests that, while in *Grutter* the Court was willing to defer to the educational reasons articulated by the law school,⁴⁶ it was not willing to recognize the constitutionality of a university's social justice motivations to pursue racial diversity.

³⁸ 515 U.S. 200 (1995).

³⁹ *Id.* at 227.

⁴⁰ *Id.* at 224.

⁴¹ *Grutter*, 539 U.S. at 328.

⁴² *Post*, supra note 10, at 60.

⁴³ See Guinier, supra note 12, at 176 (observing that *Grutter* differs from Justice Powell's *Bakke* opinion by recognizing as an aspect of diversity the "legitimate[ion of] the democratic mission of higher education").

⁴⁴ 539 U.S. at 447-48 (Scalia, J., concurring in part and dissenting in part).

⁴⁵ *Grutter*, 539 U.S. at 331; see also *Plyer v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Sweat v. Painter*, 339 U.S. 629, 634 (1950).

⁴⁶ See *Post*, supra note 10, at 65 (arguing that "*Grutter* draws its analysis of the 'compelling interest' prong of strict scrutiny . . . from the values and beliefs of elite universities," because the opinion "states that it will 'defer' to the 'Law School's educational judgment that such diversity is essential to its educational mission'"). As the analysis in the next few paragraphs demonstrates, however, the Court was quite selective about which values and beliefs it was willing to honor, rejecting those that sounded in remediation or racial equity.

Justice Powell proposed diversity as a compelling interest only after rejecting the argument that remedying societal discrimination is an interest capable of justifying the use of racial preferences.⁴⁷ The Court repeated several times before *Grutter* its rejection of remedying societal discrimination as a constitutionally compelling interest.⁴⁸ This rejection is consequential, because it shapes Justice Powell's and the *Grutter* Court's description of diversity. Justice Powell argued that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."⁴⁹ *Grutter* adopts this view, holding that Michigan Law School's admissions policy survived strict scrutiny because the policy "d[id] not restrict the types of diversity contributions eligible for 'substantial weight'" and "recognize[d] 'many possible bases for diversity admissions.'"⁵⁰ The Court acknowledged that the law school was especially committed to "'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,'"⁵¹ but it did not approve that remedial rationale.⁵²

The rejection of a broadly remedial compelling interest also shaped the means that a university would be permitted to use racial preferences in order to further diversity. In *Grutter*, the law school's policy survived strict scrutiny because it avoided the use of blunt weighting systems and racial quotas, instead reviewing race as a factor within a

⁴⁷ Bakke, 438 U.S. at 307-10 (opinion of Powell, J.) (rejecting the remedial rationale as espousing "an amorphous concept of injury that may be ageless in its reach into the past," could not sustain the injuries that would be suffered by "innocent individuals" due to the use of racial preferences, and would require first that a political institution of sufficient "authority and capability" make findings "in the record" that a particular classification was necessary to respond to discrimination); see also Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 Cal. L. Rev. 1473, 1489 (2007) (describing Justice Powell's rejection of the "remedial logic" advocated by the university in favor of a "unique and highly innovative" diversity rationale). Four Justices would have accepted the university's remedial antidiscrimination rationale. See Bakke, 438 U.S. at 362 (opinion of Brennan, White, Marshall, and Blackmun, J.J.) ("Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs . . .").

⁴⁸ See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 498-99 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

⁴⁹ Bakke, 438 U.S. at 315.

⁵⁰ *Id.* at 318. The policy instructed admissions officials to consider these factors alongside "important (if imperfect) predictors of academic success," such as standardized test scores and undergraduate grade point averages, in addition to other "'soft variables.'" *Id.*

⁵¹ *Id.* at 316.

⁵² The opinion records that the law school connected critical mass to "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," 539 U.S. at 318; see also *id.* at 319 (the dean of the law school also defined critical mass as "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race"), but the Court never identified concerns such as minority isolation and stereotype threat as important institutional reasons that—like lively classroom debate and the promotion of learning outcomes—justify the law school's pursuit of diversity.

process of “truly individualized consideration,” defined as “flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’”⁵³ *Grutter* shares Justice Powell’s rejection of racial quotas and forbids the pursuit of proportional representation, or “racial balancing.”⁵⁴ In place of quotas, the Court accepted the use of the flexible benchmark of “critical mass,” defined as “meaningful numbers” or “meaningful representation” of underrepresented persons necessary to secure the educational benefits of diversity.⁵⁵ The Court accepted that critical mass meant more than “token” representation of minority students, but it set no minimum threshold, and, given the Court’s rejection of racial balancing, it would seem to forbid setting proportional representation of underrepresented groups as the benchmark.⁵⁶

In practice, the holistic review process affords universities some latitude to reconsider the weight given to indicia of merit the predictive value of which may be moderated by social status due to phenomena such as testing bias and stereotype threat.⁵⁷ The decision, however, explains the process as allowing universities to identify persons whose viewpoints, experiences, and perhaps even mere presence will have a positive impact on the educational process.⁵⁸ What consideration an individual applicant may

⁵³ 539 U.S. at 315. See also *Gratz v. Bollinger*, 539 U.S. 244, 274 (2003) (ruling unconstitutional the University of Michigan’s affirmative action policy for undergraduate admissions, because it “ma[de] race a decisive factor for virtually every minimally qualified underrepresented minority applicant”); *Grutter*, 539 U.S. at 316 (“The policy does not restrict the *types of diversity* contributions eligible for ‘substantial weight’ in the admissions process, but instead recognizes ‘many possible bases for diversity admissions.’” (emphasis added)); *id.* at 338 (“The Law School seriously considers each ‘applicant’s promise of making a notable contribution to the class by way of a *particular strength, attainment, or characteristic – e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.*” (emphasis added)); *id.* (“[T]he Law School actually gives substantial weight to diversity factors besides race . . . frequently accept[ing] nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected.”).

⁵⁴ *Grutter*, U.S. at 330 (describing “racial balancing” as “patently unconstitutional”); *id.* at 334 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot ‘insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants’” (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

⁵⁵ 539 U.S. at 318; *id.* at 333 (“The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”); *id.* at 338 (“By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

⁵⁶ *Id.* at 333.

⁵⁷ See Gregory M. Walton et al., *Affirmative Meritocracy*, 7 *Soc. Issues & Pol’y Rev.* 1 (2013) (advocating for this form of review). See generally Claude M. Steele, *Whistling Vivaldi and Other Clues to How Stereotypes Affect Us* (2010) (describing extensive research on the effects of stereotype threat in depressing the intellectual performance of women and minorities).

⁵⁸ In effect, the diversity that serves a compelling interest, according to *Grutter*, is the diversity generated when a university “seriously considers each ‘applicant’s promise of making a notable contribution to the [admitted] class.’” *Id.* at 338. The Court considered as important evidence that the law school abided by this conception of diversity its “frequent[] accept[ance of] nonminority applicants with grades and test scores lower than

need in order for her potential for excellent academic performance to be made visible is not the focus of individualized consideration as described by the Court. Rather than explaining the process in terms of a critique of traditional notions of merit, Justice O'Connor's opinion actually aligns diversity with merit, explaining that the use of racial preferences during holistic review will permit elite universities to preserve their commitments to "academic selectivity" as compared with more structural devices, such as percentage plans that award admission to any student within a specified percentage of top performing students in the state's public school system.⁵⁹

Nevertheless, *Grutter* makes limited gestures toward an antistatutory understanding of equal protection.⁶⁰ Justice O'Connor's majority opinion states that "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" in order "to cultivate a set of leaders with legitimacy in the eyes of the citizenry," and that "[a]ccess to legal education (and thus the legal profession) must be inclusive of talented and qualified persons of every race and ethnicity."⁶¹ Legal scholar Cynthia Estlund has found in this language evidence of "*Grutter's* innovation": its contribution to legal discourse is a forward-looking rather than remedial rationale for integration in which educational diversity is considered critical to securing "the possibility of an integrated future."⁶² However, *Grutter's* language of "visibility," "openness," and "access" is ambiguous.⁶³ It emphasizes process legitimacy rather than racial inclusion or equity.⁶⁴ Access to university education does not establish diversity as

underrepresented minority applicants (and other nonminority applicants) who are rejected." Id.

⁵⁹ Id. at 340-41 (concluding that narrow tailoring did not require the law school to adopt a percentage plan of the kind adopted by Texas and other states).

⁶⁰ See Siegel, *supra* note __, at 1538-40 (arguing that *Grutter* displays antistatutory values by "defin[ing] the state's interest in achieving 'diversity' as an interest in ensuring that no group is excluded from participating in public life and thus relegated to an outsider").

⁶¹ *Grutter*, 539 U.S. at 332.

⁶² Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 Berkeley J. Emp. & Lab. L. 1, 16-17 (2005).

⁶³ As Robert Post has observed, *Grutter's* language of legitimacy—and I would argue also "openness"—leaves unclear whether the constitutional interest in diversity requires actual demographic diversity among enrolled students and leaders or only that the pathways to leadership give confidence to citizens because they appear "visibly open." See Post, *supra* note 10, at 61.

⁶⁴ See, e.g., id. at 332-33 ("*Access* to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that the members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." (emphasis added)); see also id. at 332 ("All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this [leadership] training." (emphasis added)). Justice O'Connor's opinion cites *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plyer v. Doe*, 457 U.S. 202 (1982); and *Sweat v. Painter*, 339 U.S. 629 (1950)—seminal cases of racial and educational equity—but only in order to establish the special constitutional role of public education in cultivating citizenship and civic participation, see *Grutter*, 539 U.S. at 331 (citing *Brown* and *Plyer*), and to establish the practical educational value of a student body that is representative of the society in which the university operates, id. at 332 (citing *Sweat*).

a compelling interest because of the social mobility offered but because of the institutional legitimacy conferred. *Grutter* does not measure the success or sincerity of diversity efforts based on whether the government's program results in the cultivation of human capital benefiting minority individuals. Perhaps this omission is understandable. After all, *Grutter* was a case about affirmative action in the admissions program of an elite law school; a fair assumption would be that, if the program increased the number of minority enrollees, it increased the school's human capital investment in minority students and promoted social mobility. However, without the distributional mechanism of affirmative action and the individual good of elite education, *Grutter's* diversity rationale for the use of racial preferences falls back onto an unsatisfying account of diversity's "benefits."

The Court's emphasis on diversity's benefits is so fundamental to its reasoning that it frequently describes the government's compelling interest as an interest in securing those benefits,⁶⁵ alternating indiscriminately between that formulation and one that describes diversity itself as the compelling interest.⁶⁶ In *Grutter's* words, these educational and public benefits are presumed to "*flow from a diverse student body.*"⁶⁷ The Court did not consider whether the achievement of student body diversity must be complemented by other institutional practices—such as diverse faculty hiring, a diverse curriculum, or other structures of conflict resolution, mentorship or social networking—in order to realize those benefits. Nor did it consider whether the presence or absence of such practices should impact a university's constitutional authority to use racial preferences in pursuit of student body diversity. The Court did make a qualitative assessment of the law school's pursuit of diversity—that is, it approved of the law school's use of racial preferences in lieu of a class-rank percentage plan such as has been used in Texas, Florida, and other states.⁶⁸ The Court argued that the use of racial preferences provided the law school with a superior means to balance its needs for diversity and academic excellence.⁶⁹ Its qualitative assessment, however, did not include

⁶⁵ *Grutter*, 539 U.S. at 343 ("In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a *compelling interest in obtaining the educational benefits that flow from a diverse student body.*" (emphasis added)); see also *id.* at 333 ("The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its *compelling interest in securing the educational benefits of a diverse student body.*" (emphasis added)).

⁶⁶ *Id.* at 383 ("Today, we hold that the Law School has a *compelling interest in attaining a diverse student body.*" (emphasis added)); *id.* at 329 ("Our conclusion that the Law School has a *compelling interest in a diverse student body* is informed by our view that attaining a diverse student body is at the heart of the Law School's proper educational mission" (emphasis added)); *id.* (referring to Justice Powell's "announc[ement of] the principle of *student body diversity as a compelling interest*" (emphasis added)).

⁶⁷ *Id.* at 343 (emphasis added).

⁶⁸ *Id.* at 340.

⁶⁹ *Id.* at 340 ("[E]ven assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along the qualities valued by the university. We are

any discussion, let alone evaluation, of the university's claim that a critical mass of minority students was necessary in order to encourage the participation of minority students overall, and it did not discuss whether the law school's program did in fact—or ought to in principle—support the academic success of minority students.

B. Questions Remaining After *Grutter*

Even as it establishes diversity's status as a compelling governmental interest, *Grutter* leaves several important questions unanswered and those questions are only made more salient by the Court's decision in *Fisher v. University of Texas at Austin*. In *Fisher*, the Court held that a university must exhaust race neutral options for achieving diversity before it will be permitted to use racial preferences. The Court reversed and remanded the Fifth Circuit's decision upholding summary judgment for the University of Texas, because it found that the circuit court had misapplied *Grutter* by granting deference to the university's design of its affirmative action plan. The university had arranged its use of racial preferences to supplement the application of the Texas legislature's Top Ten Percent Law, which requires state colleges to admit any student graduating in the top ten percent of his or her class from one of the state's public high schools.⁷⁰ The legislature had passed the law in response to *Hopwood v. Texas*,⁷¹ a prior decision by the circuit court barring the use of racial preferences under pre-*Grutter* law. Following *Grutter*, the university established a supplemental "holistic review" process that considered race as one among many factors when considering students who were not admitted under the percentage plan.

Fisher's narrow ruling clarifies that the university's judgment that student body diversity is essential to its educational mission is owed "some, but not complete, judicial deference."⁷² It also withholds deference entirely from the university's judgment as to whether its use of racial preferences is necessary in order to serve its interest in diversity. Instead, the decision strictly instructs that courts must "verify that it is 'necessary' for a university to use race to achieve the benefits of diversity."⁷³ The ruling, however, fuels questions already stirring under the surface of *Grutter*, for once the Court showed that it was willing to withhold deference to a university's academic judgment on one issue this raised the possibility that it may do so with respect to others.

satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.").

⁷⁰ See *Fisher*, 133 S. Ct. at 2415-16 (describing the sequence of events that led to the university's current affirmative action plan).

⁷¹ 78 F.3d 932 (1996).

⁷² *Id.* at 2419.

⁷³ *Id.* at 2420.

1. *Whether success achieving diversity through race neutral means will bar or restrict the use of racial preferences.* On remand to the Fifth Circuit, the plaintiff Abigail Fisher argued that because the University of Texas had achieved considerable success increasing the number of minority students solely under the percentage plan, it should not be permitted to use racial preferences.⁷⁴ The circuit court held that the success of the percentage plan did not bar its supplementation by the university's process of holistic review. The court argued that "an examination that looks exclusively at the percentage of minority students fails before it begins," because *Grutter* rejects any "mechanical" process that "treat[s] minority students as fungible commodities that represent a single minority viewpoint." It therefore rejected the plaintiff's racial "head count by skin color or surname," because it concluded that this was "not the diversity envisioned by *Bakke* and a measure it rejected."⁷⁵ This reasoning turns the logic of *Grutter* against *Fisher*, using the former's broad definition of diversity against the latter's restrictive application of strict scrutiny. Reprising the Supreme Court's argument in *Grutter* that Michigan Law School should be permitted to use racial preferences in order to balance its interests in diversity and "academic excellence,"⁷⁶ the Fifth Circuit reasoned that the university should be allowed to use holistic review to obtain students with higher test scores than would have been admitted under the Top Ten Percent Plan.⁷⁷ One can also read the court's opinion as an approval of the idea that "intra-racial diversity" is important to the university's educational mission because it is fundamental to dismantling racial stereotypes.⁷⁸ The court refused to force the university to accept the numerical diversity yielded by the percentage plan alone, because it found that *Grutter* authorized the university to differentiate between different types of diversity and to design an

⁷⁴ The plaintiff pointed to the university's "combined Hispanic and African-American enrollment of approximately 21.5 %" in 2004, the last year before the university adopted racial preferences as a supplement to the percentage plan. *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (July 15, 2014), slip op. at 14. This number exceeded the minority enrollments achieved through the use of racial preferences in *Grutter*. *Id.* The Supreme Court itself noted in passing that "[b]efore the admissions program at issue in [*Fisher*], in the last year . . . that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic," while in the last year that the university had explicitly considered race under a prior race-conscious plan before the *Hopwood* decision, it had generated an enrollment of 4.1% African-American [students] and 14.5% Hispanic [students]." *Fisher*, 133 S. Ct. at 2416.

⁷⁵ *Fisher*, No. 09-50822, slip op. at 34.

⁷⁶ 539 U.S. at 340.

⁷⁷ *Fisher*, slip op., at 25 ("Fisher's claim can proceed only if Texas must accept this weakness of the Top Ten Percent Plan and live with its inability to look beyond class rank and focus upon individuals. Perversely, to do so would put in place a quota system pretextually race neutral."); see also *id.* at 23-25 (reasoning that, because the "Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system . . . the de facto segregation of Texas schools" holistic review was necessary in order to serve the university's interests in diversity and academic excellence); cf. *Gratz v. Bollinger*, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting) ("Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level . . .").

⁷⁸ See Devon W. Carbado, *Intra-racial Diversity*, 60 U.C.L.A. 1130, 1176-80 (2013) (offering this argument in support of the university's supplementation of the percentage plan with holistic review).

admissions program that would yield the precise form of diversity that it believed would satisfy its educational mission.

On the heels of the Fifth Circuit’s ruling on remand in *Fisher*, newly commenced litigations naming Harvard University and the University of North Carolina as defendants are also attempting to use the Supreme Court’s opinion in *Fisher* to argue that the use of racial preferences by these institutions is impermissible because each has race neutral means at its disposal that would permit it to obtain a critical mass of minority students.⁷⁹ By challenging the “Harvard Plan,” the plaintiff has targeted the very affirmative action program offered as a model of constitutionality by Justice Powell and repeatedly referred to in subsequent cases.⁸⁰ These cases do not directly challenge *Grutter*’s expression of the educational value of diversity. But they will no doubt raise issues similar to those discussed above. A threshold question concerns whether the diversity rationale will apply at all in a statutory context. Harvard, as a private university, is subject to challenge under Title VI of the 1964 Civil Rights Act but not under the Equal Protection Clause. These suits challenge not simply the narrow tailoring but also the sincerity of the universities’ affirmative action plans, threatening to unmask that the universities have concealed racial quotas⁸¹ or that the implementation of their plans reflects bias against certain groups such as Asian Americans.⁸² The plaintiff may wish to force convergence between the constitutional and statutory standards by encouraging courts to adopt *Fisher*’s strict application of strict scrutiny as the statutory standard.⁸³

2. *How to define “critical mass” and who may define it.* The definition of critical mass bears directly on the question of whether the use of racial preferences is justified. On remand, *Fisher* argued that the university could not pursue a “critical mass” of minority enrollment that exceeded the percentage of minorities enrolled under the

⁷⁹ See *supra* note 27 and accompanying text.

⁸⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-18 (1978) (opinion of Powell, J.) (discussing with approval the Harvard College program because it “does not insulate the individual from comparison with all other candidates for the available seats”); *Grutter*, 539 U.S. at 335 (describing Justice Powell’s discussion of the differences between an unlawful quota-based plan and the Harvard Plan “instructive”); *id.* at 337 (“Like the Harvard plan, the law School’s admissions policy ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according the m the same weight.’” (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.))).

⁸¹ Complaint, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. _____ (filed Nov. 17, 2014, M.D. N. Carol.), para. 3-5 (alleging that the university uses racial preferences in exist of what is necessary to achieve “critical mass”); Complaint, *Students for Fair Admissions, Inc. v. Harvard College*, No. _____ (filed Nov. 17, 2014, D. Mass.), paras. 288-303 (alleging that Harvard engages in racial balancing through a de facto quota system).

⁸² *Students for Fair Admissions, Inc. v. Harvard College*, No. _____ (filed Nov. 17, 2014, D. Mass.), paras. 434-37 (alleging that Harvard has relied on prejudicial and stereotypical assumptions to discriminate intentionally against Asian American applicants for admission).

⁸³ See Stephen M. Rich, *One Law of Race?*, 100 *Iowa L. Rev.* 201, 204-05 (2014) (arguing that the Court has in recent years aggressively forced the convergence of statutory law with restrictive constitutional standards).

University of Michigan Law School's plan as it was approved in *Grutter*.⁸⁴ She also argued that, because the use of racial preferences added .92% to African American enrollment and 2.5% to Latino enrollment, this was merely a de minimis effect that the court should interpret to be evidence of "gratuitous racial engineering."⁸⁵ The circuit court, however, interpreted *Grutter*'s definition of critical mass to require consideration of the specific educational context in which the concept was being applied. The court concluded that diversity does not equal race alone and that "[c]ritical mass, the tipping point of diversity, has no fixed upper board of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like spokespersons for their race."⁸⁶ Following this reading of *Grutter* to its logical conclusion, critical mass can, and indeed must, be set at different levels based on the unique features of each educational institution.

In addition, the court's reasoning raises the question of how to count students toward critical mass by ruling, in effect, that the university was not required to count all student's within a racial group toward the achievement of critical mass because the university was entitled to differentiate between students within the group based on other indicia of their contributions to diversity.⁸⁷ The Fifth Circuit turned *Grutter* against the Supreme Court's ruling in *Fisher* by exploiting the former's decision not to embrace a definition of critical mass based on the objective of enhancing minority students' classroom performance; the circuit court presumed that to do so would yield a lower threshold than focusing on the benefits of diversity that the Court actually endorsed. Whether or not this assumption is accurate, it shows the circuit court thinking about crosscutting issues regarding student body diversity and its benefits that the Supreme Court was not required to consider in *Grutter* but that *Fisher* now requires courts to consider.

3. *What "educational benefits" diversity entitles a university to pursue.* *Grutter* derives its list of diversity's educational benefits largely by granting deference to the law school's judgment regarding the reasons why it deemed student body diversity "essential to its educational mission."⁸⁸ The Court has never stated *Grutter*'s list of educational

⁸⁴ *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (July 15, 2014), slip op. at 14-15 (stating that Texas was already enrolling 21.4% to 25.5% Latino and African American students under the Top Ten Percent Plan, whereas the Michigan plan had enrolled between 4% and 14%).

⁸⁵ *Id.*

⁸⁶ *Id.* at 34.

⁸⁷ *Fisher*, slip op., at 34 (arguing that "an examination that looks exclusively at the percentage of minority students fails before it begins" because *Grutter*'s "nonmechanical" conception of diversity authorizes the university to seek minority students who possess other qualities besides racial status that will contribute to educational diversity).

⁸⁸ *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

benefits is meant to be exhaustive. Indeed, if the Fifth Circuit is right that the conception of diversity and its benefits must be tailored to the educational mission of the institution, then the Court must have intended to leave some leeway for institutions to define the benefits of diversity as they see fit—to supplement *Grutter*'s list and perhaps also to ignore some of *Grutter*'s recognized benefits. But, even if this is true, surely there must be a limit as to those benefits that deserve constitutional endorsement. The Court apparently sought to avoid benefits that sounded too much like attempts to remedy societal discrimination. For example, it did not endorse benefits such as raising the academic achievement of minority students, increasing the numbers of minority alumni, or (as the defendant law school had argued) creating an academic environment in which minority students felt sufficiently comfortable to participate in the educational experience. It also did not include signaling benefits such as improving recruitment of academically qualified students who interpreted student body diversity as a sign of the university's commitments to social justice or increasing donations by alumni and others who similarly favored diversity.

Perhaps the Court and the educational experts to whose opinions the Court deferred sought to avoid benefits too firmly associated with the financial "business" of the university. This distinction, however, is not made explicit. Moreover, one could interpret goals such as improving the professional preparation and standing of university graduates as exploitative because they address the transactional value of a university education in an "increasingly global marketplace."⁸⁹ The Court does not make such associations, but it does not guide the reader away from them either. It may be that the Court reasonably assumed that, because of the public value associated with education, any benefit that contributes to the educational experience should not be faulted just because it also benefited a university in more material ways. This assumption, however, cannot be transferred to the context of private employment and may yet be tested in the context of higher education.

4. *Whether the "benefits" of diversity are severable from student body diversity.* This is a question which no case has yet considered. *Grutter* assumes that certain educational benefits "flow" from student body diversity, as if the two were inextricable. However, several—if not all—of the educational benefits listed by *Grutter* are, at least in theory, severable from student body diversity. Benefits such as promoting cross-racial understanding and exposing students to a variety of viewpoints can be achieved through curricular reform and through social outreach programs organized by the university. In fact, universities and educational experts rarely consider student body diversity in isolation. While some research has found that intergroup contact enhances the educational experience, other research by educational experts and social psychologists

⁸⁹ Id. at 330.

has problematized the facile association of diversity with increased tolerance and intergroup understanding. Interactions between individuals of different backgrounds may not yield such benefits unless properly structured by appropriate curricular design and other forms of institutional intervention.⁹⁰ *Grutter*, however, does not consider the interaction of affirmative action with other educational policies, and *Fisher* appears to make these interactions enormously salient.

The benefits of diversity need not be strictly severable from student body diversity if the use of other policies such as diversity curricula, on-campus counseling, and diversity faculty hiring affect the success of on-campus diversity in realizing educational benefits. If the intersection of diversity and policies outside of the student admissions process (which themselves may be either race neutral or have no constitutionally significant distributional effects) causes a university to be more successful at achieving educational benefits with less student body diversity, this would in theory affect where critical mass should be set. And, if the availability of race neutral alternatives affects the constitutional permissibility of affirmative action, why would not the availability (or actual presence) of non-affirmative action policies affect how universities are permitted to define critical mass? This is yet another question that *Grutter* does not consider but that the logic of *Fisher* makes salient.

5. *Whether the Supreme Court remains committed to diversity.* We are now twelve years into the 25-year reprieve given to affirmative action by Justice O'Connor's majority opinion in *Grutter*.⁹¹ The composition of the Court has changed significantly, including the retirement of the opinion's author and crucial swing vote, Justice O'Connor. Members of the current Court have signaled that the constitutional standing of diversity is as precarious as it has been at any time since *Grutter* was decided.

As discussed above, Justice Kennedy's majority opinion in *Fisher* accepted *Grutter* as settled precedent,⁹² but it put new pressure on *Grutter*'s reasoning. Occupying the current Court's ideological center, Justice Kennedy has never strayed from the view, expressed in his *Grutter* dissent, that "[p]referent by race, when resorted to by the State, can be the most divisive of all policies," threatening even "the idea of equality."⁹³

⁹⁰ See *infra* notes 185-187 and accompanying text.

⁹¹ *Grutter*, 539 U.S. at 343 ("It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

⁹² Two Justices indicated that they would have overruled *Grutter* if given the chance. See *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring) (noting that the "petitioner in this case did not ask us to overrule *Grutter*'s holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions" and "therefore join[ing] the Court's opinion in full"); *id.* (Thomas, J., concurring) (writing separately "to explain that I would overrule [*Grutter*] and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause").

⁹³ *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); see also, e.g., *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) ("To be forced to

The association of viewpoint diversity with racial diversity is one of the foundations for *Grutter*'s conclusion that the consideration of an applicant's race allows a university to improve the learning experience.⁹⁴ Justice Kennedy's continued aversion to that association suggests that there are yet difficult challenges ahead for diversity.

In addition, in *Schuette v. BAMN*,⁹⁵ a fractured Court upheld an amendment to Michigan's state constitution banning all racial preferences by state actors, including the University of Michigan Law School admissions policy that *Grutter* had held constitutional. Members of the *Schuette* majority expressed views that raise considerable doubts about the continuing viability *Grutter*'s diversity rationale. At one end of the spectrum, Justice Scalia (joined by Justice Thomas) argued that the amendment could not violate the federal constitution's guarantee of equal protection because it embodied the "correct understanding" of that guarantee.⁹⁶ Justice Kennedy gestured toward the same colorblindness absolutism and reprised the arguments of his *Grutter* dissent when he rejected the circuit court's conclusion that the amendment violated the political restructuring doctrine of *Hunter v. Erickson*⁹⁷ and *Washington v. Seattle School District No. 1*⁹⁸ because, in his view, those cases should not be interpreted to require the COURT to define groups "in racial terms" and to use "impermissible racial stereotypes" when identifying group interests.⁹⁹

However, Justice Kennedy interpreted the amendment not as the fulfillment of the Constitution's concept of equality but as an evolution in the popular conception of equality. Portraying the state electorate's decision to ban affirmative action as a sign of the maturation of a democratic community, Justice Kennedy argued that "we must

live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. . . . Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. . . . lead[ing] to a corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process." (opinion of Kennedy, J.); *Metro Broadcasting, Inc., v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (disagreeing with the "demeaning notion that members of . . . defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"). Prior to *Fisher*, however, Justice Kennedy accepted diversity as a compelling interest, *Parents Involved*, 551 U.S. at 783, and also proposed that the government has a compelling interest in "avoiding racial isolation" in public education, and he has tied to the nation's "moral and ethical obligation" to provide "equal opportunity to for all of its children." *Parents Involved*, 551 U.S. at 797. But he offered no guidance regarding what differences in substance and applicability may exist between the compelling interest in diversity and a compelling interest in avoiding racial isolation.

⁹⁴ *Grutter*, 539 U.S. at 330.

⁹⁵ *Schuette v. BAMN*, 572 U.S. ___, No. 12-682, slip op. (Apr. 22, 2014).

⁹⁶ *Id.* at 1-2 (opinion of Scalia, J.).

⁹⁷ 393 U.S. 385 (1969).

⁹⁸ 458 U.S. 457 (1982). For a discussion of the political restructuring doctrine under *Hunter* and *Seattle Sch. Dist. No. 1*, see Stephen M. Rich, *Inferred Classifications*, 99 Va. L. R. 1525, 1539-47 (2013).

⁹⁹ *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

assume” that Michigan’s voters believed that a system permitting any racial preferences was “unwise” because of “its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.”¹⁰⁰ He further argued that to strike down the amendment on equal protection grounds would have raised “serious First Amendment implications” by denying the electorate its “capacity” and “duty to learn from its mistakes.”¹⁰¹ Notwithstanding diversity’s constitutional roots in Justice Powell’s conclusion that a university’s pursuit of diversity is protected by the First Amendment,¹⁰² Justice Kennedy makes no mention of the First Amendment implications of denying public universities the option of exercising their academic freedom through an admissions process that that promotes student body diversity. In effect, Justice Kennedy envisions democratic politics—and not the university—as the place where individuals come together “to discover and confront persisting biases” and “to rise above those flaws and injustices.”¹⁰³

Justice Kennedy’s words seem to paint a picture of a possible future in which the nation outgrows the need for *Grutter*. And yet, Justice Breyer’s *Schuette* opinion may be even more troubling for supporters of *Grutter*’s diversity rationale. Justice Breyer was a member of *Grutter*’s 5-4 majority, and a defender of voluntary affirmative action in public education in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*.¹⁰⁴ In that case, Justice Breyer argued that “promoting or preserving greater racial ‘integration’ of public schools”—which he understood to be the meaning of *Grutter*’s “diversity”—has not only an “educational element,” but also a “historical and remedial element” that “seek[s] to set right the consequences of prior conditions of segregation” and a “democratic element” that seeks to “produc[e] an educational environment that reflects the ‘pluralistic society’ in which our children will live.”¹⁰⁵ It is therefore all the more surprising that Justice Breyer’s analysis in *Schuette* opened by distinguishing between laws prohibiting the use of race “to remedy past exclusionary racial discrimination or the direct effects of that discrimination” and laws forbidding “programs that, as in *Grutter* . . . rest upon ‘one justification’: using ‘race in the admissions process’

¹⁰⁰ BAMN, slip op. at 18. In this way, Justice Kennedy attributed to Michigan’s voters the same views that he had expressed in his *Grutter* dissent. See supra note 93 and accompanying text.

¹⁰¹ Id. at 16

¹⁰² See supra note 33 and accompanying text. See also *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (“Academic freedom . . . long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.”).

¹⁰³ Id.

¹⁰⁴ 551 U.S. 701, 828 (2007) (Breyer, J., dissenting) (rejecting the plurality’s conclusion that equal protection required the invalidation of voluntary school assignment programs using racial preferences based on a principle “accepted by every brand of government” that “the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so”).

¹⁰⁵ Id. at 838-40.

solely in order to ‘obtai[n] the educational benefits that flow from a diverse student body.’”¹⁰⁶ Justice Breyer argued that Michigan’s constitutional amendment concerned only the latter. In his view, although the Constitution affords public educational institutions the latitude to pursue student body diversity, it “foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs.”¹⁰⁷ Had Justice Breyer continued to argue, as he had in *Parents Involved*, that the pursuit of diversity fulfills important remedial and democratic purposes in addition to educational ones, then he may have concluded that Michigan’s amendment deserved heightened scrutiny even if the political restructuring doctrine did not apply.¹⁰⁸ As discussed above, legal challenges continue to be brought in an attempt to alienate diversity from the project of equal opportunity by opposing it to the more jurisprudentially and perhaps socially ascendant concept of colorblindness, or equal treatment. Justice Breyer’s *Schuette* opinion can be read to express agreement that diversity is a matter of secondary importance, even if he would disagree with *Grutter*’s opponents regarding how to define the central concerns of equal protection.

* * * * *

¹⁰⁶ *Schuette*, slip op.at 1-2 (opinion of Breyer, J.). Justice Breyer’s basis for this distinction is a bit of a mystery. It seems to originate in his interpretation of the history of the amendment’s passage, which began with the Court’s decision in *Grutter*. However, the amendment itself makes no distinction between diversity and remedial measures, and in fact it never explicitly refers to “diversity” or to “*Grutter*.” Enacted as Article I, § 26 of the Michigan Constitution, the amendment’s first subsection specifically prohibits “[t]he University of Michigan . . . and any other public college or university” from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race . . . in the operation of public employment, public education, or public contracting.” Mich. Const., art. I, § 26(1). Subsequent subsections, however, extend the same prohibition to “[t]he state” generally, and they define the state to include “any city, county . . . or any other public subdivision or governmental instrumentality of or within the State of Michigan.” Mich. Const., art. I, § 26(2) & (3).

¹⁰⁷ *Id.* at 3.

¹⁰⁸ The political restructuring doctrine of *Hunter* and *Seattle School District No. 1* was not implicated, according to Justice Breyer, because the forbidden admissions policies had previously been established by university faculties rather than political bodies; by requiring a vote of the electorate, the amendment therefore returned the issue of diversity conscious admissions to the political process rather than denying it equal consideration within that process. *Id.* at 4. Although it is not a central concern of this Article, one may question Justice Breyer’s conclusion that the delegation of authority over admissions policy by “elected university boards” to “unelected faculty members” somehow renders admissions decisions by university faculties outside of the political process rather than incorporated into the political process. See *id.* at 4. To say, as Justice Breyer does, that the amendment simply “took decisionmaking authority away from these unelected actors and placed it in the hands of voters” is a gross mischaracterization. Certainly, Michigan might have passed legislation forbidding the university boards from delegating the responsibility to set admissions policy. Had it done so, Justice Breyer’s characterization would be accurate. However, a law forbidding any political institution from considering or enacting a particular type of admissions practice *without repeal of a constitutional amendment* is a very different thing, and that is exactly what Michigan’s amendment did. To say that it is not an act of political restructuring with respect to how—and indeed whether—particular substantive policies may be used by any subdivision of the state is to conflate mere removal of the decision making authority from unelected officials with the law’s actual restriction of *any* political institution’s authority to use race conscious measures in order to promote racial diversity.

In summary, *Grutter*'s association with antisubordination values and its connection to the project of equal opportunity are functions of its factual context. Because the decision upholds an affirmative action plan, it can reasonably be interpreted as pro-integration even though its language of "legitimacy" and "visible openness" equivocates. *Grutter* invokes the legacy of *Brown*, *Plyer*, and *Sweat v. Painter* which viewed educational equality as a critical means to the achievement of equal citizenship.¹⁰⁹ Nevertheless, the Court's explanation of the diversity rationale inherits from Justice Powell's understanding features that restrict its utility as an instrument of integration and racial equity, including naming the educational setting as a special source of diversity's value and rejecting racial remediation as a component of the interest in diversity. *Grutter* also introduces its own difficulties by articulating a theory of "educational benefits" said to "flow" from diversity without sufficiently accounting for that connection and by linking the university's specific institutional benefits with the cultivation of public goods. Both linkages are difficult to replicate outside of an educational setting, and the first in fact is so undertheorized that it may crumble under the weight imposed by *Fisher*'s requirement that the reviewing court verify the necessity of racial preferences in order to obtain the benefits of diversity. The Court has failed to differentiate between exploitative and egalitarian pursuits of diversity or to establish whether the benefits of diversity are severable from student enrollments. Moreover, the cascade of questions that arrive with *Fisher* demonstrates that the Court has yet to theorize either the importance of a relationship between affirmative action and other institutional practices or the impact of such a relationship on the status of *student body* diversity as compelling interest.

II. MANAGERIAL DIVERSITY AS COMPLEMENT AND COMPETITOR TO *GRUTTER*

By deferring to the opinions of university elites and corporate leaders regarding the benefits of diversity, the Court has opened itself to a discourse about public values, but this act of deference is in fact an assertion of the Court's agency. The foregoing discussion demonstrates that the Court has been quite discriminating about which reasons for diversity it has chosen to honor and which it has not. *Grutter* portrays diversity as a "demand side" rationale that emphasizes institutional benefits and leans upon a market-based conception of diversity's value in order to render that value concrete.¹¹⁰ Managerial discourse similarly depicts workforce diversity as an institutional asset to be managed and utilized as a component of business strategy. *Grutter*'s similarities with managerial diversity, however, also expose its weaknesses. Demand side rationales inherently place institutional interests before public interests, and exploitative uses of diversity before

¹⁰⁹ See *supra* note 45.

¹¹⁰ Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 *Ohio State L.J.* 669, 677 (1998) (describing diversity as a "demand side" rationale proposed to answer the question why educational institutions should seek to draw students from a diverse pool).

egalitarian ones. *Grutter*'s educational context moderates these difficulties and obscures their need for a doctrinal solution. In this respect, managerial diversity has a depth that *Grutter* does not. It conceives of the relationship between diversity and its benefits as one that must be tended in order for those benefits to be realized, in contrast to *Grutter*'s thin description of diversity which collapses the benefits of diversity with the achievement of a demographically defined end-state. In many ways, managerial diversity begins where *Grutter*'s search for diversity ends, taking demographic diversity as its starting point and then asking how such diversity can be converted into institutional success. For these reasons, comparing *Grutter* with managerial diversity can provide important lessons for legal discourse about diversity's dangers and its possibilities.

Sociologists have well documented the concurrent genealogies of diversity rhetoric in managerial discourse and diversity management as an organizational practice. From one point of view, the history of diversity management has unfolded within the larger history of workplace policies that arose in response to the executive orders of Presidents Kennedy and Johnson requiring affirmative action by federal contractors and to the passage of the 1964 Civil Rights Act prohibiting race and sex discrimination by employers.¹¹¹ Diversity management is therefore sometimes described as “old wine in new wineskins”: a continuation via rebranding of institutional practices that, following the civil rights retrenchment of the Reagan administration, could no longer function effectively under the headings of “affirmative action” and “equal opportunity.”¹¹² From another point of view, the managerial conception of diversity represents a rejection of traditional civil rights norms and a reinterpretation of legal compliance strategies that put the satisfaction of institutional interests before the principle of equal opportunity. Under this view, managerial diversity is an example of the “managerialization of law”: a process by which legal concepts “become progressively infused with managerial values” as organizational practices inform the meaning of legal compliance, blurring legal and organizational fields.¹¹³ The two perspectives are not mutually exclusive. Spurred by a shift in the federal government's enforcement practices and alarmist predictions about changing workforce demographics, managerial experts in the 1980s began to describe workforce diversity¹¹⁴ as a problem that American businesses must manage effectively if

¹¹¹ Kelly & Dobbin, supra note 8, at 963-64; DOBBIN, supra note 8, at 32-34.

¹¹² Kelly & Dobbin, supra note 8, at 978-80; DOBBIN, supra note 8, at 16-17.

¹¹³ Edelman et al., supra note 8, at 1592; see also id. at 1600 (citing Edelman's prior work on legal endogeneity to caution that “lawyers and judges may embrace managerial rhetorics, lending them legal legitimacy”).

¹¹⁴ By “workforce diversity,” I mean to invoke the meaning ascribed in managerial and sociological discourses—that is, the “composition of work units (work group, organization, occupation, establishment or firm) in terms of the cultural or demographic characteristics that are salient and symbolically meaningful in the relationships among group members” and, I would add, to the institution in accordance with the interests and objectives that institutional actors believe are impacted by diversity. Nancy DiTomaso et al., Workforce Diversity and Inequality: Power, Status, and Numbers, 33 Annual Rev. Soc. 473, 474 (2007).

they wanted to succeed in the twenty-first century marketplace. At the same time, human resources personnel embraced the new diversity rhetoric as a way of establishing their continued value during a period of regulatory change. The result was a concept of diversity with a distinctive genealogy that developed without substantial legal guidance or intervention.

A. Distinguishing Diversity from Civil Rights Law

The distinction between diversity and civil rights law posited here is a normative one. Managerial diversity, with its intense focus on institutional performance, illustrates how the pursuit of diversity may threaten equal opportunity. This section will demonstrate the need for antidiscrimination law to draw a distinction between exploitative and egalitarian uses of diversity, by discussing managerial diversity's focus on institutional performance to illustrate how the pursuit of diversity may threaten equal opportunity. It will also show that diversity can make a contribution to equal opportunity by looking beyond affirmative action's moment of selection to the possibility of continuing organizational investment in individual growth and achievement. Unlike *Grutter*, managerial diversity recognizes a need for organizations to take account of individual differences in order to improve the quality of advancement opportunities for that an organization provides. Such opportunities may require human capital investment or the design of positions and job responsibilities that permit underrepresented individuals to acquire skills and experience on an equal basis with their peers. The legal conception of diversity may draw inspiration from managerial rhetoric's aspiration that organizations should adjust their practices to realize concurrent benefits to themselves and to each of their members.

Legal scholar Cynthia Estlund has described the ideological core of managerial diversity—the “business case for diversity”—as “the proposition that a diverse workforce is essential to serve a diverse customer base, to gain legitimacy in the eyes of a diverse public, and to generate workable solutions within a global economy.”¹¹⁵ Early proponents of diversity management viewed diversity as the inevitable consequence of a shift in workforce demographics which would bring new challenges to American businesses not faced when managing relatively homogeneous workforces.¹¹⁶ From this perceived crisis,

¹¹⁵ See Estlund, *supra* note 62, at 4.

¹¹⁶ The diversity management movement formed largely in response to the predictions of *Workforce 2000*, a report published by the Hudson Institute, which erroneously predicted that by the turn of the century white males would make up only 15 percent of new entrants into the labor market. WILLIAM B. JOHNSTON & ARNOLD H. PACKER, *WORKFORCE 2000: WORK AND WORKERS FOR THE 21ST CENTURY* xiii (1987); see also DOBBIN, *supra* note 8, at 141-42 (describing the exaggerated predictions of *Workforce 2000* as a catalyst for the spread of diversity management); Edelman et al, *supra* note 8, at 1612-14 (describing how “*Workforce 2000* appears to have spawned diversity rhetoric by constructing a threat regarding a major change in the demographics of the workforce”); Kelly & Dobbin, *supra* note 8, at 974 (“EEO/AA and diversity specialists seized *Workforce 2000*, with its pragmatic, future-oriented message, to increase interest in their own programs.”).

managerial experts and human resources professionals began to develop diversity management as a strategy for organizational survival. In time, they also pivoted to expound a positive message about workforce diversity, one that emphasized demographic and cultural differences as potential sources of innovation. They proposed that, with the proper set of managerial tools, organizations could convert diversity from a liability to a business opportunity.¹¹⁷ Today, the business case for diversity has received hegemonic status in the business community, as some of the world's most respected management consultants and financial publications accept without reservation the organizational value of diversity.¹¹⁸

1. *Conflict with existing law.* Proponents of diversity management quickly set out to distinguish diversity from compliance with civil rights law. In their 2001 survey of diversity rhetoric in managerial literature, sociologist Lauren Edelman and her colleagues depicted a complex interplay between the two, through which “diversity rhetoric embraces and yet transfigures the legal ideals embodied” in the law.¹¹⁹ First, they argued that managerial diversity rhetoric “carries forth the civil rights legacy” through the “curious paradox” of defining diversity in terms that seem to equate “legal” and “nonlegal” social statuses.¹²⁰ Second, they argued that, by conceiving of diversity as a business resource, managerial literature transformed “[d]iscrimination and exclusion”

¹¹⁷ See Edelman et al., *supra* note 8, at 1618-19 (discussing the move toward considering diversity a business resource); Kelly & Dobbin, *supra* note 8, at 978-79 (listing “common diversity practices” advertised by diversity specialists as necessary for “handling workforce diversity, but arguing that “many of these were simply repackaged EEO and AA practices”); see also, e.g., David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity* (1990), reprinted in *HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY* 33, 34 (2001 ed.) (arguing that “a more diverse workforce . . . will increase organizational effectiveness . . . lift morale, bring greater success to new segments of the marketplace, and enhance productivity”); William B. Johnston, *Global Work Force 2000: The New Labor Market* (1991), reprinted in *Differences That Work: Organizational Excellence Through Diversity* (1994) 3, 25-26 (arguing that, despite the “uncertain” effects of globalization and changes in workforce demographics, companies “willing to accept the trends” would find “great opportunity” and “competitive advantage”).

¹¹⁸ For example, publications by McKinsey & Co. and *Forbes* magazine regularly attest to diversity's value as part of a broader corporate strategy to secure innovation and to strengthen returns on investment. See, e.g., Thomas Barta et al., *Is There a Diversity Pay-Off*, McKinsey Quarterly (April 2012) (observing that companies high in board diversity received greater returns on investment than low-diversity firms); McKinsey & Co., *Gender Diversity in Top Management: Moving Corporate Culture, Moving Boundaries*, in *WOMEN MATTER* 2013, at 7 (“For seven years, McKinsey's annual *Women Matter* studies have pointed out that companies with a ‘critical mass’ of female executives perform better than those with no women in top management positions.”); Forbes Insights, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce*, http://images.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf (viewed on January 20, 2015), at 2 (describing diversity as a “key driver of innovation” and a “critical component” of success on a “global scale”).

¹¹⁹ Edelman et al., *supra* note 8, at 1591.

¹²⁰ *Id.* at 1590-91 (explaining that “diversity rhetoric . . . expands the conception of diversity so that it includes a wide array of characteristics no explicitly covered by any law,” thus putting diversity of characteristics such as “thought,” “culture,” and “dress . . . on par with diversity of sex and race”); *id.* at 1616-18 (explaining that “nonlegal categories” added by managers to the legal conception of diversity “reflect traditional areas of managerial concerns”).

from moral and legal concerns to problems that “inhibit the firm’s ability to profit in a global and more diverse world.”¹²¹ Third, the authors described overt attempts within managerial literature to distinguish civil rights law from diversity. Frequently, these attempts depicted the law as artificial, coercive, and economically inefficient, in contrast to the “*natural* character of the new diversity.”¹²² Edelman and her colleagues appreciated that the self-interested business orientation of managerial diversity holds pragmatic advantages, because it can persuade organizations to pursue minority inclusion where social justice arguments have failed.¹²³ This hypothesis also resonates with Estlund’s depiction of diversity as a forward-looking, non-remedial rationale that can bridge corporate interests and the law’s goal of integration.¹²⁴

Nevertheless, the “business case” also reveals diversity at its most exploitative. Sociologist John Skrentny has argued that, in the post-civil rights era, organizations regularly engage in “racial realism,” meaning that they undertake employment decisions with the view that “race has both significance and usefulness in the workplace . . . irrespective of governmental policy or lofty concerns about equality and justice.”¹²⁵ Skrentny divides employers’ uses of racial diversity into two categories. First, the exploitation of “racial abilities” reflects “perceptions that employees of some races are better able to perform some tasks than employees of other races due to their aptitude or know-how.”¹²⁶ Second, “racial signaling” represents the effort “to gain a favorable response from an audience through the strategic deployment of an employee’s race.”¹²⁷ Legal scholar Nancy Leong has situated such practices within the more general phenomenon of “racial capitalism,” or “the process of deriving social or economic value from the racial identity of another person.”¹²⁸ Leong argues that “racial capitalism is common” because “[i]n a society preoccupied with diversity, nonwhiteness is a valued commodity.”¹²⁹ Racial realism and racial capitalism are manifested when, for example, a major U.S. pharmaceutical retailer assigns African American employees to management

¹²¹ Id. at 1618-19.

¹²² Id. at 1620-21.

¹²³ Id. at 1632 (“[P]recisely because diversity rhetoric constructs diversity as consonant with managerial interest and values, it may overcome much of the managerial resistance to nontraditional workers by transforming the notion of ‘difference’ from one of legal imposition to one of business advantage.”).

¹²⁴ Estlund, *supra* note 62, at 14-15 (explaining that the instrumental quality of diversity broadens the concept’s appeal).

¹²⁵ SKRENTNY, *supra* note 20, at 10.

¹²⁶ Id. at 11-12.

¹²⁷ Id. at 13; see also Tristin K. Green, *Race and Sex in Organizing Work: “Diversity,” Discrimination, and Integration*, 59 *Emory L.J.* 585, 587 (2010) (arguing that the business context is dominated by a “value-added narrative” of workplace diversity in which “race and sex are relevant as means of serving markets and of signaling a firm’s commitment to diversity and its adherence to egalitarian norms”).

¹²⁸ Nancy Leong, *Racial Capitalism*, 126 *Harv. L. Rev.* 2152, 2153 (2013).

¹²⁹ Id. at 2154.

positions in predominantly black neighborhoods, where comparatively low sales volumes undermine managers' prospects for advancement.¹³⁰ They are manifested when a real estate firm assigns black realtors to show black homebuyers properties in predominantly black neighborhoods, thereby curtailing the realtors' opportunities to serve a wider clientele in other real estate markets with the concomitant loss of additional referrals and commissions.¹³¹

The threat of exploitation exists not only when employers act seemingly without concern for the legality of their actions, but also when employers self-consciously pursue diversity in order to demonstrate legal compliance without sacrificing organizational interests. Indeed, it may be difficult to distinguish the two, as employers engaging in racially exploitative practices may believe that they are expanding minority opportunities, not violating civil rights laws.¹³² Edelman and her coauthors situate the shift from civil rights to diversity rhetoric within a larger narrative about the "blurring of organizational fields," and warn that, "because organizational fields overlap with legal fields, managerial rhetorics also influence ideas in legal fields."¹³³ The authors concluded that, as a consequence, "[d]iversity becomes conditional upon serving corporate interests rather than grounded in social justice,"¹³⁴ and they predicted that this process may penetrate legal institutions as it had managerial discourse and corporate practice.¹³⁵ Thus, from their point of view, the ultimate threat of managerial diversity rhetoric to civil rights

¹³⁰ SKRENTNY, *supra* note 20, at 13 (offering this factual scenario—taken from a federal lawsuit against Walgreen Co.—as an example of racial signaling); see also EEOC, Systemic Race Bias Suit Against Walgreens Resolved for \$24.7 Million, EEOC Compliance Manual, No. 182, July 31, 2007 (describing the consent decree that resolved the commission's 2005 lawsuit); Robert Ottinger, EEOC Sues Walgreen for Racial Discrimination, New York Employment Lawyer Blog (June 30, 2013), <http://newyorkemploymentlawyerblog.com/eec-sues-walgreen-for-racial-discrimination/> (describing the commission's renewed allegations against the company in a 2013 lawsuit alleging similar acts of discrimination).

¹³¹ See *Hall v. Lowder Realty Co., Inc.*, 160 F. Supp. 2d 1299 (M.D. Ala. 2001) (denying summary judgment against plaintiff's claims of discrimination under § 1981 and violations of the Fair Housing Act of 1968 because evidence of defendant's racial pairing of plaintiff with black clientele was unlawful and plaintiff's professional success did not void her claim of injury).

¹³² For example, Walgreens argued that its assignment of black managers to stores in black neighborhoods was not discriminatory because blacks represented 17 percent of the company's managers, compared with an industry average of 9 percent. See EEOC, Systemic Race Bias Suit, *supra* note 130.

¹³³ Edelman et al., *supra* note 8, at 1631; Rich, *supra* note 22, at 83-93 (discussing Edelman's work in support of my own theory of "discrimination as compliance," which argues that diversity initiatives may operate to discriminate against minority workers by denying them opportunities under the cover of legal compliance).

¹³⁴ Edelman et al., *supra* note 8, at 1632; see also *id.* at 1621-26 (modeling the study's conclusions which demonstrate the influence of managerial ideals on discussions of diversity in business literature);.

¹³⁵ *Id.* at 1633 ("The import of these overlapping fields is that the potential of organizations to influence the law that regulates them may be substantially greater than previously demonstrated by studies of regulatory capture or organizational compliance.").

law is nothing less than a transformation of the substance of law to reflect managerial values.

Professor Edelman's work has shown that a variety of organizational voluntary compliance practices—some of which may be associated with diversity management—often function as little more than symbolic compliance with civil rights law that. The Supreme Court has established that an employer's use of anti-discrimination policies, anti-harassment policies, and grievance procedures may provide the basis for a defense to liability or punitive damages.¹³⁶ Diversity management practices can influence litigation outcomes, even without evidence that an employer implemented diversity measures to decrease discrimination or to promote workplace integration.¹³⁷ Edelman has consistently shown, that despite judicial endorsement, these practices “may in fact operate to perpetuate discrimination.”¹³⁸ Little evidence exists, however, to suggest that managerial “diversity rhetoric” has influenced the substance of employment

¹³⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that an employer will establish an affirmative defense against sexual harassment liability if it institutes reasonable internal grievance procedures, the plaintiff unreasonably fails to provide notice by complaining through those procedures, and no tangible employment action was taken against the plaintiff); accord *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); see also *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (establishing that adoption of antidiscrimination policies and supervisor training may repel a punitive damages award). In addition, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court concluded that “the employer must be allowed some latitude to introduce evidence which bears on his motive,” including evidence that its “work force was racially balanced or that it contained a disproportionately high percentage of minority employees,” *id.* at 580. Courts continue to follow this logic in cases that explicitly involve diversity. For example, in *Whethers v. Nassau Health Center*, 956 F. Supp. 2d 364 (E.D.N.Y. 2013), the district court found that the employer's installation of a new diversity office and director and its dissemination of diversity awareness training weighed against an inference of discriminatory intent in a claim brought by a black employee, see also, e.g., *Hawkins v. County of Oneida*, 497 F. Supp. 2d 363 (N.D.N.Y. 2007) (finding that employer's dissemination of diversity training weighed against black corrections officer's claim of deliberate indifference to his constitutional and statutory rights).

¹³⁷ For example, notwithstanding the lack of evidence that it is an effective debiasing tool, see *infra* notes 176-178 and accompanying text (discussing the ineffectiveness of popular diversity initiatives, such as diversity training), courts frequently order “diversity training” as a remedy for discrimination, see, e.g., *DOBBIN*, *supra* note 8, at 148 (describing consent decrees establishing diversity training and task forces in suits brought against Texaco and Coca-Cola), and consider an employer's implementation of such training as mitigating evidence when assessing vicarious liability for harassment and punitive damages for intentional discrimination, see, e.g., *Williams-Boldware v. Denton Cty., Tex.*, 741 F. 3d 635, 641-21 (5th Cir. 2014) (employer avoided liability for sexual harassment by promptly ordering diversity training for perpetrator, despite evidence he did not take the training seriously); *Brown v. Arkansas State Hwy. & Transp. Dep't*, 358 F. Supp. 2d 729, 735 (W.D. Ark. 2004) (employer's implementation of diversity training following the plaintiff's complaint of harassment constituted reasonable steps sufficient to avoid liability).

¹³⁸ Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 *Am. J. Soc.* 888, 934 (2011) (discussing formal antidiscrimination policies); see also Lauren B. Edelman, *The Endogeneity of Law: Civil Rights at Work*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES* 337, 350-51 (2005) (sexual harassment policies and grievance procedures); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 *Am. J. Soc.* 406 (1999) (grievance procedures). See generally Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 *Am. J. Soc.* 1531 (1992).

discrimination law by redefining what constitutes unlawful discrimination. In other words, diversity management may provide mitigating evidence or a blueprint for possible injunctive relief in specific cases, but this does not mean that courts presume that workplace diversity efforts are permissible when they include overt consideration of social status. Indeed, the current state of the law supports the opposite conclusion.

First, Title VII offers no defense against a claim of racial disparate treatment discrimination unless the employer's action was necessary to avoid disparate impact liability or occurred in the context of a valid affirmative action program. In its compliance manual, the Equal Employment Opportunity Commission advises that "Title VII permits diversity efforts designed to open up opportunities to everyone,"¹³⁹ but it offers no legal authority establishing that diversity programs lacking a remedial purpose are lawful.¹⁴⁰ Title VII's "bona fide occupational qualification" defense is unavailable against claims of race or color discrimination (unlike sex, national origin, and religious discrimination),¹⁴¹ and the Supreme Court has determined that, when the defense is available against non-racial discrimination claims, it must be strictly applied.¹⁴² Title VII does not require proof of prejudice or malice to support a claim of disparate treatment,¹⁴³ meaning that claims will be viable even when the employer's motives are rationale or "well intentioned or benevolent," absent a valid defense.¹⁴⁴

Second, Title VII distinguishes between lawful and unlawful affirmative action programs based on whether a program advances the statute's broadly remedial purposes. Under the Supreme Court's decisions in *Steelworkers v. Weber*¹⁴⁵ and *Johnson v. Transportation Authority, Santa Clara County*,¹⁴⁶ only a program that "mirror[s]" the statute's purposes of "breaking down old patterns of . . . segregation and hierarchy" and

¹³⁹ EEOC Compliance Manual, sec. 15, "Race and Color Discrimination," at 15-31, 15-32.

¹⁴⁰ *Id.* (stating that "[a]ffirmative action, by contrast, 'means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity' and acknowledging particular statutory requirements for a valid affirmative action program).

¹⁴¹ See 42 U.S.C. § 2000e-2(e) (providing an affirmative defense to liability for disparate treatment "on the basis [that the plaintiff's] religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

¹⁴² See, e.g., *UAW v. Johnson Controls, Inc.*, 491 U.S. 187, 201 (1991) ("[I]n order to qualify as a BFOQ, a job qualification must relate to the 'essence' or to the 'central mission of the employer's business.'" (citations omitted)).

¹⁴³ See generally Rich, *supra* note 22, at 65-69 (discussing Supreme Court authority supporting this view).

¹⁴⁴ *Ricci v. DeStefano*, 557 U.S. 557, 583-84 (2009) (establishing that an employer that engages in disparate treatment may avoid liability only if it proves that it had a strong basis in evidence to believe that, without such disparate treatment, it would have incurred liability).

¹⁴⁵ 443 U.S. 193 (1979).

¹⁴⁶ 480 U.S. 616 (1987).

“open[ing] employment opportunities” for status groups “in occupations which have been traditionally closed to them” will be endorsed as valid expressions of compliance with the statute.¹⁴⁷ A valid program must be designed to correct a manifest statistical imbalance in a traditionally segregated job category, must be temporary in duration, and must not “unnecessarily trammel” the interests of persons not intended to benefit from the program.¹⁴⁸ The *Weber-Johnson* rationale is therefore remedial in the broadest sense in that it permits workplace affirmative action programs in response to the employer’s past discrimination or to societal discrimination affecting the particular job category.¹⁴⁹

An employer’s intention to promote diversity has never been held to satisfy *Weber-Johnson*, and instrumental uses of race generally have been rejected by the lower courts. In *Taxman v. Piscataway Township Board of Education*,¹⁵⁰ the Third Circuit held the school board’s decision to retain a black teacher over an admittedly equally qualified white teacher was unlawful discrimination despite the board’s contention that its purpose was to promote diversity.¹⁵¹ The court reasoned that under Title VII only a remedial purpose will justify the employer’s use of an affirmative action plan granting racial preferences.¹⁵² The rejection of diversity as a basis for racial preferences also has not been limited to reverse discrimination claims. For example, in *Ferrill v. Parker Group, Inc.*,¹⁵³ the Eleventh Circuit held that a marketing firm violated Title VII and Section 1981 when it engaged in “race-matching” in connection its pre-election “get-out-the-vote” calling business. The circuit court upheld a jury verdict for the African American plaintiff finding that she suffered discrimination because her company had assigned her telemarketing responsibilities based on the assumption “that black voters will more readily identify with and be sympathetic to ‘black voices’” and white voters will respond similarly to “‘white voices.’”¹⁵⁴ Similarly, in *Hall v. Lowder Realty Co., Inc.*,¹⁵⁵ the district court held that the racial pairing of a black real estate agent with black

¹⁴⁷ *Weber*, 443 U.S. at 208; accord *Johnson*, 480 U.S. at 628-29.

¹⁴⁸ *Weber*, 443 U.S. at 208; accord *Johnson*, 480 U.S. at 630.

¹⁴⁹ See *Weber*, 443 U.S. at 212 (Blackmun, J., concurring) (“The sources cited [in the majority opinion] suggest that the Court considers a job category to be ‘traditionally segregated’ when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent [racial] disparity[.]”); *Johnson*, 480 U.S. at 630 (acknowledging that the employer “need not point to its own prior discriminatory practices, nor even to evidence of an ‘arguable violation’ on its part” (quoting *Weber*, 443 U.S. at 212 (Blackmun, J., concurring) (arguing that, contrary to the Court’s ruling, the employer should be required to demonstrate an “arguable violation” of the statute to support the use of affirmative action))).

¹⁵⁰ 91 F.3d 1547 (1995), cert. granted, 521 U.S. 1117 (1997), cert. dismissed, 522 U.S. 2010 (1997).

¹⁵¹ *Id.* at 1563.

¹⁵² *Id.* at 1557.

¹⁵³ 168 F.3d 468 (11th Cir. 1999).

¹⁵⁴ *Ferrill v. Parker Group, Inc.*, 967 F. Supp. 472, 475 (N.D. Ala. 1997).

¹⁵⁵ 160 F. Supp. 2d 1299 (M.D. Ala. 2001).

buyers and the assignment of the agent primarily to handle listings in predominantly black neighborhoods were actionable under Section 1981 and the Fair Housing Act of 1968. Only cases citing the “operational needs” of urban police departments and the role-modeling needs of a correctional bootcamp for predominantly African American teens have contradicted this trend¹⁵⁶

Despite the weight of authority, corporate and legal actors continue to discuss workplace diversity efforts as if they carry unquestionable legal legitimacy.¹⁵⁷ Of course, the best evidence in support of Edelman’s and her colleagues’ prediction is *Grutter* itself. Heeding the opinions of corporate leaders, the decision recognizes the law school’s need to produce graduates with the skills to participate in the effective management of “an increasingly diverse workforce” and in an “increasingly global marketplace.”¹⁵⁸ *Grutter*’s broad definition of diversity, in fact, *requires* universities that use racial preferences to include “nonlegal” (i.e., non-racial) categories within their holistic review in order to meet the constitutional requirement of narrow tailoring.¹⁵⁹ This does not mean, however, that the managerial and educational conceptions of diversity are identical. As Estlund acknowledges, there is a dichotomy in managerial discourse “between the pursuit

¹⁵⁶ See, e.g., *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981) (justifying the use of racial preferences in the hiring and promotion of police officers because the court recognized “the operational needs of an urban police department serving a multi-racial population”); accord *Reynolds v. City of Chicago*, 296 F.3d 524, 530-31 (7th Cir. 2002); *Petit v. City of Chicago*, 352 F.3d 111, 1114 (7th Cir. 2004). But see *Lomack v. City of Newark*, 463 F.3d at 309-10 (declining to apply the operational needs defense to a fire department). Courts have opined that “[i]n a sense, *Grutter* is an operational needs opinion. The Supreme Court essentially found that law schools have an operational need for a diverse student body in order to effectively achieve their educational mission.” *Dietz v. Baker*, 523 F. Supp. 2d 407, 418 (D. Del. 2007) (internal quotation marks omitted) (quoting *Lomack v. City of Newark*, 463 F.3d 303, 310 n.8 (3d Cir. 2006)). Even in the law enforcement context, courts have sometimes recognized claims by minority officers when exploitative uses of the officers’ racial statuses were not justified. See, e.g., *Patrolmen’s Benevolent Association v. City of New York*, 310 F.3d 43, 52-53 (2d Cir. 2002) (recognizing the operational needs defense but upholding a verdict for black police officers because their transfers to a particular precinct in which a black detainee had recently suffered beating and torture were not compelled by the department’s operational needs); *Perez v. FBI*, 707 F. Supp. 891 (W.D. Tex. 1988) (recognizing that Hispanic agents had claims for compensation for promotions and other opportunities lost as a consequence of the bureau’s assignment of them to undercover work), *aff’d* 956 F.2d 265 (5th Cir. 1992).

¹⁵⁷ In certain ways, legal actors have worked as hard to claim diversity within the civil rights agenda as proponents of the business case for diversity have worked to distinguish the two. For example, in its Compliance Manual, the Equal Opportunity Employment Commission refers to “workforce diversity” as a “business management concept” and yet advises that “Title VII permits diversity efforts designed to open up opportunities to everyone.” EEOC Compliance Manual, sec. 15, “Race and Color Discrimination,” at 15-31. The commission provides no authority for this conclusion, which otherwise seems to contradict the plain language of Title VII. 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers from “discriminating” against an individual “because of . . . race”).

¹⁵⁸ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); see also Estlund, *supra* note 8, at 20 (arguing that “the [*Grutter*] majority seems to endorse the ‘business case for diversity’ itself”).

¹⁵⁹ Edelman and her colleagues note in fact that the notion of diversity as a resource—which encourages a broad, institution specific definition of diversity—managerial discourse may have been influenced by prior legal decisions, such as *Bakke*. Edelman et al., *supra* note 8, at 1627 & n.25.

of a greater social good and the pursuit of institutional objectives” that was not present in *Grutter*, even if one believes, as Estlund does, that the workplace—like the university—is an important site of civic and social interaction.¹⁶⁰ Estlund herself faults managerial discourse for failing to “tap into the reservoir of support that *Grutter* evinces for the civic imperative of building a more integrated and egalitarian society,”¹⁶¹ but she also raises doubts about whether private firms seeking to justify racial preferences would be able to lay claim to such a public benefit. Thus, while from one perspective *Grutter*’s diversity and managerial diversity are homologous—each authorizing institutions to pursue diversity for their own self interests and granting institution’s substantial discretion in defining what those interests are—in fact, each falls at a different point along a continuum: *Grutter* occupies a coveted position, where pursuing diversity to satisfy institutional needs also necessarily promotes public goods; but managerial diversity covers an expanse in which the relationship between institutional and public interests is either greatly attenuated or simply nonexistent.

2. *Looking beyond existing law.* Managerial discourse proposes a conception of diversity that simultaneously distances itself from civil rights law and articulates a vision of synergy between organizational and individual success that resonates with the goals of equal opportunity. As expressed by some of its most prominent proponents, diversity management seeks to avoid the superficial use and exploitation of minority workers and to develop the professional endowment and performance potential of each individual worker, because doing so will return material benefits to the firm. For example, in a 1994 *Harvard Business Review* article, entitled “From Affirmative Action to Affirming Diversity,” diversity consultant and former Harvard Business School professor R. Roosevelt Thomas, Jr. described diversity management as a strategic business activity liberated from the “increasingly shopworn” assumptions and priorities of the prior generation’s affirmative action policies. Roosevelt argued that prejudice, while “hardly dead . . . ha[d] suffered some wounds that may eventually prove fatal,” and that, in the meantime, American business were now populated by “progressive people—many of them minorities and women themselves—whose prejudices, where they still exist, are much too suppressed to interfere with recruitment.”¹⁶² The failure of corporations to fully exploit the potential of workforce diversity was, according to Thomas, a function of their anxiety about possible negative consequences for their productivity. Thomas explained his solution by stating that “[m]anaging diversity does not mean controlling or containing diversity, it means enabling every member of your work force to perform to his of her potential” so that the organization may achieve “the unexpected upside of

¹⁶⁰ Estlund, *supra* note 8, at 27.

¹⁶¹ *Id.* at 26.

¹⁶² R. Roosevelt Thomas, *From Affirmative Action to Affirming Diversity*, reprinted in *HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY* [hereinafter *Managing Diversity*] 1, 4 (2001 ed.).

diversity.”¹⁶³ Roosevelt thus made human capital investment in the performance potential of every worker a linchpin of his theory of diversity management, one that distinguished the theory from civil rights enforcement and explained equal opportunity as a business opportunity.

At its best, diversity management is a structural project aimed to create an environment in which firms and their minority workers experience simultaneous success—what some experts call “designing for diversity.”¹⁶⁴ Contemporary authors sometimes refer to this feature of diversity management as part of an ideological shift from diversity to “inclusion,”¹⁶⁵ but it has been part of the diversity management literature for more than two decades. In a 1996 *Harvard Business Review* article entitled “Making Differences Matter,” Harvard Business School professors David Thomas and Robin Ely faulted early “diversity efforts” for “not fulfilling their promise” because they wrongly thought of “diversity simply in terms of identity-group representation [which] inhibited effectiveness.”¹⁶⁶ The authors attributed this mode of thinking to the dominant “discrimination-and-fairness” paradigm which shared with “traditional affirmative-action efforts” the assumption that social prejudices required that firms focus their diversity efforts on minority recruitment and retention.¹⁶⁷ This line of argument sounds in some ways like a rejection of civil rights norms. But Thomas and Ely also argue that the use of diversity to gain access to new markets and to establish legitimacy with a diverse clientele had ultimately failed, because it had exploited and alienated underrepresented workers and thereby forfeited its opportunity to harness their true performance

¹⁶³ Id. at 12. Over the years, Thomas developed his theory of diversity management as a craft or exercise in building the proper institutional context (or “house”) in which to take cultivate the benefits of workforce diversity. See generally R. ROOSEVELT THOMAS, BUILDING A HOUSE FOR DIVERSITY: HOW A FABLE ABOUT A GIRAFFE AND AN ELEPHANT OFFERS NEW STRATEGIES FOR TODAY’S WORKFORCE (1999); R. ROOSEVELT THOMAS, BUILDING ON THE PROMISE OF DIVERSITY: HOW WE CAN MOVE TO THE NEXT LEVEL IN OUR WORKPLACES, OUR COMMUNITIES, AND OUR SOCIETY (2006).

¹⁶⁴ See, e.g., David A. Harrison & Stephen E. Humphrey, Designing for Diversity or Diversity for Design? Tasks, Interdependence, and Within-Unit Differences at Work, 31 J. Org. Behavior 328 (2010). See generally TREVOR WILSON, DIVERSITY AT WORK: THE BUSINESS CASE FOR EQUITY (1997).

¹⁶⁵ As one prominent diversity consultant has explained:

In order to really reach our potential, we will need not only to get people in the door but really develop a sense of *inclusion*. . . . [by] creating opportunities for people to be part of the fundamental fabric of the way the organization functions—decision-making, responsibility, leadership—and then creating organizations that are *culturally competent*, *culturally intelligent*, and *culturally flexible*.

HOWARD J. ROSS, REINVENTING DIVERSITY: TRANSFORMING ORGANIZATIONAL COMMUNITY TO STRENGTHEN PEOPLE, PURPOSE, AND PERFORMANCE 34 (2011); see also MICHAEL C. HYTER & JUDITH L. TURNOCK, THE POWER OF INCLUSION: UNLOCK THE POTENTIAL AND PRODUCTIVITY OF YOUR WORKFORCE (2005); FREDERICK A. MILLER & JUDITH H. KATZ, THE INCLUSION BREAKTHROUGH: UNLEASHING THE REAL POWER OF DIVERSITY (2002).

¹⁶⁶ Thomas & Ely, *supra* note 117, at 35.

¹⁶⁷ Id. at 38-39.

potential.¹⁶⁸ Thomas and Ely concluded that a firm's success depends on its willingness to embrace differences in social perspective as business resources and to stimulate the personal development of all workers. The latter included concrete objectives such as "the careful design of jobs that allow people to grow and develop," training, and education programs, and instilling each worker with a sense of his or her own personal value.¹⁶⁹

The paradox found in this line of reasoning is the very converse of the one identified by Edelman and her coauthors: rather than the paradox—and very real legal and practical problem that it describes—of preserving while diluting civil rights norms through the definition of "diversity," here the paradox is that, at the very moment that diversity management proponents claim distinction from civil rights norms, they embrace a fundamental, but often overlooked, feature of the project of equal opportunity. Unfortunately, managerial diversity rarely describes human capital investment and individual advancement as matters of equal opportunity. The legal conception of diversity should now do so in order to establish a connection between diversity and equal opportunity that will be durable and productive as struggles over the legal significance of diversity intensify and proliferate across social environments.

B. Distinguishing Diversity from Affirmative Action

The normative distinction drawn in managerial discourse between diversity and civil rights law includes affirmative action policy, as the prior section showed. This section, however, focuses on the difference between diversity management and affirmative action as institutional practices. Diversity management poses challenges to the concept of diversity not faced in the Supreme Court's equal protection cases because diversity management includes institutional practices that do not have a direct connection to the civil rights goal of integration. In practical terms, they are not meant to cultivate a more demographically diverse workforce, either because they are intended to exploit opportunities to match a relatively limited number of workers to particular business tasks or because they are meant to manage the efficiency and profitability of a workforce that already reflects some degree of diversity. This brings us, however, to the second innovation of diversity management that is not recognized by *Grutter*: that the management of diversity, like the achievement of equal opportunity, is a project involving the interconnection of multiple institutional practices and throughout the life of an individual's relationship with an institution. How the law sorts among these practices or determines the significance of their interactions will ultimately be a function of the benefits that the diversity rationale endorses. Thus, the interaction of institutional practices heightens the need for a clearer understanding of the benefits an institution will be permitted to pursue in the name of diversity.

¹⁶⁸ Id. at 46-48.

¹⁶⁹ Id. at 52-54.

Diversity management encompasses a broad assortment of organizational practices, including diversity and sexual harassment training, mentoring and networking programs, diversity evaluations, and diversity committees and taskforces—as well as affirmative action.¹⁷⁰ At one end of the spectrum, hiring minority workers for “racial realist” reasons, such as to market goods and services to minority markets, might be considered a diversity initiative. At the opposite end, policies involving the division of work into team structures, flexible work schedules, subsidized childcare and even egg-freezing policies also may be construed as diversity initiatives insofar as they are intended to realize organizational performance benefits or to create an environment in which men and women, whites and minorities, receive sufficient support to do their best work and to have their work contributions recognized.¹⁷¹ *Grutter*’s diversity rationale conceives of diversity as an end-state, measured by the demographics of a university’s student body, and this interpretation is consistent with diversity’s use as a justification for affirmative action. Diversity management, by contrast, seeks to implement various initiatives within a deliberate and, ideally, coordinated strategy to capture the performance benefits of workforce diversity. The objectives of diversity management are not limited to the achievement of any particular end-state or to benefits that are conditioned upon that end-state. Instead, diversity management practices may be implemented to transform institutional culture, without affecting demographics, or to secure objectives that are entirely business related.

Once diversity is decoupled from affirmative action, the connection between diversity and integration becomes more uncertain. Corporate leaders and managerial experts who advocate diversity initiatives most frequently assert profit as the reason for

¹⁷⁰ DOBBIN, *supra* note 8, at 143-55 (discussing a variety of diversity initiatives such as diversity mission statements, diversity training, mentoring, and networking); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 *Am. Soc. Rev.* 589, 590 (2006) (listing “seven common diversity programs—affirmative action plans, diversity committees and taskforces, diversity managers, diversity training, diversity evaluations for managers, networking programs, and mentoring programs”).

¹⁷¹ See, e.g., Alexandra Kalev, *Cracking the Glass Cages? Restructuring and Ascriptive Inequality at Work*, 114 *Am. J. Soc.* 1591, 1627-29 (2009) (demonstrating that “the introduction of cross-functional work programs—self-directed teams and cross-training—leads to increases in the shares of women and minorities in management” due to positive opportunities for visibility and networking, but that “black men and black women experience adverse effects from the introduction of problem-solving teams”); Robin J. Ely et al., *Racial Diversity, Racial Asymmetries, and Team Learning Environment: Effects on Performance*, 33 *Org. Stud.* 341 (2012) (arguing that work teams require inter-racial interaction to achieve optimal performance, but that team diversity may also hamper such interactions in environments that reinforce negative racial stereotypes); Alison M. Konrad & Yang Yang, *Is Using Work-Life Interface Benefits a Career-Limiting Move?*, 33 *J. Org. Behav.* 1095 (2012) (using a large national sample of Canadian companies, finding that use of work-life benefits positively correlated with promotion and did not have career limiting effects). But see René Almeling et al., *Egg-Freezing a Better Deal for Companies Than for Women*, <http://www.cnn.com/2014/10/20/opinion/almeling-radin-richardson-egg-freezing/> (arguing that egg-freezing benefits at Facebook and other companies benefit the companies themselves and perpetuate other structural inequalities within firms at the expense of women).

diversity measures, not integration.¹⁷² Skrentny has argued that by the 1990s firms had come to pursue diversity in order to satisfy a perceived need for “racial marketing,” or the race-matching of minority employees with minority markets.¹⁷³ He recorded statements by executives at firms such as Proctor & Gamble, Dupont, and IBM claiming to have proof based on their own experiences that diversity produces “richer marketing plans,” helps firms “better serve [their] customers,”¹⁷⁴ and generates “new ideas, opinions, and perspectives.”¹⁷⁵ Even when firms have asserted legal compliance as their motivation, they have often done so for diversity measures that contribute to organizational debiasing and litigation avoidance but do not directly contribute to workforce integration.¹⁷⁶ Many of the measures associated with diversity management have no direct or even measurable distributive effects in terms of the allocation of employment opportunities.

Indeed, attempts to measure the impact of diversity initiatives in terms of whether they result in higher percentages of women and minorities in management positions have shown surprisingly that some of the most popular initiatives yield no positive effects. Sociologists Alexandra Kalev, Frank Dobbin, and Erin Kelly measured the success of various diversity initiatives based on their correlation with the representation of black and white men and women in the managerial ranks of private firms. Their research shows that workplace structures that establish responsibility for diversity outcomes result in significant increases in managerial diversity, whereas programs aimed at debiasing management decisions and programs intended to ameliorate social isolation showed no or modest gains, respectively.¹⁷⁷ This means that, while affirmative action programs, diversity task forces, and diversity committees are among the most effective means of producing managerial diversity, some of the most popular corporate diversity initiatives such as diversity training, diversity evaluations, and social networking opportunities have little proven value from the perspective of workforce integration and advancement.¹⁷⁸ In

¹⁷² For example, in their seminal study of the managerial literature, Edelman and her colleagues found that 50 percent of articles cited profit as a reason for organizational diversity, 19 percent cited legal compliance, and 30 percent cited fairness. Edelman et al., *supra* note 8, at 1619.

¹⁷³ See SKRENTNY, *supra* note 20, at 63-65.

¹⁷⁴ *Id.* at 63-65.

¹⁷⁵ *Id.* at 72-73.

¹⁷⁶ See, e.g., DOBBIN, *supra* note 8, at 149 (recounting that in the 1990s “HR managers responding to a survey overwhelmingly listed legal protection as their first reason for using diversity training”).

¹⁷⁷ *Id.* at 590.

¹⁷⁸ *Id.* at 590-91, 602-05; see also Soohan Kim et al., Progressive Corporations at Work: The Case of Diversity Programs, 36 N.Y.U. Rev. L. & Soc. Change 171, 192-200 (2012) (reporting unfavorably on widely used debiasing strategies such as formalized hiring procedures, diversity training, and diversity performance evaluations as means of increasing workforce diversity, and discussing recruitment and training, mentoring, and accountability structures such as diversity managers and taskforces as effective strategies); KEVIN STAINBACK & DONALD TOMASKOVIĆ-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT 289-91 (2012) (reporting studies showing that debiasing strategies such as diversity

particular, diversity training continues to be the most prevalent of diversity initiatives advocated by corporate managers and ordered by courts as remedies for workplace discrimination, despite showing no gains in the number of minorities and women in management.¹⁷⁹ The study observed strong interaction effects between diversity programs generally and the overlay of structures that improved program effectiveness by enhancing organizational responsibility.¹⁸⁰ It also found that these interaction effects were different for members of different social groups.¹⁸¹

Without a significant reconstruction, *Grutter*'s diversity rationale would be of little help in determining when diversity initiatives do and do not advance equal opportunity. In *Grutter*, the law school's affirmative action program may be presumed to serve equal opportunity because it distributes educational opportunities to members of underrepresented groups, thus contributing to the integration of the institution, and because the opportunity to graduate from the law school itself improves the recipient's future chances for social mobility. But the Court did not design its diversity rationale in order to discern when a program's contributions to integration or social mobility justify the use of racial preferences. On the one hand, *Grutter* suggests that workplace diversity initiatives could be justified if they enhance organizational performance. At its most extreme, this interpretation of the Court's reasoning would appear to allow a firm to defend workplace diversity initiatives by producing evidence of diversity's contributions to the firm's financial well-being. On the other hand, if *Grutter* were interpreted to require a demonstrable connection between institutional success and public goods, it would support the legal endorsement of diversity initiatives only if an enterprise contributed substantially to the public interest, regardless whether the challenged diversity initiatives contributed to workplace integration or to the advancement of underrepresented persons. Either way, *Grutter* shows that in its current form it cannot meet the challenges of workplace diversity.

Finally, the variety of diversity management practices points to yet another important limitation of *Grutter*. Diversity management conceives of diversity as a business strategy that requires the coordination of several practices at once. A firm's success implementing one practice will be affected by the firm's choice of objectives and by the skill with which it implements another practice. For example, a firm may pursue equal opportunity goals of workforce integration and individual advancement for all

training and diversity guidelines are largely ineffective, that training may in fact lead to backlash against blacks, and that guidelines, in order to be effective, must be accompanied by specific goals).

¹⁷⁹ Kalev et al., *supra* note 170, at 590; see also DOBBIN, *supra* note 8, at 147-49 (discussing support for diversity training by managers and courts).

¹⁸⁰ *Id.* at 606-07.

¹⁸¹ *Id.* at 607 (finding that for white women the sheer number of diversity programs implemented by a firm correlated positively with managerial diversity, but for blacks the content of programs was more significant).

workers. In that case, whether a firm's mentoring program for women employees results in a higher percentage of women at the management level may be influenced by the presence or absence of accountability structures that hold decision makers responsible for the firm's progress toward improving workforce diversity. Or a firm may use diversity management strictly to increase profit and performance. In that case, whether a firm's existing gender diversity results in improved business performance may depend on whether women are employed in positions of power within the firm, whether women's perspectives are considered in connection with matters of business strategy, and whether work and benefits structures support each employee's ability to maintain work-life balance. *Grutter* and *Fisher* speak to these interactions only insofar as they would require that status neutral alternatives be exhausted before diversity measures that consider status may be implemented. Carried to its logical conclusion, the same principle should also require consideration of race conscious, non-distributive alternatives to affirmative action.¹⁸² The diversity management illustration shows, however, that the law must not simply defer to institutional objectives but must prioritize certain objectives in order to mediate conflicts between competing diversity strategies. Doing so would be necessary not only in order to ensure that the organization's chosen means were properly tailored to the achievement of permissible benefits, but more importantly also to ensure that organizational practices provide underrepresented persons equal opportunity.

III. DIVERSITY IN THREE DIMENSIONS

The discussion in Parts I and II has shown that, in its present form, *Grutter*'s diversity rationale is ill-equipped to survive either the challenges to its application that loom on the horizon in education or the new difficulties that it would face if extended to workplace diversity initiatives. *Grutter*'s weaknesses are so fundamental to its design that its rehabilitation is not simply a matter of making explicit principles that implicitly shaped the Court's ruling. The diversity rationale requires a reconstruction, and that task requires identification of the dimensions along which a more complete, more adaptable rationale must be built. The goal must not be simply to correct *Grutter*'s problems; we also must engage diversity's possibilities.

This section describes diversity in three dimensions: diversity-as-end-state, diversity-as-strategy, and diversity-as-motivation. "Diversity-as-end-state" is the most familiar understanding of diversity. It is defined by the demographic composition of an institution—the heterogeneity of persons within an institution as determined by some set of criteria, such as race or sex. When the Supreme Court endorsed diversity as a compelling interest in *Grutter*, it was referring to end-state diversity. Yet *Grutter* also discusses diversity as a complex achievement to be measured in terms of the

¹⁸² See *supra* Part I.B.4.

demographic diversity of the student body, the benefits associate with diversity, and the practices used to obtain those benefits. Grappling with those features of *Grutter*'s architecture to look beyond diversity-as-end-state is the first critical step toward reconstructing diversity. "Diversity-as-strategy" refers to institutional practices intended to manage diversity and to obtain its benefits. Managerial diversity emphasizes this dimension by distinguishing between the benefits of diversity and diversity as an end-state and by appreciating that to obtain diversity's benefits will likely require the coordination of multiple institutional efforts. "Diversity-as-motivation" refers to diversity offered as a justification for institutional policies or decisions. This dimension of diversity highlights the distinction between the value associated with diversity when it is perceived to be an organic consequence of formally neutral institutional self-governance and the value of diversity when it is believed to be a product of institutional design. Both *Grutter* and diversity management presume the motivation of achieve diversity to be uncontroversial, even laudable; but lower courts have demonstrated that the legitimacy of such motivations cannot be taken for granted, at times ruling that evidence of a firm's commitment to diversity may prove discrimination.

A. Diversity-As-End-State

End-state, or numerical, diversity is the most commonly discussed dimension of diversity, the most consistent with the term's ordinary language meanings of "difference" and "variety."¹⁸³ This dimension of diversity is implicated whenever we talk about diversity as the outcome of a selection process; it is how we typically think of diversity in relation to affirmative action. *Grutter* shows that, by itself, this dimension of diversity holds great complexity. What statuses should be represented, the degree to which they should be represented, and how they should be weighed against other qualities such as individual talent or experience are all issues that complicate the Court's discussion of diversity. *Grutter* also shows, however, that statistics by themselves provide an incomplete measure of diversity. By distinguishing diversity from remediation and prioritizing the instrumental value of diversity, *Grutter* alters the conceptual landscape. The objective of affirmative action under a diversity justification is not to restore racial minorities that suffered either institutional or societal discrimination to the position they would have been in absent that history.¹⁸⁴ *Grutter* authorizes universities to pursue "in good faith" a critical mass of underrepresented minority students and queues the value of critical mass to the number of minority students necessary to produce certain

¹⁸³ WEBSTER'S DICTIONARY 411 (1972).

¹⁸⁴ The Court's Title VII doctrine, for example, permits an employer voluntarily to attempt to correct a "manifest imbalance" between the racial composition of its workforce and that of the relevant labor market, and the same doctrine authorizes courts to order remedial affirmative action plans that set hiring goals based on the percentage of minorities in the relevant labor pool in response to a finding of discrimination. See *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); see also *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 630-32 (1987) (applying the *Weber* standard to sex-based affirmative action).

“educational benefits.” In *Grutter* and *Fisher*, however, the Court appeared not to recognize how the diversity rationale subtly shifts the analytical framework regarding affirmative action’s permissibility from how much diversity and how may it be achieved to what are the benefits of diversity and how may they be achieved. It converts numerical diversity, which was once an end-state, into a starting point.

Doctrinally, the Court’s equal protection jurisprudence has resisted this shift, presuming that constitutionally salient institutional and public benefits “flow” from student body diversity without considering what other conditions contribute to the materialization of those benefits. By contrast, diversity management illustrates the point that diversity’s institutional benefits should not be presumed even in the presence of numerical diversity; an institution must coordinate its efforts to manage the resource of numerical diversity in order to ensure that its benefits will be realized. The Court has never considered what intermediate steps may be required for a university’s achievement of student body diversity to produce benefits such as breaking down racial stereotypes and promoting learning outcomes. Instead, it treats such benefits as if they necessarily coincide with numerical diversity. Educators themselves rarely take such a naïve view. Social psychology and educational theory warn that interactions between individuals of different backgrounds may not yield institutional benefits unless structured through institutional intervention.¹⁸⁵ Curricular design is a particularly common approach to the promotion of diversity in education,¹⁸⁶ and diversity coursework has been linked to an institution’s success in realizing the educational benefits of a diverse student body.¹⁸⁷ To date, the Court has not addressed such interactions between numerical diversity and non-affirmative action based policies, but they are critical if indeed the Court is sincere in naming the “*educational benefits* of a diverse student body” a compelling interest.¹⁸⁸

This does not mean that discussions of end-state diversity are not consequential. Writing before *Grutter* was decided, Edelman and her colleagues criticized the

¹⁸⁵ Derek R. Avery & Kecia M. Thomas, *Blending Content and Contact: The Roles of Diversity Curriculum and Campus Heterogeneity in Fostering Diversity Management Competency*, 3 *Acad. Mgmt. Learning & Educ.* 380, 381 (2004) (citing social psychology in support of this view).

¹⁸⁶ *Id.* at 381 (“One of the most common practices for heightening students’ awareness of and sensitivity toward demographic group differences is the incorporation of diversity content in their educational curriculum.”); Carol G. Schneider, *Diversity Requirements*, 86 *Liberal Educ.* 2, 2 (2000) (stating that 62% of universities, colleges, and community colleges require students to complete a diversity course prior to graduation).

¹⁸⁷ Donna Henderson-King & Audra Kaleta, *Learning About Social Diversity*, 71 *J. of Higher Educ.* 142 (2000) (indicating that the tolerance and cross-racial understanding benefits of student body diversity may not be realized unless students are exposed to diversity courses); see also Matthew J. Mayhew et al., *Curriculum Matters: Creating a Positive Climate for Diversity from the Student Perspective*, 46 *Research in Higher Educ.* 389 (2005) (concluding that students’ perceptions of a college’s commitment to diversity reflect students’ pre-college experiences with peer diversity and the institutions’ incorporation of diversity issues into its curriculum).

¹⁸⁸ 539 U.S. at 333 (emphasis added).

managerial conception of diversity for opening the definition of diversity to include “nonlegal” statuses and characteristics. The result, they argued, would be the infusion of legal understandings of diversity and equal opportunity with managerial values of efficiency and profitability.¹⁸⁹ To a certain extent, *Grutter* has fulfilled that prophecy. The law school’s admissions policy survived equal protection challenge because the Court judged that the law school’s affirmative action “consider[ed] race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race.”¹⁹⁰ Edelman and her coauthors decry this understanding of diversity as “undermin[ing] law’s moral commitment to redressing historical wrongs.”¹⁹¹ Of course, the Supreme Court has already repudiated the notion that the remedying of societal discrimination is a constitutionally compelling governmental interest. The Court firmly distinguished diversity from the goal of proportional representation, when, in *Gratz*, it struck down an affirmative action program because the program made race a “decisive” admissions factor¹⁹² and, in *Grutter*, it upheld an admissions program because the program did not use quotas or engage in “racial balancing.”¹⁹³ Thus, on the one hand, when it discusses the public value of diversity in promoting the legitimacy of elite and political institutions and signaling the visible openness of those institutions, *Grutter* seems especially concerned with racial diversity. It is the history of racial exclusion—the sense that “race unfortunately still matters”¹⁹⁴ in America—that makes racial inclusion such a powerful symbol. On the other hand, *Grutter*’s broad description of diversity does not endorse racial diversity at all. Race makes diversity constitutionally salient, but racial diversity is an insufficient basis to justify the government’s reliance on race.

By design, the diversity rationale causes race to be equated to other social factors, as if “a relationship exists between race and social experiences, on the one hand, and knowledge and practices on the other.”¹⁹⁵ Edelman and her coauthors warned that such an approach could justify perverse outcomes. They wrote that “[i]f the white farm boy from Idaho is considered as important to firm diversity as the black inner-city kid from Los Angeles on the basis of geographic diversity, then diversity can more easily be used to justify a workforce that is primarily white or male (but is diverse on other

¹⁸⁹ See *supra* notes 119-135 and accompanying text.

¹⁹⁰ 539 U.S. at 340.

¹⁹¹ Edelman et al., *supra* note 8, at 1632; see also *id.* (“The managerial conception of diversity de-emphasizes the law’s focus on discrimination, injustice, and historical disenfranchisement and supplants it with a conception of diversity grounded in organizational success.”).

¹⁹² *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

¹⁹³ *Grutter*, 539 U.S. at 330.

¹⁹⁴ *Id.* at 333. This is the sense in which Post writes that *Grutter* “points to the particular and unique value of racial diversity.” Post, *supra* note 10, at 70.

¹⁹⁵ See Devon W. Carbado & Mitu Gulati, What Exactly Is Racial Diversity?, 91 Cal. L. Rev. 1149, 1153 (2003) (book review).

dimensions).”¹⁹⁶ This sort of calculus does threaten to undermine civil rights norms, but not in the way that the authors imagined. This approach is not inconsistent with civil rights law; it is the conception of diversity under civil rights law, as it was understood by Justice Powell in *Bakke* and as it is currently understood under *Grutter*.¹⁹⁷ In a sense, the “managerial vision” of diversity cannot “undermine law’s moral commitment to redressing historical wrongs”¹⁹⁸ because both *Grutter*’s diversity and Justice Powell’s diversity abandoned that broad remedial logic and embraced an understanding of diversity in which the importance of social status is not derived from an aspiration to redress a history of discrimination but from a belief that status may be meaningful to institutions as a predictor of viewpoint and experience. The problem, in other words, with both approaches is not that they make race matter as much as geography and other “nonlegal” characteristics, but that they make race matter for the wrong reasons. In the end, both *Grutter* and managerial discourse contradict Edelman and her colleagues quite defensible interpretation of the moral core of civil rights law because neither takes equality as its objective; each subordinates equal opportunity to institutional goals, with the result that the form of diversity that matters is the form that serves the institution. For some readers, *Grutter* may successfully deflect this criticism because the decision sanctions the pursuit of educational integration in the form of “critical mass.” However, it is *Grutter*’s acceptance that end-state diversity is sufficient to establish a constitutionally compelling interest that renders the decision to underspecify the relationship diversity and its benefits and to ignore other important dimensions of diversity.

B. Diversity-As-Strategy

Diversity-as-strategy directly concerns how to define the institutional benefits of diversity and how to design and coordinate institutional practices in order to secure those benefits. It is the dimension of diversity to which the concept’s demand side orientation

¹⁹⁶ Edelman et al., *supra* note 8, at 1632.

¹⁹⁷ Justice Powell had in *Bakke* already illustrated his vision of holistic review by depicting that “[t]he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared” to a white applicant “if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism,” such as “exceptional personal talents, unique work or service experience, leadership potential, maturity,” and so on. *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.). Curiously, Edelman and her coauthors do not cite but may have meant to allude to another example quoted by Justice Powell from Harvard College’s description of its own admissions practices, which stated that “[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer” and “[s]imilarly, a black student can usually bring something that a white person cannot offer.” *Id.* at 316 (internal quotation marks omitted). *Grutter* too states that “[j]ust 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.” When selecting among different candidates, the Court’s diversity rationale expects that the attributes that ultimately motivate a decision will depend on the particular diversity needs of the university based on the composition of current enrollees.

¹⁹⁸ Edelman et al., *supra* note 8, at 1632.

has shifted the conversation in managerial discourse and the dimension that is most absent from the law's conceptualization of diversity. Diversity-as-strategy comes into view only if one acknowledges two factors: (i) that the benefits of diversity can sometimes be separated from numerical diversity, meaning that they may be pursued by a variety of means independently of selection devices that take numerical diversity as their objective, (ii) that, regardless whether they can be *completely* separated from numerical diversity, success in achieving these benefits may require coordinated institutional effort, including after the moment of selection, and (iii) that the effectiveness of those coordinated efforts may determine how much numerical diversity an institution will require in order to achieve particular benefits. It is therefore a dimension of diversity that is beyond numerical measurement; in fact, it will sometimes view numerical diversity as its starting point, and it will rarely if ever view numerical diversity as its end.

The absence of any discussion of this dimension of diversity in the Court's equal protection jurisprudence has made the doctrine more vulnerable to future collapse and less effective as a means of promoting equal opportunity. Managerial discourse, by contrast, is replete with discussions of diversity-as-strategy, but often fails to connect this dimension of diversity to equal opportunity. Even managerial experts who reject the facile notion that workforce diversity is a sufficient condition for enhancing business performance, convey the message that firms should revise their diversity management practices through functionalist interventions such as increasing data collection and self-analysis, tying diverse perspectives to marketing and innovation, and equipping managers with new skills to extract value from demographic differences among employees.¹⁹⁹ Often the subtext is that engaging in such practices will produce synergies between "positive organizational, group, and individual results."²⁰⁰

Managerial expert and scholar David Thomas used the phrase "diversity as strategy" when recounting IBM's experiences with diversity management during the 1990s under the leadership of then-CEO Louis Gerstner, Jr.²⁰¹ For Thomas, the term signifies the transformation of business practices to harness the strengths and perspectives of a diverse workforce in order to accomplish core business goals such as innovation, profitability, and effective personnel management. He describes how, at IBM, those efforts began with the launching of a "diversity task force that become the

¹⁹⁹ See, e.g., Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 *Human Res. Mgmt.* 3 (2003) (finding that "there is virtually no evidence to support the simple assertion that diversity is inevitably either good or bad for business" and proposing "a more nuanced view" of the business case for diversity "which focuses on the conditions that leverage benefits from diversity or, at the very least, mitigate its negative effects").

²⁰⁰ *Id.* at 18. Trust in these synergies has been a founding element of the diversity management ideology, and the realization of these synergies a continuing goal of diversity management in practice. See *supra* notes 162-169 and accompanying text.

²⁰¹ David A. Thomas, *Diversity As Strategy*, *Harvard Business Review* 1 (Sept. 2004).

cornerstone of IBM's HR strategy" and later included other management structures designed to make "diversity a market-based issue."²⁰² Through the proliferation of the taskforce model to include individual, identity-based taskforces,²⁰³ IBM's approach allowed women and minority executives to make strategic contributions to firm objectives and provided them with an organizational space in which to advocate for the reform of practices that impacted the work experiences and opportunities of their constituencies.²⁰⁴

Thomas uses IBM's story to illustrate how diversity management may be at the center of a larger strategy of corporate renewal and global innovation.²⁰⁵ This message of strategic restructuring and accountability resounds throughout the managerial and sociological literatures on workforce diversity.²⁰⁶ By Thomas's account, IBM's practices also illustrate a synergy between the management of diversity as a business resource and equal opportunity for underrepresented workers. Ending discrimination and achieving the proportional representation of women and minorities were not priorities of IBM's taskforce program.²⁰⁷ However, the company's approach included significant commitments to increasing minority participation in leadership roles, improving mentoring for women globally,²⁰⁸ and holding senior executives "accountable for spotting and grooming high-potential minority managers."²⁰⁹ Ultimately, IBM's diversity efforts coincided with dramatic increases in the number of female and minority executives worldwide.²¹⁰

²⁰² Id. at 1-2 (explaining that "diversity . . . at about more than expanding the talent pool" but includes a variety of ways in which a firm might recruit workforce diversity for market gains).

²⁰³ Id. at 5 (listing seven task forces for women, blacks, Hispanics, people with disabilities, Asians, Native Americans, and white men, each composed of "15 to 20 senior managers, cutting across the companies business units").

²⁰⁴ Id. at 3 (describing how the taskforces identified "for evaluation and improvement communications, staffing, employee benefits, workplace flexibility, training and education, advertising and marketplace opportunities, and external relations"). Underrepresented employee perspectives were also accessed through the use of social networking groups, local "diversity councils," and a "market development" unit that pioneered the expansion of sales to "female- and minority-owned businesses." Id. at 3-4, 6.

²⁰⁵ D. Thomas, *supra* note 201, at 1 (narrating that, shortly after he became CEO of the company, "when Gerstner took a look at his senior executive team, he felt it didn't reflect the diversity of the market for talent or IBM's customers and employees").

²⁰⁶ See, e.g., *supra* notes 177-180 and accompanying text (discussing the role of accountability in effective, integrative diversity management).

²⁰⁷ D. Thomas, *supra* note 201, at 6-9.

²⁰⁸ Id. at 6.

²⁰⁹ Id. at 8.

²¹⁰ Id. at 4. Thomas reported increases of 370% for female executives worldwide and 233% for U.S.-born minorities in a period of under a decade. Id. at 1; see also id. ("Rather than attempting to eliminate discrimination by deliberately ignoring differences among employees, IBM created eight task forces, each focused on a different group such as Asians, gays and lesbians, and women.").

As with the connection between numerical diversity and institutional benefits, however, the depicted synergy between organizational goals and equal opportunity cannot be presumed. Recent studies in sociology and social psychology advise caution. Comparing the strength of managerial commitments to diversity against commitments to “efficiency, quality, and profit,” sociologists Kevin Stainback and Donald Tomaskovic-Devey have warned that ineffective diversity management may produce signaling effects that are beneficial to corporate marketing but not to the advancement of women and minorities. As their research shows, despite widespread use of diversity initiatives in corporate America for roughly three decades, “racial resegregation is widespread in U.S. private sector” with “[m]any firms . . . actually getting worse over time.”²¹¹ The authors fault “symbolic compliance” with antidiscrimination laws, including through the use of workplace diversity initiatives without sufficient monitoring or accountability.²¹² They conclude that “[t]rue corporate equal opportunity leadership” would integrate a commitment to equal opportunity into a “firm’s normal accounting and reward systems” and that the goal of diversity management should be the transformation of the workplace into a “welcoming, fair, and dynamic” environment through the redesign of organizational structures and practices that include diversity within the normal governance and accountability structures of the firm.²¹³

Stainback and Tomaskovic-Devey’s work aligns with Edelman’s work on the managerialization of civil rights laws and with new work in social psychology showing that diversity structures may legitimate organizational practices, leading to the impression that organizational practices are fair despite contradicting evidence. In successive studies, Cheryl Kaiser, Brenda Major, and their colleagues have shown that diversity structures “create an *illusion of fairness*” that “impairs high-status group members’ ability to detect discrimination against members of underrepresented groups and causes them to react more harshly to members of underrepresented groups who claim to experience discrimination.”²¹⁴ Their research demonstrates that, if poorly designed or poorly implemented, diversity initiatives may create within the firm not a culture of inclusion but a culture of skepticism and stagnation.

²¹¹ STAINBACK & TOMASKOVIC-DEVEY, *supra* note 178, at 313.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Cheryl R. Kaiser et al., Presumed Fair: Ironic Effects of Organizational Diversity Structures, 2012 *J. of Personality & Soc. Psych.* 1,1 (finding that subjects failed to make attributions to discrimination when discriminatory behaviors were legitimated by an institution’s apparent commitment to diversity); see also Tessa L. Dover et al., Diversity Initiatives, Status, and System-Justifying Beliefs: When and How Diversity Efforts De-Legitimize Discrimination Claims, 17 *Group Processes & Intergroup Relations* 485 (2013) (finding that an individual’s social status and system-justifying beliefs influenced when that same individual would view the presence diversity initiatives as legitimizing discriminatory institutional behavior).

In my own work, I have argued against allowing employment discrimination law to shield from legal scrutiny what I call “discrimination as compliance,” or voluntary compliance practices that result in discriminatory outcomes. Such discrimination occurs when “practices intended to limit the employer’s liability or, through the management of diversity as a resource, to serve the employer’s business interests . . . have the pernicious effect of perpetuating workplace inequality.”²¹⁵ My recommendation has been to subject diversity measures taken to limit the employer’s liability to Title VII’s ordinary standards for assessing discrimination in order to better align the impact of diversity practices with the equality commitments of civil rights law. My intention has not been to feed the flow of reverse discrimination claims,²¹⁶ but to support the rights of women and minorities to challenge diversity practices which, whether inadvertently or by design, operate to their disadvantage, thus giving employers a legal incentive to develop practices that better contribute to the project of equal opportunity.

I have therefore concluded that undertaking a strategic outlook in order to manage the interaction effects of organizational practices should be a matter of paramount concern in law and business. The relationship between diversity and equal opportunity depends on such an approach. Consider a familiar example from corporate diversity practices. Formal race- and sex- matched mentoring programs intended to strengthen interpersonal relationships between junior and senior workers may have the unintended consequence of denying women and minority juniors access to advantageous work assignments and to productive relationships with seniors outside of their status group.²¹⁷ A strategic approach to equal opportunity through diversity practices could avoid this outcome in many ways, such as by decoupling mentoring relationships from work assignments, focusing on diversity and organizational responsibility at senior management levels, expanding the role of mentors beyond the one-on-one interaction to the cultivation of productive professional networks for protégés, or by developing strategies for supporting cross-racial and cross-gender mentor-protégé relationships that

²¹⁵ Rich, *supra* note 22, at 80-81.

²¹⁶ STAINBACK & TOMASKOVIC-DEVEY, *supra* note 178, at 311-12 (arguing that “[t]here is not now and has never been a widespread pattern of reverse discrimination” and that, in the “post-Civil Rights Act era” white men’s “access to good jobs, with the exception of the credentialed professions, has been enhanced rather than reduced”).

²¹⁷ See Rich, *supra* note 22, at 90-91 (discussing an example); see also, e.g., Kalev, *supra* note 171, at 1631 (citing research demonstrating that “special networking and mentoring programs for women and minorities” have proved to have “weak, and often negative, effects on diversity outcomes”); Belle Rose Ragins, *Diversified Mentoring Relationships in Organizations: A Power Perspective*, 22 *Acad. Mgmt. Rev.* 482, 504 (“Homogeneous relationships with minority mentors and protégés are limited in the provision of career development functions, but provide psychosocial and role modeling functions.”); Carol T. Kulik & Loriann Roberson, *Diversity Initiative Effectiveness: What Organizations Can (and Cannot) Expect from Diversity Recruitment, Diversity Training, and Formal Mentoring Programs*, in *DIVERSITY AT WORK* 265, 286 (Arthur P. Brief, ed., 2008) (observing that “in terms of career outcomes, demographic similarity may not be an advantage for women and people of color,” and discussing research showing that protégés with white male mentors received higher compensation).

expand the access of minorities and women to career- and skill-building relationships.²¹⁸ In the present legal climate, however, an organization will take these extra steps only if it perceives the advancement of underrepresented persons to have strategic value and to be subject to influence by institutional reform.

The legal community can and should learn from the efforts and aspirations—if not always the achievements—of the business community in promoting the advancement of women and minorities, and it should seek to incorporate those aspirations into a legal vision of equal opportunity that will guide the future organizational diversity efforts. Diversity management proposes that, with the proper coordination of institutional practices and the development of new managerial skills, organizations can achieve the true inclusion of underrepresented workers and themselves benefit in the process. True inclusion means integration within the decision-making hierarchy and culture of the firm and endowment with opportunities for growth and advancement.²¹⁹ These are also fundamental goals of equal opportunity. Diversity initiatives violate equal opportunity when they assign underrepresented workers to positions and work assignments that stunt their professional development and impede their advancement.²²⁰ Conversely, diversity contributes to the project of equal opportunity when it inspires the redesign of institutional practices to support the advancement of underrepresented persons by providing meaningful opportunities and human capital investment on an equal basis with the opportunities afforded to nonminorities. Perfecting the manner in which organizations voluntarily secure this objective requires thinking of diversity as a continuing organizational strategy and not simply as a numerical benchmark.

C. Diversity-As-Motivation

Because the Supreme Court's understanding of diversity took shape in constitutional cases challenging the use of racial classifications, the Court has never directly addressed the permissibility of diversity as a motivation for institutional behavior. Regardless what the government's motivation may be, when its chosen means include

²¹⁸ See, e.g., Kulik & Roberson, *supra* note 217, at 287-88 (arguing that mentoring programs would better “enhance advancement” if they reduce stereotyping by, for example, building cross-race and cross-gender relationships leading to “visible and challenging job assignments”); David A. Thomas, *Beyond the Simple Demography-Power Hypothesis: How Blacks in Power Influence White-Mentor-Black-Protégé Developmental Relationships*, in *MENTORING DILEMMAS: DEVELOPMENTAL RELATIONSHIPS WITHIN MULTICULTURAL ORGANIZATIONS*, 157, 164-167 (1999) (discussing ways in which the presence and participation of black managers in mentoring relationships between white mentors and black protégés may enhance the productivity of those relationships); David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, in *HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY* 117, 132-41 (2001) (discussing various “mentoring challenges” and proposing ways to bridge cross-race mentoring relationships and to enlist mentors in the project of “network management” in support of their protégés).

²¹⁹ See, e.g., MILLER & KATZ, *supra* note 165, at 53-54; see also *supra* note 165 and accompanying text.

²²⁰ See *supra* notes 126-132 and accompanying text (discussing some examples of employers practicing “racial realism” in the service of business objectives).

racial classifications, the Court requires that they satisfy strict scrutiny.²²¹ The Court has never contemplated a scenario in which the critical fact indicating whether an institution undertook a particular action because of race is the institution's motivation to promote diversity. On the one hand, diversity's status as a compelling interest would appear to be meaningless if diversity is not a permissible motivation for governmental action.²²² On the other hand, it is conceivable that diversity may provide a compelling justification for status conscious action in some areas but not in others.

Lower courts now face with growing frequency the question of whether a firm's commitment to diversity can be construed as evidence that the firm intentionally discriminated against individuals based on an impermissible classification. As discussed above, courts have generally rejected the argument that employers should be permitted to assign positions based on the belief that an employee's status is a valid proxy for the value that he or she will contribute to an assignment. More troubling, however, are the growing number of reverse discrimination cases in which courts have been asked to take evidence of an employer's commitment to workplace diversity as evidence of discrimination. One such case, *Ricci v. DeStefano*,²²³ received Supreme Court review on a separate issue,²²⁴ according to the district court, however, the "crux" of the plaintiffs' case had been that the government's interest in promoting racial diversity motivated it to violate Title VII and equal protection by refusing to enter the results of an examination required for promotion within its fire department after finding the test produced a racially disparate impact.²²⁵ Although the Supreme Court did not address the argument directly,

²²¹ See *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 ("[R]acial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.' (quoting *Grutter*, 539 U.S. at 326)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) ("[T]he Fourteenth Amendment requires strict scrutiny of race-based action by state and local governments.").

²²² With respect to diversity, the Court's holding in *Fisher* that universities must exhaust race neutral means before implementing racial preferences would seem meaningless if the purpose of achieving diversity were discriminatory regardless how it is achieved. See *Fisher*, 133 S. Ct. at 2420 (requiring "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications" before an admissions policy incorporating racial preferences can be determined to satisfy narrow tailoring). But see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 *Geo. L.J.* 2331, 2333 (2000) (arguing that "the Supreme Court's affirmative action cases establish [that] the purpose to benefit racial minorities is a discriminatory purpose"). I have elsewhere explained why I reject the contrary view. See Rich, *supra* note 98, at 1575-86 (arguing that the Court has repeatedly confirmed that racially remedial purposes are not themselves subject to heightened scrutiny, only the use of racial classifications to achieve those purposes).

²²³ 557 U.S. 557 (2009).

²²⁴ Before the Court, *Ricci* concerned the question of whether the City of New Haven violated equal protection or Title VII when it decided not to certify the results of an examination used to award promotions within its fire department, which had a disparate impact against black and Hispanic firefighters. The petitioners contended that diversity was "not an issue," and that in any event the city had disclaimed reliance on diversity. *Ricci v. DeStefano*, Nos. 07-1428, 08-328, Pet's Merits Br., at 37. The Supreme Court concluded that the city's decision constituted unlawful disparate treatment under Title VII. *Ricci*, 557 U.S. at 593.

²²⁵ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 156-57 (D. Conn. 2006).

its decision has conflicting implications for this issue. On the one hand, its conclusion that the city's decision was "race-based" in a sense vindicates the plaintiffs' original argument.²²⁶ After all, if merely taking the racial disparity into account is race discrimination, then taking race into account in making any number of adjustments to institutional practices may also be race discrimination. On the other hand, the Court appeared to accept that Title VII permitted the city to consider the possible racial impact of the test and to design the test so as to reduce the risk of racially disparate results provided that it did so before the actual results of the test were known.²²⁷

In other cases, circuit courts have accepted the argument that diversity efforts are probative of discrimination. For example, in *Bass v. Board of County Commissioners*,²²⁸ the Eleventh Circuit held that the government's adoption of a "Diversification Plan" intended to ensure "that the workplace is devoid of discrimination and generally reflective of the county's diverse population" was probative of the government's intent to discriminate against a white plaintiff.²²⁹ The case is a sobering illustration of a skeptical approach taken by some courts to voluntary employer efforts to promote workforce diversity. The court did not base its holding on any finding that the plan included racial preferences.²³⁰ Nevertheless, because the plan contained "percentage hiring goals in positions that were found to have few minorities or women," the court labeled it an "affirmative action plan."²³¹ The court denied the government's motion for summary judgment, even though the plaintiff put forth no direct evidence that the government had relied on the plan, relying instead on circumstantial evidence, such as evidence that two of the three persons who made the decision not to award the plaintiff his sought position were themselves supporters of affirmative action and that the county asserted pressure on the Fire and Rescue Division to hire more minorities and sent the chief of the division "period reports showing the number of women and blacks in all positions."²³²

²²⁶ Ricci, 557 U.S. at 580 ("The question is not whether that conduct [refusing to certify the test results] was discriminatory but whether the City had a lawful justification for its race-based action.").

²²⁷ See id. at 563-66 (discussing at length, but finding no legal fault, with the city's efforts to design the test so as to avoid racial impacts); see also Rich, supra note 22, at 77 (discussing the relationship between the timing of the city's decision and the Court's ruling).

²²⁸ Bass v. Board of County Commissioners, 256 F.3d 1095 (11th Cir. 2001).

²²⁹ Id. at 1112; see also Humphries v. Pulaski Cty. Special Sch. Dist., 580 F.3d 688, 696 (8th Cir. 2009) (concluding that if the school district had a policy of "pairing assistant principals with principals of different races" this would be required to be justified as a valid affirmative action program or else would be evidence of discrimination).

²³⁰ The court stated that the parties "agree[d] that the County had affirmative action plans in place" during the relevant time period, but the court characterized the "Diversification Plan" merely as containing benchmarks, a requirement of written justification presented to the "EEO/Professional Standards Department" for any hiring process that failed to produce diversity, and suspension of the hiring process "when no qualified minority or female applicant was available." Bass, 256 F.3d at 1112.

²³¹ Id. at 1113.

²³² Id. at 1099.

Sociologists have counseled that benchmarks and accountability structures such as were employed by the county are important features of a successful diversity policy.²³³ In *Bass*, however, they constitute circumstantial evidence of discrimination.

This conclusion is not uncommon. Courts in the Third and Seventh circuits have held that a plaintiff supported a factual determination of discriminatory intent by providing evidence that minority applicants were inserted into the hiring pool late in the process under a general directive that “serious consideration” should be “given to diversity”²³⁴ or that the decision maker had received “administrative pressure” to increase diversity.²³⁵ The Tenth Circuit has even held that an investigator’s mere notation on a questionnaire referring to applicants as “minorities” may be probative of discrimination, even though the investigator had no hiring authority.²³⁶ Although some courts require the plaintiff to show a causal “nexus” between the employer’s interest in diversity and the challenged decision,²³⁷ the aforementioned decisions did not, seeming to conclude that it is enough that diversity is “in the air.” Courts have also used evidence of an employer’s commitment to diversity as “background evidence” to support the plaintiff’s *prima facie* showing of discrimination in reverse discrimination cases.²³⁸

These cases reveal a fundamental irony. Evidence that an employer implemented diversity initiatives to boost the hiring or retention of minority workers or to minimize the harassment of minorities and women may be used in “standard” discrimination cases brought by women and minority plaintiffs as exculpatory evidence against a finding of intentional discrimination, vicarious liability, or punitive damages.²³⁹ However, the same evidence may be used in reverse discrimination cases to prove discrimination regardless whether diversity initiatives were causally connected to the challenged adverse employment action. In addition, these cases put employers in the uncomfortable position

²³³ See *supra* notes 177-181 and accompanying text.

²³⁴ *Iadimarco v. Runyon*, 190 F.3d 151, 155, 164 (3d Cir. 1999).

²³⁵ *Rudin v. Lincoln Land Community College*, 420 F.3d 712, 721-22 (7th Cir. 2005).

²³⁶ *McGarry v. Bd. of Cty. Comm’rs of Pitkin Cty.*, 175 F.3d 1193 (10th Cir. 1999).

²³⁷ See, e.g., *Mlynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) (holding that a manager’s comments showing an interest in diversity and the existence of managerial incentives to promote diversity were not sufficient to prove discriminatory intent); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000) (even if employer had a policy to promote workforce diversity, this was insufficient to support a claim of discrimination absent a showing of actual reliance on such a policy); *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 185–86 (D. Del. 2001) (mere existence of diversity policy is insufficient to support a claim of discrimination without evidence of a nexus between the policy and an adverse employment action).

²³⁸ *Sutherland v. Michigan Dep’t of Treasury*, 344 F.3d 603 (6th Cir. 2003) (evidence that blacks held 29 percent of the relevant positions even though they constituted 7.7 percent of the applicant pool); *Harel v. Rutgers*, 5 F. Supp. 2d 246 (D.N.J. 1998) (internal and external pressure to increase diversity may be a factor supporting “background circumstances”); see also *Iadimarco*, 190 F.3d at 159-60 (collecting cases and describing the circuit split).

²³⁹ See *supra* note 136.

of risking the conclusion that they have discriminated against a white or male employee because they have otherwise made a general statement in support of diversity, whether or not that statement was connected to an actual affirmative action program or served as the impetus for the employment decision. When employers talk of diversity, they are sometimes pursuing organizational advantage and sometimes equal opportunity. Uncertainty regarding diversity's legal status as an organizational motivation might chill employers' discussions of business strategies to engage new markets and to develop new clients as well as their discussions of strategies to promote workforce integration and equal opportunity. Without a clear understanding of when talk of diversity may be evidence of discrimination and why, organizations lack the freedom to discuss these matters in the open, using language that has become customary in corporate culture and indeed in public discourse more generally.

IV. WHY DIVERSITY?

Grutter's diversity rationale is thin. It hinges the constitutional significance of diversity on the educative enterprise of public universities and substantially defers to the judgment of universities when defining the amalgam of institutional and public goods that it calls diversity's benefits. It proposes no distinction between exploitative and egalitarian uses of diversity, a critical omission if the rationale is to be applied in other social contexts, and it underspecifies the relationship between end-state diversity and the benefits for which such diversity may be pursued. A thick conception of diversity would avoid these deficiencies by attending to the relationship between diversity's benefits and the institutional structures and strategies necessary to secure those benefits. It would not cede to institutions the authority to determine what benefits hold legal significance and would, at the very least, define a range of permissible purposes for which an institution's pursuit of diversity would receive legal endorsement. This Part will close by arguing that, to satisfy the requirements of antidiscrimination law, institutional efforts to promote diversity must provide equal opportunity for all persons regardless of status. Finally, a thick conception of diversity would recognize that, given the broad cultural and legal significance of the term "diversity" in public discourse, institutions must have some latitude to discuss diversity and to assess their own performance with regard to its achievement without threat of legal penalty. If not, the chilling effect on internal deliberations would impair an institution's ability to fulfill its legal obligations and to advance the goal of equal opportunity.

A. How *Grutter's* Diversity Rationale Underserves Equal Opportunity

The diversity rationale has always been a "master compromise," granting limited support for race-based affirmative action while refusing to renounce an interpretation of

the law as colorblind.²⁴⁰ In this way, it has allowed affirmative action to continue during an era in which remedial justifications for race conscious practices are often met with resistance.²⁴¹ But it has also transformed affirmative action and our understanding of its objectives. Under one interpretation, diversity is a “code word” for equality that conceals what would otherwise be seen as a controversial social justice agenda.²⁴² Diversity—so the argument goes—gives institutions reasons to increase substantive equality that are self-referential, forward-looking, and unbounded in time because they are not tied to a history of societal discrimination. If, however, diversity’s value is exhausted in affirmative action, then its contributions to equal opportunity are limited. Equal opportunity means not only that the allocation of opportunity provides each individual due consideration but also that the opportunities given are substantively equal—that is, equal in their potential to enable individual growth and advancement—regardless of the social status of the person who receives it.

One might think of individualized consideration as *Grutter*’s process-based contribution to the project of equal opportunity, because it seeks to balance the Court’s understanding of equal protection as a personal right against a university’s interest in securing the instrumental benefits of diversity. The process can be viewed to grant universities discretion to reduce the weight of traditional indicia of merit in order to avoid selection bias, and in practice it may sometimes perform this function.²⁴³ Justice O’Connor’s opinion, however, describes diversity in terms of viewpoints and experiences believed to enrich the educational process which individualized consideration permits universities to pursue without sacrificing “academic selectivity.”²⁴⁴ Hers and Justice Powell’s aesthetic descriptions of individualized consideration suggest that the significance of an individual’s social status varies with a university’s educational needs; they are not anchored in an understanding that holistic review provides *equal* consideration by adjusting selection methods or the weight given to particular selection criteria in order to account for the prior opportunities and life experiences of each

²⁴⁰ Siegel, *supra* note 9, at 1532 (“Even as he rejected a race-asymmetric or antisubordination framework for interpreting the presumption against racial classifications, Justice Powell offered the nation a master compromise in the concept of ‘diversity’ itself—a framework that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles.”); see also Post & Siegel, *supra* note 47, at 1489-90 (discussing Justice Powell’s rejection of a remedial rationale in favor of diversity).

²⁴¹ See *supra* note 11 and accompanying text.

²⁴² See *supra* notes 1-2 and accompanying text.

²⁴³ For example, universities may judge that race and socioeconomic status have interaction effects with the predictive validity of certain standardized admissions tests and adjust their reliance on those tests accordingly. Cf. Guinier, *supra* 12, at 151-54 (distinguishing between sponsored mobility practices that use “soft” criteria—like diversity—to reproduce the effects of social privilege and practices that attempt to “discover and reward untapped, and perhaps unmeasurable, human potential”).

²⁴⁴ See *supra* notes 52-59 and accompanying text.

individual. In short, *Grutter*'s diversity rationale does not value difference in order to promote equality, but rations opportunity through the concept of critical mass in order to serve institutional self-interest.

Grutter cedes to universities the autonomy to determine the institutional objectives of diversity and the form of diversity necessary to achieve those objectives. In itself this raises difficulties from the standpoint of equal opportunity, because it constructs diversity as a demand side rationale and makes the achievement of equal opportunity tangential, if not irrelevant, to the question of whether the university can state a constitutionally compelling interest. In the limited context of affirmative action in university admissions, a doctrine that does not overtly tie the constitutionality of the government's practice to the goal of equal opportunity may not seem problematic. Like Justice Powell's *Bakke* opinion, *Grutter* situates the value of diversity within the enterprise of education,²⁴⁵ and *Grutter* enriches Justice Powell's understanding by appealing to the democratic value of public university education and to the role of elite universities as pathways to professional and political leadership.²⁴⁶ In that context, a doctrine advancing the "openness" of those pathways makes a contribution to equal opportunity, even if the Court's deference to universities would not require them expressly to invest in equal opportunity for underrepresented persons.

Fisher, however, complicates the issue of judicial deference by insisting that a university must exhaust race neutral means before implementing an admissions policy involving racial preferences. As a consequence, how diversity is defined (including number of underrepresented persons that will satisfy "critical mass"), how its benefits are defined, and whether those benefits can be viewed as severable from student body diversity are all enormously consequential issues. *Grutter* would seem to sweep them within the ambit of its deference to the university's educational judgment. *Fisher* cannot afford this interpretation without sacrificing its vision of narrow tailoring. Formally, *Fisher*'s ruling concerns the narrow tailoring of the government's chosen means, but the same means may be narrowly tailored to achieve one interest and not another. If, for example, a university may raise the threshold of critical mass to a higher bar than race neutral means can meet or define critical mass by differentiating within a particular racial group between those who do and those who do not meet the university's test for diversity, then it can rely on judicial deference to the target that it sets in order to preserve the constitutionality of its chosen means.²⁴⁷ Alternatively, if courts are permitted to define

²⁴⁵ See supra notes 32-43 and accompanying text.

²⁴⁶ See supra notes 42-40 and accompanying text.

²⁴⁷ For example, a university may receive a particular number of students who are members of a racial minority through application of a percentage plan but judge that only a fraction of those admitted by that process will satisfy its goals of breaking down racial stereotypes and improving the quality of classroom discussion. It might therefore seek to obtain other students with unique life experience or high academic achievement in order to supplement students obtained through the percentage plan. This is the very balancing of "diversity" and

critical mass or to declare certain benefits to be severable from student body diversity, then they will effectively be placed in the role of setting educational policy.

Grutter constructs education as a developmental asset—or “path to leadership”²⁴⁸—specially positioned to ensure fair competition for coveted roles and opportunities in public life. Educational diversity is necessary for maintaining the “legitimacy” of the nation’s leadership class, because it is necessary to ensure confidence in that competition. *Grutter* therefore expresses what legal scholar Joseph Fishkin has called a “starting gate” theory of equal opportunity, in which a system’s legitimacy hinges on whether fairness is present at an important competitive starting gate.²⁴⁹ Fishkin criticizes such theories for their failure to recognize that, when opportunities are allocated in this fashion, the metaphorical starting gate artificially constrains numerous downstream opportunities for those who compete unsuccessfully and unduly influences the developmental choices even of those who succeed.²⁵⁰ Like Fishkin’s theory of equal opportunity, the theory of diversity expressed here rejects the notion that the requirements for equal opportunity are satisfied when developmental opportunities are justly allocated prior to competition for social goods and opportunities.²⁵¹ However,

“academic quality,” or “selectivity,” that Justice O’Connor described in *Grutter*, 539 U.S. at 340, and that the Fifth Circuit permitted on remand in *Fisher*, see *supra* notes 84-87 and accompanying text.

²⁴⁸ *Id.* at 332.

²⁴⁹ See FISHKIN, *supra* note 3, at 29-32.

²⁵⁰ See Rich, *supra* note 3, at 443-47 (discussing Fishkin’s account of starting gate theories at length).

²⁵¹ In my prior review of Fishkin’s book, I noted that, although he does not discuss diversity directly, certain resonances exist between his theory of equal opportunity and the ideal of diversity. Rich, *supra* note 3, at 483. Both imagine that social differences may translate into differences in knowledge, experience, or structural disadvantage that require institutions to be flexible in their evaluation of individual potential. See *id.* at 438-39; see also *id.* at 441 (arguing that Fishkin’s theory of equal opportunity suggests a way to “reconnect diversity with equal opportunity . . . because it conceives of equality in terms of the opportunity to develop human capital, which individuals will exercise differently in accordance with their different needs”). Cf. *Grutter*, 539 U.S. at 334 (describing the constitutional requirement of “individualized consideration,” or the “flexible” consideration of “all pertinent elements of diversity in light of the particular qualifications of each applicant,” for university admissions programs that use racial preferences). In this way, Fishkin’s theory resembles diversity’s critique of more commonplace legal interpretations of equal opportunity because he rejects the notion that opportunities can be presented in a single “vessel” that “all seekers may use.” See Rich, *supra* note 3, at 457 (discussing Fishkin’s rejection of the objective of fashioning such an ideal vessel, as the Supreme Court had proposed in *Griggs v. Duke Power Co.*); see also *infra* notes 274-276 and accompanying text (discussing *Griggs*). However, as I have previously explained, Fishkin’s theory is not, strictly speaking, a theory of “equality” because it does not require the equalization of opportunities available to all persons, regardless of their social status, Rich, *supra* note 3, at 440, and it is not a theory of “diversity” in that it is not concerned with whether any particular institution is “diverse,” *id.* at 484-85 (arguing that instead of focusing on any institution’s capacity to provide individuals equal opportunity, Fishkin advocates a pluralization of the opportunity structure overall “through attention to the interconnections between institutions and the opportunities that they provide” for self-directed individual mobility across a range of social goods and roles). In both ways, his theory differs from the theory of diversity presented in Part IV.B of this Article. In arguing that the law should endorse uses of diversity that serve the commitment to equal opportunity, I mean that permissible diversity measures should promote individual growth and advancement. This reorientation would require measuring equality in terms of the

unlike Fishkin's theory, the account of diversity articulated here is concerned with the substantive equality of opportunities provided to the "winners" of such competitions, which—particularly in the business context—can be guaranteed only through continuing attention to the interaction between institutional practices and individuals' social statuses.

Grutter's diversity does not concern itself with what other institutional practices following or coinciding with the moment of selection may affect the practical value of that asset. Certainly this is understandable. The Court faced a limited constitutional question, and, even if it had given consideration to the interests of underrepresented students meant to receive elite educational opportunity, it could rationally have considered the competition for seats within the law school's enrollment to be a competition for fungible assets. This, however, is not an assumption that is portable beyond education. A university's selection of a particular student based on assumptions about how her social status will affect her contributions to the educational process may indeed impact her experience but it will not likely affect what opportunity she is given in the sense that all seats within the class are equal. The same considerations may very well, however, affect the opportunity that a job applicant is given when multiple positions are available or when the same position may be associated with different tasks and pathways to promotion. The previous discussion of managerial diversity showed that, when employers award positions based on assumptions about "racial ability," they sometimes lock minority workers into positions with limited opportunity for growth and advancement as compared with the opportunities offered to their white counterparts.²⁵² Similarly, firms motivated to signal their compliance with civil rights law may confer sham, or token, opportunities that—wittingly or unwittingly—restrict personal growth and derail individual advancement.²⁵³

Prominent legal scholars have interpreted *Grutter* to invite a public dialogue about equal opportunity reaching beyond the particular facts of the case. Lani Guinier, for example, has argued that the Supreme Court "drew much of the *Grutter* opinion's energy from the public character of educational institutions and the role they play in a democracy."²⁵⁴ For Guinier, *Grutter's* democratic foundations present "a long overdue

fairness of procedures used to allocate opportunity *and* in terms of the substantive equality of the opportunities conferred to individuals regardless of their social status. That is, in my conception of diversity as an instrument of equal opportunity, it matters that individual opportunities are equal in the sense that two persons receiving a particular opportunity enjoy equal chances for growth and advancement. It is not necessary under my theory that societal structures for allocating opportunities as a whole provide "a plurality of paths leading to valued roles and goods." FISHKIN, *supra* note 3, at 146. Rather, it is necessary that, if an organization undertakes to consider an individual's social status in connection with the award of some privilege or benefit, it do so in a manner that advances rather than sacrifices equal opportunity.

²⁵² See *supra* notes 125-132, 150-157 and accompanying text.

²⁵³ See *supra* notes 215-219 and accompanying text.

²⁵⁴ Guinier, *supra* note 12, at 117; see also *id.* at 213 (describing the "historic opportunity presented by *Grutter* and *Gratz*" as the opportunity to engage the public with internal

opportunity to focus the conversation on the distributive and functional role of higher education in a democracy.”²⁵⁵ Guinier’s reading of *Grutter* resonates with the starting gate interpretation presented above. She sees, in Justice O’Connor’s majority opinion, an understanding that “elite” public universities are “educational gatekeepers that perform democratic functions: they grant upward mobility to their graduates and identify future leaders.”²⁵⁶ However, Guinier finds a fatal flaw in the diversity rationale because it underspecifies the parameters of legitimate academic discretion and so runs the risk of allowing educational elites to reproduce their own cherished values and privileges. Her understanding of educational opportunity is also broader than the opportunity granted or denied to individuals through *Grutter*’s system of “sponsored mobility.”²⁵⁷ Guinier ultimately suggests that *Grutter* could serve as a catalyst for educators and the public to engage in a “future-oriented” conversation about “structural mobility,” or the redesign of university admissions practices “to provide access to large numbers of people across class, race, and geographic lines” in order to match the structure of educational opportunity to democratic aspirations for our society.²⁵⁸

Although she questions any form of selectivity that would afford educational elites the discretion to reproduce a privileged class, Guinier’s discussion of social mobility centers on the practice of student selection, and for that reason actually repeats the very same blindness that hampered Justice O’Connor in *Grutter*: the quality of educational opportunity and its ability to guarantee equal chances for individual achievement is not merely a matter of student selection. *Grutter* asks the reader to conflate diversity’s achievements with affirmative action’s achievements and to accept the false premise that an institution’s self-interested pursuit of diversity necessarily serves equal opportunity. Guinier, by contrast, articulates a democratic vision of education that would measure equal opportunity in terms of how changes in educational policy produce positive structural effects beyond any single institution and beyond discrete transactions that affect individuals.²⁵⁹ Structural mobility thus represents a macro-level policy shift

educational constituencies to improve the admissions process through information gathering, dialogue, and transparency).

²⁵⁵ Id. at 118.

²⁵⁶ Id. 175.

²⁵⁷ Guinier, supra note 12, at 153 (referring to the sense in which diversity uses preferences as instruments of selective discretion).

²⁵⁸ Id. at 159-60; see also id. at 159 (“A commitment to structural mobility means that an institution’s commitments to upward mobility, merit, democracy, and individualism are framed and tempered by an awareness of how structures . . . tend to privilege some groups of people over others.”). Of course, Justice O’Connor’s opinion itself strongly resists that conversation, arguing that Michigan Law School should not be required to adopt a purely structural approach to admissions, because doing so would force the law school to sacrifice “academic selectivity.” *Grutter*, 539 U.S. at 340-41.

²⁵⁹ Guinier, supra note 12, at 159 (explaining that structural mobility advocates intend to “open[] access to higher education” because doing so “benefits the society as a whole, not just the individual admittees”).

that would measure its success in terms of broad social effects.²⁶⁰ However, as a matter of equal opportunity for every individual, Guinier seems unintentionally to overlook the possibility that investing in individual growth and advancement after the moment of selection would transform our understanding of equal educational opportunity to reflect concern for the ability of universities to adapt to meet the educational needs of each student within a demographically evolving student body.

Cynthia Estlund has considered *Grutter*'s potential impact on the use of affirmative action in employment. She admits that, unlike educational diversity, diversity in business settings does not benefit from a direct and necessary connection between institutional diversity and the public good.²⁶¹ Nevertheless, she argues that "*Grutter* may suggest an alternative defense of affirmative action in employment that better fits both what employers are doing and what they are proclaiming under the banner of diversity."²⁶² The business case for diversity, in Estlund's view, underutilizes "the powerful evidence" that workplace diversity advances the "*civic* imperative of building a more integrated and egalitarian society."²⁶³ She proposes that *Grutter* may "alter the equation" through "a reconstruction of the right at stake and a more deferential judicial approach to the review of pro-integration preferences."²⁶⁴ Her description of *Grutter* as a pro-integration decision seems to stem from its approval of affirmative action and certain apparent limitations on what may be identified as a benefit of diversity. For example, Estlund argues that deference to the university's nomination of educational benefits presumably would not require judicial endorsement of an expressed interest in segregated education.²⁶⁵ This asymmetry can, however, be explained by arguing that *Grutter* would disavow the educational and legitimating value of segregationist admissions practices, rather than standing for integration for its own sake.²⁶⁶ As discussed above, *Grutter*'s

²⁶⁰ As she explains, "[a]n institution committed to structural mobility might measure its success, for example, not only by the students it admits but also by the changes it precipitates in educational opportunity at the K-12 level," *id.* at 160-61, and award "educational opportunities" based on a framework fashioned and agreed upon by "stakeholders," who comprise the institution's "internal and external constituencies," *id.* at 161.

²⁶¹ Estlund, *supra* note 62, at 27 ("The societal benefits [of diversity] are not merely incidental but integral to the educational mission. . . . The civic contribution of workplace interactions among diverse workers, though powerful, is entirely incidental to the primary organizational objectives."); *id.* at 31 ("Merely self-interested claims of the sort embodied in the 'business case for diversity' may be insufficient to justify racial preferences; yet broad claims of societal benefits, untethered to institutional needs, evoke a different sort of skepticism. Universities may be uniquely positioned to threat this particular needle . . .").

²⁶² *Id.* at 4.

²⁶³ *Id.* at 26.

²⁶⁴ *Id.* at 31.

²⁶⁵ *Id.* at 32 (arguing that *Grutter*'s is "a skewed invocation of deference—one that makes room for integrationist preferences but not segregationist preferences").

²⁶⁶ Justice Thomas offers the example of historical black colleges and social science supporting the conclusion that black students perform better in predominantly black environments in order to chide this hidden assumption. *Grutter*, 539 U.S. at 364-66.

selective deference actually leads it to deny approval to reasons for diversity that sound too much like commitments to social justice or integration.²⁶⁷

The idea that *Grutter*'s model of deference could be a model in employment discrimination cases is problematic for two additional reasons: First, *Fisher* greatly circumscribes that deference, and may in time lead the Court to restrict or to jettison *Grutter*'s deference to a university's depiction of the value of diversity to its educational mission because its vision of narrow tailoring is incompatible with an infinitely elastic conception of the compelling interest.²⁶⁸ Second, *Grutter*'s model of deference makes no distinction between exploitative and egalitarian reasons to pursue diversity, and it therefore lacks essential guidance for private firms otherwise tempted to act for purely self-interested reasons. Estlund attempts to allay concerns about transposing *Grutter*'s deference model to employment discrimination law by arguing that there is no reason to expect that predominantly white organizations will use racial preferences "to indulge or accommodate invidious prejudices against white applicants,"²⁶⁹ but this is not the issue. Assuming that the interests of whites are not unnecessarily impaired, an employer may implement diversity initiatives to avoid legal liability, to attract customers, or to spur creativity and innovation, without meaningfully increasing the presence of underrepresented persons or enhancing equal opportunity for those already within its workforce. Although Estlund describes *Grutter*'s contribution to the workplace as a means of justifying affirmative action, organizations pursue diversity and its benefits through many other means.

Like *Grutter*, Estlund collapses the value of diversity and affirmative action, but, unlike *Grutter*, she does so in order to claim expressly a connection between diversity and integration that is difficult to sustain if the instrument to affirmative action is removed from the equation. Her theory does not explain how *Grutter* could sustain programs such as racially motivated work assignments, networking programs, training programs, and team structures when individual employees demonstrate causal connections between adverse employment actions and these practices. If an employer hires black telemarketers to better serve its marketing efforts to black customers, has it integrated the workplace in a manner that should receive legal endorsement? If "diversity" positions to which blacks are assigned are shown to be token, or dead-end, positions, on what basis would *Grutter* advise courts to take that fact into account? These are questions that Estlund does not answer and that *Grutter* itself cannot answer. Employment discrimination itself already permits a plaintiff to recover for disparate

²⁶⁷ See supra notes 47-56 and accompanying text.

²⁶⁸ Elsewhere I have also questioned that, if constitutional and Title VII employment-related standards were to merge on this issue, it would be difficult to predict how much of *Fisher* might accompany *Grutter*'s diversity rationale to more greatly restrict employers' discretion to pursue remedial uses of employees' social statuses. See, Rich, supra note 83, at 238-46.

²⁶⁹ Estlund, supra note 62, at 34.

treatment discrimination when a position awarded to her is substantively inferior to the same position when it is awarded to a member of another status group.²⁷⁰

Ultimately, both Guinier and Estlund imagine a role for *Grutter* in the project of equal opportunity that is greater than the role imagined by the Court. Guinier finds in *Grutter* democratic possibilities that were not the Court's aspirations and imagines that *Grutter* might inspire a democratic conversation that contradicts the Court's expressed values. Estlund finds in *Grutter* possibilities for workplace integration by overestimating *Grutter's* commitment to an integrationist ideal and underestimating the potential consequences of its failure to differentiate between exploitative and egalitarian uses of diversity. In the end, we must admit that *Grutter's* diversity is simply not designed for the challenges of application beyond the educational context. How to reconstruct it to meet such challenges is the subject of the next section.

B. What Diversity Contributes to the Project of Equal Opportunity

Diversity's potential contributions to the project of equal opportunity exceed what can be accomplished by affirmative action and its structural, race neutral alternatives alone. As discussed above, end-state diversity is not diversity's only dimension. This Part proposes that the law embrace an understanding of diversity in which social status interacts with organizational practices to affect opportunities for individual growth and advancement during and after the moment of selection. In this way, the concept of diversity would support a renewed commitment to equal opportunity independent of its use to justify affirmative action. Institutional arrangements continuously negotiate the social effects of an individual's status—inwardly as a matter of institutional culture and outwardly in terms of signaling effects—and that the significance of social status can be moderated or intensified by the institutional arrangements that structure an individual's interactions with the institution and its personnel. These lessons from the discussion of organizational experiences with managing diversity in Part II hold important consequences for equal opportunity. The relationship that they portray between organizational policies and practices, on the one hand, and social status, on the other, is one to which antidiscrimination law must attend if we want the law to ensure that organizational diversity initiatives serve the project of equal opportunity and not merely organizational interests.

Interpreting diversity in this way presents definite challenges. Diversity resists the fundamental axiom of equal protection doctrine that similarly situated persons should

²⁷⁰ See, e.g., *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (holding that a firm may not lawfully discriminate between men and women by denying women consideration for partnership, regardless whether such consideration was merely a privilege of employment). Moreover, a firm could no more withhold benefits from women as a class in order to employ more women than it could require women—due to longer average lifespan—to pay more into a common pension fund than men in order to avoid reducing the benefits paid to men and women. Cf. *City of Los Angeles, Dep't of Water & Power*, 435 U.S. 702 (1978).

be treated similarly.²⁷¹ That doctrine assumes that social status is not relevant to determining whether two persons are similarly situated; if it were, then the disparate treatment of persons from different status groups would not be probative of discrimination. The Supreme Court’s equal protection opinions have sometimes explained this formal, or colorblind, model of equal opportunity by repudiating as “impermissible racial stereotyp[ing]” any assumption that individuals hold the same viewpoints, interests, or political preferences because they are members of the same racial group.²⁷² The concept of diversity challenges this model by questioning what it means for two persons to be similarly situated. In its demand-side incarnation, diversity permits an organization to ascribe value to social status as a proxy for experiences, viewpoints, and abilities deemed useful to the fulfillment of organizational goals.

Diversity also invites consideration of what, in *Griggs v. Duke Power Co.*,²⁷³ the Court called the “posture and condition” of the individual.²⁷⁴ *Griggs* ushered into being a new legal theory of “equal of opportunity” when it held, under Title VII, that an employer commits unlawful discrimination by implementing a facially neutral policy that produces a racially disproportionate impact, unless the employer demonstrates that the policy was job related and consistent with business necessity.²⁷⁵ *Griggs* repudiates the notion that formal equality satisfies the requirements of equal opportunity by alluding to the fable of the stork and the fox in which a host and dinner guest are each given the same vessel but only one is able to drink. *Griggs* interprets equal opportunity to require that the vessel offered be “one all seekers can use.”²⁷⁶ Under a diversity model, one should reinterpret the fable to conclude that each seeker should be given a vessel appropriate for her needs. In fact, *Griggs* and the diversity model present important and potentially complementary pathways to equal opportunity. For example, in the employment context, *Griggs* applies when the employer uses a facially neutral practice that has a disparate impact, whereas the diversity model would apply when the employer

²⁷¹ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (summarizing equal protection as “essentially a direction that all persons similarly situated should be treated alike”); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (establishing that “dissimilar treatment for men and women who are, , , similarly situated” is the “very kind of arbitrary legislative choice forbidden” by the Constitution)..

²⁷² *Shaw v. Reno*, 509 U.S. 630, 647 (1993); see also *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995); *Schuetz v. BAMN*, 134 S. Ct. 1623, 1634 (2014) (opinion of Kennedy, J.).

²⁷³ 401 U.S. 424 (1971).

²⁷⁴ *Id.* at 431.

²⁷⁵ *Id.*; see also Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. & Emp. L.J. 431, 433 (2005) (“Aside from *Brown v. Board of Education*, the single most influential civil rights case during the past forty years that has profoundly shaped, and continues to shape, civil rights jurisprudence and the discourse on equality is *Griggs*”); Alfred W. Blumrosen, 71 Mich. L. Rev. 59 (1971) (“*Griggs* redefines discrimination in terms of consequence rather than motive, effect rather than purpose. This definition is new to the field of employment discrimination law”).

²⁷⁶ *Id.*

seeks to justify its voluntary use of status to confer some benefit. If, however, the legal significance of diversity will continue to derive from its perceived contributions to institutional performance, then diversity will always be orthogonal—and sometimes will be hostile—to equal opportunity. Conversely, if the purpose of the law’s endorsement of diversity is the promotion of equal opportunity, then it should commit to this ideal by conceiving of equal opportunity as diversity’s objective and principal benefit, and it should assess the lawfulness of institutional practices according to whether they advance or undermine equal opportunity. Were it to do so, several advantages over the current framework would follow.

1. *Putting equality first.* Taking equal opportunity as diversity’s objective yields three important advantages: First, it would align institutional policies and practices undertaken in the name of diversity with antidiscrimination law’s guarantee of equal opportunity. Second, it would remedy *Grutter*’s failure to distinguish between exploitative and egalitarian uses of diversity, not by risking the precarious task of delineating when an institution’s mission holds sufficient public value to justify consideration of an individual’s social status but by minimizing the legal significance of institutional interests altogether. Third, it would provide a justification for the expansion of the diversity rationale beyond the educational context. The need to distinguish between exploitative and egalitarian uses results from giving deference to institutional assertions of self-interest, because such deference introduces exploitative purposes that undermine equal opportunity. Putting equality first means situating equal opportunity as the principal good served by diversity. Although civic and democratic equality values may continue to place education in a special constitutional niche,²⁷⁷ an institution’s self-serving reasons to pursue diversity should not affect the calculus under antidiscrimination law, except perhaps in rare cases where the institution’s reasons are discriminatory and its pursuit of diversity is a sham intended to conceal them.

This proposal represents a significant change, even in the educational context. *Grutter*’s rationale does not specify a need for the university’s challenged practices to advance equal opportunity, although the context of affirmative action in public university admissions may have led the Court to infer a synergistic relationship between the two. Were the Supreme Court to agree that, to some degree, diversity’s benefits are severable from end-state diversity, then, as discussed above, many challenges would follow from the current doctrine.²⁷⁸ The equal opportunity model of diversity would nullify these challenges by eliminating a university’s need to justify the pursuit of any particular educational benefit through student body diversity; the issue would be, instead, whether the manner in which the university pursues diversity enhances or inhibits its

²⁷⁷ See supra notes 32-45 and accompanying text.

²⁷⁸ See supra Part I.B. (discussing doctrinal difficulties that would flow from recognizing that student body diversity and its benefits are severable).

ability to provide equal educational opportunity. This change in the doctrine is all the more important given that *Grutter* does not state that its proffered list of educational benefits is exhaustive.²⁷⁹ The Court's selection of benefits reflects its recognition of the instrumental value of integration, or end-state diversity, and its rejection of a broadly remedial outlook. It is therefore difficult to say whether benefits associated with end-state diversity that serve the institution's bottom line more than they do the educational process—such as inspiring greater charitable contributions or increasing funding and enrollment within particular academic programs—would or would not receive the Court's approval. Refocusing diversity on educational opportunity would reframe such questions, allowing courts to treat exploitative purposes as having no legal significance—the issue instead would be whether the institution's pursuit of diversity serves equal opportunity.

The shift to an equal opportunity model of diversity would also have consequences for the practice of individualized consideration. Under *Grutter*, individualized consideration affords a university the discretion to consider how an applicant's social status may contribute to the university's educational mission without running afoul of the applicant's equality rights. Under the proposed model, individualized consideration would be understood to serve constitutional equality values, in part, because it serves each individual's interest in equality as a personal right—just as under *Grutter*—and, in part, because it grants a university the discretion to weigh traditional indicia of merit differently based on its assessment of the adequacy of those criteria in capturing a candidate's performance potential. Diversity should be seen as advancing equal opportunity because it helps to refine and to improve upon judgments about a person's potential to perform well academically and to thrive as a member of the institution through her own personal growth and by contributing to the intellectual lives of her classmates.²⁸⁰ In this sense, diversity is not a consideration added to an assessment of merit or qualification, but a reconceptualization of the evaluation process. Even understood in this way, the reconstructed diversity rationale need not conflict with the Court's commitments to formal equality as expressed in *Grutter* and *Gratz*. As in *Grutter*, all individuals would “have the opportunity to highlight their own potential diversity contributions,” and these contributions may issue from factors other than

²⁷⁹ Compare *Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part and dissenting in part) (prophesying that some future lawsuits will address “whether, in the particular setting at issue, any educational benefits flow from diversity” and others will “challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity”), with *Estlund*, supra note 62, at 32 (opining that *Grutter*'s understanding of benefits is “skewed” to favor integration).

²⁸⁰ The argument here is not that universities should cease making student selection decisions based on judgments about diversity's contributions to their educational mission, but that such judgments about the relationship between diversity and the institution's own interests should receive no legal protection under antidiscrimination law. Universities might continue under an equal opportunity model to act on such judgments, and they may continue to receive some protection under the First Amendment as matters of academic freedom.

race.²⁸¹ And, unlike the university policy struck down in *Gratz*, the review promised under this model remains individualized in the sense that, although race and other demographic factors may influence how the university assess each applicant's qualifications, how it does so will depend on the presence of other factors.

Using diversity considerations in this way does not require that we “revert” from forward-looking to remedial purposes. Under an equal opportunity model, the design of university admissions procedures still represents an occasion for thinking ahead to the integrated society that we hope to produce and the selection system that we hope will engender that outcome. This model also answers the concern that diversity breeds the abuse of elite discretion by directing organizational discretion at the selection stage toward the achievement of equal opportunity.²⁸² For example, the judgment that a particular person would contribute to the intellectual lives of her classmates would be important because of the positive consequences for her own, and for their, growth and achievement—not because her contributions are what the institution determines that it needs to advance its mission. The judgment that a particular constellation of persons or attributes is necessary in order to produce a desirable campus culture should be guided by the extent to which the sought cultural qualities would provide a supportive environment for the academic success of all students, including those from underrepresented groups.²⁸³ To address these issues, serious attention must be paid to the performance of underrepresented groups over time, including data collection.

Naming equal opportunity as the principal objective recognized under this reconstructed diversity rationale would also render it more readily transferrable to social contexts outside of education. As Estlund has recognized in the business context, although “[f]ostering interracial discourse and bridging racial divisions clearly happens in the workplace,” these benefits are “incidental” to the profit-taking agenda of firms in contrast to their being “integral to the educational mission” of universities.²⁸⁴ The equal

²⁸¹ Grutter, 539 U.S. at 338.

²⁸² Guinier, *supra* note 12, at 196-98 (discussing this concern in relation to *Grutter*'s diversity rationale).

²⁸³ Placing such an aspiration before admissions officials does not mean abandoning the Court's current rejection of broadly remedial purposes as a justification for racial preferences, but it will require courts to consider evidence that they might in other circumstances associate with the remedying of racial wrongs. For example, under the equal opportunity model, a university would not receive legal endorsement under antidiscrimination law of its pursuit of diversity in order to promote learning outcomes, but it would receive protection for uses of diversity in admissions designed to close racial achievement gaps. Antidiscrimination law could take as its goal the creation of an integrated society in which all individuals have an equal opportunity for growth and advancement. Cf. Estlund, *supra* note 62, at 16 (“*Grutter* recognized that *what is at stake is the possibility of an integrated future in a still-unequal and still-divided society.*” (emphasis in original)). And if a university offered evidence that its admissions program increased minority enrollments and led to the closing of achievement gaps, both should be taken as evidence of a commitment to equal opportunity, notwithstanding that the same evidence could be used to argue that the university sought to remedy societal discrimination.

²⁸⁴ Estlund, *supra* note 62, at 27.

opportunity model would not require courts to make sensitive and difficult determinations about the public value of a firm's pursuits, because the value of equal employment opportunity is generalizable across firms, and—like the civic and democratic values associated with public education—it has already been recognized by existing law. A court would not be required to determine whether the law should endorse an organization's purposes because those purposes, whatever they may be, are simply orthogonal to the question whether the firm's practices supply equal opportunity to its employees. Managerial discourse may continue to be fixated on the question of how diversity can best contribute to a firm's bottom line, but the proposed model's focus on the contributions of organizational practices to the growth and advancement of all persons would prevent organizations from using diversity as a justification for purely exploitative practices.

Rather than stifle the voluntary use of workplace diversity initiatives, the equal opportunity model would supply them with the conceptual basis for a legal rationale that they currently lack. Today, firms select and operate diversity initiatives in a legal blind: some sources champion the use of such measures, but lower court decisions reflect skepticism about their legality and, when they use status preferences, they would seem to conflict with statutory law.²⁸⁵ Employment discrimination law scholar Tristin Green has proposed an alternative approach to the regulation of workplace diversity initiatives that shares some similarities with, but also exhibits important differences from, the model proposed here. Like the equal opportunity model, Green's model would allow uses of social status that fulfill the law's established purposes,²⁸⁶ rather than deferring to the organization's to the self-interested reasons. She outlines a structural approach according to which Title VII would permit "the use of race and sex in decisions organizing work" if those decisions "reduc[e] workplace discrimination" and operate within the employer's "broader integrative effort."²⁸⁷ Green's focus on reducing discrimination rather than providing equal opportunity marks an important difference, and, given the social science on the weakness of debiasing workplace initiatives, that emphasis appears misplaced.²⁸⁸ Moreover, Green's approach would subordinate the equal opportunity interests of individuals to the interests of women and minorities in reducing discrimination.²⁸⁹

²⁸⁵ See supra notes 228-238 and accompanying text (courts have held that an organization's diversity efforts may constitute evidence of discrimination); supra notes 150-157 and accompanying text (courts have found instrumental uses of race unlawful, regardless whether they resulted in minority hiring); supra notes 139-144 and accompanying text (discussing statutory impediments to diversity initiatives).

²⁸⁶ See Green, supra note 127, at 620; see also supra note 147 and accompanying text (discussing the Court's reliance on Title VII's purpose of providing equal opportunity to justify upholding voluntary affirmative action).

²⁸⁷ Green, supra note 127, at 591.

²⁸⁸ See supra Part II.B.

²⁸⁹ Under her approach, "minorities as well as whites and women as well as men may bear a cost" due to the employer's diversity efforts, if the employer can justify those efforts by

Green's approach is thus problematic for one of the very reasons that *Grutter* itself falters: It conflates end-state diversity with equal opportunity.²⁹⁰

By contrast, the equal opportunity model would hold an employer's diversity efforts to the standard of equal opportunity, but it would also require the plaintiff to establish a causal link between those efforts and a challenged adverse employment action. It would therefore not permit claims to go forward simply because diversity is "in the air."²⁹¹ Green rightly cautions that diversity-based decisions organizing work are "soft" in the sense that they may not involve directly a tangible employment action such as a hiring, promotion, or termination decision.²⁹² The relevant question under the equal opportunity model, however, is whether all persons subjected to such practices are provided equal opportunities for growth and advancement. For example, an employer may assign an account with black clients to a black employee. A white employee who was later denied a promotion after not receiving the account would have a viable claim of discrimination if, in the employer's selection process, race were given so much weight as to deny the white employee due consideration of individual qualities and characteristics supporting his suitability to handle the account and he proved a causal connection between the assignment of the account and the later promotion decision. The black employee who received the account, and other accounts based on race, but denied the subsequent promotion may have a claim if, due to the race-based assignment of accounts, he was denied opportunities critical to his receipt of the promotion. Similarly, a black plaintiff would not succeed in a claim that her employer's race- or sex-based mentoring scheme concealed discrimination as compliance if the employer could show that her lost opportunities were due to her own conduct and performance rather than to the firm's diversity policies. Relevant, but not dispositive, to this determination would be evidence that the firm's mentoring policy made positive contributions to her growth and advancement or to that of her black female peers, as such evidence would disrupt the causal inference that the mentoring scheme resulted in the employers' denying her some downstream opportunity. It is important therefore to recognize that putting equality first does not mean subjecting organizations to a special tax when they make decisions involving minorities and women. Rather, it means holding them to the same standard of equal opportunity in the implementation of diversity measures and maintaining congruent legal protection for all individuals regardless of their status.

showing that the particular decision affecting an individual employee contributed to a macro-level reduction in discrimination. *Id.* at 620-21.

²⁹⁰ In this sense, Green's model also resembles the "bottom line" theory of disparate impact discrimination rejected by the Supreme Court in *Connecticut v. Teal*, 457 U.S. 440 (1982) (holding that an employer may not avoid disparate impact liability by using an affirmative action policy to correct the statistical imbalance produced by a particular employment practice).

²⁹¹ See *supra* note 234-238 and accompanying text.

²⁹² Green, *supra* note 127, at 639.

2. *Envisioning diversity beyond affirmative action.* The contributions of diversity to equal opportunity are not limited to the advantages obtained by putting equality first. If the reconstruction of the the law's diversity rationale were limited to this single change, it would still reproduce much of the superficiality of the current approach. *Grutter* conceives of diversity as a numerical end-state and addresses the question of whether an institution is justified in pursuing that end-state and, if so, whether the institution's chosen means are narrowly tailored to fulfill that purpose. Managerial discourse, by contrast, has adapted its conception of diversity to the understanding that the benefits of diversity cannot be presumed to flow from the achievement of end-state diversity. Realizing those benefits is a strategic process not a fixed destination, and this is no less true when the benefit at issue is equal opportunity. Managerial rhetoric's opposition of affirmative action to diversity management may have originated as a slogan intended to highlight the latter's instrumental, business value, but in practice it has proved to be a profound—at times even liberating—distinction allowing managerial discourse to conceive of interlocking and subtle adjustments to institutional practice as critical to the conversion of social difference into opportunity.

Within organizations, diversity operates along dimensions that are not reducible to the achievement of a particular numerical end-state. Organizations craft their diversity practices to realize their self-interests. Once diversity is decoupled from affirmative action and from the goal of a particular numerical end-state, the risk of exploitative uses of diversity grows and the relationship between diversity and integration becomes uncertain. The equal opportunity model restores some equilibrium by establishing equal opportunity as the public interest that will sustain an institution's practices against legal challenge. It also forces courts and organizations to confront another issue: that the project of equal opportunity is not exhausted by the achievement of integration. The substantive equality of opportunities is as important a measure of equal opportunity as procedural fairness, and whether opportunities are substantively equal must be judged according to whether they provide each individual the same chances for growth and advancement. The concept of diversity contributes to equal opportunity by looking beyond integration in this way and by proposing that opportunities can be made substantively equal only by taking relevant social differences into account and adjusting opportunities to meet individual needs.

Part II demonstrated that, although workplace diversity initiatives are most commonly justified in managerial discourse as sound business strategy and legal compliance measures, “[t]alk of developing human potential is no stranger to diversity discourse.”²⁹³ Yet within the business world such talk has largely occurred without engaging antidiscrimination law as its interlocutor. The econometric framing given to

²⁹³ Rich, *supra* note 3, at 485; see also *supra* notes 162-169 and accompany text.

diversity in managerial discourse obscures the value of equal opportunity that is also a subject of that discourse, although recruited to serve organizational ends. Diversity management propounds that firms have business reasons to provide equal opportunity, and it generously conceives of such opportunity not based on a narrow framework of formal equality but based on the optimal growth and performance of every worker. Sociological literature has rightly pointed to deep tensions between the managerial conception of diversity and a more remedial understanding of civil rights norms.²⁹⁴ It has also shown that, when the success of diversity initiatives is measured in terms of the integration of the management level of firms or in terms of the macro effects of diversity management on the private sector generally, managerial diversity has come up short.²⁹⁵ This, however, is not a reason to repudiate the whole of the managerial discourse on diversity; it is a reason to engage managerial discourse where it shares some common ground with existing legal norms.

Without denying the importance and elusiveness of integration in the American workplace, even an organization with substantial workforce diversity will fail to provide equal opportunity if, after the hiring stage, it does not develop the human capital of all persons equally. Token and dead-end opportunities that increase workforce integration do not serve equal opportunity. Sincere but flawed diversity initiatives that artificially constrain the opportunities of underrepresented persons and impair their chances for advancement do not serve equal opportunity. Allowing persons harmed by such initiatives to recover under antidiscrimination law would encourage organizations to put equality first not just at the moment of selection but in all instances in which an organization seeks to achieve some instrumental benefit by taking an individual's status into account. It would also deter organizations from relying upon ineffective diversity measures on a cynical basis to feign legal compliance or to conceal existing discrimination. Whether particular measures support or hinder equal opportunity for individual growth and advancement would be factual questions worked out in the course of determining whether the organization's practices actually caused an individual harm, and would not be presumed merely from the outcome that a person who was intended to benefit from a particular program did not succeed.

The need for such a shift in the law's focus is a matter of some urgency. As demonstrated in Part I, the trajectory of equal protection jurisprudence after *Fisher* makes untenable the assumption that the Court's narrow tailoring analysis will stop with the requirement that public universities exhaust race neutral alternatives before implementing affirmative action programs.²⁹⁶ Whether a university can improve its ability to obtain

²⁹⁴ See supra notes 125-138 and accompanying text.

²⁹⁵ See supra notes 177-181 and accompanying text.

²⁹⁶ See supra Part I.B.

diversity's educational benefits independently of its admissions process will likely one day influence the extent to which the law will permit the university to engage in affirmative action-based admissions, assuming that affirmative action programs survive long enough to face such a challenge. This shift in doctrinal focus would spawn some very difficult questions. For example, what is the relative value of integration without a robust commitment to equal opportunity? What ought to be the legal consequences of implementing institutional policies that treat end-state diversity as the primary engine of equal opportunity versus policies that commit to a standard of equal opportunity for all persons entering the institution with the result that fewer underrepresented persons are admitted within its ranks? However, as difficult as these questions are, they are also tremendously important if we are to take seriously the relationship between diversity and equality. As an instrument of equal opportunity, diversity demands that institutions consider how their practices interact with social status to support or undermine individual opportunity and then adjust those practices accordingly so that the opportunities granted to individuals will be substantively equal, regardless of an individual's social status. It does not resolve for us what the value of integration is relative to value of equal opportunity, but it does force us to acknowledge that they are not one and the same.

Finally, the arguments in favor of using liability rules to provide firm legal guidance to organizational diversity measures so that they will align better serve the project of equal opportunity do not apply to organizational speech about diversity. We cannot expect organizations to develop effective strategies for using diversity considerations to promote equal opportunity if they worry that discussions of diversity or statements of commitment to diversity will result in liability for discrimination. Precisely because "diversity" is a term of varied meaning and because one of those meanings is equal opportunity, organizations should enjoy some latitude to talk about diversity without such talk being used against them as evidence of discrimination. Exceptions can and should be made for cases in which an individual can show a causal nexus between a particular diversity policy or practice and a legally cognizable harm or that the term "diversity" was used consciously to conceal a plan of discrimination. However, interpreting an organization's references to workforce diversity or to diversity as an organizational strategy as evidence of discrimination will stifle important conversations equal opportunity. Organizations must be able to discuss the needs and progress of internal constituencies and to vet policy options for promoting individual growth and advancement in order for diversity practices to provide equal opportunity. Some scholars have argued that antidiscrimination law conflicts with freedom of expression and places unreasonable restraints on speech.²⁹⁷ In this particular case, however, the conduct-speech distinction is clear. Antidiscrimination law is concerned

²⁹⁷ See, e.g., Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 *UCLA L. Rev.* 1791 (1992); Eugene Volokh, *What Speech Does 'Hostile Work Environment' Harassment Law Restrict?*, 85 *Georgetown L.J.* 627 (1997).

with how organizations treat individuals. Talk of diversity is not, ordinarily, speech directed to have some pernicious effect on individuals, and therefore it would be a terrible irony if antidiscrimination law were interpreted, as some cases have suggested,²⁹⁸ to prevent organizations from talking about matters of inequality and equal opportunity. Under a reconstructed diversity rationale, courts should hold to the principle that an organization's expression of its motivation to promote diversity is not evidence of discrimination absent evidence of a causal connection between a specific diversity practice and some legally cognizable adverse consequence.

CONCLUSION

We now speak of diversity where we once spoke of equality, but this does not mean that diversity should be allowed to displace the law's commitment to equality. *Grutter v. Bollinger* established that diversity is a compelling interest capable of justifying the use of racial preferences in public university admissions. It did not, however, quiet public controversies about affirmative action or inscribe in legal discourse a common understanding of diversity's value. This Article has shown that *Grutter* underserves the law's equality values by deferring to institutional constructions of diversity's benefits, equating the achievement of end-state diversity with the accomplishment of those benefits, and failing to distinguish between exploitative and egalitarian uses of diversity. These deficiencies obscure diversity's potential to reimagine the relationship between equal opportunity, individual achievement, and institutional design. Managerial diversity provides a useful foil for *Grutter*'s conception. Although it reveals diversity at its most exploitative, it also shows that the transformative potential of diversity extends beyond affirmative action to embrace institutional practices that adjust to meet the needs of underrepresented persons in order to provide substantively equal opportunities for individual growth and advancement regardless of a person's social status. Only by reconstructing the law's diversity rationale to put equality first and to withhold legal endorsement from diversity measures that fail to meet this substantive standard of equal opportunity can we hope to avoid diversity's erosion by continuing legal and political attack and to benefit from its unique contributions to one of our nation's most cherished legal ideals.



²⁹⁸ See supra notes 228-238 and accompanying text.