
WHAT DIVERSITY CONTRIBUTES TO EQUAL OPPORTUNITY

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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. Yet we seldom pause to consider the costs that have accompanied this shift. In Grutter v. Bollinger, the Supreme Court held that a public university's use of racial preferences in student admissions will not violate equal protection if the challenged admissions policy is narrowly tailored to achieve the university's compelling interest in student body diversity. Rather, however, than quieting public controversies about affirmative action, the decision has been a frequent target of legal and political attack. Grutter and the Court's subsequent decisions in Fisher v. University of Texas at Austin have established the dominant legal conception of diversity, but they have also left many questions unanswered concerning the applicability of Grutter's diversity rationale outside of the educational context. This Article rejects Grutter's rationale, but not the relevance of diversity to the goal of equal opportunity. It demonstrates that Grutter's rationale underserves equal opportunity 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. This Article uses the popular conception of diversity found in business settings and managerial literature

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as a foil for the legal conception. On the one hand, by conceiving of diversity as a business resource, managerial discourse advocates for exploitative uses of diversity, thereby widening the gap between diversity and equal opportunity. On the other hand, because the value of diversity as a business resource turns in part on the professional growth and achievement of individual workers, managerial discourse sometimes invokes the concept of diversity in order to promote new institutional practices that extend professional opportunities to all persons, regardless of social status. Managerial discourse thus reveals important dangers and possibilities inherent within the concept of diversity that have yet to be explored in legal discourse. This Article marshals those lessons to propose a reconstruction of Grutter’s diversity rationale to fulfill its potential as an instrument of equal opportunity, even outside of the educational context and even when an institution does not rely on affirmative action.

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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. Yet we seldom pause to consider the costs of this shift.¹ Today, when minority workers complain of on-the-job harassment and discrimination, corporations answer with “diversity mission statements” and “diversity training.”² When minority university students complain of on-campus violence and intimidation, universities answer with the appointment of diversity officers, the

1. Notable exceptions do, of course, exist. For example, leading scholar on law firm diversity David Wilkins foreshadowed a central theme of this Article when he asked “what caused the rhetoric of the black equality struggle to shift from one grounded on moral claims about integration being ‘the right thing to do’ to economic arguments premised on the claim that ‘diversity is good for business?’” David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553 (2004). Wilkins, however, chose to set aside such “obviously large and difficult questions” in his early discussion of *Grutter v. Bollinger*, 539 U.S. 306 (2003), published shortly after the opinion issued. Wilkins, *supra*, at 1554. Other prominent discussions of diversity in legal literature have yielded little consensus regarding the concept’s impact on civil rights jurisprudence. Constitutional scholar Reva Siegel, for example, finds in *Grutter*’s diversity an embrace of antisubordination values, even as “the Court mask[ed] the antisubordination rationale for its decision and impose[d] practical requirements on the admissions process designed to limit its institutional expression.” Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1539 (2004). Other scholars, however, have been less generous. *See, e.g.*, Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (arguing that diversity is merely another iteration of the interest convergence thesis); Lani Guinier, Comment, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 196 (2003) (characterizing diversity as a mere “fig leaf to hide a commitment to the status quo”); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 678 (2000) (criticizing diversity as an incoherent concept that undermines antisubordination goals); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. CIV. RTS. & CIV. LIB. 171, 176–78 (2005) (same). *See also* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2066–67 (1996) (arguing that diversity reinforces pernicious stereotypes).

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

implementation of “diversity training” and diversity faculty hiring initiatives.³ One common theme dominates discussions of diversity—that the organizations implementing diversity initiatives stand to benefit as much as do their underrepresented constituencies because the inclusion of those constituencies provides a resource that can be used to support organizational goals. The instrumental logic of diversity is appealing at first glance, because it encourages organizations to promote integration for self-interested reasons—reasons that may be more effective and more durable in shaping their behavior than legal coercion. The same instrumental logic is also troubling, however, because it holds moral and legal commitments to equal opportunity hostage to an organization’s calculation of its self-interest, thus recasting equal opportunity as an elective enterprise.

The Supreme Court endorsed this logic, when it held, in *Grutter v. Bollinger*,⁴ that race-conscious affirmative action policies implemented by public universities will satisfy the constitutional guarantee of equal protection if they are narrowly tailored to fulfill “a compelling interest in obtaining the educational benefits that flow from a diverse student body.”⁵ The Court’s recent discussion of diversity, in *Fisher v. University of Texas at Austin*,⁶ underscores that the constitutionally salient interest “is not an interest in enrolling a certain number of minority students” but instead an interest in a qualitative transformation of the educational experience that is uniquely tied to student body diversity.⁷ Public universities thus enjoy significant constitutional latitude to pursue demographic diversity within their student body enrollments only because such diversity is expected to

3. See, e.g., Koran Addo, *Mizzou Will Require Diversity Training After Racist Incidents on Campus*, ST. LOUIS POST-DISPATCH: EDUC. (Oct. 8, 2015), http://www.stltoday.com/news/local/education/mizzou-will-require-diversity-training-after-racist-incident-on-campus/article_814f0292-36d9-5184-aabb-e99541b09aed.html (describing the university’s response to student protests of race-related incidents, including diversity training to faculty and staff); Kim Bellware, *Mizzou Announces Diversity Initiatives After Student Race Protests*, HUFFPOST: COLL. (Nov. 9, 2015, 8:40 PM), http://www.huffingtonpost.com/entry/mizzou-diversity-initiatives_564135ece4b0307f2caeb6c5 (describing diversity initiatives authorized by Mizzou following student protests of race-related incidents, including the hiring of a diversity officer); Peter Salovey & Ben Polak, *Yale Announces \$50 million Faculty Diversity Initiative*, YALE UNIV.: OFFICE OF THE PROVOST (Nov. 3, 2015), <http://provost.yale.edu/news/yale-launches-50-million-faculty-diversity-initiative> (following racial unrest and student protests at Yale and Mizzou, announcing five-year \$50 million faculty diversity initiative).

4. *Grutter*, 539 U.S. 306.

5. *Id.* at 343.

6. *Fisher v. Univ. of Texas at Austin* (“Fisher II”), No. 14-981 (U.S. June 23, 2016).

7. *Id.* at 11.

yield qualitative educational benefits. *Grutter* and its progeny represent the dominant legal conception of diversity, but, having been designed to assess the constitutionality of affirmative action in public university admissions, that conception hinges on the Court's understandings of academic freedom and educational need. Missing from these decisions is a satisfactory discussion of the relationship between diversity and equal opportunity, much less one that could help us to anticipate how, if at all, the diversity rationale should be applied beyond education and independently of an organization's use of affirmative action.

This Article rejects that dominant legal conception and instead proposes to realign diversity and equal opportunity by offering an account of diversity capable of supplementing and enriching prior understandings of equal opportunity. Diversity is most at odds with equal opportunity when it licenses institutions to exploit the value associated with an individual's social status in order to satisfy their own self-interests without also requiring policies implemented in the name of diversity to grant every individual equal access to meaningful opportunities. Yet this is precisely *Grutter's* approach. This Article proposes a reconstruction of diversity to fulfill its potential as an instrument of equal opportunity and to broaden its applicability beyond the educational context and beyond affirmative action. In order to achieve this goal, the Article argues that antidiscrimination law should distinguish between (1) exploitative uses of diversity⁸ that are orthogonal, or even hostile, to equality because they value diversity primarily as a means to advance institutional interests and (2) uses of diversity that promote equal opportunity by promoting individual growth and achievement for all persons, regardless of their social status.⁹ The

8. The term "exploitative" is important here. Exploitative uses of diversity coincide with instrumental ones in that all exploitative uses seek to obtain a benefit from diversity that is distinct from the mere fact of demographic, or numerical, diversity and supportive of an institution's self-interest. Not all instrumental uses, however, are exploitative. For example, the public benefits of civic participation and good citizenship valued by the Court in *Grutter* are instrumental in that they result—and yet are distinct—from the achievement of numerical diversity. They are not exploitative, however, because they are not defined exclusively by the institution's self-interest. In this sense, promoting equal opportunity is an instrumental public benefit of pursuing diversity precisely because equal opportunity cannot be reduced to the achievement of demographic diversity but, as I argue here, must be understood to include equal access to opportunities that are also substantively equal. For another discussion of the practical legal impediments to 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).

9. 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. The university admissions programs under review in the Court's equal protection decisions conveniently occupy a space on this continuum in which egalitarian and institutional values necessarily

Article thus proposes to realign diversity and equal opportunity by offering an account of diversity capable of supplementing and enriching prior understandings of equal opportunity.

Before *Grutter*, three foundational principles of equal opportunity animated civil rights law. The first and most restrictive of these is the anticlassification principle—also described as colorblindness, or formal equal treatment—exemplified in constitutional law by the requirement that strict scrutiny must be applied to all racial classifications made by state actors regardless what ends such classifications were intended to serve.¹⁰ Diversity deviates philosophically from this principle because it accepts that, in some circumstances, consideration of social statuses including race may be necessary in order to achieve important benefits.¹¹ The second principle of equal opportunity is the antistatutory principle expressed in *Griggs v. Duke Power Co.*,¹² which held that facially neutral policies violate federal employment discrimination law if they produce racially disproportionate impacts and cannot be justified by their job relatedness and business necessity.¹³ *Griggs*'s disparate impact theory required that, in

converge. “Student body diversity” means “integration” insofar as it requires increasing or maintaining the number of historically underrepresented minorities enrolled within an institution, and the opportunity that a student is given by having been selected for admission can rationally be seen as an unqualified good for the individual who is selected, even as it produces instrumental benefits for the institution. In other areas of social life, however, such as employment, the connection between diversity and civil rights is more tenuous. *See infra* Part II.A.

10. *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications . . .”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (“[T]he Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.”); *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (“[T]he very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is ‘benign.’”); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”); Siegel, *supra* note 1, at 1473 (observing that “most [scholars] would agree that American equal protection law has expressed anticlassification, rather than antistatutory, commitments as it has developed over the past century”). *See also* Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1562–73 (2013) (discussing the development of this principle through the Court’s constitutional rulings on affirmative action).

11. *See, e.g., Grutter*, 539 U.S. at 340 (determining that the availability of race-neutral alternatives to the explicit consideration of race during the admissions process did not violate equal protection because “these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both”).

12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

13. *Id.* at 431.

order to avoid perpetuating the subordinating effects of a history of discrimination, employers must provide “equality of opportunity” in the form of a “vessel,” or set of evaluative employment criteria, that “all seekers can use.”¹⁴ In other words, every individual must be measured by the same criteria, and those criteria must not reproduce inequality without convincing evidence that their use is necessary. Diversity, by contrast, accepts that evaluative criteria may apply differently to members of different groups, in order that each individual may receive the “individualized consideration” necessary to appreciate fully his or her potential to contribute to institutional goals.¹⁵ The third principle of equal opportunity found in civil rights law is the principle of remediation. Rather than simply prohibiting suspect classifications and removing other “artificial barriers”¹⁶ to individual success, this principle seeks affirmatively to restore the individual to the position he or she would have held absent a history of discrimination. Historically, this idea provided the impetus for affirmative action in federal contracting and workplace policy.¹⁷ It formed the basis for the Court’s statutory decisions upholding the use of workplace affirmative action programs that sought to correct “manifest racial imbalances in traditionally segregated job categories.”¹⁸ Diversity, however, is not a remedial concept. It is instead instrumentalist

14. *Id.* I have elsewhere discussed the “twist” that the concept of diversity works on the Court’s interpretation of the fable of the stork and the fox in *Griggs*, and I have argued that at a time when “‘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.” 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)).

15. *See, e.g., Grutter*, 539 U.S. at 336–37 (explaining that, in order to satisfy “individualized consideration,” a “university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application”); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.) (arguing that an admissions program using racial preferences would be permissible if it were “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 them the same weight”).

16. *Griggs*, 401 U.S. at 431 (describing Congress’s intent to remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification”).

17. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 32–34 (2009); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 963–66 (1998).

18. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (upholding a race-based affirmative action program granting training opportunities to minority workers because the program was “designed to break down old patterns of racial segregation and hierarchy” by “eliminat[ing] a manifest racial imbalance”). *See also Johnson v. Transp. Agency*, 480 U.S. 616, 631–40 (1987) (applying *Weber* to uphold a sex-based affirmative action program).

and forward-looking, endorsing status-based preferences as long as they contribute positively to the organization's self-interest.¹⁹

That diversity is at odds with each of these established iterations of equal opportunity is, however, hardly the end of the story. Diversity has undoubtedly made an important contribution to the goal of equal opportunity by prolonging the life of affirmative action in higher education in the face of persistent efforts to dismantle it entirely. Yet it has done so by obscuring the very remedial logic that once connected affirmative action to equal opportunity. The "familiar and comfortingly vague nomenclature of 'diversity'" disguises antisubordination and remedial values which, if expressed directly, would contradict the antidiscrimination principle that has shaped the constitutional test of strict scrutiny.²⁰ The problem, however, is that those values are not merely disguised. *Grutter's* diversity rationale alters those values, recasting a history of discrimination from a source of preparatory deficit that may require the redesign of evaluative procedures or the remediation of status-based injuries to a source of socially salient viewpoints and experiences worthy of consideration by the university only because they may enhance the university's educational climate.

This Article takes up a connection between educational and workplace diversity recognized but underdeveloped by *Grutter*. Doing so reveals dimensions of diversity that have remained dormant in the Court's equal protection jurisprudence.²¹ In *Grutter*, the Court sought to demonstrate a

19. Cynthia L. Estlund, *Putting Grutter to Work, Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 14 (2005) (explaining that *Grutter's* diversity rationale "is instrumental and forward-looking" but "decidedly *not* a remedial argument" because "[i]t is about making a better future, and not about making up for the sins of the past").

20. Siegel, *supra* note 1, at 1539–40 ("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' . . ."). By concealing antisubordination values in language that suggests a commitment to the formal equal treatment of individuals, the diversity rationale avoids what constitutional scholar Reva Siegel has called the "'hotter' talk of group harm." *Id.* at 1478. See also Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 64 (2003) (arguing that, although elite universities tend to justify affirmative action based on the benefits of educational diversity recognized by the Supreme Court, "'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. CONST. L. 573, 601 (2000))).

21. This Article identifies three dimensions of diversity. "Diversity-as-end-state," the most familiar dimension, is defined by the demographic composition of an institution's membership. *Grutter*

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 argued in amicus briefs that a diverse educational experience assists in the preparation of students for work in the global economy and in the legitimation of the mechanisms by which our society cultivates national leaders.²² 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.²³ By doing so here, this Article sheds new light on the contextual nature of diversity's value, the limits of *Grutter's* vision, and the stability—or lack thereof—of diversity as an organizing concept in antidiscrimination law.

In legal discourse, diversity's origins in affirmative action case law have arrested its conceptual development. To equate diversity with affirmative action is to take a superficial view, denying diversity the potential to make unique and positive contributions to our understanding of equal opportunity. Managerial discourse provides a useful contrast. It has so deeply accepted the pursuit of diversity as a key organizational objective that it often opposes affirmative action and civil rights law to the business strategy of diversity management, which seeks to utilize workforce diversity as a business resource in order to capture benefits that coincide

emphasizes end-state diversity by authorizing public universities to use racial preferences to obtain a "critical mass," or "meaningful number," of underrepresented minority students. *See infra* Part I.B.4. "Diversity-as-strategy" refers to institutional practices intended to manage diversity and to obtain its benefits; these practices are not exhausted by the achievement of end-state diversity. Managerial diversity emphasizes this dimension by distinguishing management practices intended to harness the benefits of diversity from affirmative action programs intended to diversify the demographics of a firm's labor force. *See infra* Part II.A.4. "Diversity-as-motivation" refers to diversity offered as a justification for organizational policies or decisions. Although *Grutter* has endorsed diversity as a compelling interest in public education—and by extension affirmed the legitimacy of the government's motivation to obtain diversity—some courts have treated an employer's motivation to obtain diversity as evidence of discrimination. *See infra* notes 235–259 and accompanying text. 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 an institutionally engineered outcome.

22. *Grutter*, 539 U.S. at 330–31 (citing amicus briefs filed by current and former military officers and Fortune 500 corporations).

23. 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 under the banner of "diversity management." *See generally* DOBBIN, *supra* note 17; Kelly & Dobbin, *supra* note 17.

with the organization's self-interest.²⁴ Managerial discourse therefore highlights diversity's exploitative aspect. In its most thoughtful iterations, however, managerial discourse does something quite different by positing that attention to diversity will optimize human potential. Furthermore, managerial discourse distinguishes diversity management from affirmative action because it recognizes that sustained organizational support for an individual's professional growth and achievement will improve her ability to contribute to the firm's long-range business objectives. By analyzing legal discourse alongside managerial discourse, this Article offers a more comprehensive description of the ways in which the diversity concept is used in our society. This description illuminates important and underappreciated limitations of the dominant legal conception of diversity. At the same time, it helps us to begin to repair those limitations by supplying a thicker description of diversity that will provide a superior foundation for conceptual development.²⁵

Simply put, in order to improve our understanding of the concept of diversity as it operates in today's society and as it may yet operate in legal

24. Throughout this Article, I use the term "managerial diversity" to refer to the conception of diversity that is common to the management literature, and I use "diversity management" to refer to the set of organizational policies and practices adopted by firms in order to harness the resource potential of workforce diversity. Managerial diversity is sometimes also called the "business case for diversity." See, e.g., Estlund, *supra* note 19, at 4 (defining 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"). 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." Nancy DiTomaso et al., *Workforce Diversity and Inequality: Power, Status, and Numbers*, 33 ANN. REV. SOC. 473, 474 (2007).

25. This distinction between "thick" and "thin" conceptions of diversity is inspired by anthropologist Clifford Geertz's 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 provide the social context from which one can understand their meaning. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 4–10 (1973). Legal scholar Nancy Leong has also proposed a taxonomy for diversity that distinguishes between thick and thin "version[s] of the diversity objective." Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2152, 2169 (2013). In her parlance, however, a thin version of diversity is one that "emphasizes numbers and appearances," and a thick version "views diversity as a prerequisite to cross-racial interaction . . . benefiting institutions and individuals of all races." *Id.* Judging that "[t]he thin version of diversity is of far greater concern," Leong makes it the focus of her critique of "racial capitalism." *Id.* at 2190. By contrast, in this Article, I view thick and thin conceptions of diversity not as objectives to be judged for their depth or superficiality, but as heuristic tools to be judged by their ability to make sense of diversity and its possibilities both inside and outside legal discourse, and both with or without reference to affirmative action.

discourse, 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. This means decoupling the achievement of organizational objectives from the law's reasons for endorsing diversity measures and situating equal opportunity as the principal good that permissible diversity measures must serve. This Article will show that diversity offers the potential for a fourth principle of equal opportunity to expand the reach of civil rights law—one that recognizes that equal opportunity is not exhausted by formally equal distributive mechanisms or by statistical integration, even if the latter requires the achievement of better than “token” numbers.²⁶ Equal opportunity requires that the opportunities themselves must be substantively equal in that they sustain the professional growth and achievement of all persons. This “diversity principle” of equal opportunity thus recognizes that an institution may need to take individual differences into account in order to provide substantively equal opportunity.

Critiques of diversity abound, without question.²⁷ The analysis offered here follows in the tradition of legal scholarship that critically examines central concepts in antidiscrimination law so that we may appreciate how those concepts have come to deviate from foundational equality norms, and so that we may recommit them to the satisfaction of those norms.²⁸ It is therefore not just a critique. Diversity, under current doctrine, conflicts sharply with established principles of equal opportunity. Consider affirmative action. *Grutter* and its progeny permit affirmative action not because it is equality enhancing, but because, as a departure from the standard of formal equality, it can sometimes be justified by its association with other positive ends. This Article proposes a reconstruction of *Grutter*'s diversity rationale that would restrict diversity's use as a defense against claims of discrimination to measures that provide equal opportunity for individual growth and achievement, regardless of a person's social

26. *Grutter*, 539 U.S. 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”).

27. See *supra* note 1 and accompanying text.

28. See generally, 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 permitted status-enforcing state action to persist in new forms).

status.²⁹ Whether an institution's efforts also advance its own self-interest should be of no moment to antidiscrimination law. Although synergies between equal opportunity and self-interest may spur an institution to pursue diversity voluntarily, they do not establish that the institution's efforts are aligned with the law's purposes.

The subject of this Article is a matter of some urgency. First, although the implementation of diversity initiatives outside of education is widespread, their legal status is uncertain. Many such programs, such as those found in business settings, would not likely receive legal endorsement under an adapted version of *Grutter*'s rationale because the organization's pursuit of diversity would not be seen as necessary in order to achieve important public benefits. Corporate uses of diversity frequently emphasize exploitative objectives, and so, perhaps not surprisingly, lower courts in employment discrimination cases have treated an employer's intention to pursue diversity as evidence of illicit discrimination. Second, even in education, ambiguities in *Grutter*'s diversity rationale have left it a frequent target of litigation. Three times in as many years, the Supreme Court has taken up questions concerning the constitutionality of affirmative action,³⁰ and newly filed cases have set in their crosshairs the Court's most hallowed example of permissible affirmative action by a private university.³¹ *Grutter* itself famously prophesied affirmative action's end,

29. This Article therefore builds upon an argument that I have sketched elsewhere about the importance of "reestablishing a connection between diversity and equality." Rich, *Equal Opportunity*, *supra* note 14, 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).

30. See, e.g., *Fisher v. Univ. of Texas at Austin* ("Fisher II"), No. 14-981 (U.S. June 23, 2016) (following remand by *Fisher v. Univ. of Texas at Austin* ("Fisher I"), 133 S. Ct. 2411 (2013), affirming summary judgment against petitioner's claim that the university's consideration of race in undergraduate admissions denied her equal protection); *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (upholding against an equal protection challenge the Michigan electorate's decision to amend its state constitution in order to ban affirmative action, including the very law school admissions program upheld in *Grutter*); *Fisher I*, 133 S. Ct. 2411 (remanding to the circuit court to apply strict scrutiny to the university's affirmative action program, without deference to the university's conclusion that it could not achieve sufficient diversity through race-neutral means).

31. See *Complaint, Students for Fair Admissions v. Harvard Coll.*, No. 1:14-cv-14176-DJC (D. Mass. Nov. 17, 2014) (asserting that the university's use of racial preferences constituted purposeful race discrimination under Title VII of the 1964 Civil Rights Act); *Students for Fair Admissions v. Univ. of N.C.*, No. 1:14-cv-00954 (M.D. N.C. Nov. 17, 2014) (asserting statutory and constitutional claims against the college alleging purposeful discrimination under Title VII and violations of equal protection under *Fisher I*). The so-called "Harvard Plan" has repeatedly been endorsed by the Court as a model for

proclaiming that within “25 years . . . the use of racial preferences will no longer be necessary to further the interest” of diversity.³² We have now traveled half the temporal distance allowed by *Grutter*. If ever there were a time to theorize a role for diversity after affirmative action, that time is now.

Part I of this Article discusses *Grutter*'s diversity rationale, examining its reasoning and identifying important limitations. This part shows that *Grutter*'s rationale is flawed because it displaces remedial rationales for affirmative measures, 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 to define what benefits are constitutionally salient. It also shows that the Court's subsequent *Fisher* decisions have done little to correct these deficiencies and, in fact, have raised new concerns. Part II uses the managerial conception of diversity to deepen our understanding of *Grutter*'s limitations by showing that *Grutter*'s rationale is ill-equipped to resolve disagreements about the legality of workplace diversity initiatives. 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 and come into focus only when we begin to think about diversity outside of the educational context and independently of affirmative action. Part III explains how the deficiencies of *Grutter*'s diversity rationale underserve the law's commitment to equal opportunity and preclude the law from applying the diversity rationale in social contexts beyond education. This part concludes by proposing a reconstructed diversity rationale that puts equal opportunity first and envisions a productive role for diversity beyond affirmative action.

I. GRUTTER'S DIVERSITY

This Part will present *Grutter*'s diversity rationale and explore its conceptual limitations. As the Court has cautioned, context matters.³³ We

permissible affirmative action programs. *See, e.g., Grutter*, 539 U.S. at 335 (2003) (explaining its affirmance of Michigan Law School's affirmative action plan because it was “satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–18 (1978) (Powell, J.) (discussing the “illuminating example” of “the Harvard College program” as an illustration of how affirmative action programs could be designed without using quotas). *See also Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987) (stating approvingly that the challenged workplace affirmative action plan “resembles the ‘Harvard Plan’”).

32. *Grutter*, 539 U.S. at 343.

33. *Id.* at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

associate diversity with equality in legal discourse because the concept has been recruited to determine the constitutionality of race-based affirmative action. We associate diversity with education because public university enrollments are the sole context in which the Court has found diversity to be a compelling interest.³⁴ These associations bring conceptual and practical limitations. *Grutter* makes ambiguous overtures to integration, racial equity, and social mobility. Fundamentally, however, the Supreme Court explained its recognition of diversity as a compelling interest in terms that emphasize the uniqueness of the educational context and the benefits that diverse student enrollments should be expected to return to the educational mission of public universities and to the public. We can begin to evaluate the costs associated with *Grutter*'s conception of diversity only when we recognize that the doubly narrow context of *affirmative action* in *higher education* has artificially cabined the Court's articulation of diversity even as it has also provided certain foundations on which to base the dominant legal understanding of diversity's value.

A. *GRUTTER* AND *FISHER* IN CONTEXT

A frequent topic of constitutional scholarship, diversity's origins in Justice Powell's opinion in *Regents of California v. Bakke*³⁵ do not require exhaustive treatment here.³⁶ In *Bakke*, the Court struck down a race-based affirmative action program that reserved 16 out of 100 seats in the university's medical school for applicants who were members of particular racial minorities. Justice Powell cast the decisive fifth vote in favor of invalidating the program. In doing so, however, he also voted with the four remaining justices to lift the lower court's injunction banning the university from any consideration of race in admissions. Justice Powell rejected the two remedial justifications proposed by the university for its special admissions program: "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession"

34. *But cf. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564–65 (1990) (holding "benign" racial classifications implemented by the federal government deserve only "intermediate" scrutiny), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

35. *Regents of California v. Bakke*, 438 U.S. 265, 265–324 (1978) (Powell, J.).

36. Useful discussions of this relationship and comparisons between the two opinions can be found in Post, *supra* note 20, at 56–75 (describing how the Court's decisions regarding diversity in higher education reflect transformations in our "constitutional culture," which is itself both internal and external to legal discourse) and Siegel, *supra* note 1, at 1538–40 (explaining that, although a majority of the Court in *Grutter* adopted the anticlassification perspective of Justice Powell's *Bakke* opinion, antisubordination values also shaped the decision in important ways).

and “countering the effects of societal discrimination.”³⁷ Indeed, he considered “societal discrimination” to be “an amorphous concept of injury”³⁸ which, if used to justify racial preferences, would “impose[] disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”³⁹ He found instead that a university could sustain an affirmative action program based on its “compelling” interest in attaining student body diversity because the university’s “academic freedom” necessarily included “the selection of its student body.”⁴⁰ The special admissions program failed, in his judgment, because it was not designed to fulfill that purpose. Justice Powell found two fatal flaws in the program’s design: it defined diversity too narrowly as racial or ethnic diversity and its quota system denied individuals fair consideration. He explained that the “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.”⁴¹

Justice Powell’s view of diversity appears to depend on the notion that social statuses such as race and ethnicity correlate in some way to viewpoints and experiences that have the capacity to contribute positively to an educational environment. For example, when Justice Powell praised Harvard College for its admissions program, he reiterated the college’s argument that “the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases” because “[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.”⁴² However, Justice Powell also believed that race should not always be dispositive. He explained 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 . . . with that of an applicant identified as Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.”⁴³ According to Justice Powell, such nuanced judgments require a process that

37. *Bakke*, 438 U.S. at 306.

38. *Id.* at 307.

39. *Id.* at 310.

40. *Id.* at 312.

41. *Id.* at 315 (quoted in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)).

42. *Id.* at 316 (quoting the amicus brief submitted by Harvard and several other elite universities).

43. *Id.* at 317.

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 them the same weight.”⁴⁴ The special admissions program thus failed, by his lights, because it disregarded the individual’s right to equal protection.⁴⁵

In *Grutter*, the Court endorsed Justice Powell’s rationale, but it also advanced new arguments. The case involved a challenge by an unsuccessful white female applicant for admission to the University of Michigan Law School who challenged the law school’s race conscious admissions policy on constitutional and statutory grounds. Modeled upon Justice Powell’s *Bakke* opinion, the law school’s policy directed officers to consider an applicant’s potential contribution to the law school’s diversity and gave “substantial” but “var[ying]” weight to a variety of nonacademic factors including “racial and ethnic diversity with special reference to the inclusion of students from groups” historically disadvantaged by discrimination.⁴⁶ The law school sought to enroll a “meaningful number,” or “critical mass,” of underrepresented minority students.⁴⁷ The Supreme Court held that the law school’s flexible approach provided “individualized consideration” to all applicants and was therefore narrowly tailored to fulfill a compelling interest in obtaining the benefits of student body diversity.⁴⁸

In reaching this conclusion, the Court agreed with Justice Powell that educational diversity’s status as a compelling interest turned on the constitutional value of academic freedom,⁴⁹ and it further recognized the law school’s need to identify a means to achieve diversity that did not unduly sacrifice academic selectivity.⁵⁰ The Court thus deferred to the law school’s academic judgment that student body diversity contributed

44. *Id.*

45. *Id.* at 320. *See also id.* at 318 (referring to the absence of individualized consideration as the “principal evil” of the special admissions program).

46. *Grutter*, 539 U.S. at 315–16 (internal quotation marks omitted).

47. *Id.* at 318 (defining “critical mass” as a “meaningful number” sufficient to assist these students to participate in classroom dynamics without feeling stigmatized or isolated).

48. *Id.* at 343. *See also id.* at 337 (approving the law school’s “highly individualized, holistic review of each applicant’s file”).

49. *Id.* at 329 (“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.”).

50. *Id.* at 340.

positively to its educational mission.⁵¹ It also warned that certain race-neutral alternatives to affirmative action capable of yielding substantial racial diversity nevertheless “may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university,” and that they may cause an elite university “to abandon the academic selectivity that is the cornerstone of its educational mission.”⁵² The Court concluded that the “percentage plans” used in Texas and other states to achieve racial diversity were thus no substitute for a process of holistic review in which race was considered as one factor among many.⁵³

The Court also shared Justice Powell’s understanding that, although a university may consider an applicant’s race in relation to its educational mission, it must not equate diversity with racial diversity or rely on racial quotas. *Grutter* accepts the premise that minority students are “likely to have experiences of particular importance to the Law School’s mission.”⁵⁴ Writing for the majority, Justice O’Connor mused 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 in a society, like our own, in which race unfortunately still matters.”⁵⁵ However, Justice O’Connor also struggled with this premise and praised Michigan Law School for choosing not to rely on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint.”⁵⁶ Race, in other words, is a kind of experience—one that has special significance because we live in a society in which race still matters—but it is also subject to comparison with other experiences. *And*, as with any other experience, everyone’s experience of race is unique. The *Grutter* Court thus recognized that the educational goal of “break[ing] down racial stereotypes”⁵⁷ will sometimes require exploring and capitalizing upon

51. *Id.* at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

52. *Id.* at 340.

53. *Id.* (addressing the argument that plans used in other states guaranteeing admission to students who ranked within the top *x* percent of their prior academic institutions demonstrated an adequate race-neutral alternative to racial preferences).

54. *Id.* at 333.

55. *Id.* at 333, 338.

56. *Id.* at 333 (citation omitted) (internal quotation marks omitted).

57. *Id.* at 330.

“intra-racial diversity,”⁵⁸ or the variety of viewpoints and experiences that characterize members of any particular racial group, some of which will no doubt contradict racial stereotypes.

Grutter inherited from Justice Powell a fundamentally instrumentalist logic in which the kind of diversity that a university is constitutionally permitted to pursue is one that will advance its educational mission. It defined that mission, however, somewhat more broadly by placing greater emphasis on the larger social role of public university education, both in the marketplace and in our democracy. *Grutter* prizes the contributions of diversity to educational goods such as “cross-racial understanding,” “break[ing] down racial stereotypes,” sparking “livelier, more spirited” classroom debate, and “promot[ing] learning outcomes”⁵⁹ and the contributions of educational diversity to what constitutional scholar Robert Post has called “extrinsic social goods” such as “professionalism, citizenship, [and] leadership.”⁶⁰

The Court cited the opinions of business leaders and military leaders in order to demonstrate that diversity’s benefits beyond the university “are not theoretical but real.”⁶¹ Representatives of major American corporations argued that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”⁶² Military leaders offered their view that it was important for “service academies and the ROTC to use race-conscious recruiting and admissions policies” because “a highly qualified, racially diverse officer corps” is necessary in order for the military “to fulfill its principal mission to provide national security.”⁶³ The Court thus concluded that national leadership generally depends for its legitimacy on the diversity and openness exhibited by elite universities, which must be “visibly open” to all “talented and qualified individuals” in order for our

58. See generally Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013) (explaining how and why universities’ efforts to promote racial diversity frequently include efforts to obtain intra-racial diversity by making distinctions between individuals within racial groups based on perceived “racial types”).

59. *Grutter*, 539 U.S. at 330 (citation omitted) (internal quotation marks omitted).

60. Post, *supra* note 20, at 60.

61. *Grutter*, 539 U.S. at 330 (“These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”).

62. *Id.* at 330.

63. *Id.* at 331.

nation's leaders to have "legitimacy," and in order for educational institutions to convey "openness and integrity."⁶⁴ By this logic, access to university education does not establish diversity as a compelling interest because of the social mobility offered to minority students, but because of the institutional legitimacy conferred by the appearance that minority students compete for admission on an equal footing.⁶⁵

A decade later, in two decisions issued in the case of *Fisher v. University of Texas at Austin*,⁶⁶ the Court again examined the constitutionality of race-based affirmative action. A white female plaintiff challenged the University of Texas at Austin's consideration of race as part of a holistic applicant review process designed to resemble the process approved by the Court in *Grutter*. The university's process was not identical, however, because holistic review was used only to supplement a state-mandated percentage plan that admitted up to 75 percent of the university's undergraduate class based solely on applicants' class-rank within Texas high schools.⁶⁷ The so-called Texas "Top Ten Percent Plan" had been enacted after the Fifth Circuit held that race-based affirmative action was prohibited by the Constitution in *Hopwood v. Texas*⁶⁸ and was supplemented by a process of holistic review following *Grutter*.

In *Fisher I*, the Supreme Court examined the holistic review process to determine whether the Fifth Circuit's decision to affirm summary judgment for the university had properly applied *Grutter*. The Court clarified that, although *Grutter* established that courts must defer to a university's "educational judgment that [student body] diversity is essential to its educational mission," that deference did not extend to the means chosen by the university to obtain such diversity.⁶⁹ The Court instructed that "[n]arrow tailoring also requires that the reviewing court verify that it

64. *Id.* at 331–33. *See also id.* (arguing that public university education "must be accessible to all individuals regardless of their race or ethnicity" because it is an important pathway to "good citizenship," to "leadership," and to "succeed in America").

65. *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 all members of our heterogeneous society *may participate* in the educational institutions that provide the training and education necessary to succeed in America." (emphases added)); *id.* at 332 ("All members of our heterogeneous society *must have confidence* in the *openness* and integrity of the educational institutions that provide this training." (emphases added)). *See also id.* at 371 (Thomas, J., dissenting) (criticizing the majority for its apparent lack of interest in whether students who benefited from the law school's affirmative action program were successful participants in the school's educational opportunities).

66. *Fisher v. Univ. of Texas at Austin* ("Fisher II"), No. 14-981 (U.S. June 23, 2016); *Fisher v. Univ. of Texas at Austin* ("Fisher I"), 133 S. Ct. 2411 (2013).

67. *Fisher II*, slip op. at 3–4.

68. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

69. *Fisher I*, 133 S. Ct. at 2419.

is ‘necessary’ for a university to use race to achieve the educational benefits of diversity” and that the university has not overlooked “workable race-neutral alternatives.”⁷⁰ Rather than determining whether the university had met its burden in light of the state-mandated percentage plan that had already succeeded in permitting the university to enroll a significant number of minority students, the Court remanded the case to the circuit court to apply the proper standard.

When the case returned in *Fisher II*, the Court considered directly whether the university’s holistic review process met the requirements of narrow tailoring. It found that the university’s program survived even the strict “verification” requirement of *Fisher I*. The plaintiff had argued that the university could not justify its use of racial preferences because (1) it had failed to articulate a compelling interest “with sufficient clarity” by precisely defining the required critical mass of minority student enrollment; (2) it had already enrolled a critical mass of minority students under the percentage plan, without using racial preferences; (3) the modest increase in minority enrollment demonstrated that the use of racial preferences was not necessary; and (4) that the university discounted other race-neutral means by which it could have satisfied its interest in diversity.⁷¹ The Court rejected all four arguments, and, in doing so, it turned *Grutter*’s definitions of “diversity” and “critical mass” against *Fisher I*’s requirement of verification.

The Court first concluded that the university’s failure to define critical mass was not fatal because “the compelling interest that justifies the consideration of race . . . is not an interest in enrolling a certain number of minority students,” but is in fact, as *Grutter* had established, the university’s interest in “obtaining ‘the educational benefits that flow from student body diversity.’”⁷² Second, and somewhat contrary to its first conclusion, the Court found that the “stagnation” of minority enrollments justified its use of racial preferences because it agreed that, although “by no means dispositive,” demographics “have some value as a gauge of the University’s ability to enroll students who can offer underrepresented perspectives.”⁷³ The Court maintained that the determination of critical mass must be context specific, and it rejected the plaintiff’s contention that

70. *Id.* at 2420.

71. *Fisher II*, slip op. at 11–12.

72. *Id.* at 11 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

73. *Id.* at 12–14.

the university's success in achieving a greater level of diversity through more race-neutral means than Michigan Law School had achieved through its affirmative action program meant that it had already achieved critical mass.⁷⁴ Indeed, the Court cautioned that—even though the Texas university's judgment had been exercised “with care” and resulted in a “reasonable determination”—a university “must continually reassess its need for race-conscious review”⁷⁵ and “must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.”⁷⁶ Third, the Court found that the modest increase in the actual number of minority students constituted a “meaningful” percentage increase over prior years in which the university had restricted itself to race-neutral means and that, in any event, the program's small impact on minority enrollments “should be a hallmark of narrow tailoring, not evidence of unconstitutionality.”⁷⁷ Finally, the Court interpreted the university's history of attempts to improve student body diversity through race-neutral means to be convincing evidence against the plaintiff's contention that other workable, race-neutral means were available. The Court opined that greater reliance on socioeconomic factors could force the university to sacrifice its “reputation for academic excellence,” and it warned that reliance on the “single metric” of class rank would not comport with *Grutter*'s definition of educational diversity.⁷⁸

Fisher II is a victory for advocates of affirmative action who have staked the latter's constitutionality on the value of diversity. The decision's rationale, however, reveals two significant problems with the Court's equal protection doctrine. First, the idea of critical mass severely complicates the Court's understanding of diversity as a compelling interest. *Grutter* permits universities to use racial classifications to achieve critical mass in minority enrollments, not proportional representation. The decision defines critical mass as a quantitative value—a “meaningful number” of underrepresented students—sufficient to bring about a qualitative effect on the university's performance of its educational mission. Indeed, *Grutter* expressly asserts that instrumental benefits *flow* from student body diversity. Perhaps it is

74. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 644–45 (5th Cir. 2014) (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%). *See also Fisher II*, slip op. at 18 (Alito, J., dissenting) (quoting the university's contention that “critical mass in Texas is necessarily larger than critical mass in Michigan” because “a majority of the college-age population in Texas is African American or Hispanic”).

75. *Id.* at 15.

76. *Id.* at 11.

77. *Id.* at 15.

78. *Id.* at 17.

true that affirmative action in university admissions can only ever affect the qualitative goals of a university's educational mission by influencing student body demographics. Yet by collapsing numerical diversity and diversity's qualitative benefits, the Court sometimes speaks as if the achievement of numerical diversity necessarily results in constitutionally significant qualitative educational benefits, and other times speaks as if only those benefits truly matter. Although the Court has never expressly said so, the latter formulation suggests that a university will not be permitted to pursue student body diversity if it can achieve the educational benefits articulated in *Grutter* without altering the demographic composition of its student body.

This ambiguity leads to additional problems with *Fisher I*'s verification requirement. *Fisher I* described its verification requirement in both quantitative and qualitative terms.⁷⁹ Yet it seems implausible that a court would not defer to a university's judgment that its educational performance was not sufficiently advanced by the extent of diversity that had been achieved through race neutral means. Verification would seem to require courts to weigh a university's need to use racial classifications against workable race-neutral alternatives likely to yield the same *amount* of student body diversity. Indeed, nowhere does *Fisher II* authorize courts to audit a university's contention that diversity achieved through racial preferences actually enhanced its educational performance. To the contrary, the decision demonstrates through its example that a court's review of a university's need to use racial preferences in admissions will turn largely on its assessment of the diligence and "good faith" of the university's efforts to identify suitable race neutral methods.⁸⁰ Otherwise, for example, a court would be required to invalidate a carefully considered, holistic review process because it judged independently that the benefits of diversity could be obtained through changes to the university's curriculum. *Fisher II* thus reveals the verification requirement to be a bit of a paper

79. *Fisher I*, 133 S. Ct. at 2420 ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could *achieve sufficient diversity* without using racial classifications." (emphasis added) (internal citations omitted)); *id.* ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would *produce the educational benefits of diversity*." (emphasis added)).

80. *Fisher II*, slip op. at 14 (noting with importance that the plaintiff had not challenged the university's "good faith" in determining that race-neutral means had not yielded sufficient student body diversity).

tiger, because the fundamental question answered by a reviewing court is not whether the university's judgment of its need was sound, but whether its effort to render that judgment in good faith was credible. A more robust verification requirement, however, would have risked undermining the value of academic freedom that has provided the foundation for the Court's diversity rationale.

B. GRUTTER'S LIMITATIONS

This Section will discuss limitations inherent in *Grutter's* diversity rationale that restrict its applicability beyond public university education and even threaten its longevity.

1. Reasoning Outward from Education

As discussed in the prior section, *Grutter's* diversity rationale shares with Justice Powell's an architecture centered around the university. Orienting diversity in this way has three important limiting consequences. First, the value of academic freedom provides a basis for university judgments about student body composition to receive special solicitude. Outside of the educational context, the basis for similar deference to organizational judgments is uncertain and would likely vary based on context. A corporation, for example, may deserve a degree of deference regarding its exercise of business judgment. It seems doubtful, however, that this deference could extend to the corporation's consideration of race for diversity purposes. Indeed, although Title VII of the 1964 Civil Rights Act⁸¹ permits other social statuses such as sex and national origin to qualify as bona fide occupational qualifications capable of justifying their direct consideration, the statute does not extend this affirmative defense to claims of discrimination based on race or color.⁸²

Even in the educational context, the Court has demonstrated serious discomfort with this deference and uncertainty regarding what level of deference ought to be applied. The dissenters in *Grutter* argued that the Court's ruling amounted to a relaxation of strict scrutiny, in large part because of the deference given to the law school's determination that it needed student body diversity in order to realize important educational benefits.⁸³ Justice Kennedy's majority opinion in *Fisher I* subsequently

81. Civil Rights Act, 42 U.S.C. §§ 2000e et seq. (2012).

82. See *infra* notes 226–227 and accompanying text.

83. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting) (criticizing the Court's "unprecedented deference"); *id.* at 362–63 (arguing that such deference finds no constitutional basis in the value of academic freedom); *id.* at 387 (Rehnquist, C.J., dissenting) (criticizing the Court

drew a sharp distinction between a university's expressed need for diversity to fulfill its mission and the means chosen by the university to obtain diversity, the very distinction articulated by the Justice in his *Grutter* dissent.⁸⁴ *Fisher I* held that a university will not be permitted to pursue diversity through race-conscious means without both demonstrating that it had considered workable race-neutral alternatives and convincing the reviewing court that no such alternative "would produce the educational benefits of diversity."⁸⁵ However, in yet another opinion by Justice Kennedy, *Fisher II* revealed that the Court itself would not necessarily distinguish between judicial verification of the unavailability of appropriate race-neutral alternatives—which *Fisher I* appeared to require—and judicial examination of the diligence and good faith of the university's consideration of such alternatives.⁸⁶ Thus, rather than establishing clarity regarding the proper exercise of deference to a university's educational judgment, the *Grutter* and *Fisher* trilogy of decisions has shown that even in this limited context the Court has been unable to formulate a coherent and neatly administrable doctrine.

Second, *Grutter* accepts that the university is a place where diversity matters. That is, it accepts the premise that various aspects of students' educational experiences are enhanced by diversity. Enhancing learning outcomes and promoting robust debate are benefits of diversity that are understood to have critical value in the educational context. They are no doubt of some importance for many noneducational institutions, but only a relatively small number could say that they are critical; moreover, courts would experience great difficulty determining on this basis which noneducational institutions deserve their deference and which do not. Consider the difference between a university that argues that, without diversity, it will no longer function as a university because it could no longer fulfill its educational mandate and a business institution that argues that, without diversity, it will be less profitable and will suffer competitive disadvantage. The concept of diversity helps *Grutter* define what the

for upholding the law school's affirmative action program "despite its obvious flaws" by engaging in "an unprecedented display of deference"). *See also id.* at 388 (Kennedy, J., dissenting).

84. *Id.* at 388 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of its goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.").

85. *Fisher I*, 133 S. Ct. at 2420.

86. *See supra* note 80 and accompanying text.

educational experience is—an experience of personal growth through exposure to different ideas and viewpoints. Diversity has intrinsic value to the university precisely because it is otherwise integral to education. It will be the rare noneducational institution that could make such a showing of close connection between its *raison d'être* and its pursuit of diversity.

Third, diversity's coveted constitutional status as a compelling interest substantially results from the public benefits that are presumed to flow from the achievement of educational diversity. Perhaps exposure to diversity in noneducational contexts also produces important societal benefits. Law professor Cynthia Estlund has argued that workplace diversity, like educational diversity, breaks down racial stereotypes and enhances civic participation.⁸⁷ *Grutter* does not deny this. But it does not follow that, if breaking down racial stereotypes in the workplace is important, then breaking them down before one enters the workforce is not more important. University education intervenes at a critical point in an individual's maturation and development. It provides a liminal space of profound reflection and self-orientation that is not reproduced *ad infinitum* in one's future endeavors or one's subsequent everyday experiences; rather it is intended to be a foundation from which one prepares for those experiences. *Grutter* reflects this premise, when it emphasizes that educational diversity is necessary in order to prepare graduates for professional life in a diverse, global marketplace.⁸⁸ In addition, benefits such as the production of national leaders with public legitimacy seem to be transferrable only to other elite institutions that enjoy a superlative national reputation, such as the military, which, for this very reason, *Grutter* compares with elite education.⁸⁹

In the end, the Court has designed the diversity rationale to work within the educational context in which it was forged. The diversity rationale hinges on the Court's belief that universities enjoy a unique degree of deference in our constitutional system and that universities have a unique need to cultivate diverse environments in order to fulfill their educational mission. In addition, the *Grutter* decision exploits the social

87. Estlund, *supra* note 19, at 20–21 (“It is surely true that racial diversity within a workforce contributes both to stimulating diversity of perspectives and to connectedness and mutual respect among diverse workers. And these workplace dynamics in fact contribute to the very civic objectives that *Grutter* certified as compelling.”); *id.* at 24 (“Cooperation among diverse co-workers builds interpersonal bonds, combats stereotypes, and promotes understanding and empathy across racial lines. Indeed, the experience of working together may do these things more effectively . . . than the experience of attending college with diverse classmates.”).

88. *Grutter*, 539 U.S. at 330.

89. *Id.* at 331.

reality that public universities in particular are uniquely situated to confer public benefits onto the populous as a whole and onto our system of democracy when their educational efforts are successful. These special features of public university education are inextricable from *Grutter's* reasoning, and it remains difficult to generalize from *Grutter's* diversity to a more general theory of diversity applicable beyond the educational context. Perhaps it is true that diversity is an inherent good anywhere that it can be achieved because diverse experiences always produce better ideas, better institutions, and better people. But even if true, it begs the question why the Court insisted on drawing such close connections between education and the value of diversity, and does not establish that diversity generally is sufficiently important to sustain the use of racial preferences when the success of a university's educational mission is not at stake.

2. The Displacement of Remedial Rationales

The limitations of *Grutter's* diversity rationale cannot be fully understood unless one acknowledges that diversity displaces other possible justifications for affirmative action. Justice Powell quite explicitly rejected the argument that remedying a history of societal discrimination should be considered a compelling interest.⁹⁰ *Grutter's* marginalization of remedial rationales is more circumspect. For example, the Court acknowledges Michigan Law School's expressed purposes to use affirmative action to foster minority inclusion and to relieve its minority students' experiences of racial isolation, but nowhere within its list of diversity's educational benefits does either purpose appear.⁹¹ Instead, *Grutter* affirms only

90. See *supra* notes 37–39 and accompanying text. 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 *Regents of California v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall, and Blackmun, J.J., dissenting) ("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 . . .").

91. In *Fisher II*, Justice Kennedy offers some overture to the concern that the pursuit of diversity may be necessary to combat racial isolation. *Fisher v. Univ. of Texas at Austin* ("Fisher II"), No. 14-981, slip op. at 14–15 (June 23, 2016) (noting that the university had "put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation"). Kennedy had previously argued that "[a] compelling interest exists in avoiding racial isolation." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring). The Court itself, however, has never elevated the avoidance of racial isolation to the status of a compelling governmental interest.

instrumental benefits to the university and a sense of democratic order and legitimacy that relies on the success of public education.

Some legal scholars have excused diversity's apparent divergence from remedial rationales, arguing in effect that, by suppressing remediation as a justification for affirmative action, *Grutter* ultimately serves egalitarian ends, permitting civil rights law to hold fast to foundational values of integration and antisubordination, without garnering the hostility and opposition that is often directed at remedial rationales. Professor Estlund has identified as "*Grutter*'s innovation" its discovery of a forward-looking rather than remedial rationale for integration, in which educational diversity is critical to securing "the possibility of an integrated future."⁹² Constitutional scholar Reva Siegel has argued that the diversity rationale "disguises . . . antisubordination values" because it permits affirmative action "when the state is seeking to inhibit or break down caste relations, so long as the state acts in a fashion that will not unduly exacerbate race consciousness or arouse the resentment of majority group members."⁹³ Siegel finds in *Grutter* a reformulation of diversity to embody the government's public interests "in ensuring that no group is excluded from participating in public life and thus relegated to outsider, or second-class, status" and "in cultivating the confidence of all citizens that they have the opportunity to serve in positions of national leadership."⁹⁴

These interpretations describe *Grutter* as an expression of the Court's commitment to racial integration, which these scholars depict as either elliptical or fortuitously disguised. The argument, however, has its limits. Distributively, equal opportunity is not a condition of the government's reliance on the Court's diversity rationale, and, even if one interprets *Grutter*'s ambiguities in favor of an antisubordination reading of the decision, it is equally true that *Grutter* transforms the very antisubordination principles that it masks. The decision does not just "distance[] itself from group-based justifications" for affirmative action;⁹⁵ it displaces them in favor of a rationale that turns on the instrumental value of diversity to the educational institution and the public that it serves. The current doctrine's failure to distinguish between exploitative and egalitarian uses of diversity (discussed in the next section) is a direct consequence of

92. Estlund, *supra* note 19, at 16–17.

93. Siegel, *supra* note 1, at 1540.

94. *Id.* at 1539.

95. *Id.* at 1539. In *Grutter*, 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. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

this shift; the doctrine now focuses on whether a university's pursuit of diversity advances the university's educational mission, not on whether a university's enrollments reflect an effort to provide equal opportunity.

The Court did find support for its instrumental logic in some of the canons of civil rights law, citing *Brown v. Board of Education*⁹⁶ and *Plyer v. Doe*⁹⁷ for the principles that “education . . . is the very foundation of good citizenship,”⁹⁸ and is essential to “sustaining our political and cultural heritage” and to “maintaining the fabric of society.”⁹⁹ The Court omitted reference, however, to the remedial logic of those decisions: that education must be provided to all on an equal basis in order to avoid the stigma and social disadvantage to minority students that accompanied educational segregation.¹⁰⁰ By contrast, *Grutter* portrays the distributive benefits of affirmative action for historically underrepresented groups not as ends in themselves but as the means to ends that it describes as the benefits that flow from educational diversity.

Interestingly, the Court interpreted remediation to be integral to the design of statutory law, when it approved of disparate impact liability and voluntary affirmative action under Title VII.¹⁰¹ For example, in *Griggs v. Duke Power Co.*,¹⁰² the Court held that employment practices “neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment

96. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

97. *Plyer v. Doe*, 457 U.S. 202 (1982).

98. *Grutter*, 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493).

99. *Id.* (quoting *Plyer*, 457 U.S. at 221).

100. *See, e.g., Brown*, 347 U.S. at 493 (discussing the importance of public education to “good citizenship” and the impartation of “cultural values” in order to explain that education is such a critical public benefit that “where the state has undertaken to provide it, [it] is a right which must be made available to all on equal terms”); *id.* at 494–95 & n.11 (citing research regarding the psychology of racial stigma to conclude that “[s]eparate educational facilities are inherently unequal”). *See also Plyer*, 457 U.S. at 228–29 (holding that the state failed to justify exclusion of undocumented children from the public schools, notwithstanding its argument that the denial of educational opportunities to some children would raise the quality of education for others); *id.* at 234 (Blackmun, J., concurring) (arguing that the denial of education placed undocumented children “at a permanent political disadvantage” akin to the “second-class social status” conferred by denying an individual the right to vote).

101. I mean “remedial” here in a broad sense: not the remedying of specific acts of past discrimination by the same institution that now seeks to pursue diversity, but the remedying of a history of discrimination that may extend well beyond the institution’s own conduct.

102. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Justice Powell considered and rejected in *Bakke* the argument that the logic of *Griggs* sustained the remedial use of affirmative action under equal protection. *Regents of California v. Bakke*, 438 U.S. 265, 308–09 n.44 (1978).

practices.”¹⁰³ The *Griggs* Court determined that the defendant power company’s reliance on standardized tests and high school graduation violated Title VII because those criteria produced a racially disproportionate impact against African Americans and could not be justified by a showing of job relatedness and business necessity.¹⁰⁴ In reaching this conclusion, the Court surmised that a history of discrimination in the state’s public school system was likely to blame for the disparity.¹⁰⁵

In a sense, *Grutter* is the opposite of *Griggs*. Rather than compelling Michigan Law School to justify its reliance on undergraduate GPAs and LSAT scores, which it conceded would not alone produce sufficient diversity, the Court permitted the law school to consider race and in fact to weigh race differently, alongside other factors, on a candidate-by-candidate basis.¹⁰⁶ Indeed, Justice Thomas argued in dissent that the law school implemented its affirmative action policy as a “solution to the self-inflicted wounds of this elitist admissions policy” which the law school “kn[ew] produce[d] racially disproportionate results.”¹⁰⁷ *Grutter* does not require universities suffering a lack of diversity in their enrollments to find alternative race-neutral criteria that would produce no disparate impact, and it does require universities to prove that race-neutral criteria, such as GPAs and LSAT scores, under-predict future performance before they may supplement them by considering an applicant’s race.¹⁰⁸ *Griggs* appears closest to *Grutter* when we consider that both require the defendant to demonstrate necessity in order to avoid liability for discrimination. It is farthest from *Grutter* when we consider the remedy that each upholds: *Griggs* would have employers perfect the facially neutral criteria that they use to make employment decisions so that those criteria can be applied to all persons *in just the same way* without producing unlawful disparate impacts; *Grutter* would have universities engage in a holistic review in which the weighting of particular admissions factors, including race, *adjusts to the individual* based on the university’s educational needs.

103. *Griggs*, 401 U.S. at 430.

104. *Id.* at 431.

105. *Id.* at 430 (“This consequence [of a racially disproportionate impact] would appear to be directly traceable to race. . . . Because they are Negroes, petitioners have long received inferior education in segregated schools. . . .”).

106. *Grutter*, 539 U.S. at 326–30 (describing how the law school’s flexible admissions approach provided all candidates individualized consideration).

107. *Id.* at 350 (Thomas, J., dissenting).

108. *Cf. Ricci v. DeStefano*, 557 U.S. 557 (2009) (holding under Title VII that an employer may not take a race-based action to avoid causing a racially disparate impact without a strong basis in evidence that the employer had violated the law).

The Court also endorsed a broadly remedial approach in its Title VII affirmative action decisions. First, in *United Steelworkers of America v. Weber*,¹⁰⁹ the Court held that the statute permitted the voluntary implementation of a race-based affirmative action plan that reserved openings for African Americans in a craft training program in order to correct a “manifest racial imbalance in [a] traditionally segregated job categor[y].”¹¹⁰ The Court reasoned that “an interpretation of [Title VII] that forbade all race conscious affirmative action would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.”¹¹¹ That purpose, it concluded, was the “break[ing] down of old patterns of racial segregation and hierarchy.”¹¹² For this reason, the Court rejected the notion that an employer must itself admit to having engaged in discrimination or must have an arguable basis to believe that it had discriminated before it may lawfully use racial preferences to correct a manifest imbalance in its labor force.¹¹³ Later, in *Johnson v. Transp. Agency*,¹¹⁴ the Court reaffirmed *Weber* and applied its remedial rationale to uphold an affirmative action program in which sex was considered as a “plus” factor when evaluating candidates for promotion.¹¹⁵ By noting similarities between the employer’s program and the “Harvard Plan” approved by Justice Powell in *Bakke*,¹¹⁶ the Court assured that the remedial logic of *Weber* would survive under statutory law even if the Court’s growing distaste for quota-based programs threatened the lawfulness of set-aside programs such as the one upheld in *Weber*. The *Weber-Johnson* rationale under Title VII is, therefore, ultimately based on the very principle of remedying societal discrimination that Justice Powell had rejected in *Bakke*, and that has since become anathema to equal protection.¹¹⁷

109. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

110. *Id.* at 197.

111. *Id.* at 202 (citation omitted).

112. *Id.* at 208.

113. *Id.* at 210–12 (Blackmun, J., concurring) (failing to persuade the majority that voluntary racial preferences should be lawful under Title VII only when they are used in response to “arguable violations” of the statute).

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

115. *Id.* at 656.

116. *Id.* at 638 (“The Plan thus resembles the ‘Harvard Plan’ approvingly noted by Justice Powell . . .”).

117. *See, e.g., City of Richmond v. J.A. Croson. Co.*, 488 U.S. 469, 498–99 (1989) (criticizing the city’s “generalized assertion” that its plan remedied past discrimination as “sheer speculation” that “would give local governments license to create a patchwork of racial preferences based on statistical

Justice Powell's *Bakke* opinion preceded the *Weber* decision by one year. Together, they set the stage for a sharp divergence between the manner in which Title VII and the Constitution address affirmative action.¹¹⁸ One now permits affirmative action to be used to remedy the effects of our society's history of discrimination; the other permits only those affirmative action programs that fulfill the government's compelling interest either in remedying its own prior discrimination or in obtaining the educational benefits of diversity.¹¹⁹ One now treats voluntary affirmative action for broadly remedial purposes as a *fulfillment* of the law's objectives; the other permits affirmative action to be justified by diversity because diversity is a constitutionally compelling *exception* to equal protection's preference for formally equal treatment.

The contrast between equal protection and Title VII makes clear that, doctrinally if not always rhetorically, *Grutter* sets diversity adrift from any principle of equal opportunity. What Estlund depicts as *Grutter's* innovation is essentially its recognition that the instrumental and public benefits of diversity may occur even when diversity is not pursued in order to remedy a history of discrimination. This approach renders the diversity rationale applicable, at least in theory, in any social context where an organization and the public stand to gain significant benefits; a firm, for example, would be permitted to use racial preferences to pursue diversity even when it exhibits no history of discrimination and does not seek to integrate a traditionally segregated job category. It is equally true, however, that demographic diversity will not always yield benefits prized by *Grutter*, and many of those benefits can be secured without any change in an institution's demographic diversity if the institution implements policies that emphasize viewpoint diversity and empower the participation of currently underrepresented members. Ultimately, if one admits that numerical diversity can be severed from diversity's qualitative benefits, *Grutter's* rationale collapses around itself. The only means to rehabilitate *Grutter* while acknowledging that reality is to articulate a theory of equal opportunity that explains the uniqueness of diversity's contribution

generalizations"). In addition to *Croson*, the Court several times rejected remedying societal discrimination as a constitutionally compelling interest in multiple decisions issued between *Bakke* and *Grutter*. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

118. See Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 238–46 (2014) (discussing divergence between the affirmative action doctrines of Title VII and equal protection).

119. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding court ordered affirmative action to remedy Alabama's employment discrimination in the hiring of state troopers (cited approvingly by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995))).

independently of mechanisms that seek primarily to impact the demographics of an institution's membership.

3. The Failure to Distinguish Exploitative from Egalitarian Ends

In the limited context of affirmative action in university admissions, the Court has faced no urgent need to distinguish exploitative from egalitarian uses of diversity. When a public university pursues student body diversity by granting preferences to underrepresented minority students, the university's self-interest coincides with egalitarian ends. The university provides minority students with coveted educational opportunities while simultaneously serving its own self-interest. It is for precisely this reason that, when the Court gave constitutional weight to diversity's educational benefits, it also acted in concert with the egalitarian objective of extending valuable opportunities to racial minorities. The relationship between the university's interest and an integrated student body is so fundamental to the Court's understanding of diversity that *Grutter* and the *Fisher* decisions ignore the possibility that these interests could diverge.

But of course they can and often do diverge. In the next Part, we will see how sharply institutional and egalitarian interests can diverge even when racial preferences are used to award positions to racial minorities. In the business context, tensions are evident between self-interested, or exploitative, uses of diversity and egalitarian uses of diversity. To *Grutter*, the possibility of such conflict is invisible. Yet, even in the educational context, an affirmative action policy that awards minority students inferior opportunities within the institution may fulfill some of the educational and public benefits of diversity, as described by *Grutter*, but it would deny those individual applicants equal opportunity. It is true that *Grutter*'s construction of equal opportunity differs from formally equal treatment in that it allows some variation in the weight given to different admissions factors precisely so that each person's potential contribution to the university may be fully recognized. However, the Court did not expressly acknowledge that a university may require the latitude to consider an applicant's race *in order to grant her equal opportunity*. Ironically, Justice Powell had recognized that "fair appraisal of each individual's academic promise in light of some cultural bias in grading or testing" could have constituted a legitimate purpose for the use of racial classifications because "it might be argued that" in such a process "there is no 'preference' at

all.”¹²⁰ The medical school, however, did not raise the argument, and Justice Powell found it otherwise incompatible with the set-aside structure of the school’s special admissions program.¹²¹ In *Grutter*, the Court did not revisit this argument as a possible justification for the law school’s admissions program.

According to *Grutter*, a university’s consideration of race is constitutional because it signals that “the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity,”¹²² not because it actually serves as a means of perfecting the process of evaluating academic potential by offsetting standards that are marred by persistent racial disparities. *Grutter*’s rationale also restricts consideration of whether a policy provides equal opportunity to the question of whether it awards opportunities on an equal basis (for example, after each applicant has received individualized consideration) rather than asking whether each applicant awarded an opportunity has received an *equal* opportunity. One must look beyond the moment of selection for an opportunity in order to assess the relative quality of opportunities; in other words, one must look beyond the selection device of affirmative action to assess whether the opportunities conferred prove to be substantively equal.

Grutter does not require a university to demonstrate that the opportunities that it grants through its affirmative action program are substantively equal, regardless of a person’s race. It warns that a university’s use of racial classifications will not be sustained if the university seeks merely “token numbers of minority students.”¹²³ But it overlooks a different kind of tokenism than simply admitting minority students in minute numbers; it overlooks tokenism in which minority students are admitted to contribute to the educational environment provided by the university but not necessarily to receive an equal education or to benefit equally from the education that they do receive. Again, in *Grutter*, there is little room to entertain this question. Seats within the law school’s entering class may reasonably have been presumed to be substantively equal, and there was no evidence that they were not. *Grutter*, however, puts no pressure on the law school (or other universities) to ensure that they will be. It simply leaves universities to articulate the reasons for which they require student body diversity—as these reasons relate to their educational mission—and, in this way, the decision puts exploitative, or self-interested,

120. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

121. *Id.*

122. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

123. *Id.* at 333.

uses of diversity before egalitarian ones without ever acknowledging its having done so.

4. The Failure to Theorize Beyond a Numerical 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"¹²⁴ and the most congenial to the term's association with "representation" and "integration." 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. It would be a gross oversimplification, however, to say that *Grutter* and its progeny care only about end-state diversity. As the Court has recently reminded us in *Fisher II*, "the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students," but in "obtaining 'the educational benefits that flow from student body diversity.'"¹²⁵ Yet, as discussed above, the Court repeatedly looks to the demographics of university enrollments—and not the university's qualitative educational achievements—when determining whether a university's reliance on race comports with narrow tailoring.¹²⁶ Thus, although *Grutter* prizes diversity for its qualitative benefits, its doctrine expresses a *diversity-as-end-state* approach, in which the constitutionality of a university's affirmative action program hinges on whether racial preferences are necessary in order to achieve a critical mass of underrepresented students.

It is true that *Grutter* treats end-state diversity as a means to achieve qualitative institutional and public benefits, but its articulation of the relationship between demographics and those benefits is razor thin. It describes diversity's benefits as if they passively "*flow* from a diverse student body" and describes "critical mass" as the point at which one should expect the benefits of diversity to accrue.¹²⁷ The Court's rhetoric alternates indiscriminately between a formulation that describes the

124. *Difference Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/difference> (last visited Aug. 15, 2016); *Variety Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/variety> (last visited Aug. 15, 2016).

125. *Fisher v. Univ. of Texas at Austin* ("Fisher II"), No. 14-981, slip op. at 11 (U.S. June 23, 2016) (citing *Fisher v. Univ. of Texas at Austin* ("Fisher I"), 133 S. Ct. 2411, 2424 (2013)).

126. *See supra* Part I.A.

127. *Grutter*, 539 U.S. at 343 (emphasis added).

government's compelling interest as an interest in securing diversity's benefits and one that describes diversity itself as the compelling interest.¹²⁸ But between the enrollment of a "meaningful number" of minority students and the achievement of qualitative improvements to the university's educational mission looms an immeasurable distance. The Court never discusses whether and to what extent diversity's benefits are severable from the numerical end-state that it names "critical mass." American universities, however, could hardly tolerate the suggestion that, whenever the struggle to achieve critical mass is lost, the goal of preparing students for life in an increasingly diverse society is also forfeit. Nor should they accept the fallacy that whenever critical mass is achieved, the work of securing an inclusive and broadly enriching educational environment is also complete.

The Court has never considered what additional steps may be required for a university's achievement of student body diversity to produce educational benefits such as breaking down racial stereotypes or 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 psychologists and educational theorists have warned, moreover, that interactions between individuals of different backgrounds may not yield educational benefits unless structured by institutional intervention.¹²⁹ Curricular design is one common approach to the promotion of diversity in education,¹³⁰ and diversity coursework has been linked to an institution's success in realizing the educational benefits of

128. *Compare 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)); *id.* 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 benefits that flow from a diverse student body.*" (emphasis added)); *id.* at 383 ("Today, we hold that the Law School has a *compelling interest in attaining a diverse student body.*" (emphasis added)), *with 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)).

129. 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).

130. *Id.* ("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).

student body diversity.¹³¹ To date, the Court has not addressed interactions between numerical diversity and non-affirmative action based policies, but doing so is critical if indeed the Court is sincere in its statement, in *Fisher II*, that the *educational benefits* of diversity are the constitutionally compelling interest.¹³² Whether or not such benefits flow from end-state diversity, they may also be achievable through means that do not involve adjusting the demographic composition of the student body, and, even if numerical diversity plays an irreplaceable role, the coordination of other policies may affect the precise threshold at which numerical diversity can be converted into instrumental value.

To be sure, the qualitative benefits articulated in *Grutter* transcend numerical diversity. Professor Devon Carbado has observed that *Grutter* records eight possible benefits of diversity, including those discussed above.¹³³ Their role, however, in Justice O'Connor's majority opinion is definitional rather than operational. In other words, *Grutter* does not condition reliance on its diversity rationale on proof that the university has achieved any of the decision's enumerated educational benefits. Rather, it authorizes universities to use racial preferences to achieve a critical mass of underrepresented minority students with the understanding that those benefits will flow from numerical diversity. The Court has never considered whether student body diversity must be complemented by other institutional practices—such as diverse faculty hiring, a pro-diversity curriculum, or other structures of conflict resolution, mentorship or social networking—in order to realize those benefits. Nor has it considered whether the presence or absence of such practices should impact a university's constitutional authority to use racial preferences in order to enhance student body diversity.

131. 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 RES. 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).

132. *Fisher v. Univ. of Texas at Austin* ("Fisher II"), No. 14-981, slip op. at 11 (U.S. June 23, 2016).

133. Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1145–46 (2013) (listing those benefits as "[d]iversity to promote speech and the robust exchange of ideas . . . to effectuate the inclusion of underrepresented students . . . to change the character of the school . . . to disrupt and negate racial stereotypes . . . to facilitate racial cooperation and understanding . . . to create pathways to leadership . . . to ensure democratic legitimacy . . . [and] to prevent racial isolation and alienation").

By contrast, university officials 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 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 structured by appropriate curricular design and other forms of institutional intervention.¹³⁴ Recent student protests at the nation's universities have rallied against racial inequality both on and off university campuses. Rather than responding to student outcries simply by promising to increase minority enrollments, university officials have instead promised diversity officers, diversity faculty hiring, and increased funding for diversity related university programs.¹³⁵ These developments show the Court's equal protection jurisprudence to be practically and politically naïve, even in the educational context where it was forged.

* * * * *

By distinguishing diversity from remediation and prioritizing the instrumental value of diversity, *Grutter* altered the conceptual landscape. Diversity is not merely a set of statistics demonstrating integration; but the achievement of an educational environment presumed to qualitatively enhance the educational experience. The Court has yet to recognize how its own diversity rationale has subtly shifted 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*. Its equal protection jurisprudence has thus converted numerical diversity, which was once an end-state, into a mere starting point; and yet the Court itself has never left this starting point.

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

Grutter portrays diversity as a “demand side” rationale.¹³⁶ The decision emphasizes diversity's instrumental relationship to downstream institutional and public benefits, and it attempts to render diversity's benefits concrete by appealing to a market-based understanding of their

134. See *supra* notes 129–31 and accompanying text.

135. See *supra* note 3 and accompanying text.

136. Issacharoff, *supra* note 27, at 677 (describing diversity as a “demand side” rationale proposed to answer the question why educational institutions should seek to draw students from a diverse pool).

value. Managerial discourse similarly depicts workforce diversity as an organizational asset to be managed and exploited for the organization's benefit. Professor Estlund has aptly 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.”¹³⁷ Managerial discourse and legal discourse both conceive of diversity by assuming a forward-looking, nonremedial perspective and adopting an instrumental logic according to which diversity's value is defined by the institutional achievements that it enables. Yet the description is, in a sense, misleading. Managerial discourse, for example, does not treat diversity as a static resource, but speaks of “managing diversity” as a strategy for organizational success of which workforce diversity is only one component.

Grutter's similarities with managerial diversity also expose its weaknesses. Demand side rationales skew toward putting institutional interests before public interests, and exploitative uses of diversity before egalitarian ones. *Grutter's* educational context moderates these difficulties and obscures their need for a doctrinal solution. In managerial discourse, these difficulties are more stark. And yet, managerial diversity also has a depth that *Grutter's* diversity rationale 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, *Grutter's* thin description of diversity collapses the benefits of diversity with the achievement of a demographically defined end-state. In many ways, managerial diversity begins where *Grutter's* articulation of diversity ends, by taking demographic diversity as its starting point and then asking how such diversity can be converted into organizational success. For these reasons, comparing *Grutter's* diversity rationale with managerial diversity can provide important lessons for legal discourse about diversity's dangers and its possibilities.

A. DISTINGUISHING MANAGERIAL DIVERSITY FROM CIVIL RIGHTS LAW

The distinction between managerial diversity and civil rights law discussed here is a normative one. The distinction made in the next section between diversity management—the set of organizational practices through

137. See Estlund, *supra* note 19, at 4.

which the managerial conception of diversity is operationalized—and affirmative action is a practical one. Managerial diversity, with its intense focus on institutional performance, illustrates how the pursuit of diversity sometimes undermines equal opportunity. This Section will show why antidiscrimination law must draw a distinction between exploitative and egalitarian uses of diversity if the doctrine is ever to be extended beyond university admissions. It will also show that diversity’s true contribution to equal opportunity looks beyond affirmative action to the possibility of continuing organizational investment in each person’s growth and achievement.

1. An Introduction to Managerial Diversity

Passionate rhetoric about the dangers and opportunities inherent in workforce diversity emerged in the late 1980s in managerial literature and eventually grew to prominence throughout the business community.¹³⁸ Early theorists of managerial diversity viewed diversity as the inevitable consequence of a shift in workforce demographics that would bring new challenges to American businesses not faced when they had managed relatively homogeneous workforces.¹³⁹ These predictions, which ultimately proved false,¹⁴⁰ intertwined with the civil rights retrenchment of the Reagan administration, which led a backlash against “affirmative action” and “equal opportunity.”¹⁴¹

Managerial experts quickly set out to distinguish diversity management from legal compliance. Resistance to the affirmative action policies of the prior generation transformed from resentment of race-based allocations of opportunity to a perception that civil rights enforcement had

138. See Edelman et al., *supra* note 23, at 1609–15 (chronicling the rise of diversity rhetoric in managerial literature).

139. 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 17, at 141–42 (describing the exaggerated predictions of *Workforce 2000* as a catalyst for the spread of diversity management); Kelly & Dobbin, *supra* note 17, at 974 (“EEO/AA and diversity specialists seized *Workforce 2000*, with its pragmatic, future-oriented message, to increase interest in their own programs.”).

140. Edelman et al., *supra* note 23, at 1612–14 (describing how, although “[t]oday, even the Hudson Institute has acknowledged that its predictions were incorrect,” *Workforce 2000* nevertheless “appears to have spawned diversity rhetoric by constructing a threat regarding a major change in the demographics of the workforce”). See also RICHARD W. JUDY & CAROL D’AMICO, *WORKFORCE 2020: WORK AND WORKERS IN THE 21ST CENTURY*, xiii–xv (1997) (admitting flawed predictions and taking aim at the “diversity industry” for misreading certain portions of *Workforce 2000*).

141. DOBBIN, *supra* note 17, at 16–17, 133–38; Kelly & Dobbin, *supra* note 17, at 978–80.

lowered employment standards, introduced organizational inefficiencies, and upset profit-taking.¹⁴² In general, managerial experts and corporate officers distinguished managerial diversity from civil rights and affirmative action “by emphasizing business goals.”¹⁴³ They also began to portray the law as coercive and compliance as an exercise in conformity, drawing organizations away from the productive and creative possibilities inherent in workforce diversity.¹⁴⁴ This shift aided managerial experts and human resources professionals to maintain organizational influence during an era of civil rights retrenchment,¹⁴⁵ and it has led the ethos of diversity to become deeply infused into corporate culture. Fundamentally, however, the new diversity rhetoric of the 1980s and 1990s also reflected changing assumptions about the prevalence of discrimination and the inevitability of workforce diversity.

For example, in a 1990 *Harvard Business Review* article entitled “From Affirmative Action to Affirming Diversity,” pioneering 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 businesses had become 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.”¹⁴⁶ He described affirmative

142. See Edelman et al., *supra* note 23, at 1618–19 (discussing the move toward considering diversity a business resource). See also, e.g., DAVID A. THOMAS & ROBIN J. ELY, MAKING DIFFERENCES MATTER: A NEW PARADIGM FOR MANAGING DIVERSITY (1996), reprinted in HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY 33, 34 (2001 ed.) [hereinafter MANAGING DIVERSITY] (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 3, 25–26 (1994) (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”).

143. Kelly & Dobbin, *supra* note 17, at 975. See also *supra* note 23 (citing examples).

144. THOMAS & ELY, *supra* note 142, at 34 (arguing that “a more diverse workforce . . . will increase organizational effectiveness . . . lift morale, bring greater success to new segments of the marketplace, and enhance productivity”).

145. See DOBBIN, *supra* note 17, at 138–43. See also Kelly & Dobbin, *supra* note 17, at 969–71.

146. R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar.–Apr. 1990, at 4.

action as “an artificial, transitional intervention” meant to “correct an imbalance, an injustice,” but that ultimately lacked the organizational focus necessary to realize diversity’s benefits.¹⁴⁷ The failure of corporations to fully exploit the potential of workforce diversity was, according to Thomas, a function of their anxiety about the potential impact on 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 or her potential” so that the organization may achieve “the unexpected upside of diversity.”¹⁴⁸ 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.¹⁴⁹

Similarly, in 1996, 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.”¹⁵⁰ The authors attributed this mode of thinking to the dominant “discrimination-and-fairness” paradigm that shared with “traditional affirmative-action efforts” the assumption that social prejudices required firms to focus their diversity efforts on minority recruitment and retention.¹⁵¹ The authors argued that it ultimately stifled productivity by emphasizing “equal treatment” instead of the diversification of work opportunities and the “leveraging” of diversity as a business resource.¹⁵² The authors argued that, in “the competitive climate of the 1980s and 1990s,” discrimination-and-fairness largely gave way to an “access-and-legitimacy” paradigm in which “new professional and managerial opportunities for women and people of color” were created by firms that sought to exploit their employees’ “cultural differences” through strategies of “market segmentation.”¹⁵³ The access-and-legitimacy paradigm thus replaced equal treatment with marketing practices that too

147. *Id.* at 2–4.

148. *Id.* at 12.

149. 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 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).

150. THOMAS & ELY, *supra* note 142, at 35.

151. *Id.* at 38–39.

152. *Id.* at 40.

153. *Id.* at 45.

often pigeonholed employees believed to possess “niche capabilities.”¹⁵⁴ The authors advocated that firms adopt a “learning-and-effectiveness paradigm for managing diversity” which would consist of “incorporat[ing] employees’ perspectives into the main work of the organization and to enhance work by rethinking primary tasks and redefining markets[,] . . . strategies[,] . . . business practices, and even cultures.”¹⁵⁵ Thus, Thomas and Ely conceived of diversity management as an interactive process in which individual’s cultural differences from the firm’s norms necessitated concrete adaptive responses such as “the careful design of jobs” as well as long-term investments in the transformation of firm culture necessary to instill in all persons a sense of their organizational value.¹⁵⁶ The authors’ influential account powerfully distinguished between “financial measures” that sought merely to leverage the market value of cultural difference and measures that invested in the value of diversity by remaking the structure of work in order to promote “organizational and individual growth.”¹⁵⁷

Today, the business case for diversity has achieved hegemonic status, as the world’s most respected management consultants and financial publications accept without question the value of organizational diversity.¹⁵⁸ However, as the articles discussed above show, firms’ orientations toward diversity management can take varying forms, and

154. *Id.* (“Whereas discrimination-and-fairness leaders are too quick to subvert differences in the interest of preserving harmony, access-and-legitimacy leaders are too quick to push staff with niche capabilities into differentiated pigeonholes without trying to understand what those capabilities really are and how they could be integrated into the company’s mainstream work.”).

155. *Id.* at 49.

156. *Id.* at 52–54.

157. *Id.* at 35. As sociologist John Skrentny has explained, employers “talk about ‘leveraging’ diversity” when they act upon the belief “that some races can do things that other races cannot, and they their strategic management of race can therefore affect performance and profits.” SKRENTNY, *supra* note 8, at 38. For Thomas and Ely, the shift from access-and-legitimacy to learning-and-effectiveness required firms to internalize diversity’s lessons by adapting business goals and redefining the modalities of work.

158. 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 Payoff From Top-Team Diversity?*, MCKINSEY Q., Apr. 2012 (observing that companies high in board diversity received greater returns on investment than low-diversity firms); FORBES INSIGHTS, GLOBAL DIVERSITY AND INCLUSION: FOSTERING INNOVATION THROUGH A DIVERSE WORKFORCE 2, http://images.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf (describing diversity as a “key driver of innovation” and a “critical component” of success on a “global scale”); MCKINSEY & CO., GENDER DIVERSITY IN TOP MANAGEMENT: MOVING CORPORATE CULTURE, MOVING BOUNDARIES 7 (2013) (“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.”).

within those variations much is at stake regarding the relationship between diversity and equal opportunity. To date, firms have undertaken diversity measures without clear legal guidance. In the over a quarter century since the industry of diversity management first emerged, there has been little productive engagement with the managerial discourse on diversity by legal scholars.¹⁵⁹ To the contrary, strong tensions have developed between the two, as managerial discourse has tended to depict civil rights law as a source of artificial constraint undermining the success of the firm and legal discourse has sounded the alarm that diversity management may result in sham and symbolic compliance strategies that undermine the goals of civil rights law.¹⁶⁰

2. The Conflict Between Managerial Diversity and Civil Rights

In their seminal 2001 survey of diversity rhetoric, legal sociologist Lauren Edelman and her colleagues collected a chorus of voices from the managerial literature and identified key trends. Their work demonstrated that managerial discourse had absorbed the conservative critique of civil rights law as “*artificial*” and inefficient, in contrast to diversity management, which it depicted as “*natural*,” dynamic, and creative.¹⁶¹ The authors whose work Edelman and her colleagues analyzed depicted diversity as a concept that looks “beyond the achievement of [a] mere statistical goal” to emphasize the impact of workforce diversity on organizational culture and creative potential.¹⁶² At some times, these authors described diversity as an advancement over affirmative action and civil rights enforcement, and at other times as an advancement over “equal opportunity.” For example, one author distinguished “[m]anaging or valuing diversity” from “the conventional approach to equal opportunities” which focused on “the achievement of [a] mere statistical goal.”¹⁶³ Another author wrote that “[w]hile the doors of opportunity were opened to many who were previously excluded, new hurdles were created by the unnatural focus on special target groups” because that focus communicated to “white managers that standards were being lowered to accommodate minorities and women.”¹⁶⁴ Finally, one voice in this chorus summarized the

159. *But see* Estlund, *supra* note 19 (arguing that similarities between the constitutional concept of diversity and managerial diversity could provide new support for integrative workplace measures).

160. *See, e.g.*, Edelman et al., *supra* note 23. *See also* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASHINGTON L. REV. 1 (2011).

161. Edelman et al., *supra* note 23, at 1620.

162. *Id.* at 1621 (alteration in original) (internal quotation marks omitted).

163. *Id.* (internal quotation marks omitted).

164. *Id.* (internal quotation marks omitted).

“punchline” of a 1994 volume collecting fourteen articles on managerial diversity by stating that “using diversity as a process to be managed unleashes performance energy that was previously wasted in fighting discrimination.”¹⁶⁵ Thus, as showcased by Edelman and her colleagues, managerial discourse viewed civil rights enforcement as both constraining and obsolete, and it sought to shift organizational focus from the statistical inclusion of underrepresented groups to the task of rendering workforce diversity a productive business resource for the revitalization of organizational teamwork and creativity.

Edelman and her colleagues drew powerful conclusions from their survey, looking below the surface of the managerial literature’s rhetoric to find deeper tensions between managerial diversity and civil rights norms. First, they argued that “diversity rhetoric embraces and yet transfigures the legal ideals embodied” in civil rights law because it “carries forth the civil rights legacy” but through the “curious paradox” of defining diversity in terms that seem to equate “legal” and “nonlegal” social statuses.¹⁶⁶ Second, they argued that, by conceiving of diversity as a business resource, managerial discourse transformed “[d]iscrimination and exclusion” from moral and legal concerns to problems that “inhibit the firm’s ability to profit in a global and more diverse world.”¹⁶⁷ 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.¹⁶⁸ Ultimately, however, they argued that managerial diversity’s shift in focus from the remedial norms of civil rights law to business objectives resulted in the “managerialization of law”—a process whereby legal concepts “become progressively infused with managerial values” as organizational

165. William H. Vroman, *Review of Differences that Work: Organizational Excellence Through Diversity*, 8 ACAD. OF MGMT. EXECUTIVE 107, 108 (1994). See also Edelman et al., *supra* note 23, at 1621 (including a portion of Vroman’s statement).

166. Edelman et al., *supra* note 23, at 1590–91 (explaining that “diversity rhetoric . . . expands the conception of diversity so that it includes a wide array of characteristics not 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”).

167. *Id.* at 1618–19.

168. *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.”).

practices inform the meaning of legal compliance, blurring legal and organizational fields.¹⁶⁹ They concluded that, as a consequence, “[d]iversity bec[ame] conditional upon serving corporate interests rather than grounded in social justice,”¹⁷⁰ and they predicted that this process may penetrate legal institutions as it had managerial discourse and corporate practice.¹⁷¹ Thus, from their point of view, the efforts of managerial experts to distinguish diversity from civil rights come full circle when the managerial conception of diversity merges with and alters the legal conception.

169. Edelman et al., *supra* note 23, 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”). Professor Edelman’s body of 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. The Supreme Court has established that an employer’s use of antidiscrimination policies, anti-harassment policies, and grievance procedures may provide the basis for a defense to liability or punitive damages. *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 Constr. 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. Edelman has consistently shown that, despite judicial endorsement, these practices “may in fact operate to perpetuate discrimination.” *See, e.g.,* 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).

Courts continue to follow this logic in cases that explicitly involve diversity. For example, in *Whethers v. Nassau Health Care Corp.*, 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 362 (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).

170. Edelman et al., *supra* note 23, 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).

171. *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.”).

3. Managerial Diversity in the Present-Day

Historically, corporate leaders and managerial experts who advocate for diversity initiatives most frequently assert profit as the reason for diversity measures, not integration nor equal opportunity.¹⁷² Even when firms have asserted legal compliance as their motivation, they have often done so for diversity measures that address organizational debiasing and litigation avoidance but do not directly contribute to workforce integration.¹⁷³ Today, managerial diversity enjoys hegemonic status in the American workplace, providing a conceptual language through which concepts as disparate as equal opportunity and organizational creativity are filtered. Most large and mid-size employers engage in diversity management practices of one form or another, but, despite this, workforce integration statistics have remained relatively flat over the last several decades, and in some sectors have actually worsened.¹⁷⁴

Recent studies have confirmed that, even in our so-called “post-civil rights” and “post-racial” era, the business community’s pursuit of diversity’s instrumental benefits tends toward exploitative uses of workforce diversity and symbolic expressions of pro-diversity attitudes that do not necessarily increase workplace integration. Sociologist John Skrentny has observed that today 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.”¹⁷⁵ 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.”¹⁷⁶ Second, “racial signaling” represents the effort “to gain a favorable response from

172. For example, in their seminal study of the managerial literature, Edelman and her colleagues found that 50% of articles cited profit as a reason for organizational diversity, 19% cited legal compliance, and 30% cited fairness. Edelman et al., *supra* note 23, at 1619. *See also supra* note 158 and accompanying text.

173. *See, e.g.,* DOBBIN, *supra* note 17, 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”).

174. *See infra* notes 214–220 and accompanying text.

175. SKRENTNY, *supra* note 8, at 10.

176. *Id.* at 11–12.

an audience through the strategic deployment of an employee's race."¹⁷⁷ Skrentny showed 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.¹⁷⁸ 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,"¹⁷⁹ and generates "new ideas, opinions, and perspectives."¹⁸⁰ While these statements resonate strongly with the more theoretical perspectives expressed in the managerial literature surveyed by Edelman, they are additionally significant in that they come from present-day, corporate leadership.

Legal scholar Nancy Leong has situated the practices observed by Skrentny within the more general phenomenon of "racial capitalism," or "the process of deriving social or economic value from the racial identity of another person."¹⁸¹ Leong argues that "racial capitalism is common" because "[i]n a society preoccupied with diversity, nonwhiteness is a valued commodity."¹⁸² Racial realism and racial capitalism are manifested when, for example, a major U.S. pharmaceutical retailer assigns African American employees to management positions in predominantly black neighborhoods where comparatively low sales volumes undermine managers' prospects for advancement.¹⁸³ 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.¹⁸⁴ The notion of

177. *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 case" 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").

178. See SKRENTNY, *supra* note 8, at 63–65.

179. *Id.*

180. *Id.* at 72–73.

181. Leong, *supra* note 25, at 2153.

182. *Id.* at 2154.

183. SKRENTNY, *supra* note 8, at 13 (offering this factual scenario—mirroring a federal lawsuit against Walgreen Co.—as an example of racial signaling). See also *infra* note 243 and accompanying text.

184. See *Hall v. Lowder Realty Co.*, 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).

assigning market value to racial identity is no doubt distasteful to many, harkening back to our nation's history of racial slavery. Leong's and Skrentny's work shows, however, that it is remarkably commonplace and often viewed in the business community as benevolent. These are, nevertheless, exploitative uses of race—no doubt some more disturbing than others—cloaked in the language of diversity.

The next section will discuss the practical and doctrinal consequences of distinguishing exploitative workplace diversity practices from affirmative action and other more egalitarian practices in the absence of a unifying principle of equal opportunity that can link both types of practices together.¹⁸⁵ First, however, we must examine the vision of equal opportunity that shines through the managerial discourse on diversity—a vision that legal scholarship has left unexamined until now.

4. From “Discrimination as Compliance” to “Diversity-as-Strategy”

I have argued elsewhere that legal scholarship has sometimes taken too restrictive a view of what constitutes unlawful discrimination. The threat of injurious discrimination and exploitation exists not only when employers act out of prejudice, whether or not they do so consciously, but also when employers self-interestedly pursue diversity in order to demonstrate legal compliance without sacrificing organizational objectives. 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. I have called this phenomenon “discrimination as compliance,” referring to workplace diversity initiatives and other voluntary compliance practices that, despite an employer's effort either to sincerely comply or to signal compliance with the law, result in discriminatory outcomes. Such discrimination occurs when “practices intended to limit the employer's liability or . . . to serve the employer's business interests . . . have the pernicious effect of perpetuating workplace inequality.”¹⁸⁶ Recognizing the inherent difficulties in distinguishing sincere from sham compliance efforts and the fact that even sincere but failed efforts result in the denial of equal opportunity, I have previously recommended that diversity initiatives should be subjected to the same legal scrutiny that would apply to any adverse employment action.¹⁸⁷ The

185. See *infra* Part II.B.

186. Rich, *supra* note 160, at 80–81.

187. *Id.* at 82–86.

law should seek to shape employer behavior and to support the development of effective workplace strategies for promoting minority inclusion by holding employers accountable for failed strategies that put institutional self-interest before equal opportunity. *And* plaintiffs should be required to demonstrate a causal relationship between diversity programs that, at best, award incremental employment opportunities on the basis of social status and adverse employment actions sufficiently severe to alter the terms and conditions of their employment.

That prior work engaged with Edelman's theory of legal endogeneity and, specifically, with her thesis that managerial diversity rhetoric exemplifies the managerialization of law.¹⁸⁸ My own research has found that this relationship is more complicated than it may have at first appeared. Doctrinally, as will be shown below, the penetration of managerial diversity into judicial rhetoric has been superficial; courts have not treated the pursuit of diversity as a defense to claims of reverse discrimination, and in some instances they have even treated an employer's interest in diversity as evidence of discrimination.¹⁸⁹

One could argue, nevertheless, that *Grutter* itself provides powerful evidence that Edelman's predictions were correct. The opinion reprises the arguments of corporate leaders that educational diversity is good for business because graduates must be equipped with the skills necessary to succeed in a global marketplace.¹⁹⁰ However, Edelman and her colleagues underestimated the degree to which the struggle between remedial and instrumental rationales for affirmative action was already internal to legal discourse before diversity rhetoric took hold in managerial discourse. As discussed above, Justice Powell had already sought to discredit remedial rationales, and he proposed diversity as a means to justify some limited use of race in student admissions without permitting universities to structure affirmative action programs around the "amorphous" concept of societal discrimination.¹⁹¹ He had also proposed, and in *Grutter* the Court accepted, a definition of diversity that combined what Edelman and her colleagues called "legal" and "nonlegal" statuses, just as managerial diversity does. Therefore, the very outcome that they considered anathema to civil rights—that a "white farm boy from Idaho [could be] considered as important to

188. *Id.* at 91–93.

189. *See infra* Part II.B.3.

190. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003). *See also supra* notes 61–63 and accompanying text.

191. *See supra* notes 37–39 and accompanying text.

firm diversity as the black inner-city kid from Los Angeles”¹⁹²—had already been approved by Justice Powell and was later adopted by *Grutter* to illustrate individualized consideration.¹⁹³

My research has also shown that prior studies have underestimated the extent to which managerial diversity incorporates a perspective on equal opportunity that, in some ways, makes important advances over existing civil rights law. 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,”¹⁹⁴ or “diversity as strategy.” David Thomas has used the latter phrase when recounting IBM’s experiences with diversity management during a dramatic turnaround staged in the 1990s under the leadership of then-CEO Louis Gerstner, Jr.¹⁹⁵ For Thomas, the phrase signified 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 described how, at IBM, those efforts began with the launching of a “diversity task force that became the cornerstone of IBM’s HR strategy” and later included other management structures designed to make “diversity a market-based issue.”¹⁹⁶ According to Thomas, 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 identity-based constituencies.¹⁹⁷ The company’s approach included significant

192. Edelman et al., *supra* note 23, at 1632.

193. *Grutter*, 539 U.S. at 333 (comparing regional and racial contributions to diversity); *Regents of California v. Bakke*, 438 U.S. 265, 316 (1978) (quoting Harvard College’s comparison of the diversity contributions of “[a] farm boy from Idaho” and “a black student”).

194. 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. BEHAV. 328 (2010). See generally TREVOR WILSON, *DIVERSITY AT WORK: THE BUSINESS CASE FOR EQUITY* (1997).

195. David A. Thomas, *Diversity As Strategy*, HARV. BUS. REV., Sept. 2004, at 1. In his memoir recounting the period, Gerstner himself downplayed his own role in promoting workforce diversity. LOUIS K. GERSTNER, JR., WHO SAYS ELEPHANTS CAN’T DANCE: LEADING A GREAT ENTERPRISE THROUGH DRAMATIC CHANGE 31 (2003) (“IBM’s HR department had been well recognized for its leadership in many areas, including diversity, recruitment, training, and executive development.”).

196. Thomas, *supra* note 195, at 1–2 (explaining that “diversity . . . is about more than expanding the talent pool” but includes a variety of ways in which a firm might recruit workforce diversity for market gains).

197. *Id.* at 3 (describing how the taskforces identified “communications, staffing, employee

commitments to increasing minority participation in leadership roles, improving mentoring for women globally,¹⁹⁸ and holding senior executives “accountable for spotting and grooming high-potential minority managers,” which resulted in the matriculation of women and minorities into executive positions.¹⁹⁹ Thomas’s account thus illustrates the potential for synergy between the management of diversity as a business resource and equal opportunity for marginalized workers, and the blueprint that he outlined continues to be advocated by leaders in the field of diversity management.²⁰⁰ As discussed above, this synergy has been a goal of some of the most influential proponents of diversity management nearly since its beginning.²⁰¹

The *diversity-as-strategy* model makes two important contributions to the current project. First, substantively, it describes organizational support for the professional growth and achievement of women and minority workers as an integral component of diversity management. This understanding can be rephrased to say that diversity includes a vision of equal opportunity that encourages organizations to take social status into account in order to adapt organizational policies and practices to support the professional growth and achievement of every worker. Ironically, prior studies have not discussed this aspect of managerial diversity as an area of confluence between managerial rhetoric and civil rights law, perhaps because the managerial literature itself has so often contrasted diversity management with civil rights and equal opportunity. This Article instead embraces diversity’s contribution to the project of equal opportunity by

benefits, workplace flexibility, training and education, advertising and marketplace opportunities, and external relations” as areas for “evaluation and improvement”). 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.

198. *Id.* at 6.

199. *Id.* at 6–9. Ultimately, IBM’s diversity efforts also coincided with dramatic increases in the number of female and minority executives worldwide. *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.”).

200. As one influential diversity consultant recently 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*. What is inclusion? I believe it means 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).

201. *See supra* Part II.A.1.

learning from diversity management as a strategic effort offering support for the growth and performance of all persons within the firm. Second, operationally, diversity-as-strategy emphasizes the coordination of organizational practices—of which recruitment, hiring, and promotion are only a part—in order to secure a range of specific goals.²⁰² It rejects the notion that end-state diversity is itself the goal or is sufficient to realize all other desirable goals.

Diversity-as-strategy comes into view only if one acknowledges three factors: (1) that the benefits of diversity can sometimes be separated from end-state diversity, meaning that they may be pursued by a variety of means independently of selection devices that take numerical diversity as their immediate objective, (2) that, regardless whether they can be *completely* separated from end-state diversity, success in achieving these benefits may require coordinated institutional effort, including after the moment of selection, and (3) 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 strict 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. For these reasons, it provides a useful template for envisioning diversity and equal opportunity independently of affirmative action.

B. DISTINGUISHING DIVERSITY FROM AFFIRMATIVE ACTION

Whereas managerial diversity and civil rights are normative concepts, diversity management and affirmative action describe organizational practices. Appreciating their differences illuminates a set of important practical and doctrinal concerns that are discussed in this Section.

202. Even when the objective is efficiency rather than equal opportunity, managerial experts who recommend that firms revise their diversity management practices through functionalist interventions, such as increasing data collection and self-analysis, reject the facile notion that workforce diversity is a sufficient condition for enhancing business performance. *See, e.g.*, Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. 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”).

1. Acknowledging the Breadth of Diversity Management Practices

Affirmative action generally refers to the assignment of positions or training opportunities using race- or other status-based preferences. Diversity management encompasses a broad assortment of organizational practices, some of which resemble affirmative action, but others which do not because they do not use preferences to assign opportunities or because the opportunities that they provide are more incremental and do not necessarily place an individual within a position or program.²⁰³ Sociologists Erin Kelly and Frank Dobbin have warned that the transition from “equal opportunity” and “affirmative action” to “diversity” has been to some degree a matter of “old wine in new wineskins.”²⁰⁴ Many of the institutional practices of the 1960s and 1970s were retained and simply repackaged using diversity rhetoric. Equal opportunity, or affirmative action, officers survived within firms because they transitioned from a legal compliance framework by “formalizing human resources management” and “invent[ing] diversity management, arguing that the capacity to manage a diverse workforce well would be the key to business success in the future.”²⁰⁵ What we call diversity measures in the workplace are, according to this view, largely a reflection of organizational inertia and self-preservation.

Diversity management did, however, develop some new practices and strategies. At one end of the spectrum are practices that are largely educational or symbolic, such as diversity training or the publication of diversity mission statements.²⁰⁶ At the other is the hiring or assignment of workers to particular responsibilities for “racial realist”-types of reasons, such as to market goods or services to minority communities.²⁰⁷ In the middle are practices that do not follow affirmative action’s model of assigning positions based on status preferences, but nevertheless take the social statuses of individual workers into account when assigning resources and opportunities. Such practices include work teams that exhibit

203. See, e.g., DOBBIN, *supra* note 17, 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”).

204. Kelly & Dobbin, *supra* note 17, at 978–80. See also DOBBIN, *supra* note 17, at 143 (describing the “rebranding” of “equal opportunity” as “diversity management”).

205. Kelly & Dobbin, *supra* note 17, at 961.

206. DOBBIN, *supra* note 17, at 144–48.

207. See *supra* notes 175–79 and accompanying text.

demographic diversity,²⁰⁸ race- or sex-matched mentoring,²⁰⁹ status-based affinity groups, flexible work schedules, subsidized childcare,²¹⁰ and even egg-freezing policies.²¹¹ All of these may be construed as diversity initiatives insofar as they are intended to realize organizational performance benefits given an already diverse workforce or to create an environment in which every person receives sufficient support to do his or her best work and to have his or her work contributions recognized.

2. Symbolic and Interaction Effects

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 improve recruitment and retention, to transform institutional culture without affecting demographics, or to secure business objectives. Precisely because diversity can be associated with so many different types of benefits, the success of particular diversity measures is often difficult to assess. When assessments are trained on metrics relating to equal opportunity, the results of diversity initiatives are decidedly mixed and recent studies in sociology and social psychology advise caution.

208. See, e.g., 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); 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”).

209. See generally Belle Rose Ragins, *Diversified Mentoring Relationships in Organizations: A Power Perspective*, 22 ACAD. MGMT. REV. 482 (1997); 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 (Arthur P. Brief ed., 2008).

210. See, e.g., 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).

211. See, e.g., Rene Almeling et al., *Egg-Freezing a Better Deal for Companies Than for Women*, CNN (last updated Oct. 20, 2014, 4:11 PM), <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).

In successive psychological 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 towards members of underrepresented groups who claim to experience discrimination.”²¹² The authors conclude that “the presence of diversity initiatives acts as a legitimizing cue,” signaling the fair treatment of minorities regardless whether this is in fact the case, and that whites derogate minorities who complain of discrimination when the institution accused of discriminating had such initiatives in place.²¹³ Their research demonstrates that the use of ineffective diversity measures comes at an additional cost to minorities beyond the lost opportunity to foster greater inclusion. In sum, poorly designed and poorly implemented diversity initiatives may create within the firm a culture of skepticism and stagnation that raises additional impairments to the goal of providing equal opportunity.

Comparing the strength of managerial commitments to diversity against commitments to “efficiency, quality, and profit,” sociologists Kevin Stainback and Donald Tomaskovic-Devey have similarly warned that ineffective diversity management may produce signaling effects beneficial to corporate marketing but not to the advancement of women and minorities. Their research shows that, 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.”²¹⁴ The authors fault “symbolic compliance” with antidiscrimination laws, including the implementation of workplace diversity initiatives that lack sufficient monitoring or accountability.²¹⁵ They conclude that “[t]rue corporate equal opportunity leadership” would integrate a commitment to equal opportunity into a

212. Cheryl R. Kaiser et al., *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. OF PERSONALITY & SOC. PSYCH. 504, 504 (2012) (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 REL. 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).

213. Dover et al., *supra* note 212, at 491.

214. KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT 313 (2012).

215. *Id.*

“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.²¹⁶

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 also yielded disappointing results: 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 only modest gains, respectively.²¹⁷ 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 race-or sex-matched mentoring and social networking have little proven value in terms of workforce integration and professional advancement.²¹⁸ In particular, diversity training continues to be the most prevalent of diversity initiatives, widely advocated by corporate managers and ordered by courts as a remedy for workplace discrimination, despite showing no gains in the number of minorities and women in management.²¹⁹ The study observed strong interaction effects between

216. *Id.*

217. *Id.* at 590.

218. *Id.* at 590–91, 602–05. *See also* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 214, at 289–91 (reporting studies showing that debiasing strategies such as diversity 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); 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).

219. Kalev et al., *supra* note 203, at 590. *See also* DOBBIN, *supra* note 17, at 147–49 (discussing support for diversity training by managers and courts).

diversity programs generally and the overlay of structures that improved program effectiveness by enhancing organizational responsibility.²²⁰

Encouraging firms to embrace a strategic outlook mindful of the interaction effects of organizational practices should be a matter of paramount concern in law and business. Establishing a productive relationship between diversity and equal opportunity depends on such an approach. Consider a familiar example from corporate diversity practices. 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 productive relationships with seniors outside of their status groups.²²¹ Perhaps one could improve upon the ability of such programs to enhance equal opportunity by decoupling mentoring relationships from work assignments, focusing on diversity at senior management levels, holding mentors accountable for the success of mentoring relationships, supplementing mentoring through the cultivation of productive professional networks for protégés, or developing strategies for supporting cross-racial and cross-gender mentor-protégé relationships that expand the access of minorities and women to career- and skill-building relationships.²²² In the present legal climate, however, an organization typically will take these extra steps only if it perceives them to have strategic business value. There is, therefore, an opportunity for

220. *Id.* at 606–07.

221. See Rich, *supra* note 160, at 90–91 (discussing an example). See also, e.g., Kaley, *supra* note 212, 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”); Kulik & Roberson, *supra* note 209, at 286 (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); 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.”).

222. See, e.g., Kulik & Roberson, *supra* note 221, 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, 164–67 (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 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).

productive legal intervention, but existing doctrine poses significant challenges to the realization of this opportunity.

3. Doctrinal Implications

Unlike education, where *Grutter* has established diversity as a justification for affirmative action, in the workplace, affirmative action and diversity are more often distinguished than aligned. When an organization deploys an affirmative action program, its allocation of positions and training opportunities will reflect preferences that it gives to individuals on the basis of race or perhaps some other social status. When an organization deploys a diversity initiative, it is not clear what it has done. Sometimes the initiative will be structurally indistinguishable from an affirmative action program. Other times it will allocate opportunities based on status preferences, like an affirmative action program, but the opportunities that it allocates will be incremental or intangible. They may or may not include a change in the terms or conditions of employment; they may or may not determine an individual's future success. Moreover, whether the deployment of an initiative affects future outcomes will often be a function of the interaction between that initiative and other organizational policies that may enhance or impair its effect.

For example, a firm may have a mentoring program in which it matches female junior employees with female senior mentors, with the expectation that sex-matched mentoring will result in more reliable and effective transmission of knowledge, skills, and experience necessary for future success. Whether the program results in a higher percentage of women at the management level will be influenced by the presence or absence of accountability structures that hold decisionmakers responsible for the firm's progress toward improving workforce diversity.²²³ Or it will be influenced by the relative power and influence of female mentors within the firm. The decision to pair female mentors and mentees will likely not run afoul of existing employment law because, standing alone, it does not constitute an adverse employment action. A claim will arise, however, even for incremental or inchoate sex-based decisions if they are causally related to future adverse decisions that do alter a person's terms or conditions of employment. Should a claim of discrimination succeed when the

223. Kalev et al., *supra* note 203, at 611 ("Structures that embed accountability, authority, and expertise . . . are the most effective means of increasing the proportions of white women, black women, and black men in private sector management.").

employer's policy was motivated by a desire to comply with the law by promoting women's opportunities?

The answer to that question is far from simple. Workplace affirmative action often follows a remedial logic, whereas diversity management generally follows the business case for diversity. A successful disparate treatment claim under Title VII does not require proof of prejudice or malice to support a claim of disparate treatment,²²⁴ meaning that claims will be viable even when the employer's motives are rational or "well intentioned or benevolent," absent a valid defense.²²⁵ An organization's consideration of non-racial statuses could be sustained under the statute's "bona fide occupational qualification" ("BFOQ") affirmative defense, but the defense is unavailable against claims of race or color discrimination.²²⁶ Moreover, the Supreme Court has determined that, even when the defense is available against non-race claims, it must be strictly applied.²²⁷ For example, courts have long rejected the idea that customer preferences alone provide a sufficient basis to establish that sex is a BFOQ.²²⁸

A defendant may avoid liability for racial disparate treatment discrimination only if its race-based action was part of a valid affirmative action program or was necessary to avoid disparate impact liability. As discussed above, the Supreme Court's decisions in *Weber* and *Johnson* permit an organization to implement voluntary affirmative action programs in order to correct a manifest imbalance in its workforce in a traditionally segregated job category.²²⁹ An employer's self-interested reasons to pursue diversity hold no weight under this framework, even if they might

224. See generally Rich, *supra* note 160, at 65–69 (discussing Supreme Court authority supporting this view).

225. 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).

226. See Civil Rights Act, 42 U.S.C. §§ 2000e–2(e) (2012) (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").

227. See, e.g., UAW v. Johnson Controls, Inc., 499 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)).

228. See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (holding that, notwithstanding the district court's conclusion that female flight attendants provided greater psychological "reassurance" to airline passengers than male flight attendants, this did not make sex a BFOQ because such reassurance was "tangential" to the airline's "primary function"); Wilson v. Sw. Airlines, 517 F. Supp. 292 (N.D. Tex. 1981) (ruling that the airline could not justify its exclusive hiring of sexually appealing women as flight attendants to satisfy the preferences of male business travelers).

229. See *supra* notes 109–17 and accompanying text.

otherwise have satisfied the BFOQ defense. The Court more recently held, in *Ricci v. DeStefano*,²³⁰ that an employer will have a valid defense to a claim of disparate treatment arising from its refusal to certify the results of a promotion examination that disproportionately disqualified black applicants only if it provides a “strong basis in evidence” that it would have faced disparate impact liability had it acted upon the results of the test. *Ricci* did not involve a racial preference per se. The Court concluded, however, that the decision not to certify the test results was race-based because it was motivated by a desire to avoid disparate impact liability in the event that black applicants decided to bring suit for disparate impact. Together, *Ricci*, *Weber*, and *Johnson* produce the doctrinal irony that an employer’s use of racial preferences will comply with federal statutory law if those preferences were intended to correct status-based underrepresentation as part of a valid affirmative action program; however, decisions motivated by a desire to maintain legal compliance or to achieve diversity may require an employer to meet the “strong basis in evidence” test, even if its conduct did not rise to the level of awarding a racial preference.²³¹

The dividing line between affirmative action and diversity is therefore, doctrinally speaking, enormously consequential, yet has been woefully under theorized. In its compliance manual, the Equal Employment Opportunity Commission advises that “Title VII permits diversity efforts designed to open up opportunities to everyone,”²³² but it offers no legal authority establishing that diversity programs lacking a remedial purpose are lawful. Indeed, neither the statute’s text nor its doctrine discusses diversity as a potential defense to a claim of disparate treatment. The Commission also draws a curious distinction between affirmative action programs and diversity initiatives, admitting that the former are governed by the well-defined doctrinal requirements of *Weber* and *Johnson* but offering no authority that could provide a source of guidance regarding the latter.²³³ Perhaps the line between affirmative action and diversity

230. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

231. See also Rich, *supra* note 160, at 74 (arguing that “[b]y establishing the ‘strong basis in evidence’ test to sustain race conscious compliance measures in *Ricci*, the Court applies a higher level of scrutiny to practices that are frankly less overt and less direct in their consideration of protected statuses” than the affirmative action programs at issue in *Weber* and *Johnson*).

232. EEOC, EEOC COMPLIANCE MANUAL 15-31 (2006), <https://www.eeoc.gov/policy/docs/race-color.pdf>.

233. *Id.* (stating that, while diversity initiatives that open opportunity to everyone are permissible,

management could be drawn at the dividing point between remedial and nonremedial, forward-looking practices. Or it could be drawn at the dividing point between programs that award job or training positions and programs that award incremental opportunities which, standing alone, would not alter the “terms or conditions” of an individual’s employment. This issue has yet to be clarified by either the Commission or the Court.

Perhaps the most significant difference between affirmative action and workplace diversity initiatives concerns their relationship to time. *Weber* and *Johnson* fully conceive of affirmative action as a means to achieve a particular end-state. Their doctrinal framework restricts an employer’s license to engage in affirmative action to the correction of a manifest imbalance in its labor force. Once that imbalance is corrected, *Weber* and *Johnson* state that status-based preferences are no longer authorized.²³⁴ Not surprisingly then, doctrinal difficulties for workplace diversity measures arise when an employer considers status without a clear effort to achieve a particular, corrective numerical end-state.

When an employer seeks diversity as a business strategy intended to align its legal compliance efforts with other organizational goals, lower courts have withheld the protections of *Weber* and *Johnson*. An employer’s intention to promote diversity has never been held to satisfy their doctrine, and lower courts have generally rejected instrumental uses of race. Instead, these lower courts have even interpreted the motivation to pursue diversity itself as evidence of discrimination. The most well-known example of this interpretation occurred in *Taxman v. Piscataway Township Board of Education*,²³⁵ when 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.²³⁶ The court reasoned that under Title VII, only a remedial purpose would have justified its use of affirmative action.²³⁷

The rejection of diversity as a basis for racial preferences has not been limited to reverse discrimination claims. For example, in *Ferrill v. Parker*

“[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).

234. *Johnson v. Transp. Agency*, 480 U.S. 616, 639–40 (1987) (upholding the defendant’s affirmative action plan because it “was intended to *attain* a balanced work force, not to maintain one”).

235. *Taxman v. Piscataway Twp. Board of Educ.*, 91 F.3d 1547 (1996), *cert. granted*, 521 U.S. 1117 (1997).

236. *Id.* at 1563.

237. *Id.* at 1557 (“[W]e are convinced that unless an affirmative action plan has a remedial purpose. . . it cannot satisfy the first prong of *Weber*.”).

Group, Inc.,²³⁸ the Eleventh Circuit held that a marketing firm violated Title VII and Section 1981 when it engaged in “race-matching” in connection with its pre-election “get-out-the-vote” calling business. The circuit court upheld a jury verdict for the African American plaintiff, finding that she had suffered discrimination because her company 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.’”²³⁹ Similarly, in *Hall v. Lowder Realty Co.*,²⁴⁰ the district court held that the racial pairing of a black real estate agent with black buyers and the assignment of the agent primarily to properties located in predominantly black neighborhoods were actionable under Section 1981²⁴¹ and the Fair Housing Act of 1968.²⁴² The Commission itself recently obtained a consent decree in a lawsuit filed against the pharmaceutical retailer Walgreens Co., alleging that Walgreens had engaged in disparate treatment by assigning African American managers to work in stores located in African American neighborhoods without allowing them to compete equally for positions in nonminority neighborhoods.²⁴³ Only cases citing the “operational needs”²⁴⁴ of urban

238. *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468 (11th Cir. 1999).

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

240. *Hall v. Lowder Realty Co.*, 160 F. Supp. 2d 1299 (M.D. Ala. 2001).

241. 42 U.S.C. § 1981 (2012) (prohibiting race discrimination in the making and enforcement of contracts).

242. Fair Housing Act, 42 U.S.C. § 3606 (2012) (prohibiting race and other forms of discrimination by denying an individual “access to or membership or participation” in any “service, organization, or facility relating to the business of selling . . . dwellings” or by “discriminat[ing] against him in the terms or conditions of such access, membership, or participation”)

243. *Tucker v. Walgreens*, No. 05-cv-440-GPM (S.D. Ill. Mar. 24, 2008). See *Systemic Race Bias Suit Against Walgreens Resolved for \$24.7 Million*, WOLTERS KLUWER (Jul. 16, 2007), <http://www.hr.cch.com/news/employment/071607a.asp> (describing the consent decree that resolved the commission’s 2005 lawsuit). Walgreens had argued that its assignment of black managers to stores in black neighborhoods was not discriminatory because blacks represented 17% of the company’s managers, compared with an industry average of 9. Ann Brown, *Class-Action Lawsuit Against Walgreen Co. Finalized*, BLACK ENTERPRISE (Apr. 8, 2008), <http://www.blackenterprise.com/uncategorized/class-action-lawsuit-against-walgreen-co-finalized/>. In the end, however, the consent decree subjected Walgreens to substantial monitoring and revision of its promotion and antidiscrimination training procedures, and it awarded monetary relief to the plaintiffs. Consent Decree, *Tucker v. Walgreens*, No. 05-cv-440-GPM (S.D. Ill. Mar. 24, 2008).

244. 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 1111, 1114 (7th Cir. 2003). *But see* *Lomack*, 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

police departments and the role-modeling needs of a correctional bootcamp for predominantly African American teens have contradicted this trend.²⁴⁵

It is unclear how the Supreme Court would address a facially race-neutral 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. A growing number of lower courts, however, have been asked to consider whether evidence of an employer's commitment to workplace diversity is evidence of discrimination. These cases point to the phenomenon of *diversity-as-motivation* in which an organization's consideration of diversity is viewed adversely even though *Grutter* and its progeny suggest that diversity is a legitimate and, in some circumstances, laudable goal.²⁴⁶

One such case, *Ricci v. DeStefano*, received Supreme Court review on a separate issue.²⁴⁷ According to the district court, however, the "crux" of

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) (quoting *Lomack v. City of Newark*, 463 F.3d 303, 310 n.8 (3d Cir. 2006) (internal quotation marks omitted)). 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 Ass'n 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), *aff'd* 956 F.2d 265 (5th Cir. 1992) (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).

245. *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (upholding the use of race by a correctional bootcamp because the predominantly African American inmates were "believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp").

246. 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 of how it is achieved. *Fisher v. Univ. of Tex. at Austin* ("Fisher I"), 133 S. Ct. 2411, 2420 (2013) (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). *See also* Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 61 (2013) ("[I]n discussing the importance of exploring alternative methods to promote diversity that do not individuate by race, *Fisher* [I], reaffirmed government's constitutional authority to promote diversity by race-conscious facially neutral means . . ."). *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 118, 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).

247. *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

the plaintiffs' case had been that the government's interest in promoting racial diversity motivated it to violate Title VII and the Equal Protection Clause because the government had refused to enter the results of an examination required for promotion within its fire department after finding that the test produced a racially disparate impact.²⁴⁸ Although the Supreme Court did not address the argument directly, its decision has conflicting implications for this issue. On the one hand, its conclusion that the city's decision was "race-based" because it took the racial impact of the test into account in a sense vindicates the plaintiffs' original argument.²⁴⁹ 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. The Court's requirement that an employer must have a strong basis in evidence to conclude that it had violated the law before it could attempt to neutralize the effects of such a racial disparity could then be viewed to suggest that the same requirement must be met for any adjustment to institutional practices intended to promote racial diversity.²⁵⁰ On the other hand, the Court appeared to accept that Title VII would have 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.²⁵¹

Lower court employment discrimination cases paint a more stark picture regarding the viability of diversity as a legally permissible motivation. Several circuit courts have accepted the argument that diversity efforts are probative of discrimination. For example, in *Bass v. Board of County Commissioners*,²⁵² the Eleventh Circuit held that the government's adoption of a "Diversification Plan" intended to ensure "that the workplace

its fire department, which had a disparate impact against black and Hispanic firefighters. The petitioners contended that diversity was "not at issue," and that in any event the city had disclaimed reliance on diversity. Petitioner's Brief on Merits at 37, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328). The Supreme Court concluded that the city's decision constituted unlawful disparate treatment under Title VII. *Ricci*, 557 U.S. at 593.

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

249. *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.")

250. *See id.* at 582-83 (adapting the "strong basis in evidence" test from equal protection doctrine to negotiate intra-statutory conflicts between the disparate treatment and disparate impact of Title VII).

251. *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 160, at 77 (discussing the relationship between the timing of the city's decision and the Court's ruling).

252. *Bass v. Bd. of Cty. Comm'rs*, 256 F.3d 1095 (11th Cir. 2001).

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 who sought a position within the county's Fire and Rescue Division.²⁵³ 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.²⁵⁴ 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."²⁵⁵ 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. Instead, the court permitted the plaintiff to go forward with circumstantial evidence to corroborate the conclusion that the plan had led to his denial of the position. This evidence included the fact that two of the three persons who made the challenged decision were themselves supporters of affirmative action and that the county asserted pressure on the division to hire more minorities and sent the chief of the division "period[ic] reports showing the number of women and blacks in all positions."²⁵⁶ Sociologists have counseled that benchmarks and accountability structures, such as were employed by the government in *Bass*, are important features of a successful diversity policy.²⁵⁷ The circuit court concluded, however, that they constituted evidence of discrimination.

This conclusion is not uncommon. Other circuit courts have held that plaintiffs supported allegations of discriminatory intent based on similar evidence. For example, the Third Circuit has held that a white plaintiff raised a genuine issue as to whether he suffered discrimination by providing evidence that minority applicants were inserted into a hiring pool late in the process under a general directive that "serious consideration" should be "given to diversity."²⁵⁸ The Seventh Circuit has held that

253. *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).

254. 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.

255. *Id.* at 1113.

256. *Id.* at 1099.

257. *See supra* notes 214–20 and accompanying text.

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

evidence that a decisionmaker received “administrative pressure” to increase diversity supported a claim of race discrimination brought by a white, female job applicant.²⁵⁹ The Tenth Circuit has 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.²⁶⁰ Although some courts require the plaintiff to show a causal “nexus” between the employer’s interest in diversity and the challenged decision,²⁶¹ the aforementioned decisions did not. 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.²⁶²

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.²⁶³ 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 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 caused a decisionmaker to render an employment decision on the basis of

259. Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 721–22 (7th Cir. 2005).

260. McGarry v. Bd. of Cty. Comm’rs of Pitkin Cty., 175 F.3d 1193, 1199–1200 (10th Cir. 1999).

261. 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).

262. Sutherland v. Michigan Dep’t of Treasury, 344 F.3d 603 (6th Cir. 2003) (evidence that blacks held 29% of the relevant positions even though they constituted 7.7% 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).

263. See *supra* note 169.

race. 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.

III. WHY DIVERSITY?

In the context of public university admissions, the Court found a unique foundation on which to construct its account of the constitutional value of diversity. The contributions of *Grutter's* diversity rationale to the project of equal opportunity—regardless how they are defined—necessarily hinge on the importance of the university's educational mission and on the Court's decision to preserve the viability of affirmative action in university admissions. In *Grutter* and its progeny, however, the very foundations of diversity's value also encumber diversity with significant practical and conceptual limitations, leaving *Grutter's* holding vulnerable to continuing legal challenge and restricting its applicability beyond the educational context.

Grutter's diversity rationale is thin, but antidiscrimination law's conception of diversity need not remain so. The Court has underspecified the relationship between diversity's educational benefits and diversity as a numerical end-state. It has also failed to distinguish between exploitative uses of diversity and egalitarian ones, as well as between the pursuit of diversity and the instrument of affirmative action. Most importantly, the Court has been blind to diversity's potential contribution to equal opportunity. As discussed in this Article, diversity reveals equal opportunity to require substantive equality in the opportunities given, and it suggests that an institution needs to take individual differences into account in order to provide each person with equal opportunities for individual growth and achievement. This Part will conclude by offering a reconstruction of the diversity rationale built upon this understanding of the relationship between diversity and equal opportunity.

A. HOW *GRUTTER*'S DIVERSITY RATIONALE UNDERSERVES EQUAL OPPORTUNITY

Grutter's 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.²⁶⁴ *Grutter* and its progeny have allowed affirmative action to continue during an era in which remedial justifications for race conscious practices are often met with resistance,²⁶⁵ but it has also transformed the practice of affirmative action and our understanding of its objectives. These cases permit affirmative action, but only to the extent necessary to achieve a critical mass of underrepresented students.²⁶⁶ They permit universities to consider race during the admissions process, but only in order to assess each individual's potential contribution to the educational mission of the university.²⁶⁷ The concept of critical mass does not permit universities to pursue the remedial objective of proportional representation. The concept of individualized consideration has not expressly embraced a critique of traditional meritocratic criteria. It has never, for example, authorized a university to adjust the weight given to those criteria in order to improve its assessment of an individual's academic potential or to account for the possible effects of societal discrimination on an individual's past performance.

In practice, "diversity" may serve as a "code word" for proportional representation.²⁶⁸ Conceptually, however, diversity eschews egalitarian values and displaces alternative remedial grounds for affirmative action. *Grutter* describes diversity not as the fulfillment of equality but as orthogonal to it—an exception to the standard of formally equal treatment rather than an expression of equal opportunity in its own right. It is therefore difficult to identify a productive relationship between diversity and equal opportunity that is not exhausted in diversity's preservation of affirmative action.

264. Siegel, *supra* note 1, 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 90, at 1489–90 (discussing Justice Powell's rejection of a remedial rationale in favor of diversity).

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

266. See Part I.A.2.

267. See Part I.A.3.

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

Part I identified four features of *Grutter*'s diversity rationale that restrict its application beyond education and impair its ability to promote equal opportunity. First, *Grutter* tethers diversity's value to the educational context, not simply practically but analytically, because it associates that value uniquely with the educational mission of public universities and because it grants to universities a deference that it would not likely extend to institutions outside of the educational context.²⁶⁹ Second, diversity displaces remedial rationales that might have formed the basis for a more robust connection between the form of affirmative action that *Grutter* and its progeny have upheld and equal opportunity. The concept of critical mass restricts the Constitution's approval of affirmative action to programs designed to obtain only the degree of minority inclusion necessary to realize diversity's associated educational benefits. The redistributive benefits of affirmative action for historically disadvantaged groups are, according to the doctrine, not ends but means to the realization of institutional and public benefits. To the extent that those benefits are severable from end-state diversity, the justification for the integrative practice of affirmative action diminishes.²⁷⁰ Third, *Grutter*'s diversity rationale fails to distinguish between exploitative and egalitarian ends, rendering it unfit for application in social contexts, unlike in university admissions, where these two types of ends cannot be presumed to coincide.²⁷¹ Finally, fourth, the Supreme Court has failed to theorize diversity beyond the achievement of a particular end-state (for example, diverse student body enrollments) or independently of the practice of affirmative action.²⁷² As support for the practice of affirmative action wanes, the value of diversity becomes increasingly uncertain.

Part II demonstrated that the Court's focus on affirmative action and its merger of end-state diversity and the instrumental benefits of diversity have caused it to underappreciate other dimensions of diversity that bear upon the issue of equal opportunity. In the business context, managerial experts have described diversity as a business strategy, and they recognize that policies that do not impact demographic diversity directly nevertheless may indirectly affect the organization's ability to extract value from that diversity.²⁷³ Because it collapses the achievement of diversity's benefits with the achievement of numerical diversity and the mechanism of

269. *See supra* Part I.B.1.

270. *See supra* Part I.B.2.

271. *See supra* Part I.B.3.

272. *See supra* Part I.B.4.

273. *See supra* Part II.A.4.

affirmative action, *Grutter*'s diversity rationale does not address whether other institutional practices following or coinciding with the moment of selection may affect the achievement or the strength of diversity's benefits.

Because equal protection raises the constitutional question of the permissibility of the university's race conscious means, *Grutter* and the Court's recent *Fisher* decisions have sought to determine the permissibility of racial preferences by assessing the availability of race-neutral alternatives. Under *Grutter*, racial preferences are permissible when they do a better job than race-neutral alternatives of balancing the university's interests in diversity and academic selectivity.²⁷⁴ Under *Fisher I*, racial preferences are permissible only when race neutral alternatives would not yield "sufficient diversity."²⁷⁵ Finally, under *Fisher II*, the Court established that a university's success in achieving significant racial diversity through race-neutral means does not preclude the use of racial preferences if such preferences are needed to produce the kind of diversity necessary to realize important educational benefits.²⁷⁶

The Court has yet, however, to consider whether the availability of policies other than affirmative action may support the university's realization of constitutionally significant educational benefits well enough to eliminate the need for racial preferences. The above discussion of diversity-as-strategy—which focused on the diversity management example—demonstrated that the set of policies that surround an affirmative action program or that are intended to manage existing organizational diversity may either complement or undermine an organization's efforts to extract value from diversity.²⁷⁷ By underscoring that the qualitative benefits of diversity are integral to diversity as a constitutionally compelling interest, *Fisher II* has left open the possibility that similar concerns may become part of the Court's equal protection doctrine.

The doctrinal focus on the instrumental value of diversity undermines equal opportunity in still other ways. It constructs diversity as a demand

274. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

275. *Fisher v. Univ. of Texas at Austin* ("Fisher I"), 133 S. Ct. 2411, 2420 (2013).

276. *Fisher v. Univ. of Texas at Austin* ("Fisher II"), No. 14-981, slip op. at 17 (June 23, 2016) (rejecting the argument that the University should have been required to accept as sufficient the student body diversity that issued from Texas' percentage plan because "to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it").

277. *See supra* Parts II.A.4 & II.B.

side rationale and makes the achievement of equal opportunity tangential, if not irrelevant, to determining whether a university can claim to have a constitutionally compelling interest in diversity. 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 because one class seat is presumably the equivalent of another²⁷⁸ and education is itself a vital resource affecting the individual's access to various opportunities in life. However, these are not assumptions that are portable beyond education. Taking the workplace as an example, an employer may have the option of offering a range of different positions or, within one particular job category, it may vary the responsibilities given to individual workers. An employer could assign black employees to manage stores in black neighborhoods and seek the endorsement of the diversity rationale, arguing that its employment practice increased the number of black managers and supported the success of its operations within those communities. *Grutter* is blind to the exploitative features of this example. The previous discussion of managerial diversity showed, however, that when employers award opportunities 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.²⁷⁹ Similarly, a firm motivated to signal its compliance with civil rights law may confer sham, or token, opportunities that—wittingly or unwittingly—restrict professional growth and derail individual advancement, while at the same time legitimating the firm's personnel decisions and rendering discrimination less visible.²⁸⁰

Grutter comes closest to aligning diversity and equal opportunity when it depicts education as a developmental asset specially positioned to ensure fair competition for coveted roles and opportunities in public life—a "path to leadership," professionalism, and civic participation.²⁸¹ This aspect of *Grutter* expresses what one might call a "starting gate" theory of equal opportunity, in which a system's legitimacy hinges on whether fairness is

278. One certainly may not agree. Indeed, a student's awareness or suspicion that she has been admitted to the class in order to acquaint her classmates with what some would consider an unusual perspective, or to spice up classroom debate, may grow uncomfortable and may even experience stereotype threat. See generally CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2010) (describing extensive research on the effects of stereotype threat in depressing the intellectual performance of women and minorities).

279. See *supra* Part II.A.3. See also *supra* notes 239–46 and accompanying text (discussing example cases).

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

281. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

present at an important competitive starting gate.²⁸² Legal scholar Joseph Fishkin has criticized 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 lose the initial competition, thus creating bottlenecks that constrain both the opportunities that a person will have and the choices that she will make throughout her life.²⁸³ The *Grutter* majority may have appreciated the bottleneck effect of elite education and, for this very reason, decided to permit universities to relieve that bottleneck at the admissions process. By Fishkin's lights, however, starting gate theories of equal opportunity cannot escape the bottleneck problem because, precisely by loading particular contests with such overwhelming social significance, they condemn the losers to a position of severe and arbitrary disadvantage.

Fishkin's theory of opportunity pluralism proposes to resolve this problem both by opening bottlenecks so that more individuals may pass through and by expanding the number of options that a person would have to make meaningful life choices without having to pass through a particular bottleneck.²⁸⁴ While I share Fishkin's concerns and believe that his theory resonates with much of the popular discourse on diversity, the theory of diversity that I express here is quite different.²⁸⁵ Put simply, it is concerned

282. See FISHKIN, *supra* note 15, at 29–32.

283. See Rich, *supra* note 14, at 443–47 (discussing Fishkin's account of starting gate theories at length).

284. FISHKIN, *supra* note 15, at 1–2, 130–31.

285. 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 15, 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, 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 15, 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.*, 401 U.S. 424 (1971)). See also *infra* notes 311–313 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 13, at 440. And it is not a theory of “diversity” in that it is not concerned with whether any particular

with inequality among the “winners” of social contests as well as with the losers, because it recognizes that the substantive equality of awarded opportunities is critical if all who hold an opportunity are to enjoy reasonably equal chances for professional growth and achievement. In the business context, the substantive inequality of employment opportunities is particularly vexing and can be managed only through attention to the interaction between institutional practices and individual needs, which in certain circumstances will be influenced by a person’s social status. In short, even winners are not *equal* winners if they are not awarded equal opportunities. *Grutter* does not seek to ensure this kind of equality. Indeed, it does not even recognize it to have significance.

Some prominent legal scholars have read *Grutter* more charitably, seeing the decision as an invitation to initiate a public dialogue about equal opportunity and its importance across various social contexts. Professor 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.”²⁸⁶ For Guinier, *Grutter*’s democratic foundations present “a long overdue opportunity to focus the conversation on the distributive and functional role of higher education in a democracy.”²⁸⁷ Guinier’s reading of *Grutter* resonates with the starting gate theory articulated 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

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 achievement. This reorientation would require measuring equality in terms of the 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 achievement. 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 15, 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.

286. Guinier, *supra* note 27, 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 educational constituencies to improve the admissions process through information gathering, dialogue, and transparency).

287. *Id.* at 118.

upward mobility to their graduates and identify future leaders.”²⁸⁸ 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 implement admissions policies that 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.”²⁸⁹ Guinier thus argues that *Grutter* should 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.²⁹⁰

Guinier’s critique of individualized consideration and her proposal of structured mobility center around the practice of student selection, and for that reason actually repeat the very same blindness identified by this Article: that the quality of educational opportunity—including its ability to guarantee equal chances for individual growth and achievement—is not fully captured at the moment 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 between institutions and individuals.²⁹¹ Structural mobility thus represents a macro-level policy shift that would measure its success in

288. *Id.* at 175.

289. *Id.* at 153 (referring to the sense in which diversity uses preferences as instruments of selective discretion).

290. *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.

291. Guinier, *supra* note 1, 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”).

terms of broad social effects.²⁹² Guinier, however, seems to overlook the possibility that investing in individual growth and achievement after the moment of selection would transform our understanding of equal educational opportunity. Structural mobility itself would depend no less on changes to the practice of university education than it would on changes to the selection criteria used to admit students. In one very important respect, the theory of substantively equal opportunity expressed here is more consistent with *Grutter* and its progeny than with Guinier because it would put the guarantee of equal opportunity *for the individual* ahead of the macro-effects of more structural interventions. From Guinier's perspective, this would unwisely restrict education's capacity to promote positive social change. By setting her sights on macro-level transformation, however, Guinier vaults over, and therefore misses, a critical opportunity to transform the existing diversity rationale into a stronger instrument for the promotion of equal opportunity-as-social-mobility by accepting *Grutter's* individualistic orientation.²⁹³

Professor Cynthia Estlund has stretched *Grutter's* diversity rationale in a different direction by considering its potential impact on the use of affirmative action in employment. Estlund praises *Grutter* for its recognition of "*the possibility of an integrated future in a still-unequal and still-divided society.*"²⁹⁴ She admits, however, that, unlike educational diversity, diversity in business settings does not benefit from a direct and necessary connection between institutional diversity and the public good.²⁹⁵ Nevertheless, she argues that "*Grutter* may suggest an alternative defense of affirmative action in employment that better fits both what employers

292. As Guinier 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" 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 160-61.

293. See Rich, *supra* note 10, at 1561-73 (discussing the impact of colorblindness discourse on the Court's equal protection affirmative action decisions). See generally Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).

294. Estlund, *supra* note 19, at 13.

295. *Id.* 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 thread this particular needle . . .").

are doing and what they are proclaiming under the banner of diversity.”²⁹⁶ 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.”²⁹⁷ 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.”²⁹⁸

Estlund’s description of *Grutter* as a pro-integration decision seems to stem from its approval of affirmative action and from the suggestion that *Grutter* revealed the Court to be willing to restrict what may be deemed benefits of diversity in ways that support an egalitarian agenda. For example, she argues that deference to the university’s nomination of educational benefits presumably would not extend to a university’s expressed interest in segregated education.²⁹⁹ 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.³⁰⁰ As discussed above, the Court’s selective deference already has led it to deny approval to reasons for diversity that sound too much like commitments to social justice or integration.³⁰¹

The idea that the Court’s pattern of deference in university admissions could provide a model for employment discrimination cases is problematic for two additional reasons: First, *Fisher I* has greatly circumscribed 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 because the Court’s understanding of narrow tailoring is incompatible with an infinitely elastic conception of the compelling interest.³⁰² As the Court stated in

296. *Id.* at 4.

297. *Id.* at 26.

298. *Id.* at 31.

299. *Id.* at 32 (arguing that *Grutter*’s is “a skewed invocation of deference—one that makes room for integrationist preferences but not segregationist preferences”).

300. 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 v. Bollinger*, 539 U.S. 306, 364–66 (2003).

301. *See supra* Part I.B.2.

302. *See supra* Part I.A.2 (discussing *Fisher I*). Elsewhere I have also cautioned 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*

Fisher II, a “university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”³⁰³ The University of Texas at Austin met this burden because it claimed for itself those goals that the Court had already endorsed in *Grutter*.³⁰⁴ This reasoning, however, puts pressure on educational institutions that might seek educational benefits that the Court has not already endorsed and on noneducational institutions that do not require diversity in order to secure interests analogous to the qualitative benefits of university education.

Second, *Grutter*’s framework makes no distinction between exploitative and egalitarian reasons to pursue diversity, and it therefore lacks sufficient guidance for private firms otherwise motivated to act for purely self-interested reasons. Estlund attempts to allay concerns about transposing *Grutter*’s diversity rationale 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,”³⁰⁵ 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 and generally explain their support for diversity management by expressing disapproval of affirmative action.³⁰⁶

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 connection would be difficult to sustain if affirmative action were removed from the equation. Her theory does not explain how *Grutter* could sustain programs such as racially motivated work assignments, networking programs, training

note 118, at 238–46. That discussion analyzed the potential impact of equal protection’s diversity jurisprudence on statutory employment discrimination doctrine. I therefore will not repeat that analysis here.

303. *Fisher v. Univ. of Texas at Austin (Fisher II)*, No. 14-981, slip op. at 12 (U.S. June 23, 2016).

304. *Id.* at 13 (observing that “all of [the university’s] objectives . . . mirror the ‘compelling interest’ this Court has approved in its prior cases”).

305. Estlund, *supra* note 19, at 34.

306. *See* Part II.A.1.

programs, and team structures against proof of causal connections between these practices and particular adverse employment actions. 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* and its progeny cannot answer. Employment discrimination law already permits a plaintiff to recover for unlawful discrimination when a position awarded to her is substantively inferior to the same position awarded to a member of another status group.³⁰⁷ To adopt the constitutional diversity rationale as a template for employment claims would leave this plaintiff vulnerable to the employer’s disparate treatment. Those affirmative action decisions offer no way to make her harm visible once she is selected for the position.

Ultimately, both Gunier and Estlund imagine a greater role for *Grutter* in promoting the goal of equal opportunity than the role that has been imagined by the Court. Gunier finds in *Grutter* new structural opportunities and imagines that the decision might inspire a democratic conversation that would contradict the Court’s expressed values. Estlund finds 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. Although I am sympathetic to their arguments, this Article has shown that *Grutter*’s diversity rationale is simply not designed for the challenges of application beyond the educational context or beyond affirmative action. How to reconstruct it to meet those challenges is the subject of the next and final section of this Article.

307. 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 L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978).

B. WHAT DIVERSITY CONTRIBUTES TO THE PROJECT OF EQUAL OPPORTUNITY

Diversity's potential to contribute to the goal of equal opportunity reaches beyond its current role, in legal discourse, as a justification for affirmative action. End-state diversity is not diversity's only dimension, and the moment in which an individual is selected for inclusion within an organization is not the only moment that bears on whether the individual receives equal opportunity. Diversity's true contribution to equal opportunity is an understanding that social status interacts with organizational practices to influence opportunities for individual growth and achievement during and after an initial moment of selection. Institutional arrangements continuously negotiate the impact of an individual's social status—inwardly as a matter of institutional culture and outwardly in terms of signaling effects—and the significance of social status can be either mitigated or intensified by the policies and practices that structure an individual's interactions with the institution. If we understand equal opportunity to include the substantive equality of opportunities given, this contribution becomes a revelation. Diversity initiatives should be designed to provide substantively equal opportunity, rather than merely to promote institutional self-interest. We should not expect organizations, however, to implement such initiatives without adequate legal guidance and oversight.

Successful legal intervention will not be without complications. Diversity resists the fundamental axiom of equal protection doctrine that similarly situated persons should be treated similarly.³⁰⁸ 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 just because they are members of the same racial group.³⁰⁹ The concept of

308. *City of Cleburne v. Cleburne Living Ctr.*, 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).

309. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). *See also* *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1634 (2014) (Kennedy, J.); *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995).

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. However, when guided by a commitment to equal opportunity, diversity problematizes the equation of formal neutrality and equal consideration.

Diversity invites us to think about what, in *Griggs v. Duke Power Co.*, the Court called the “posture and condition” of the individual.³¹⁰ In *Griggs*, the Court repudiated 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 identical vessels from which only the host is able to drink. The decision portrays equal opportunity as the proffer of a vessel that “all seekers can use.”³¹¹ Diversity causes us to question whether such a vessel exists and indeed whether, even if it did, equal opportunity would not be better served if each individual received a vessel tailored to his particular circumstances. Under a diversity model, one should return to the original tenor of the fable: that respect for the individuality and dignity of the other requires that each guest should be given a vessel appropriate to his or her needs.

Together, *Griggs* and the diversity model present important and potentially complementary pathways to equal opportunity. Both concern the question of what constitutes due consideration of an individual’s abilities. In the employment context, *Griggs* applies when the employer uses a facially neutral practice that has a disparate impact but cannot justify its reliance on the practice; the diversity model would apply when the employer seeks to justify its use of status to confer some benefit but cannot demonstrate that its practice was designed to correct a manifest imbalance in its workforce. If the legal significance of diversity continues to be tethered to its instrumental value, then diversity will always be orthogonal—and will sometimes be hostile—to equal opportunity. Conversely, if the law’s endorsement of diversity is intended to promote equal opportunity, then it should commit to that ideal by conceiving of equal opportunity as diversity’s objective and its principal benefit. The lawfulness of voluntary diversity practices should therefore be assessed

310. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

311. *Id.*

according to whether they advance equal opportunity by promoting the growth and achievement of all persons. Were antidiscrimination law amended to take this position, several advantages over the current state of the law would follow.

1. Putting Equality First

According to *Grutter*, diversity's instrumental benefits to the university and the public establish its constitutional value as a compelling governmental interest. This Section proposes that the benefits returned to an institution in its own self-interest should be accorded no weight when determining whether the status-based means used by the institution are legally permissible. The law should not treat diversity like public safety—as if it were an exception to the principle of equal opportunity rather than an extension of that principle.³¹² The instrumental benefits to the institution that pursued diversity often supply the institution's motivation, but antidiscrimination law should excuse an institution's status-based conduct from legal proscription only when it fulfills the law's commitment to equal opportunity.

Taking equal opportunity as diversity's principal objective yields three important advantages over *Grutter*'s approach. First, it would align institutional policies and practices undertaken in the name of diversity with antidiscrimination law's commitment to equal opportunity. Diversity's relationship to equal opportunity would no longer appear opportunistic—a convenient cover for self-interested behavior—but fundamental, defining permissible pursuits of diversity. Second, this new approach 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 basis for the expansion of the diversity rationale beyond the educational context into areas, such as employment, where the risk of endorsing exploitative measures in the name of diversity is far greater. The need to distinguish between exploitative and egalitarian uses of diversity results, in large part, from the deference given to institutional assertions of self-interest; such

312. Courts therefore may continue under this approach to give special weight to matters of public safety, as for example in the area of policing where courts have permitted police departments to assign minority officers to work in predominantly minority neighborhoods as a matter of "operational need," because an officer's ability to keep the peace requires that he receive the trust of the community. *See supra* note 246 and accompanying text.

deference introduces exploitative purposes that undermine equal opportunity. Putting equality first eliminates the difficulties caused by deferring to institutional judgments about diversity's value. Civic and democratic equality norms may continue to place education in a special constitutional niche. However, the pursuit of diversity should be of special importance to antidiscrimination law not because of *who* is doing it, but because of *what* it is—a means of fulfilling the law's commitment to equal opportunity.

This proposal represents a significant change, even in the educational context. *Grutter's* rationale does not impose a need for a university's race-based practices to advance equal opportunity, although one could infer a synergistic relationship between the two in the particular context of public university admissions. Were the Supreme Court to agree that, to some degree, diversity's benefits are severable from end-state diversity, then, as discussed above, significant new challenges to the doctrine would follow.³¹³ The equal opportunity model of diversity nullifies these challenges by eliminating a university's need to justify affirmative action in terms of its pursuit of any particular educational benefit. The issue, instead, is whether the manner in which the university pursues diversity enhances or inhibits its ability to provide equal educational opportunity. This change in approach is all the more important given that *Grutter's* list of diversity's benefits reflects its recognition of the instrumental value of integration and its recognition of the public value of education. Were the Court faced with a university's assertion of benefits more consistent with its bottom line—such as inspiring greater charitable contributions or increasing funding and enrollment within particular academic programs—it would appear that the pursuit of diversity should not receive the Court's approval. Refocusing diversity on equal educational opportunity reframes such questions by allowing courts to treat exploitative purposes as having no legal significance. Instead, the issue would be whether an institution's pursuit of diversity provided all persons with equal opportunities for growth and achievement regardless of their social status.

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

313. See *supra* notes 79–80 and accompanying text. See also *supra* Part I.B.4.

educational mission without sacrificing applicants' individual rights to equal treatment. 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 an individual right and, in part, because it grants universities the discretion to weigh traditional indicia of merit differently based on assessments of the adequacy of those criteria at predicting 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. In this sense, diversity is not a consideration added to an assessment of merit or qualification, but a reconceptualization of the evaluation process. This approach need not conflict with the Court's commitments to formal equality as expressed in *Grutter* and *Gratz v. Bollinger*.³¹⁴ As in *Grutter*, all individuals would "have the opportunity to highlight their own potential diversity contributions," and these contributions could be connected to factors other than race.³¹⁵ And, unlike the university policy struck down in *Gratz*, this approach remains individualized in the sense that, although social status may influence how a university assesses each applicant's qualifications, *how* it does so will depend on the presence of other factors.³¹⁶

Reconstructing diversity 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 build by designing a selection system in order to engender that outcome. This model also answers the concern that diversity breeds abuses of discretion by educational elites, instead directing organizational discretion at the selection stage toward the task of providing equal opportunity by adjusting for inadequacies in the selection system.³¹⁷ 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

314. *Gratz v. Bollinger*, 539 U.S. 244 (2003). Indeed, one should recall that Justice Powell thought such a practice—the use of holistic review to correct for evaluative bias—may not constitute the giving of a preference at all. See *supra* note 120 and accompanying text.

315. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

316. See *Gratz*, 539 U.S. at 270 (finding that an admissions policy that "automatically distributed" a fixed number of points to the admissions score of minority applicants was "not narrowly tailored to achieve the interest in educational diversity").

317. Guinier, *supra* note 27, at 196–98 (discussing this concern in relation to *Grutter*'s diversity rationale).

her own growth and achievement, as well as for theirs—not because her contributions are what the institution determines that it needs to further its own mission. Universities may of course continue to pursue diverse student bodies for their own reasons (for example, as a means to diversify the viewpoints and experiences that inform the education process). Antidiscrimination law, however, need not honor those reasons.³¹⁸ The proper concern for antidiscrimination law is not whether university classrooms are lively and discussion spirited, but whether the university provides an environment in which the academic success of all students is equally supported.³¹⁹

Naming equal opportunity as the principal value recognized by this reconstructed diversity rationale would also render the rationale more readily transferrable to other contexts besides university admissions. 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.³²⁰ The equal 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. The legal question is never where or when equal opportunity is desirable but how should this goal—which the law shares—be achieved.

318. 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 deference 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.

319. Placing such an aspiration before admissions officials does not mean abandoning *Grutter*’s preference for forward-looking reasons to pursue diversity, but it will require courts to consider evidence that they might in other circumstances associate with the remedying of racial wrongs as evidence of the promotion of equal opportunity. 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 if a university used diversity to close racial achievement gaps this would be probative of its commitment to equal opportunity. This approach could be understood to support the forward-looking goal of the creation of an integrated society in which all individuals have an equal opportunity for growth and achievement, notwithstanding that the same evidence could be used to argue that the university sought to remedy societal discrimination.

320. Estlund, *supra* note 19, at 27.

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 bind: some sources champion the use of diversity measures, but lower court decisions reflect skepticism about their legality and, when they use status preferences, they seem to come into direct conflict with statutory law.³²¹ 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,³²² rather than deferring to the organization's self-interested reasons. She expressly warns that "race- and sex-based decisions made pursuant to the business case for diversity at the level of organizing work are likely to entrench rather than destabilize inequality in organizations."³²³ She thus 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."³²⁴ Like the current proposal, Green rejects a strictly "by the numbers" approach to assessing integration, arguing instead that "functional integration" requires institutions to value numerical *and* substantive integration.³²⁵

However, Green's focus on using structural reforms to reduce the relational dynamics of discrimination represents a departure from the approach taken here. Green seeks to move away from an individualistic model of employment discrimination law that focuses on decisionmaker bias to a relational one that focuses on social relations and their interaction

321. See *supra* notes 247–264 and accompanying text (courts have held that an organization's diversity efforts may constitute evidence of discrimination); *supra* notes 236–245 and accompanying text (courts have found instrumental uses of race unlawful, regardless whether they resulted in minority hiring); *supra* notes 225–235 and accompanying text (discussing statutory impediments to diversity initiatives).

322. See Green, *supra* note 177, at 620 ("If by taking race or sex into account in an employment decision the employer aims to advance this broader goal—to reduce the incidence of decisions based on racial or gender bias within the workplace as a whole—then the employer's purpose mirrors the purposes of Title VII."). See also *supra* notes 111–112 and accompanying text (discussing the Court's reliance on Title VII's purpose of providing equal opportunity to justify upholding voluntary affirmative action).

323. Green, *supra* note 177, at 598.

324. *Id.* at 591.

325. *Id.* at 637–38.

with institutional structures.³²⁶ While I agree that antidiscrimination law should provoke institutions to pay close attention to the relationship between workplace inequality and institutional structures, I remain committed to a vision of equal opportunity that demands equal consideration for every individual in significant selection contests and substantively equal opportunity, even after those contests have occurred, to grow and to advance within the institution. If an employer were permitted to establish a defense to disparate treatment liability by demonstrating that status-based conduct was part of a “broader integrative effort” to “reduce discrimination,” individual workers would sometimes be forced to bear the cost of transaction-level injustice in order to grant employers the latitude to achieve macro-level success.³²⁷ The model proposed here would hold an employer’s diversity efforts to the standard of equal opportunity at the level of individual transactions, but it would also require the plaintiff to establish a causal link between those efforts and the challenged adverse employment action. It therefore would not permit claims to go forward simply because diversity is “in the air.”³²⁸

Consider the following example: An employer assigns 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 considered in such a manner as to deny the white employee due consideration of the 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 was denied the subsequent promotion may have a claim if, due to the race-based assignment of accounts, he was denied critical professional growth opportunities and, as a consequence, could prove a causal connection

326. *Id.* at 592-93 (explaining orientation around this relational model as a new “theoretical move” in the employment discrimination literature).

327. *Id.* at 637-38. *See also id.* at 620 (arguing that “[f]ocusing on the antisubordination underpinning of Title VII helps make clear why the imposition” of a special cost due to their participation in diversity programs “on individual women and people of color can be justified as a means of reducing discrimination more broadly within the employer’s workplace, just as similar costs can be justified when they are imposed on men or whites”).

328. *Cf.* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014) (arguing that contemporary understandings of discrimination counsel that we think of antidiscrimination law as imposing a duty of care on employers to undertake practices that will mitigate the effects of pervasive bias).

between the race-based assignment of accounts and the subsequent denial of promotion. Similarly, a black plaintiff would not succeed in a claim that his employer's race-based work assignment scheme concealed discrimination as compliance if the employer could show that his denial of the promotion was related to his performance, rather than to any opportunities lost due to the operation of a diversity policy.

The same analysis would hold if the employer used race-matched mentoring in an effort to create mentoring relationships. Assuming that important knowledge and professional skills are imparted through those relationships, such a program may backfire and suppress the professional development of minority employees if they are denied access to potential mentors on the basis of race. Relevant, but not dispositive, to a determination of the employer's liability would be evidence that the firm's mentoring policy made positive contributions to her growth and advancement within the firm, or to that of her black female peers. Such evidence is important not because it would excuse the harm done to the plaintiff, but because it would disrupt the causal inference that the mentoring scheme resulted in the employer's adverse employment action. Moreover, it is important to recognize that putting equality first does not mean subjecting organizations to a special tax when they make diversity-oriented decisions involving minorities and women. Rather, it means holding them to the same standard of equal opportunity in the implementation of diversity measures as that to which they would be held regarding any other employment practice and maintaining congruent legal protection for all individuals denied equal opportunity by status-based policies, regardless what motivated an employer's policy choices.

2. Envisioning Diversity Beyond Affirmative Action

Antidiscrimination law must recognize that the pursuit of the benefits of diversity is a strategic process that does not take the achievement of a numerical end-state as its principal objective. Doing so is fundamental to the achievement of equal opportunity. However, once diversity is decoupled from affirmative action and the goal of end-state diversity, the risk of exploitative behavior grows and the relationship between diversity and equal opportunity becomes uncertain. The present model offers some equilibrium by positing that substantive equality of opportunities is as important a measure of equal opportunity as procedural fairness or proportional representation, and whether opportunities are substantively equal must be judged according to whether they provide each individual the same chances for growth and achievement. 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 organizational behavior to meet individuals' needs.

Part II demonstrated that “[t]alk of developing human potential is no stranger to diversity discourse.”³²⁹ Still, within the business world such talk has largely occurred without engaging antidiscrimination law as its interlocutor. The econometric framing given to diversity in managerial discourse obscures the value of equal opportunity that is also a subject of that discourse. Sociological literature has rightly pointed to deep tensions between the managerial conception of diversity and a more remedial understanding of civil rights norms.³³⁰ 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. This, however, is not a reason to repudiate the whole of managerial discourse on diversity; it is a reason to engage managerial discourse where it shares common ground with legal norms.

There is no doubt that integration in the American workplace is a goal that has proved to be as elusive as it is important. Nevertheless, even an organization with substantial workforce diversity will fail to provide equal opportunity if, after the hiring stage, it does not invest in the human capital development 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 encourages organizations to put equality first, not just at the moment of selection, but at every stage in the employment relationship. 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 achievement would be factual questions worked out in the course of determining whether an organization's practices actually caused an

329. Rich, *supra* note 15, at 485. *See also, e.g., supra* notes 142–51 and accompanying text.

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

individual harm, and the answer would not be presumed merely from the outcome that a person who was intended to benefit from a particular program did not succeed.

Finally, the use of liability rules to provide legal guidance to organizational diversity measures should not apply to organizational speech about diversity. We cannot expect organizations to develop effective strategies for promoting equal opportunity if they must worry that discussions of diversity or statements of support for 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 status-based 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 diversity to be presumptive evidence of discrimination stifles important conversations about equal opportunity and institutional design.

Organizations must be free to discuss the needs and progress of their internal constituencies and to vet policy options for promoting individual growth and achievement in order for diversity practices to provide equal opportunity. Some scholars have argued that antidiscrimination law conflicts fundamentally and predictably with freedom of expression.³³¹ In this particular case, however, the conduct-speech distinction is clear. Antidiscrimination law is concerned with how organizations treat individuals. Talk of diversity is not ordinarily meant to conceal discrimination. It would be a terrible irony if antidiscrimination law were interpreted, as some lower courts have already done,³³² to force organizations that talk about matters of inequality and equal opportunity in the language of diversity to risk liability for discrimination. 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 proof that “diversity” is a pretext or proof of a causal connection between a specific diversity practice and some legally cognizable adversity.

331. 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 *GEO. L.J.* 627 (1997).

332. See *supra* notes 253–264 and accompanying text.

CONCLUSION

We now speak of diversity where we once spoke of equality, but this does not mean that diversity should be allowed to displace antidiscrimination law's commitment to equal opportunity. *Grutter* 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. Indeed, the need to reconsider diversity's value is now a matter of some urgency, particularly its value independent of affirmative action.

The integrity of *Grutter's* diversity rationale has been eroding and under threat since the very day that the decision was authored. *Grutter's* holding continues to come under direct attack,³³³ and the Court itself has shown signs that it is losing confidence in *Grutter's* rationale.³³⁴ Given the Court's continuing ambivalence about diversity's constitutional status, it is essential that the diversity rationale receive a better legal justification if it is to survive and thrive in legal discourse.

This Article offers that justification. It 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

333. See *supra* note 30 and accompanying text.

334. Occupying the current Court's ideological center, Justice Kennedy has never strayed from the view, expressed in his *Grutter* dissent, that "[p]referential by race, when resorted to by the State, can be the most divisive of all policies" threatening even "the idea of equality." *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). See also, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J.) ("To be forced to 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 corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process."). Moreover, in 2014, a fractured Court upheld an amendment to Michigan's state constitution banning all racial preferences by state actors, including the very Michigan Law School admissions policy that *Grutter* upheld. In an opinion announcing the judgment of the Court, Justice Kennedy suggested that the Michigan electorate's ban on affirmative action expressed democratic "matur[ity]" and a willingness to rise above past "flaws and injustices." *Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J.). Siding with the conservative wing of the Court, Justice Breyer further suggested that a university's purpose to obtain the educational benefit of diversity was of lesser constitutional value than a governmental purpose "to remedy past exclusionary racial discrimination or the direct effects of that discrimination." *Id.* at 1649 (Breyer, J.). Justice Breyer appeared to be responding to the very sense in which *Grutter* positions diversity as orthogonal to the Constitution's guarantee of equality.

diversity with the accomplishment of those benefits, displacing remedial rationales for affirmative measures, and failing to distinguish between exploitative and egalitarian objectives. 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. This equal opportunity approach to diversity is founded on the principle that equal opportunity requires that the opportunities given to individuals for their growth and achievement must be substantively equal, and it recognizes that sometimes individual differences must be considered in order to reach this goal.

