

## Articles

### **THE FRONTIER OF AFFIRMATIVE ACTION: EMPLOYMENT PREFERENCES & DIVERSITY IN THE PRIVATE WORKPLACE**

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#### I. INTRODUCTION

Affirmative action remains controversial in American jurisprudence and society in general.<sup>1</sup> Corporate policies, governmental programs and judicial decisions merely touching on minority preferences generate scathing media editorials and public outcry.<sup>2</sup> The pro-affirmative action

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1. See, e.g., Laurel Rosenberg, Grutter v. Bollinger: *Setting a Path for Diversity at the University of South Carolina School of Law*, 55 S.C. L. REV. 531, 531 (Spring 2004) (“[Affirmative action] is one of the most controversial topics that the United States Supreme Court has addressed in recent years.”); Stylianos-Ioannis G. Koutnatzis, *Affirmative Action in Education: The Trust and Honesty Perspective*, 7 TEX. J.C.L. & C.R. 187, 189 (Fall 2002) (beginning the article with the sentence: “Affirmative action is one of the most controversial topics for constitutional scholars, perhaps for American society at large as well”).

2. See, e.g., *Students Outraged by Bush Attack on Affirmative Action*, IN MOTION MAGAZINE, <http://www.inmotionmagazine.com/idaa/rebush.html> (last visited Feb. 14, 2009) (discussing the George W. Bush administration’s decision to challenge the University of Michigan’s undergraduate and law school affirmative action policies); Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, N.Y. TIMES, Jan. 26, 1999, available at

camp accuses opponents of holding back minority advancement. They argue that this is especially problematic in a world where lawful discrimination drastically impeded certain groups for centuries. Proponents also argue that prejudice lingers—consciously and subconsciously—in contemporary society.<sup>3</sup> The anti-affirmative action camp counters with warnings about the destruction of the meritocracy that makes America great.<sup>4</sup> Opponents also argue that a stamp of inferiority is placed on minorities collectively when affirmative action benefits minorities individually. Strong voices on either side continue to shoot down workable solutions designed to facilitate equitable minority advancement.<sup>5</sup>

The United States Supreme Court—an institution capable of shining a bright and guiding light on issues of equal protection and individual rights—continually fails to provide clarity in the arena of minority preferences. The Court's most prominent affirmative action opinions: (1) rarely gain large majorities (or any majority at all), (2) tend to alter principles from previous precedent or muddy understanding through dicta and (3) fail to articulate workable, somewhat standardized tests to evaluate minority preference plans. This leaves governments, educational institutions, and private employers to struggle with this confusing “line” of precedent as they make contracting, employment, and admissions decisions in real time. All of this occurs in an economy where every contract, job, and admission is a precious commodity.

This article moves away from heavily analyzed affirmative action programs in higher education, public employment, and government contracting and instead frames the looming battlefield: diversity-based, non-remedial, voluntary preference programs created by private

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<http://query.nytimes.com/gst/fullpage.html?res=9D02EEDA1539F935A15752C0A96F958260> (discussing an advertising campaign with the headline: “On 15 campuses across the country, students will open their college newspapers today to a full-page advertisement with the headline: ‘Guilty by Admission’ and, in bold print, ‘Nearly Every Elite College in America Violates the Law. Does Yours?’”).

3. See, e.g., Tristin K. Green and Alexandra Kalev, Symposium: *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1435 (June 2008) (discussing conscious and subconscious discrimination in the workplace and stating that social science research “has revealed that discriminatory biases and reliance on stereotypes in the workplace are not always conscious or motivated by animus”).

4. See generally, THOMAS SOWELL, AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY, Yale University Press (2004) (examining the effects of affirmation action in other countries); Terry Eastland, *The Case Against Affirmative Action*, 34 WM & MARY L. REV. 33 (Fall 1992) (arguing against affirmative action).

5. See, e.g., Charles Kels, *Finding a Middle Ground on Affirmative Action*, DAILY PENNSYLVANIAN, Mar. 28, 2003, available at <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2003/03/28/Opinion/Charles.Kels.Finding.A.Middle.Ground.On.Affirmative.Action-2154945.shtml> (“Like most controversial issues from abortion to gun control, the affirmative action debate has unfortunately been controlled by the extreme positions on either side.”).

employers.<sup>6</sup> Structured as such, corporate affirmative action plans of the future will differ from historical efforts. In the past, minority preferences sought to remedy proven workplace discrimination or documented societal discrimination in particular job categories – a backward-looking rationale. The contemporary rationale is more forward-looking and shines the spotlight directly on workforce diversity for its own sake. Employer-proponents of such plans argue that diversity focused efforts are necessary to compete, market, innovate, think, and profit in today's global marketplace. Accordingly, this article distinguishes the Remedial Rationale of the past with the Diversity Spotlight Rationale of the future.<sup>7</sup>

More specifically, Part II defines workplace affirmative action, examines its historical roots and then synthesizes relevant precedent from the Supreme Court and federal circuit courts. Part III evaluates the Diversity Spotlight Rationale and three key components required for diversity-based plans to comply with such precedent. This analysis is informed by the recent *Grutter v. Bollinger* decision, where prominent private employers filed *amici curiae* briefs favoring diversity-based affirmative action at the University of Michigan's law school.<sup>8</sup> Part IV anticipates a potential Supreme Court case squarely confronting this topic and discusses the likely decision in light of precedent from Part I and current composition of the Supreme Court.<sup>9</sup> This part argues that the Diversity Spotlight Rationale—outside of the higher education realm—is likely at odds with the prior opinions of at least five Justices on a conservative-leaning Court. These facts lead to the prediction that private employers will have a difficult time implementing voluntary affirmative action plans without resorting to the Remedial Rationale and conceding prior institutional or societal discrimination in relevant job categories. Part V concludes with a summary of this new frontier and posits that the controversy will continue even after the next prominent affirmative action

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6. The relevant companies in this article are those governed by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e et seq. (2000). Generally, Title VII covers employers, engaged in an industry affecting commerce, employing fifteen or more employees for at least a specific period of time. § 2000e(b) (Title VII also covers federal, state and local governments as well as employment agencies and labor unions; however, such covered entities are not covered in this article).

7. Spotlights are designed to call attention to a subject or make something more prevalent. See, e.g., DICTIONARY.COM, <http://dictionary.reference.com/browse/spotlight> (last visited Feb. 26, 2009) (defining spotlight as “a strong, focused light thrown upon a particular spot . . . for making some object, person, or group especially conspicuous.”). This analogy is appropriate in the case of forward-looking, voluntary affirmative action plans by employers who call attention to diversity aspects involving their workforces.

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

9. See, e.g., *Grutter*, 539 U.S. 306; see also *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616 (1987) (examples of landmark affirmative action precedents).

decision.

## II. AFFIRMATIVE ACTION IN PRIVATE WORKPLACES, ITS HISTORY & GOVERNING PRECEDENT

Affirmative action seeks to temporarily increase employment, educational, and societal opportunities for qualified members of underrepresented groups.<sup>10</sup> Historically, affirmative action focused on helping black citizens overcome the effects of prior discrimination and segregation. Early plans attacked racial barriers obstructing employment opportunities<sup>11</sup> and contract rights.<sup>12</sup> This approach was colorblind and required employers to subtract an individual's race from the decision-

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10. For a similar definition of affirmative action see Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case For Affirmative Action*, 47 ARIZ. L. REV. 113, 114 n.2 (Spring 2005); see also Anupam Chander, *Minorities, Shareholders, and Otherwise*, 113 YALE L.J. 119, 120 n.3 (2003) (defining affirmative action as "minority-mindfulness in decision-making resulting in either a preference or a disproportionate distribution of benefits."); Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 614 (1998) (defining affirmative action similarly by stating that "affirmative action has come to mean any type of program or policy where race, national origin, or gender is taken into account. To be eligible for the benefits of affirmative action in employment, a person must meet two requirements: [1] The person must be a member of a group that has been historically underrepresented . . . and [2] the person must be otherwise qualified . . ."). Professor William W. Van Alstyne delves more deeply into the many different aspects and definitions of affirmative action in a recent article. *Affirmative Actions*, 46 WAYNE L. REV. 1517 (Fall 2000). The term affirmative action comes from the labor-management relations arena where "employers found guilty of unfair labor practices regarding employee attempts to organize could be required take steps to assure a work environment free of threats against future employee organizing activities." See, e.g., COMM. ON EDUC. AND LABOR, A REPORT OF THE STUDY GROUP ON AFFIRMATIVE ACTION, H.R. DOC. NO. 110-L, at 30 (Aug. 1987) [hereinafter H.R. DOC. NO. 110-L].

11. See, e.g., Corrine E. Anderson, Comment: *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 185-91 [hereinafter *Current Perspective*] (discussing the impetus behind the Fourteenth Amendment and stating that "African Americans were the intended beneficiaries of the earliest forms of affirmative action."). See generally Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291 (Winter 1996) [hereinafter *Historical Review*] (discussing the history of affirmative action in depth).

12. See also 42 U.S.C. § 1981(a) (2006) [hereinafter Section 1981] ("[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."). This section was part of the Civil Rights Act of 1866 and, although it has been amended, is still a major weapon against discrimination. See, e.g., Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 184 (2006) ("Section 1981's 'make and enforce contracts' clause has played an active role in modern anti-discrimination law").

making equation. Over time, the efficacy of purely colorblind affirmative action was questioned and plans morphed into color-conscious minority preferences.<sup>13</sup> Although these preference-based plans often excluded Asian Americans, they brought other underrepresented groups—such as Native Americans, Hispanics and females—under the umbrella.<sup>14</sup> In the 1960s and 1970s, preference-based affirmative action gained traction and spread into different areas of American life and commerce.<sup>15</sup> As a result, today's affirmative action plans are created, or judicially imposed, in the following five arenas: (1) government contracting,<sup>16</sup> (2) public education,<sup>17</sup> (3)

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13. See, e.g., JOHN DAVID SKRETNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 80-81 (1996) (discussing the earliest forms of affirmative action and stating that when President Lyndon Johnson assumed power “he continued Kennedy’s . . . color-blind course. His tenure began with two major initiatives, both designed to protect Americans regardless of race.”).

14. See, e.g., *Current Perspective*, *supra* note 11, at 190 (discussing how the first Executive Orders requiring affirmative action in government contracting banned discrimination based on race *and* other categories such as creed and national origin); *Johnson*, 480 U.S. at 619 (analyzing an affirmative action plan intended to benefit particular minority groups and women).

15. See e.g., Harvey Gee, Guest Commentary, *Asian-Americans and Affirmative Action*, DENV. POST, May 7, 2008, available at [http://www.denverpost.com/opinion/ci\\_9172477](http://www.denverpost.com/opinion/ci_9172477) (stating that:

“It is apparent that under the guidelines of these [affirmative action] programs, Asian Americans are not seen as sufficiently disadvantaged or underrepresented to warrant the same consideration offered to African Americans and Latinos. The virtual absence of Asian Americans from affirmative action analysis is troubling and demonstrates the need for the Asian American voice to be heard. This tendency to exclude Asian Americans from the affirmative action debate is disingenuous. Perhaps it is reflective of the erroneous belief that Asian Americans do not or should not benefit from affirmative action.”);

see also Christopher Marquis, *Woman in the News; A Washington Veteran for Labor; A Tested Negotiator for Trade; Elaine Lan Chao*, N.Y. TIMES, Jan. 11, 2001, at A-17 (quoting former Secretary of Labor Elaine Chao who stated:

“[that Asian-Americans] have also been tremendously damaged by affirmative action. . . . Many Asian-Americans are excluded from minority procurement programs [and] are not considered to be minorities in the full sense of the word – positive and negative – and quota systems in the best universities in this land exclude qualified Asian-Americans.”).

16. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204-10 (1995) (dealing with affirmative action efforts by the federal government intended to encourage government contractors to subcontract with small businesses controlled by “socially and economically disadvantaged individuals”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-78 (1989) (dealing with affirmative action efforts by a city government whereby “prime contractors to whom the city awarded construction contracts [were required] to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises . . . [defined as businesses at least fifty-one percent] owned and controlled . . . by minority group members . . . [such as] Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts”); see also *Tangren v. Wackenhut Services, Inc.*, 480 F. Supp. 539 (D.

organized labor,<sup>18</sup> (4) public employment,<sup>19</sup> and (5) private employment.<sup>20</sup>

The remainder of Part II is divided into two sections. The first focuses on the history of color-conscious, preference-based affirmative action in the private employment arena. The second section analyzes the line of precedent formed from legal challenges to such employer preference programs. This discussion provides the historical and legal background necessary for Part III and the key components of private, voluntary affirmative action plans created under the Diversity Spotlight rationale.

#### *A. The Emergence of Preference-Based Affirmative Action in the Private Employment Arena*

In 1954, the Supreme Court declared that government-sanctioned, separate but equal treatment according to race is unconstitutional.<sup>21</sup> Acting on this mandate, the federal government experimented with ideas to ameliorate racial tensions persisting after *Brown v. Board of Education*. Modern affirmative action was born out of such efforts.<sup>22</sup> The American

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Nev. 1979) (discussing an affirmative action plan voluntarily created to comply with Executive Order 11246 in contract dealings with the Atomic Energy Commission).

17. Oftentimes affirmative action plans public education at the undergraduate and graduate levels. *See, e.g., Grutter*, 539 U.S. at 312-16 (analyzing an affirmative action plan created by the law school at a public university to benefit “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [Michigan Law School’s] student body in meaningful numbers”); *Gratz v. Bollinger*, 539 U.S. 244, 271-73 (2003) (discussing an affirmative action plan created by a public university for its undergraduate College of Literature, Science, and the Arts designed to benefit blacks, Hispanics and Native Americans). In some situations, affirmative action plans also target kindergarten through high school education. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (discussing two separate affirmative action plans – public elementary school assignments in Louisville, Kentucky and public high school assignments in Seattle, Washington).

18. *See, e.g., Breschard v. Dir. Guild of Am.*, 1984 U.S. Dist. Lexis 19766, at 4-5 (C.D. Cal. 1984) (discussing *Directors Guild of America* and its attempts to create affirmative action plans to combat a “history of discrimination against its women and racial minority members by . . . production companies”).

19. *See, e.g., Taxman v. Bd. of Educ. of the Twp. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (analyzing an affirmative action plan at a public high school using Title VII as a guide).

20. *See, e.g., Weber*, 443 U.S. at 197-200 (analyzing an affirmative action plan created by a private employer as part of a collective bargaining agreement intended to benefit black craft workers); *Johnson*, 480 U.S. at 623-27 (analyzing an affirmative action plan under Title VII created to benefit women and minorities who had been underrepresented in major job classifications).

21. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

22. *See, e.g., Richard N. Appel, Alison L. Gray, and Nilufer Loy, The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Affirmative Action in the*

workplace—with its historically discriminatory practices<sup>23</sup>—became one of the government’s initial targets.<sup>24</sup>

In 1961, President Kennedy issued an Executive Order which focused the attention of the Executive Branch on discrimination in employment. Executive Order 10925 codified a concept labeled “affirmative action”<sup>25</sup> which prohibited discrimination by companies contracting with the federal government against any “employee or applicant for employment.” This legally enforceable presidential decree required that such contractors’ employment decisions be made without regard to race, creed, color, religion or national origin.<sup>26</sup> President Kennedy did not mandate that

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*Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 551-52 (Spring 2005) [hereinafter *40th Anniversary*] (“[Although the] concept of legislating equal employment in the private sector may be traced back to various constitutional amendments, Reconstruction, and New Deal Era legislation, *the modern day concept of affirmative action evolved from the social unrest of the 1950s*. During that decade, race relations became a societal flash point, leading to the reexamination of state sponsored segregation in *Brown v. Board of Education* . . . Although the actual process of desegregation stretched out for decades, the *Brown* cases paved the way for broader social reform.”) (citations omitted) (emphasis added).

23. See, e.g., Michael L. Foreman, Kristin M. Dadey, and Audrey J. Wiggins, *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation’s Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81, 83 (collecting cases and stating that in the “period following the passage of Title VII, a number of lawsuits were filed in an effort to dismantle the kind of systemic discrimination that was deeply ingrained in the American workplace.”).

24. See, e.g., *Historical Review*, *supra* note 11, at 301-02 (discussing the fact that discrimination in employment continued well beyond the *Brown* decision and the attempts made by government to end such discrimination).

25. Exec. Order No. 10,925, 3 C.F.R. 339 (1961), [hereinafter E.O. 10925] (establishing the President’s Committee on Equal Employment Opportunity). This order did not lay out any steps that such affirmative action plans should take. See, e.g., *40th Anniversary*, *supra* note 22, at 552-53. This Executive Order was superseded by Executive Order 11246, discussed below; however, Executive Order 10925 remains important for its historical significance. See, e.g., U.S. Nat’l Archives & Records Admin., *Executive Orders Disposition Tables, President John F. Kennedy*, available at <http://www.archives.gov/federal-register/executive-orders/1961-kennedy.html>.

26. E.O. 10925 (declaring that government contractors “will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin . . . [and] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”). Interestingly, under Executive Order 10925, religion was a protected class only in the government employment category and not in the subcontractor employment category and creed was a protected class only in the subcontractor employment category. Compare E.O. 10925, *Part II – Nondiscrimination in Government Employment* (prohibiting discrimination against “any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin”) with E.O. 10925, *Part III – Obligations of Government Contractors and Subcontractors* (“[C]ontractors will not discriminate against any employee or applicant for employment because of race, creed, color or national origin”).

contractors grant preferences to minorities. From the perspective of affirmative action, Executive Order 10925 declared only that employment decisions be made free from any consideration of race or color – in other words, such decisions had to be colorblind.

Congress incorporated the colorblind thrust of this and subsequent Executive Orders<sup>27</sup> into its most significant piece of civil rights legislation since 1866. Title VII of the Civil Rights Act of 1964<sup>28</sup> made it illegal for a covered employer<sup>29</sup> to:

[F]ail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>30</sup>

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27. See, e.g., Exec. Order No. 11,246, 30 Fed. Reg. 12,319, *Part II, Subpart B – Contractors Agreement*, § 202 (1965), reprinted as amended in 42 U.S.C. § 2000e (2006), available at <http://www.dol.gov/esa/ofccp/regs/statutes/eo11246.htm> (currently requiring, among other things, a government contractor to create an affirmative action program and to provide a written affirmation that it “will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin . . . [and] take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin”); Exec. Order No. 11,478, 34 Fed. Reg. 12985, § 1 (1969), reprinted as amended in 42 U.S.C. § 2000e (1994), available at <http://www.eeoc.gov/federal/eo11478/eo11478.html> (“[It is] the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.”); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980), reprinted in 42 U.S.C. § 2000d-1 (1994), available at <http://www.usdoj.gov/crt/cor/byagency/eo12250.php> (attempting to eliminate discrimination in federal programs and programs receiving federal funds); Exec. Order No. 12,259, 46 Fed. Reg. 1,253, § 1-602 (1980), reprinted in 42 U.S.C. § 2000d-1 (1994), available at <http://www.archives.gov/federal-register/codification/executive-order/12259.html> (requiring consistency from federal agencies in implementing Executive Order 12,250).

28. 42 U.S.C. § 2000e (2006). See also *Historical Review*, *supra* note 11, at 303-07 (“Congress strengthened Executive Order 10,925 by incorporating it into Titles VI and VII of the Civil Rights Act of 1964, thereby providing the legislative basis for equal employment opportunity laws and affirmative action programs. The United States Senate explicitly noted that the Act included the affirmative action program set forth in Executive Order 10,925 in the administration provisions of Title VII.”) (citations omitted).

29. Under Title VII the term “employer” means “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e(b).

30. 42 U.S.C. § 2000e-2(a)(1). In addition, Title VII makes it unlawful for a covered employer to:

[L]imit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment



A subsequent section of Title VII dealt more specifically with affirmative action and declared:

Nothing [in Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons . . . in comparison with the total number or percentage of persons . . . in any community . . . or in the available work force.<sup>31</sup>

These operative provisions, strictly interpreted, broadly ban discrimination against individuals with protected status (i.e., race, color, religion, sex and national origin) in covered workplaces. Through its express language, Title VII disincentivizes employers from implementing affirmative action programs that preference minority groups and inherently discriminate against whites “because of” race. In fact, the only express approval of affirmative action in the statute allows a court to implement preferences as a remedy only after making a determination that a covered employer has “intentionally engaged in or is intentionally engaging in an unlawful employment practice.”<sup>32</sup> In such situations, a “court may enjoin [an employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate.”<sup>33</sup>

Oponents of affirmative action quickly claimed that Title VII’s colorblind provisions—working in tandem—banned all minority preference plans voluntarily created by private employers.<sup>34</sup> Proponents of

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opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2).

31. 42 U.S.C. § 2000e-2(j).

32. 42 U.S.C. § 2000e-5(g)(1). *See also Historical Review, supra* note 11, at 309 (“Nothing in the federal statutes requires a private firm to incorporate affirmative action programs into its employment strategy. The private sector can only be required to undertake affirmative action when ordered by a court, upon a finding that the employer engaged in intentional discrimination.”).

33. 42 U.S.C. § 2000e-5(g)(1). *See also* H.R. DOC. NO. 110-L, *supra* note 10, at 37 (“[Courts have] ordered employers to hire or promote equal numbers of minority and non-minority employees up to a certain percentage of the workforce . . . [and] ordered public and private employers to adopt special recruitment and testing policies designed to assure opportunities for minorities and women to compete [for] jobs.”).

34. *See, e.g., Johnson*, 480 U.S. at 657-58 (Scalia, J., dissenting) (stating that:

With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares that it “shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

affirmative action staked their claim to the fact that the express language of Title VII does not expressly forbid voluntary affirmative action plans and that its legislative history actually encourages precisely this type of minority assistance.<sup>35</sup>

Adding to the confusion was the fact that—while the statute is clear in its anti-discrimination mandate—Title VII does not specify the elements of discriminatory conduct. This omission left the primary interpretation to the court system. Judicial decisions interpreting Title VII soon created a bifurcated liability structure for employers accused of discrimination. Under these interpretations, Title VII prohibits both (1) intentional discrimination (disparate treatment)<sup>36</sup> and (2) unintentional discrimination caused by company decisions which are facially neutral but have a discriminatory impact (disparate impact).<sup>37</sup> Facing decades of historical discrimination and confronted with an expanding liability structure punishing such practices, employers struggled to make amends. When

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compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." The Court today completes the process of converting this from a guarantee that race or sex will not be the basis for employment determinations, to a guarantee that it often will.)

35. *See, e.g., Johnson*, 480 U.S. at 645 (Stevens, J., concurring) (stating that:

The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. The Court's opinion in *Weber* reflects the same approach; the opinion relied heavily on legislative history indicating that Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible (citations omitted)).

36. Plaintiffs alleging intentional discrimination generally prove a Title VII violation in one of two ways: (1) direct evidence of intentional discrimination and (2) circumstantial evidence of intentional discrimination. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (analyzing a case of alleged intentional discrimination under the direct evidence standard); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (analyzing alleged intentional discrimination and creating a prima facie case for instances of circumstantial evidence of discrimination); Thomas A. Cunniff, Note, *The Price of Equal Opportunity: The Efficiency of Title VII After Hicks*, 45 CASE W. RES. L. REV. 507, 525-26 (Winter 1995) (discussing the creation of the *McDonnell Douglas* prima facie case and stating that this "formulation was entirely new, and the Court neither cited to any of the lower court cases nor to the earlier jury discrimination cases for support.").

37. The Supreme Court addressed the disparate impact type of discrimination in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (analyzing a facially neutral employment requirements—such as obtaining a high school diploma and passing scores on standardized tests—and stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [employees due to race] cannot be shown to be related to job performance, the practice is prohibited.").

considering an affirmative action-type program, executives had to make sense of the explicit provisions of Title VII urging colorblind decision-making and the statute's seemingly contradictory mandate to eliminate the vestiges of prior discrimination. As it did in 1961, the Executive Branch attempted clarification by attempting to legitimize a different type of affirmative action – this time in the form of minority preference programs instead of colorblindness.

In 1970, the Office of Federal Contract Compliance Programs (OFCCP) began to encourage a preference-based approach to affirmative action. The OFCCP initiated enforcement programs which required private employers to “implement numerical goals and timetables” for minority advancement.<sup>38</sup> Around the same time, the Department of Justice began to seek preference-based “affirmative action-type remedies in employment discrimination cases, including numerical goals and timetables.”<sup>39</sup> Finally, the Equal Employment Opportunity Commission (EEOC) applied pressure to companies and advocated for the implementation of preference-based affirmative action plans.<sup>40</sup> Through its newly-created National Programs Division, the EEOC initiated investigations into major American companies, such as IBM and Sears,<sup>41</sup> attempting to increase hiring of minorities and women.<sup>42</sup> In addition, segments of the public were encouraged by advocacy groups to bring pressure—via community boycotts and reciprocal trade agreements—to spur companies to voluntarily create affirmative action plans.<sup>43</sup>

Employers desiring to implement affirmative action to remedy past wrongs could find some comfort in the express governmental approval of preference-based plans. However, the government failed to provide much guidance on the limits, proper context and valid structure of such plans.

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38. Affirmative Action Programs, 41 C.F.R. § 60-1.40 (2004) (“[A] contractor’s [affirmative action] program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity.”). *See also 40th Anniversary, supra* note 22, at 553.

39. *40th Anniversary, supra* note 22, at 553 (collecting cases).

40. *See* H.R. DOC. NO. 110-L, *supra* note 10, at 38.

41. *Id.*

42. *Id.* (stating that the EEOC made the assumption that, considering its limited resources, “economies of scale would be achieved by focusing major staff resources on a few large firms in the hope that success with them would encourage other firms voluntarily to strengthen their affirmative action policies.”). This pressure had limited short-term effectiveness. *Id.* (stating that the EEOC’s strategy was “not entirely successful” and that it resulted in long legal battles with little changes in affirmative action policies).

43. *Id.* at 38-39 (stating that private organizations used “community based support to persuade public and private employers to adopt affirmative action measures beneficial to minorities and women.”).

The EEOC attempted clarification in 1979 via guidelines designed to walk employers through the creation of voluntary affirmative action plans.<sup>44</sup> These guidelines pronounced the agency's opinion that Title VII was not intended to expose employers to reverse discrimination liability based on the implementation of preference-based affirmative action.<sup>45</sup> Accordingly, the guidelines stated that voluntary affirmative action might be taken when:

- (1) an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact;
- (2) a comparison between the employer's workforce and the appropriate labor pool reveals that it is necessary to correct the effects of prior discriminatory practices; and
- (3) a limited labor pool of qualified minorities and women for employment or promotional opportunities exists due to historical restrictions by employers, labor organizations, or others.<sup>46</sup>

Employers who implement preference plans under these guidelines must: (1) conduct a reasonable self-analysis of current employment practices, (2) have a reasonable basis for concluding that action is appropriate, and (3) take reasonable action.<sup>47</sup> If employers use good faith in attempting to meet these criteria then they can claim a safe harbor for their affirmative action programs – at least according to the EEOC.<sup>48</sup>

At the end of the day, however, merely having EEOC guidance has not proven extremely comforting to private employers. In fact, companies operating under Title VII, the various Executive Orders, OFCCP and Department of Justice guidance and/or the EEOC guidelines remain leery as they were in the 1960s. On one hand, employers realize that discrimination and the effects of prior discrimination persist in the workplace and that they are potentially liable for each and every

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44. Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. § 1608 (2004).

45. Statement of Purpose, 29 C.F.R. § 1608.1 (2004) (“Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII.”).

46. Circumstances under which Affirmative Action is Appropriate, 29 C.F.R. § 1608.3(a)-(c) (2004).

47. Establish Affirmative Action Plans, 29 C.F.R. § 1608.4 (2004).

48. *See* Standard of Review, 29 C.F.R. § 1608.10(b) (2004) (stating that, if an employer claims it relied on an affirmative action plan, the EEOC will determine if an employer's reliance on such plan is true); *id.* at 1608.2 (stating that, if an employer's affirmative action plan complies with the EEOC guidelines, the EEOC will issue a no-cause determination in response to a discrimination charge); *see also* 42 U.S.C. § 2000e-12(b)(1) (stating that Title VII liability will not result from an employer's good faith reliance on any written interpretation or opinion of the EEOC). It is important to note that these guidelines specially allow affirmative action under the Remedial Rationale and seemingly not under the Diversity Spotlight Rationale – a topic reserved for Part IV.

employment decision they make. On the other hand, employers understand the simple, non-discriminatory language of Title VII and the potential for reverse discrimination lawsuits. Without clear guidance from the Supreme Court, employers even today find themselves walking “a high tightrope without a net beneath them . . . . On one side lies the possibility of liability to minorities in private actions . . . . On the other side is the threat of private suits by white employees.”<sup>49</sup> Nevertheless, organizations have continued to combat workplace discrimination via preference-based affirmative action.<sup>50</sup>

As mentioned in Part I, the Remedial Rationale formed the justification of such efforts for decades.<sup>51</sup> Today, however, employers are implementing a different strategy preferring to use affirmative action to foster a diverse workforce rather than admit and remedy past discrimination. In other words, the Diversity Spotlight Rationale currently outshines the Remedial Rationale.<sup>52</sup>

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49. *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting); see also Ferdinand S. Tinio, Annotation, *Affirmative Action Benefiting Particular Employers or Prospective Employees as Violating Other Employees' Rights Under Federal Constitution or Under Federal Civil Rights Legislation – Supreme Court Cases*, 92 L. Ed. 2d 849, 2(A) (2009) (discussing this issue and stating that:

“in attempting to rectify the effects of past discriminatory practices, courts and others frequently find themselves in a dilemma: the only way to correct past discrimination sometimes seems to be the imposition of discrimination on members of the male sex or the white majority--that is, a preference given to one group automatically discriminates against all other persons who are not members of that group and who are in competition with it, and thus results in a form of discrimination which some courts have styled ‘inverse’ or ‘majority’ discrimination, but which most courts have called ‘reverse’ discrimination.”),

40th Anniversary, *supra* note 22, at 559 (stating:

“[V]oluntary efforts result in an obvious tension with Title VII’s prohibitions on discrimination. Title VII’s literal language imposes liability for discrimination against any person on the basis of race, color, religion, sex, or national origin which contrasts with Congress’ intent to encourage voluntary action by employers in creating employment opportunities for minorities and women, which may include preferential treatment of one race or gender of employees over another.”) (citations omitted).

50. See, e.g., H.R. DOC. NO. 110-L, *supra* note 10, at 30 (“[The] prototype for an affirmative action program [implemented by a private employer] was the agreement signed by the Lockheed aircraft company in 1961 after a complaint against its employment practices . . . was filed by the NAACP.”). This plan required the company to take “special efforts to recruit and employ black workers in both white and blue collar jobs.” *Id.* Many of the early affirmative action plans went by the name Plan for Progress. *Id.*

51. One of the first affirmative action plans was entered into *after* a complaint was filed by the NAACP. *Id.* There is evidence that these early plans were ineffective. *Id.* (stating that 103 of the earliest affirmative action plans only increased the number of blacks employed within companies with such plans from 5.1 percent to 5.7 percent over a two year period).

52. See, e.g., 40th Anniversary, *supra* note 22, at 559 (“The vast majority of affirmative action programs in the United States do not fall into either the government contract or court-

With this history in mind, how should businesses desiring to implement diversity-based affirmative action programs proceed? The best course of action is deceptively simple. Employers should understand and comply with EEOC guidance but, more importantly, adhere as closely as possible to recent Supreme Court precedent. This strategy is advisable because the Court has the final say under Title VII and has “not yet determined whether the EEOC guidelines are entitled to deference by the courts.”<sup>53</sup> In addition, the EEOC guidelines are “rarely cited in litigation on this topic.”<sup>54</sup> This reality places the EEOC guidelines, and their express approval of affirmative action, on uncertain ground. On the other hand, affirmative action law “has been shaped by Supreme Court jurisprudence” interpreting Title VII.<sup>55</sup> With the importance of judicial precedent in mind, the next section discusses six Supreme Court decisions that have the potential to define the limits of voluntary, private affirmative action plans under the Diversity Spotlight Rationale.<sup>56</sup>

#### *B. Supreme Court Precedent Governing Workplace Minority Preferences*

The Supreme Court approaches workplace affirmative action similarly to other cases stemming from legislation – as an exercise in statutory interpretation. However, the Court’s interpretation of Title VII has been less than predictable. This confusion is partially explained by the tension between the statute’s explicit anti-discriminatory language and its remedial purpose. The remainder is attributable to the shifting ideological composition of the Court between major cases. Part II concludes with a discussion of six Supreme Court cases relevant to private workplace affirmative action. This analysis dissects the reasoning of each majority opinion, as well as important concurrences and dissents, and demonstrates how each case might impact voluntary, private affirmative action plans under the Diversity Spotlight Rationale. The following holdings are highlighted below:

- 1) Reverse Discrimination violates Title VII (BURGER COURT/*McDonald v. Santa Fe Trail Transportation Co.*);

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ordered categories. Rather, most initiatives are voluntary efforts implemented by employers to further equal opportunity.”).

53. *Id.* at 560.

54. *Id.*

55. *Id.*

56. Title VII is the primary law governing voluntary affirmative action plans because such plans do not involve state action. *See, e.g., Historical Review, supra* note 11, at 313-14 (“Private affirmative action is unique because neither the Fifth nor the Fourteenth Amendment is applicable; there is no government action involved. Therefore, plaintiffs seeking redress from private affirmative action programs are required to use Title VII.”).

2) Title VII permits affirmative action under the Remedial Rationale to combat conspicuous racial and gender imbalances in traditionally segregated job categories (BURGER COURT/*United Steelworkers of America v. Weber*) & (REHNQUIST COURT/*Johnson v. Transportation Agency*);

3) Diversity-based affirmative action allowing for individualized consideration can be a compelling interest in higher education admissions systems under the Equal Protection Clause (REHNQUIST COURT/*Gratz v. Bollinger & Grutter v. Bollinger*); and

4) Diversity-based affirmative action is not a compelling interest in primary and secondary school selection under the Equal Protection Clause (ROBERTS COURT/*Parents Involved in Community Schools v. Seattle School District*).

#### (1) Reverse Discrimination Violates Title VII-McDonald

Arguably, the line of workplace affirmative action precedent began with *McDonald v. Santa Fe Trail Transportation Co.*<sup>57</sup> In *McDonald*, two white employees and their black colleague were suspected of theft stemming from the same incident.<sup>58</sup> The company terminated the white employees but retained the black employee without good cause.<sup>59</sup> This led to a Title VII lawsuit alleging racial discrimination.<sup>60</sup> A unanimous Court held that employers cannot discipline white employees more harshly than black employees for the same infraction.<sup>61</sup> More generally, the majority interpreted Title VII as prohibiting discrimination directed at any race – not only discrimination directed at blacks.<sup>62</sup> In the words of Justice Thurgood

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57. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

58. *Id.* at 275-76.

59. *Id.* at 276.

60. *Id.* See also 42 U.S.C. § 2000e-2(a)(1) (prohibiting the discrimination against “any individual,” in the employment context, due to “such individual’s race”). The plaintiffs also claimed a violation of Section 1981 of the Civil Rights Act of 1866. *McDonald*, 427 U.S. at 276.

61. *McDonald*, 427 U.S. at 283 (holding that “[w]hile [an employer] may decide that participation in a theft of cargo may render an employee unqualifi[ed] [sic] for employment, this criterion must be ‘applied, alike to members of all races,’ and Title VII is violated if, as petitioners alleged, it was not.”). The District Court determined Section 1981 to be “wholly inapplicable to racial discrimination against white persons” and determined that it lacked jurisdiction over both the Section 1981 claim and the Title VII claim. *Id.* at 277. The final unanimous vote was 7-0 as Justices Stevens and Powell did not participate. *Id.* at 274.

62. *Id.* at 280 (“We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the black employee who was charged but not terminated] white.”).

Marshall, Title VII “prohibits *all* racial discrimination in employment.”<sup>63</sup>

*McDonald* was not based on an explicit affirmative action plan which preferred minorities in disciplinary decisions. However, the Court’s color-blind interpretation of Title VII left existing preference programs in serious jeopardy. Because preferences inherently discriminate on the basis of race, this decision provided white employees injured by affirmative action plans with powerful ammunition. To find a safe harbor, companies are forced to distinguish the facts of *McDonald* from their affirmative action programs. Today, employers are wise to argue that their minority preferences distinguish by race, but in a positive manner intended to advance Title VII’s mandate to eliminate discriminatory treatment, which harms protected classes. This is a concept controversially referred to as “benign discrimination.”<sup>64</sup> The Court’s next relevant affirmative action decision answered the major question left open after *McDonald*: whether Title VII forbids private employers from voluntarily engaging in benign discrimination by providing racial preferences to remedy prior discrimination.<sup>65</sup>

(2) Title VII Permits Affirmative Action under the Remedial Rationale to Combat Conspicuous Imbalances in Traditionally Segregated Job Categories—Weber & Johnson

*United Steelworkers of America v. Weber*<sup>66</sup> constituted the Court’s first foray into private workplace affirmative action.<sup>67</sup> In 1974, the Kaiser Aluminum & Chemical Corporation—together with the United Steelworkers union—crafted an affirmative action plan.<sup>68</sup> This plan was not designed to remedy rampant institutional discrimination by Kaiser.<sup>69</sup>

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63. *Id.* at 283 (emphasis in original). The Court also held that Section 1981 prohibited discrimination against white employees by a private sector employer. *Id.* at 286-87.

64. *See, e.g., Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (“So called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.”).

65. *United Steelworkers of America v. Weber*, 443 U.S. 193, 200-01 (1979) (“[This issue] was expressly left open in [*McDonald*] which held . . . that Title VII protects whites as well as blacks from certain forms of racial discrimination.”).

66. *Id.* at 201.

67. *See, e.g., 40th Anniversary, supra* note 22, at 561 (“[S]hortly after issuance of the EEOC’s regulations [discussed in Part II(A)], the Supreme Court decided the first case involving the permissible contours of voluntary affirmative action plans in the private sector.”).

68. *Weber*, 443 U.S. at 197-98.

69. This issue of whether Kaiser actually discriminated in the past is a bit complicated. *See id.* at 210 (Blackmun, J., dissenting) (“In this litigation, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question.”); Phillip P. Frickey, *John Minor Wisdom Lecture: Wisdom on Weber*, 74 TUL. L. REV. 1169,



Instead, its racial preferences targeted the effects of prior discrimination by craft unions, which had denied blacks training opportunities required for employment as craftsmen.<sup>70</sup> The goal was to increase the number of black craft employees in Kaiser's aluminum plant.<sup>71</sup> To meet this objective, the company created a new training program along with two seniority lists for craft trainees – one for white employees and the other for black employees.<sup>72</sup> For every white trainee selected, a black selection was required.<sup>73</sup> These preferences would last until the plant's percentage of black skilled craft workers approximated the percentage of blacks in the local labor force.<sup>74</sup> Weber, a white craft worker with more seniority than some of the black craft workers hired under the plan,<sup>75</sup> was denied admission to the training and filed a Title VII lawsuit alleging racial discrimination.<sup>76</sup>

In a controversial decision,<sup>77</sup> the Supreme Court upheld the plan ruling

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1172 (March 2000) [hereinafter *Wisdom*] (“Until 1974, Kaiser hired as craft workers for [its aluminum] plant only persons with prior experience in the craft. At [the plant relevant in *Weber*], this approach had resulted in a segregated workforce because blacks had historically been excluded from craft unions.”) (citations omitted).

70. *Weber*, 443 U.S. at 198-99.

71. *Id.* at 197-200. Nearly 40% of the labor force in Kaiser's neighborhood was black but less than 2% of these black employees worked in the craft division; this disparity was caused in a large part by racial discrimination, as blacks were not allowed by local unions to train for craft positions. *Id.* at 198-99 (stating that:

“This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craft workers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craft workers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.”) (citations omitted).

72. *Id.* at 199.

73. *Id.*

74. *Id.*; see also *Wisdom*, *supra* note 69, at 1173 (stating that:

“[T]he training program would have required quite a long implementation period, ending only when the percentage of African-American craft workers at the plant rose from the less than two percent in 1974 to a figure of thirty-nine percent, which was then the percentage of blacks in the local workforce.”) (citations omitted).

75. *Weber*, 443 U.S. at 199; see also *Wisdom*, *supra* note 69, at 1173 (stating that Weber had more seniority than two of the seven black trainees selected).

76. *Weber*, 443 U.S. at 199-200 (stating that Weber brought a class action lawsuit in a federal district court in Louisiana). The Court also reiterated the fact that, because no state action was involved, the Equal Protection Clause of the Fourteenth Amendment was inapplicable. *Id.* at 200.

77. See, e.g., *What the Weber Ruling Does*, TIME, July 9, 1979, available at <http://www.time.com/time/magazine/article/0,9171,920466,00.html> (“[The *Weber*] ruling will undoubtedly breed some resentment. Weber himself last week predicted that the decision will have ‘a negative effect on people all over the country toward blacks.’”); Don

that Title VII allows voluntary, race-conscious affirmative action plans<sup>78</sup> when:

- 1) Preferences are intended to “eliminate conspicuous racial imbalances in traditionally segregated job categories”;<sup>79</sup>
- 2) The rights of white employees are “not unnecessarily trammelled”—meaning that the plan neither (a) requires the

Munro, Note, *The Continuing Evolution of Affirmative Action under Title VII: New Directions after the Civil Rights Act of 1991*, 81 VA. L. REV. 565, 576 (1995) (“[The] Supreme Court specifically upheld voluntary affirmative action by private employers in its controversial decision in *United Steelworkers v. Weber* in 1979.”) (citations omitted).

78. The following chart lists each Justice sitting in *Weber* and each Justice’s decision in the case:

Case	Justice	Opinion Type	Reasoning
United Steelworkers v. Weber	Blackmun (concur)	Majority	Plan does not violate Title VII
	Brennan (opinion)	Majority	Plan does not violate Title VII
	Burger (dissent)	Minority	Plan violates Title VII
	Marshall	Majority	Plan does not violate Title VII
5-2 Private Employer Affirmative Action Plan Does Not Violate Title VII	Powell	No Opinion	Did not Participate
	Rehnquist (dissent)	Minority	Plan Violates Title VII
	Stevens	No opinion	Did not Participate
	Stewart	Majority	Plan does not violate Title VII
	White	Majority	Plan does not Violate Title VII

It appears that Justice Powell did not participate, because he had been sick at the time of the case, and that Justice Stevens did not participate, because he had previously represented Kaiser as a private attorney in Illinois. See *Wisdom, supra* note 69, at 1175.

79. *Weber*, 443 U.S. at 209 (“[T]he adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”).

termination of white employees and their replacement with black employees nor (b) creates an absolute bar to the advancement of white employees;<sup>80</sup> and  
3) Preferences are temporary in their duration.<sup>81</sup>

Because Kaiser's plan met these three requirements, its race-based classifications did not run afoul of Title VII.<sup>82</sup> The majority identified that its decision may seem at odds with the letter of Title VII, but argued that it was within the statute's spirit.<sup>83</sup> In addition, Justice Brennan's opinion did

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80. *Id.* at 208 (“[T]he plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white.”) (citations omitted).

81. *Id.* (“[T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers [sic] in the Gramercy plant approximates the percentage of blacks in the local labor force.”).

82. *Id.* at 204-06 (stating:

“Our conclusion is further reinforced by examination of the language and legislative history of § 703(j) of Title VII. Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. *Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or permit racially preferential integration efforts. But Congress did not choose such a course. Rather, Congress added § 703(j) which addresses only the first objection.* The section provides that nothing contained in Title VII “shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of” a de facto racial imbalance in the employer's work force. The section does *not* state that “nothing in Title VII shall be interpreted to *permit*” voluntary affirmative efforts to correct racial imbalances. *The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.*”) (citations omitted) (emphasis added).

83. *Id.* at 201-02 (“It is a ‘familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.’ The prohibition against racial discrimination in . . . Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.”) (citations omitted). Not all scholars believe that Title VII's anti-discrimination provisions are clear. *See, e.g., Wisdom, supra* note 69, at 1179 (discussing sections § 703(a)(1)-(2), (d) of Title VII and stating that these three provisions contain “language that can be rather easily read as invalidating the Kaiser/Steelworkers apprenticeship program. In a sense, though, that is as much an analytical problem for Weber as a benefit. If the statute is to have textual integrity, it should not have provisions that overlap each other in varying degrees of specificity and varying breadths of coverage.”).

not cabin the validity of affirmative action under Title VII to *Weber's* narrow facts. Instead, the majority expressly stated that the Court “need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans.”<sup>84</sup>

In an interesting concurrence, Justice Blackmun agreed that Kaiser's plan was valid but intimated that the majority had gone too far with its expansive view of permissible affirmative action.<sup>85</sup> He read Brennan's opinion to mean that a private sector employer need not point to prior institutional discrimination or even to “arguable” violations of Title VII before choosing to preference one race over another.<sup>86</sup> Blackmun believed that remedying this type of societal discrimination went further than Title VII allowed.<sup>87</sup>

Chief Justice Burger's dissent took a much stronger position. Burger argued that Kaiser's plan violated the express language of Title VII.<sup>88</sup> In stating that this case should have been a no-brainer, Burger claimed that:

Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities. But here there is no lack of clarity, no ambiguity. The quota embodied in the collective-bargaining agreement between Kaiser and the Steelworkers unquestionably discriminates on the basis of race against individual employees seeking admission to on-the-job training

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

85. *Id.* at 212-13 (Blackmun, J., concurring) (“‘Traditionally segregated job categories,’ where they exist, sweep far more broadly than the class of ‘arguable violations’ of Title VII. The Court’s expansive approach is somewhat disturbing for me . . . .”). Some legal scholarship on the matter concluded that Brennan’s opinion was not as well thought out and articulated as it could have been considering that the case arose at the end of the Court’s term. *See Wisdom, supra* note 69, at 1177 (“[W]ith all due respect for Justice Brennan . . . the opinion is a failure: it so lacks persuasive methodological power as to raise questions . . . about the Court’s candor in identifying the real reasons why five Justices voted as they did.”).

86. *Weber*, 443 U.S. at 212 (“The Court, however, declines to consider the narrow ‘arguable violation’ approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is ‘traditionally segregated.’ . . . [T]he Court considers a job to be ‘traditionally segregated’ when there has been a societal history of purposeful exclusion . . . .”).

87. *Id.* at 212-15 (stating that:

“[T]he Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates ‘arguable violations,’ discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted.”).

88. *Id.* at 216-17 (Burger, C.J., dissenting) (stating that “the Court’s judgment . . . is contrary to the explicit language of the statute” and citing 42 U.S.C. § 2000e-2(d)).

programs. And, under the plain language of [Title VII], that is "an *unlawful* employment practice."<sup>89</sup>

Eight years later, with two new Justices on the bench, the Supreme Court faced its second major workplace affirmative action case. *Johnson v. Transportation Agency, Santa Clara County*<sup>90</sup> analyzed a voluntary affirmative action plan by the Santa Clara County government. This plan attempted to remedy low percentages of women, minorities, and handicapped individuals within the County's employ.<sup>91</sup> The terms of the plan did not allow quota-based hiring and promotion but advocated that County managers use protected class status as a plus factor in employment decisions.<sup>92</sup> Similar to Kaiser's preference plan, Santa Clara targeted historical underrepresentation in job classifications but was not remedying

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89. *Id.* at 217. Justice Rehnquist dissented for similar reasons and stated that:

Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions . . . .

. . . .

Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history. Finding the desired result hopelessly foreclosed by these conventional sources, the Court turns to a third source -- the "spirit" of the Act. But close examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress. For if the spirit of the Act eludes the cold words of the statute itself, it rings out with unmistakable clarity in the words of the elected representatives who made the Act law. It is *equality*.

*Id.* at 222 and 253-54 (Rehnquist, J., dissenting) (citations omitted).

90. *Johnson*, 480 U.S. at 616 (1987). When *Johnson* was decided 1987, Justices O'Connor and Scalia had been conformed to the Court and Justices Burger and Stewart had retired.

91. *Id.* at 620-21 ("In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because 'mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons.' Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant." (citations omitted)).

92. *Id.* at 622 ("The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented.").

its prior discriminatory practices.<sup>93</sup>

Subsequent to the plan's adoption, the County opened a road dispatcher position.<sup>94</sup> Officials had seven qualified candidates to choose from for a road dispatcher position and ultimately recommended that a white male (Johnson) receive the job.<sup>95</sup> At the same time, a female employee (Joyce) contacted the County's Affirmative Action Coordinator who made a recommendation to the Director that Joyce should receive the job instead of Johnson.<sup>96</sup> The Director chose Joyce and defended his choice with the following statement: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise [sic], their background [sic], affirmative action matters, things like that . . . . I believe it was a combination of all those."<sup>97</sup> After the decision, Johnson filed a Title VII lawsuit claiming that the Affirmative Action Plan discriminated against him on the basis of sex.<sup>98</sup>

The Supreme Court looked to the criteria utilized in *Weber* to analyze the County's plan.<sup>99</sup> The Court looked for a "manifest imbalance" that

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93. *Id.* at 621 ("In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories. Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. . . . As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them because of the limited opportunities that have existed in the past for them to work in such classifications.") (citations omitted).

94. *Id.* at 623 ("On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division.").

95. *Id.* at 623-24 (describing the job selection process).

96. *Id.* at 624 ("The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.").

97. *Id.* at 625. The Director also considered the evaluations for each candidate, which stated that:

[B]oth [Joyce] and Johnson were rated as well qualified for the job. The evaluation of Joyce read: "Well qualified by virtue of 18 years of past clerical experience including 3 1/2 years at West Yard plus almost 5 years as a [road maintenance worker]." The evaluation of Johnson was as follows: "Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago." [The Director] testified that he did not regard as significant the fact that Johnson scored 75 and Joyce 73 when interviewed by the two-person board.

*Id.* (citations omitted).

98. *Id.* ("Petitioner Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII.").

99. *Id.* at 627-28 ("The assessment of the legality of the Agency Plan must be guided by our decision in *Weber* . . . .").

reflected underrepresentation of women in ‘traditionally segregated job categories.’”<sup>100</sup> In searching for such, the Court analyzed the percentage of women in the company’s workforce as compared to that in the area labor market or in the general population.<sup>101</sup>

In concluding that the County’s plan did not violate Title VII, the Court found that a manifest imbalance in road dispatcher positions did exist - in fact, none of the 238 Skilled Craft workers in the County were women.<sup>102</sup> This led the Court to the obvious conclusion that women were underrepresented in this job category.<sup>103</sup> The majority opinion in *Johnson* found that the County’s affirmative action plan was based on aspirations and not quotas and, at the same time, that the plan did not unnecessarily trammel the rights of the County’s male employees.<sup>104</sup> Additionally, the

100. *Id.* at 631.

101. *Id.* at 631-33 (stating that this proportionality test is appropriate when analyzing jobs that require no special expertise). When a job requires special expertise, the relevant comparison is with the percentage of the area’s labor force possessing the requisite expertise. *Id.* at 632 (citing *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (holding that the proper comparison for a specialized position rests in an analysis of how the percentage of black teachers in a company’s employ ranks with percentage of qualified black teachers in the labor force of the surrounding area)).

102. *Id.* at 636.

103. *Id.* at 634 (stating that:

“It is clear that the decision to hire Joyce was made pursuant to [a County] plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation. The [County’s] Plan acknowledged the ‘limited opportunities that have existed in the past,’ for women to find employment in certain job classifications ‘where women have not been traditionally employed in significant numbers.’ As a result, observed the Plan, women were concentrated in traditionally female jobs in the [County], and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1—who was Joyce—of the 110 Road Maintenance Workers. The Plan sought to remedy these imbalances through ‘hiring, training and promotion of . . . women throughout the [County] in all major job classifications where they are underrepresented.’”) (citations omitted).

104. *Id.* at 635 (stating that the plan did not contain quotas); *see also id.* at 638 (stating that the plan did not trammel on the rights of male employees). The following chart lists each Justice sitting in *Johnson* and each Justice’s decision in the case:

Case	Justice	Opinion Type	Reasoning
Johnson v. Transportation Agency, Santa	Blackmun	Majority	Plan does not Violate Title VII

majority opinion stated that the purposes of Title VII would be thwarted if companies were not allowed to institute voluntary affirmative action plans.<sup>105</sup>

(3) Diversity can be a compelling interest in higher education—but not in K-12 education—under the Equal Protection Clause

The Supreme Court's most recent affirmative action decisions—*Gratz v. Bollinger*,<sup>106</sup> *Grutter v. Bollinger*,<sup>107</sup> and *Parents Involved in Community Schools v. Seattle School District*<sup>108</sup>—merits a brief mention.<sup>109</sup> The

	Brennan (opinion)	Majority	Plan does not Violate Title VII
	Marshall	Majority	Plan does not Violate Title VII
	O'Connor (concur)	Majority	Plan does not Violate Title VII
	Powell	Majority	Plan does not Violate Title VII
	Rehnquist	Minority	Plan Violates Title VII
	Stevens (concur)	Majority	Plan does not Violate Title VII
	Scalia (dissent)	Minority	Plan Violates Title VII
	White (dissent)	Minority	Plan Violates Title VII

105. *Id.* at 630 (following the Court's rationale from *Weber* that found that the intent of Title VII contemplates the idea that companies might create voluntary affirmative action plans).

106. *Gratz*, 539 U.S. 244.

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

108. *Parents Involved*, 551 U.S. 701.

109. It is also important to note that the Supreme Court granted certiorari and recently decided a reverse discrimination case in its 2008-2009 term which may impact affirmative action. *See Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (questioning whether a municipality may decline to certify an employment examination because the results would lead to more whites being promoted and potential discrimination charges). In a 93-page decision (including two concurrences and one dissent) the Supreme Court held that the municipality in question violated Title VII by declining to certify the employment examination. *Id.* at 2681 (holding that:



connection rests in the reasons underlying these education-based preference plans. In each case, the organization promulgating affirmative action avoided the Remedial Rationale and relied instead on the Diversity Spotlight Rationale. Although none of these cases deals directly with private workplaces, each will likely impact affirmative action arising in this arena.<sup>110</sup> The remainder of this section summarizes how a diversity-based goal impacted the analysis of the Justices. Part IV analyzes the potential future impact of these decisions as precedent when diversity-based workplace preferences are challenged in court.<sup>111</sup>

In *Gratz*, the University of Michigan was sued by white applicants for implementing a voluntary affirmative action plan (in the form of an admissions policy) that helped determine its incoming class.<sup>112</sup> This plan generated controversy because it awarded minority applicants a predetermined amount of points specifically for being part of a specific underrepresented group.<sup>113</sup> This plan was not based on prior discrimination by Michigan;<sup>114</sup> instead, Michigan granted preferences in the interest of obtaining a diverse class.<sup>115</sup>

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“[c]onfronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.”)

As expected, Chief Justice Roberts and Justices Alito, Kennedy, Scalia and Thomas voted in the majority. *Id.*

110. See, e.g., Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 19 (2005) (stating that answering the question of whether *Grutter* might impact “the legality of workforce diversity programs that give an edge in hiring and promotions to members of underrepresented racial and ethnic groups . . . [requires crossing] both the line between education and employment and the line between the Constitution and Title VII.”). Estlund continues by stating that “we have already seen [that]... the emanations of the Supreme Court’s affirmative action decisions are so not easily cabined [by the different arenas].” *Id.*

111. See, *id.* at 4 (“[By] recognizing legitimate non-remedial justifications for affirmative action in higher education, *Grutter* may suggest an alternative defense of affirmative action in employment that better fits both what employers are doing and what they are proclaiming under the banner of diversity.”).

112. *Gratz*, 539 U.S. at 252 (stating that the plaintiffs filed a class action lawsuit claiming violations of the Equal Protection Clause, Section 1981, Section 1983 and Title VI of the Civil Rights Act of 1964).

113. *Id.* at 278 (concurring in the decision on the part of Justice O’Connor). In fact, minorities were awarded a significant number of points (20 out of a total of 150 with 100 points generally necessary for admission). *Id.* The undergraduate admissions policy also granted a predetermined number of points for other qualifications such as attendance at a disadvantaged high school or athletic accomplishments. *Id.*

114. *Id.* at 268 (stating that Michigan did not rely on the Remedial Rationale).

115. *Id.* at 257 (stating that the University of Michigan “contended that the [college of Literature, Science and the Arts] has . . . an interest in the educational benefits that result

Because the case revolved around state action not involving employment, the Court analyzed it under the Equal Protection Clause and not Title VII.<sup>116</sup> Racial classifications under the Fourteenth Amendment require courts to conduct a strict scrutiny review.<sup>117</sup> Strict scrutiny mandates that the party implementing affirmative action: (1) have a compelling interest in making distinctions based on race and (2) ensure that the classification plan is narrowly tailored to achieve the compelling interest.<sup>118</sup> In *Gratz*, the majority held that seeking diversity for educational purposes is a compelling interest but that the awarding of a set number of points to minority applicants was not a narrowly tailored means to achieve this interest.<sup>119</sup> The awarding of points, the Court held, did not treat each applicant as an individual or on an individualized basis.<sup>120</sup>

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from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest.”).

116. *Id.* at 270.

117. *Id.*

118. *Id.*

119. *Id.* at 275.

120. The following chart shows the vote of each Justice in the *Gratz* case:

Case	Justice	Opinion Type	Reasoning
Gratz v. Bollinger 6-3 Higher Education Affirmative Action Plan Unconstitutional	Breyer (concur)	Majority	Michigan's Plan Unconstitutional
	Ginsburg (dissent)	Minority	Michigan's Plan Constitutional
	Kennedy	Majority	Michigan's Plan Unconstitutional
	O'Connor (concur)	Majority	Michigan's Plan Unconstitutional
	Rehnquist (opinion)	Majority	Michigan's Plan Unconstitutional
	Scalia	Majority	Michigan's Plan Unconstitutional
	Souter (dissent)	Minority	Michigan's Plan Constitutional

However, the Court reached a different conclusion regarding a similar higher education affirmative action plan in *Grutter*.<sup>121</sup> The issue revolved around a voluntary preference plan (also contained in an admissions policy)<sup>122</sup> created by the University of Michigan’s School of Law. As in *Gratz*, this Plan was not created to remedy past discrimination.<sup>123</sup> Instead, the plan authorized the use of an applicant’s race<sup>124</sup> as a plus factor to obtain a critical mass of students able to foster educational diversity.<sup>125</sup> Importantly, this plan did not allot a predetermined number of points based on race as in *Gratz*, but instead allowed for a more individualized consideration of each candidate.<sup>126</sup>

	Stevens (dissent)	Minority	Michigan’s Constitutional Plan
	Thomas (concur)	Majority	Michigan’s Unconstitutional Plan

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

122. *Id.* at 312-16 (discussing Michigan’s affirmative action plan). The Michigan Plan began in 1992 when the Dean of the law school charged a faculty committee with producing a written admissions policy that encompassed the following goals: (1) to admit a group of the most capable students (both individually and collectively), (2) to admit individuals with a strong promise of success in law school and in the practice of law, (3) to admit individuals who will contribute to the well-being of others and (4) to admit “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” *Id.* at 313-14 (citing Michigan’s stated admissions goals). Michigan’s faculty unanimously approved the committee’s plan and the document became the school’s official admissions policy. *Id.* at 315.

123. *Id.* at 319 (quoting the chairperson of the committee that drafted the admissions policy, Professor Richard Lempert, who stated that the language of the Policy “did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination.”). In addition, “Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers.” *Id.*

124. It is important to note that only some minority groups were given preference by the plan. *Id.* at 316 (reiterating Michigan’s commitment to “‘one particular type of diversity,’ that is, ‘racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.’”).

125. *Id.* at 311 (stating the issue of the case); *see also id.* at 330 (stating that Michigan believed that a critical mass of underrepresented minority students “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, . . . ‘enables [students] to better understand persons of different races’” and assists students in what has become a diverse, global workforce).

126. The plan was based off of Justice Powell’s ruling in *Bakke* that the creation of a diverse educational environment can be a compelling governmental interest. *See* Regents of

The Supreme Court, in a controversial five-to-four decision,<sup>127</sup> affirmed the Sixth Circuit, which validated the constitutionality of the law school's plan.<sup>128</sup> The majority argued that obtaining a diverse student body is a compelling governmental interest as it relates to admissions to institutions of higher public education and that Michigan's Plan was narrowly tailored to serve this compelling interest. In so ruling, the Court stated that remedying past discrimination is not the only compelling

the Univ. of Cal. v. Baake, 438 U.S. 265, 315 (1978) (discussing the need to categorically broaden the search for diversity).

127. The following chart shows the votes of each Justice in the *Grutter* case:

Case	Justice	Opinion Type	Reasoning
Grutter v. Bollinger 5-4 Higher Education Affirmative Action Plan Constitutional	Breyer	Majority	Law School's Plan Constitutional
	Ginsburg (concur)	Majority	Law School's Plan Constitutional
	Kennedy (dissent)	Minority	Law School's Plan Unconstitutional
	O'Connor (opinion)	Majority	Law School's Plan Constitutional
	Rehnquist (dissent)	Minority	Law School's Plan Unconstitutional
	Scalia (concurring in part and dissenting in part)	Minority	Law School's Plan Unconstitutional
	Souter	Majority	Law School's Plan Constitutional
	Stevens	Majority	Law School's Plan Constitutional
Thomas (concurring in part and dissenting in part)	Minority	Law School's Plan Unconstitutional	

128. *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003).

justification allowing for the creation of an affirmative action plan.<sup>129</sup> The majority gave deference to the academic judgment of Michigan as a university and stated that the ideas of academic freedom, freedom of speech, and freedom of thought place universities in a “special niche in our constitutional tradition.”<sup>130</sup> In addition, the Court found that the Plan’s aspiration of a critical mass was not the same as racial balancing or quotas that were ruled unconstitutional in *Bakke*.<sup>131</sup> Michigan’s Plan was constitutional because it looked at each applicant as an individual and was flexible in its approach to race: retaining the ability to use race as a plus factor in admission decisions, without being forced to award points in a predetermined, mechanical fashion to underrepresented minority applicants.<sup>132</sup> Justice O’Connor’s majority opinion concluded with a discussion of the idea that all affirmative action plans must be limited in duration and that Michigan’s Plan should accomplish its goal and end in twenty-five years.<sup>133</sup>

Four Justices—Rehnquist, Scalia, Kennedy and Thomas—dissented in *Grutter*.<sup>134</sup> The dissenters agreed with the majority about the use of strict scrutiny in affirmative action cases involving race, but they disagreed that Michigan’s Plan was narrowly tailored.<sup>135</sup> In fact, the Justices felt that the

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129. *Id.* at 328, 334. The Court claimed that it had not addressed the issue of race in public education since the *Bakke* case and that other Supreme Court precedent did not foreclose diversity as a compelling governmental interest. *Id.* at 328.

130. *Id.* at 329.

131. *Id.* at 334-37.

132. *Id.* at 337.

133. *See id.* at 342 (quoting Justice O’Connor’s statement in the majority opinion stating that:

“[the Court is] mindful, however, that ‘[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.’ Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all ‘race-conscious programs must have reasonable durational limits.’”) (alteration in original) (citations omitted).

134. *Id.* at 378.

135. *See id.* at 378-79 (Rehnquist, C.J., dissenting) (stating:

“I do not believe, however, that the University of Michigan Law School’s . . . means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a ‘critical mass’ of underrepresented minority students. But its actual program bears no relation to this asserted goal. Stripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”) (citation omitted).

majority's use of the strict scrutiny test was extremely lenient and that Michigan's aspiration of enrolling a critical mass was not shown through its actual enrollment practices.<sup>136</sup> Through this discussion, the dissenters implied that Michigan's true goal was to increase the overall enrollment of black students without paying much concern to other underrepresented minority groups such as Hispanics and Native Americans.<sup>137</sup>

Finally, in *Parents Involved In Community Schools v. Seattle School District No. 1*,<sup>138</sup> the Roberts Court heard its first affirmative action case, which occurred in the arena of K-12 public education. In this case, a group of parents in the Seattle and Louisville School Districts challenged race-based preference plans that denied their children the school of their choice.<sup>139</sup> Arguably relying on *Grutter*, both districts voluntarily created plans to increase diversity rather than to remedy prior discrimination.<sup>140</sup> The five-to-four majority held that these plans violated the Equal Protection Clause.<sup>141</sup> Applying strict scrutiny, Chief Justice Roberts'

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136. *Id.* at 379–81.

137. *See id.* at 382 (reviewing actual admissions figures showing a drastically lower enrollment of Hispanic and Native American students).

138. *Parents Involved In Community Schools v. Seattle School District No. 1*, 55 U.S. 701 (2007).

139. *Id.* at 701–09.

140. *Id.* at 724–25.

141. The following chart shows the votes of each Justice in the *Parents Involved* case:

majority opinion struck down both plans as not being narrowly tailored enough to satisfy strict scrutiny.<sup>142</sup>

Case	Justice	Opinion Type	Reasoning
Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 5-4 K-12 Affirmative Action Plan Unconstitutional	Alito	Majority	K-12 Preference Plan Unconstitutional
	Breyer (Dissent)	Minority	K-12 Preference Plan Constitutional
	Ginsburg	Minority	K-12 Preference Plan Constitutional
	Kennedy (concur)	Majority	K-12 Preference Plan Unconstitutional
	Roberts (Opinion)	Majority	K-12 Preference Plan Unconstitutional
	Scalia	Majority	K-12 Preference Plan Unconstitutional
	Souter	Minority	K-12 Preference Plan Constitutional
	Stevens (dissent)	Minority	K-12 Preference Plan Constitutional
	Thomas (Concur)	Majority	K-12 Preference Plan Unconstitutional

142. *See id.* at 734 (quoting the Ninth Circuit that stated, the defendant [Seattle in this case] “has not met its burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely on the color of their skin”) (citation omitted). The Court was only able to muster a plurality opinion—Justice Kennedy would not join—declining to determine whether diversity is a compelling interest at the K-12 level. *See id.* at 726 (stating that:

“[The] parties and their amici dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve,

The opinion distinguished the need for diversity in higher education from the need for diversity in primary and secondary education and refused to apply *Grutter*'s reasoning.<sup>143</sup> The Chief Justice ended with the strong statement that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>144</sup>

Justice Kennedy agreed with the substance of the majority opinion but filed a concurrence to make clear that he identified a compelling interest in K-12 diversity and in avoiding racial isolation.<sup>145</sup> In fact, Kennedy would “allow race conscious policies which could include line drawing, new school placement, and the recruitment of students and faculty without resorting to strict scrutiny as long as individual students were not subjected to different treatment on account of race.”<sup>146</sup> However, this crucial swing Justice voted to strike down these specific plans because of their failure to meet the narrow tailoring required by strict scrutiny.<sup>147</sup> Justice Breyer penned a dissent—joined by Justices Ginsburg, Souter and Stevens—accusing the majority of violating the legacy of *Brown* and arguing that color-blind integration plans have not been effective.<sup>148</sup>

Part III utilizes this background information and precedent to introduce the Diversity Spotlight Rationale and analyze three key components necessary for any diversity-based, voluntary workplace affirmative action plan to theoretically survive scrutiny by the current Court.

### III. EXAMINING THE DIVERSITY SPOTLIGHT RATIONALE AND ITS KEY COMPONENTS

Despite walking a tightrope between liability and remediation, businesses continue to promulgate preference-based affirmative action plans.<sup>149</sup> However, as evidenced by the multitude of amicus briefs filed in

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however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.”).

143. *Id.* at 724-25.

144. *Id.* at 747.

145. *Id.* at 783.

146. Craig L. Jackson, *United States Supreme Court's 2006-2007 Term, Civil Rights and Civil Liberties, and a New Direction*, 36 CAP. U.L. REV. 511, 554 (2007) (citations omitted).

147. *Id.* at 783-84.

148. *Id.* at 788.

149. *See, e.g.*, Steven A. Holmes, *Affirmative Action Plans are Now Part of the Normal Corporate Way of Life*, N.Y. TIMES, Nov. 22, 1991, at A20 (quoting Alfred W. Blumrosen—a law professor and former EEOC official—who was discussing the prominence of affirmative action in the contemporary workplace, and who stated that “[a]ffirmative action programs are so much a part of the way industry operates today that to try to de-establish them would create enormous difficulties”).



*Grutter*, it appears that many of America's most prominent businesses have abandoned the Remedial Rationale as a justification.<sup>150</sup> Instead, contemporary affirmative action programs are justified under the Diversity Spotlight Rationale.<sup>151</sup> This change is far from subtle. As detailed in Part I, the Supreme Court ruled in *Weber*<sup>152</sup> and *Johnson*<sup>153</sup> that the Remedial

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150. This trend is in part evidenced by the multitude of amicus briefs filed in *Grutter*, implying that such programs will be created in the future. It is important to note that the filing of a brief with a court and the actual creation of such a plan based on the Diversity Spotlight Rationale are two different things. Concerning the latter, some companies tout on their websites their dedication to increasing diversity within their workforces; however, the same companies do not go into detail as to the specifics of minority preference programs. For example, 3M seems to have created a diversity-based, forward-looking affirmative action policy, which it summarizes briefly on its Website. See 3M, Diversity At 3M: Recruiting, [http://solutions.3m.com/wps/portal/3M/en\\_US/us-diversity/diversity/3M/recruiting/](http://solutions.3m.com/wps/portal/3M/en_US/us-diversity/diversity/3M/recruiting/) (last visited May 31, 2009) (claiming that the company's Workforce Diversity Department "provides direction and support to enhance recruitment of candidates for student and career employment"); see also American Express, Diversity at Work, [http://www212.americanexpress.com/dsmlive/dsm/int/staffing/staffing\\_diversity\\_empl\\_net\\_works.do?vnextoid=dc2ccc9c63e00210VgnVCM20000d0faad94RCRD](http://www212.americanexpress.com/dsmlive/dsm/int/staffing/staffing_diversity_empl_net_works.do?vnextoid=dc2ccc9c63e00210VgnVCM20000d0faad94RCRD) (last visited Oct. 27, 2009) (listing various employee networks active within the company such as the Hispanic Network, Asian Employee Network and Black Employee Network); American Express, Diversity Recruiting Events, [http://www212.americanexpress.com/dsmlive/dsm/int/amexjobs/amex\\_jobsspecialevents.do?vnextoid=dd984fdc47310210VgnVCM100000defaad94RCRD](http://www212.americanexpress.com/dsmlive/dsm/int/amexjobs/amex_jobsspecialevents.do?vnextoid=dd984fdc47310210VgnVCM100000defaad94RCRD) (last visited May 29, 2009) (listing eleven job fairs specifically targeting minority applicants). It is also possible that the policies mentioned above are merely non-preference-based minority recruitment options as opposed to preference-based affirmative action plans. Regardless, companies are placing diversity high on their recruitment priority lists. See, e.g., Jessica Calleja, *Diversity Recruiting*, JOBPOSTINGS, <http://www.jobpostings.net/articleDetail.cfm?id=251> (last visited May 31, 2009) ("[As the] American demographic continues to change and the population of visible minorities continues to grow, companies are discovering it only makes sense to take advantage of this emerging talent by making diversity recruiting a priority.").

151. See, e.g., Ronald Turner, *Grutter, The Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 200 (2004-05) [hereinafter *Diversity Justification*] ("[In] the wake of *Grutter* it can be anticipated . . . that public as well as private employers will consider and develop diversity-based justifications for voluntary affirmative action in their workplaces.") (footnote omitted).

152. See *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 209 (1979) ("We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.").

153. *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 641-42 (1987) (stating:

"We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can

Rationale does not violate the anti-discrimination mandate of Title VII. In fact, the law allows such benign discrimination as long as employers seek to remedy prior discrimination in the following ways: (1) institutionally or (2) in traditionally segregated job categories (as opposed to societal discrimination more generally).<sup>154</sup>

On the contrary, forward-looking preferences promulgated under the Diversity Spotlight Rationale have yet to gain the same level of judicial approval – at least in the private workplace arena.<sup>155</sup> Part III examines the foundation of this emerging justification. The section moves on to analyze three key components that should be present in any diversity-based preference plan to make it compliant with the precedent detailed in Part II. Part IV concludes with an evaluation of whether just such a preference plan based on the DSR and containing these three key components is likely to survive Title VII scrutiny by a conservative-leaning Supreme Court.

#### A. *The Diversity Spotlight Rationale: A Big Picture Perspective*

The claim that diversity is an important component of a company's workforce is nothing new.<sup>156</sup> In fact, businesses have been making

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make in eliminating the vestiges of discrimination in the workplace.”).

154. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (considering a case of race-based layoffs of teachers employed by a public school system and stating that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”); see also *Diversity Justification*, *supra* note 151, at 232 (stating that:

“[As] a matter of doctrine, *Grutter's* constitutional analysis did not apply to the now well-settled position that employers covered by Title VII may engage in voluntary affirmative action as a means of integrating traditionally segregated job categories and addressing manifest imbalances in particular occupations. Public and private employer affirmative action programs considering the race, sex, and other characteristics of employees for the purpose of remedying such under representations are not proscribed by the statute so long as employers comply with the prongs and standards set out in *Weber* and *Johnson*.”).

155. See, e.g., David A. Harvey, *A Preference for Equality: Seeking the Benefits of Diversity Outside the Educational Context*, 21 *BYU J. PUB. L.* 55, 56 (2007) (“Diversity, as a compelling governmental interest, has only been constitutionally approved for a relatively brief period of an individual's life - during his or her formal education - and then only through preferential race-based classifications.”). Recall that *Grutter* did allow preferences to be granted under the Diversity Spotlight Rationale in the public higher education context as the University of Michigan did not have a history of prior racial discrimination. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that “the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

156. See, e.g., *Taxman v. Piscataway Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (discussing a case where an employer who was forced to terminate one employee from its teaching staff terminated a white employee over an equally qualified black employee for the sake of diversity).

employment decisions based on diversity for decades.<sup>157</sup> However, the overt proclamation that—even in the absence of prior discrimination—an employer will grant preferences to obtain a diverse workforce gained national prominence only recently in the *Grutter* case.<sup>158</sup> In *Grutter*, over eighty prominent American businesses filed amici curiae briefs in favor of Michigan’s plan,<sup>159</sup> advocated for judicial acceptance of the school’s forward-looking approach, and thereby, presented their version of the Diversity Spotlight Rationale.<sup>160</sup> This massive support for Michigan’s

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157. See, e.g., Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 1-2, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) [hereinafter *3M Amici Brief*] (stating that the Fortune 500 companies filing this brief:

“have devoted substantial financial and human resources to create and maintain a diverse workforce. These extensive efforts are part of the very fabric of [these companies’] cultures, are implemented and overseen by senior managers, and are supported at the highest levels. In addition, many of [these companies] pursue a variety of endeavors to support minority students in higher education, including . . . summer internship opportunities, recruiting and mentoring . . .”).

158. See, e.g., John E. Higgins, *Grutter and Gratz Decisions Underscore Pro-Diversity Trends In Schools and Businesses*, 76 N.Y. ST. B.J. 32, 32 (2004) (“[The] long-term consequences of [the *Grutter* decision] are yet to be determined, but talk of ‘diversity’ in all its many stripes, shapes, colors and hues has replaced talk about ‘affirmative action’ in the new, more global parlance of the Court, in our nation’s schools, and in businesses across the country.”).

159. An amicus curiae (literally “friend of the court”) brief is a filing with the Supreme Court – made by an individual or institution who is not a party to the case – which makes an argument supporting one side or one issue in a case pending before the Court. See, e.g., *Amicus Curiae*, TECH. L.J., <http://www.techlawjournal.com/glossary/legal/amicus.htm> (last visited May 31, 2009) (presenting information from different sources which describe the role of amicus curiae). The arguments made in these briefs often deal with big-picture, public policy issues instead of the factual record or judicial decision-making of the particular case. Amici curiae briefs allow the Court to hear how a larger segment of society feels about the issue in a particular case in a way that the individual litigants are likely barred from raising as being too far from the facts. The Supreme Court encourages the filing of such briefs if they are helpful in aiding the Court to make a decision. See SUP. CT. R. 37(1) (stating which briefs will be acceptable to the Court). The most common filers of amici briefs are various advocacy groups who are not parties to the litigation at hand.

160. See, e.g., *3M Amici Brief*, *supra* note 157, at 1 (showing that the following businesses assisted in filing this brief in support of Michigan):

(1) 3M	(2) Abbott Laboratories	(3) Alcoa	(4) Alliant Energy	(5) Altria Group
(6) American Airlines	(7) American Express	(8) Amgen	(9) Ashland	(10) Bank One
(11) Baxter Healthcare	(12) Boeing	(13) Charter Financial	(14) Chevron Texaco	(15) Coca- Cola

(16) Coca-Cola Enterprises	(17) DaimlerChrysler	(18) Deloitte Consulting	(19) Deloitte & Touche	(20) Dow Chemical
(21) Eastman Kodak	(22) Eaton	(23) Eli Lilly	(24) Ernst & Young	(25) Exelon
(26) Fannie Mae	(27) General Dynamics	(28) General Electric	(29) General Mills	(30) John Hancock Fin. Svs.
(31) Harris Bankcorp	(32) Hewlett- Packard	(33) Illinois Tool Works	(34) Intel	(35) Johnson & Johnson
(36) Kaiser Found. Health Plan	(37) Kellogg	(38) KPMG Int'l	(39) Kraft Foods	(40) Lockheed Martin
(41) Lucent Technologies	(42) Medtronic	(43) Merck	(44) Microsoft	(45) Mitsubishi Motors
(46) MSC Software	(47) Nationwide Mutual Ins.	(48) NetCom Solutions	(49) Nike	(50) Northrop Grumman
(51) Pepsi Bottling Group	(52) PepsiCo	(53) Pfizer	(54) PPG Industries	(55) Pricewater houseCoopers
(56) Procter & Gamble	(57) Reebok	(58) Sara Lee	(59) Schering-Plough	(60) Shell Oil
(61) Steelcase	(62) Sterling Financial	(63) United Airlines	(64) Whirlpool	(65) Xerox

“Collectively, [the companies joining the *3M Amici Brief*] have annual revenues well over a trillion dollars and hire thousands of graduates of the University of Michigan and other major public universities.” *Id.* In addition to the sixty-five companies joining the *3M Amici Brief*, General Motors filed a separate amici brief and eighteen media companies joined together to file a separate brief in support of Michigan’s position. *See* Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) [hereinafter *General Motors Amici Brief*] (showing that General Motors supported Michigan’s position); Brief of Amici Curiae Media Companies in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) [hereinafter *Media Companies Amici Brief*] (showing that the following eighteen media companies supported Michigan’s position):

(1) Banks Broadcasting	(2) Brunson Communications	(3) ChaseCom	(4) El Dorado Communications
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policy stands in stark contrast to the fifteen briefs filed on behalf of Barbara Grutter and against the Michigan affirmative action Plan.<sup>161</sup>

The Diversity Spotlight Rationale is a straightforward way of stating that businesses desire workforce diversity merely for the sake of diversity. No emphasis is placed on making up for past wrongs against particular minority groups – whether institutional or societal.<sup>162</sup> Business proponents of this rationale would not deny past discrimination, but prefer instead to analyze how a diverse workforce can impact their future bottom-line.<sup>163</sup>

(5) Emmis Communications	(6) Essence Communication Pts.	(7) Granite Broadcasting	(8) Hispanic Broadcasting
(9) K-B Prime Media	(10) La Favorita Broadcasting	(11) LIN-Television	(12) Mariner Broadcasters
(13) Northpoint Technology	(14) Radio One	(15) Stop 26-Riverbend	(16) Susquehanna Radio
(17) Waters Broadcasting	(18) Yankees Entertainment & Sports Network		

161. University of Michigan: Admissions Lawsuits, Amicus Briefs Filed with the U.S. Supreme Court in *Grutter v. Bollinger*, [http://www.vpcomm.umich.edu/admissions/legal/gru\\_amicus-ussc/](http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/) (last visited May 31, 2009) (linking to each of the fifteen briefs from amici curiae supporting Barbara Grutter and urging reversal):

(1) State of Florida	(2) Asian American Legal Fdn.	(3) Center for Equal Opportunity	(4) Center for Individual Freedom
(5) Center for New Black Leadership	(6) Center for the Advancement of Capitalism	(7) Claremont Institute Center for Constitutional Jurisprudence	(8) Michigan Association of Scholars
(9) National Association of Scholars	(10) Pacific Legal Foundation	(11) Law Professors	(12) Reason Foundation
(13) United States	(14) Ward Connerly	(15) Cato Institute	

162. In fact, the words “remedial,” “remediation,” or “societal discrimination” are nowhere mentioned in the entire *3M Amici Brief*. The word discrimination only occurs once. See *3M Amici Brief*, *supra* note 157, at 7 (stating the benefits of diversity).

163. See *3M Amici Brief*, *supra* note 157, at 4 (quoting Justice Powell who discussed such an emphasis on the future when he stated that “it is not too much to say that the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”) (citations omitted).

They make the argument that future sustainability as a business entity in an ever-globalizing marketplace depends on the attainment of a diverse workforce.<sup>164</sup> In summary, minority preference plans under the Diversity Spotlight Rationale are:

1. Forward-looking and non-remedial in nature:

The Diversity Spotlight Rationale is “forward-looking; it is decidedly *not* a remedial argument. It is about making a better future, and not about making up for the sins of the past.”<sup>165</sup> In this sense, utilization of the DSR is a relief for employers. Executives are no longer forced to collect information about prior institutional discrimination in order to justify preference plans as remedial.<sup>166</sup> In the past, evidence of such discrimination was discoverable and available as EXHIBIT A in a Title VII discrimination lawsuit against the company. Under the DSR, employers are free to look into the future and ponder how diversity and exposure to diverse people may benefit future leaders, executives, etc. On the other hand, this type of non-remedial affirmative action is relatively untested in the private workplace arena and is sure to generate reverse discrimination lawsuits as have been litigated in the educational arena.<sup>167</sup> Part

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164. See, e.g., *3M Amici Brief*, *supra* note 154, at 1 (stating:

“[The] existence of racial and ethnic diversity in institutions of higher education is vital to *amici*’s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment. As explained in this brief, such a workforce is important to *amici*’s continued success in the global marketplace.”).

165. Cynthia L. Estlund, *Putting Grutter to Work, Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L., 1, 14 (2005).

166. This evidence-gathering to justify a remedial affirmative action plan was problematic under the Remedial Rationale. See, e.g., Jerome L. Epstein, Comment, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans After Weber*, 134 U. PA. L. REV. 457, 474 (1986) (stating:

“[To] immunize itself against a discrimination suit by a nonminority plaintiff, an employer that has enacted an affirmative action plan must satisfy *Weber*’s requirement that the plan be designed to correct ‘manifest racial imbalances in traditionally segregated job categories.’ Although the employer bears the burden of establishing the validity of its race-conscious plan, it is clear from the *Weber* Court’s rejection of the Fifth Circuit majority and dissenting opinions that the employer cannot be required to establish its own actual past discrimination or arguable violations of Title VII.”) (citations omitted).

See also Estlund, *supra* note 162, at 14 (“[F]ew employers have been willing either to put on a remedial case implying their own responsibility for the underrepresentation of people of color in their ranks.”).

167. See, e.g., Brief for the Petitioner at 2-3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (discussing the merits of the lawsuit and stating that the “Law School . . . admits that it uses race as a factor in making admissions decisions. It justifies this use of

IV discusses just how such a lawsuit against a private employer implementing a diversity-based plan might fare in front of the current Supreme Court.

2. Based on diversity in terms of ethnicity, race and color:

The term diversity as used in the Diversity Spotlight Rationale generally refers to ethnicity, race, and color as opposed to gender, affinity, economic, experiential, or other types of characteristics that differentiate individuals from one another. The *3M Amici Brief* refers only to “ethnic and racial diversity” in its argument in favor of Michigan’s preference plan.<sup>168</sup> Similarly, the *General Motors Amici Brief* disclaims that any “ruling proscribing the consideration of *race and ethnicity* in admissions decisions likely would dramatically reduce diversity at our Nation’s top institutions.”<sup>169</sup> This is a controversial position that might rile a few of the current Supreme Court Justices who abhor preferences based on such immutable traits.<sup>170</sup>

3. Voluntary as opposed to court ordered or promulgated to prevent future litigation:

Finally, affirmative action under the Diversity Spotlight Rationale is voluntary. This means that companies choose to grant preferences without being compelled to do so via a court order. Obviously, companies that have not discriminated in the past do not face legal liability and potential court-mandated affirmative action. Section 703(j) of Title VII touches on whether such voluntary affirmative action is allowed. This section states that nothing in the statute “shall be interpreted to require any employer . . . to grant preferential treatment” to any group based on percentages of such group employed by the

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race on one ground only: that it serves a ‘compelling interest in achieving diversity among its student body.’”) (citations omitted).

168. *3M Amici Brief*, *supra* note 157, at 1 (“[The] *existence of racial and ethnic diversity* in institutions of higher education is vital to *amici’s* efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment”) (emphasis added).

169. *General Motors Amici Brief*, *supra* note 160, at 2-3 (emphasis added).

170. *See, e.g., Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (“[The] Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”); *id.* at 349 (Scalia, J., concurring in part and dissenting in part) (“[The] Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”).

employer.<sup>171</sup> This section makes it very clear that Title VII does not *require* affirmative action. However, the majority in *Weber* distinguished required affirmative action from voluntary affirmative action and ruled that Title VII does not, by its express language, ban voluntarily implemented preference plans.<sup>172</sup>

In addition to defining the concept of the Diversity Spotlight Rationale accurately, it is important to cover the benefits of such plans from an employer's standpoint. Employer-proponents of DSR claim that such programs create:

1) A diverse workforce necessary to compete and innovate in the global economy (The Global Economy Focus):

The rationale underlying the Global Economy focus is that the twenty-first century workplace is increasingly globalized and therefore, increasingly diverse. 3M's brief in *Grutter* reiterated this point in stating that the nature of American business is changing. "Most of the [companies supporting the DSR] are truly international companies, and virtually all are becoming so . . . they operate and compete in a global environment, serving and working with people and cultures of all kinds."<sup>173</sup> Additionally, business-proponents of the DSR claim that they must be able to hire, train, and promote a diverse workforce—including positions in top management—in order to compete effectively in the global economy. 3M reiterated this Global Economy Focus in its *Grutter* amici brief:

*Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves. Amici need the talent and creativity of a workforce that is as diverse as the world around it.*<sup>174</sup>

Proponents of the DSR also claim that America itself is

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171. 42 U.S.C. 2000e-2(j)(2006).

172. See *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193, 206 (1979) (reasoning that section 703(j) "does not state that 'nothing in Title VII shall be interpreted to permit' voluntary affirmative action efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.").

173. *3M Amici Brief*, *supra* note 157, at 6-7.

174. *Id.* at 5-6 (emphasis added).



becoming more diverse.<sup>175</sup> They claim that projections show that Asians, Blacks, Hispanics and Native Americans will comprise 47% of the American population by the year 2050.<sup>176</sup> With such statistics in mind, proponents argue that they need a diverse workforce not only to succeed globally but also to thrive nationally.

2)A Diverse culture where new and innovative ideas can flourish (The Diversity of Ideas focus):

Proponents of the DSR also claim that new and innovative ideas are more likely to flourish in a workforce filled with diverse employees. The idea is that “a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives.”<sup>177</sup> While some of this exposure should come at the educational level, other parts will stem from the presence of a diverse workforce. In addition, “individuals who have been educated in a diverse setting are likely to contribute to a positive work environment by decreasing incidents of discrimination and stereotyping.”<sup>178</sup>

3)A diverse sales-force satisfying to customers (The Customer Preferences Focus):

The third focus revolves around the argument that diversity is becoming ever more important in the twenty-first century global workplace itself. The idea is that new employees—including novice managers—must understand how to deal with cultural differences that exist in their client, co-worker, and managerial relationships. The Customer Preferences Focus argues that diverse individuals “are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers.”<sup>179</sup> In addition, “a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world.”<sup>180</sup>

Finally, it is important to note that the prominent companies claiming an interest in Michigan’s diversity-based preference plan also have a partial

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175. *Id.* at 6.

176. *Id.*

177. *Id.* at 7.

178. *Id.*

179. *Id.*

180. *Id.*

conflict of interest. Every year, such businesses commit great resources and recruitment efforts towards Michigan and other elite schools throughout the country.<sup>181</sup> According to these employers, much of their recruitment efforts revolve around selecting students who have been immersed in diverse educational environments.<sup>182</sup> As mentioned previously, these businesses tie their future economic successes, at least partially, to the ability of the nation's educational institutions to train students to handle a diverse environment.

*B. Three Key Components of a Plan under the Diversity Spotlight Rationale*

Because the Diversity Spotlight Rationale was approved in *Grutter*—albeit narrowly within the public higher education arena—businesses such as 3M were confident that a similar rationale might be allowed in the private sector workplace. Perhaps the best chance that these businesses have to insulate their diversity-based plans from the scrutiny of an anti-affirmative action Court is to consider precedent from the key affirmative action cases analyzed in Part I. This final section of Part III will utilize this case law to identify key components of any plan promulgated under the DSR. Accordingly, plans enacted under the DSR:

1. Must be of limited duration and designed to attain rather than maintain a diverse workforce. In general, a foundational precept of affirmative action is that it will end when discrimination disappears. In *Grutter*, the University of Michigan argued that it would “like nothing better than to find a race-neutral admissions formula” and that it would “terminate its race-conscious admissions program as soon as practicable.”<sup>183</sup> Setting a specific end date may not be necessary when the plan clearly states that its intent is to attain, rather than maintain, a diverse workforce. In *Johnson*, the Court upheld an affirmative action plan without a concrete end date, because it was enacted to attain rather than

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181. See, e.g., *id.* at 8 (stating:

“What is critical to [prominent companies] is that the leading colleges, universities and graduate schools from which they recruit and hire their employees be diverse, and consist of the most qualified and talented diverse students as is possible. Universities historically have been responsive to the needs of business and other professions, developing an extraordinary talent pool upon which [these businesses] and others may draw.”).

182. See, e.g., *3M Amici Brief*, *supra* note 157, at 1 (“[A]mici are global businesses that recruit at the University of Michigan or similar leading institutions of higher education. . . . [Such businesses] have a vital interest in who is admitted to our nation's colleges and universities, and what kind of education and training those students receive.”).

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

maintain a diverse workforce.<sup>184</sup> With this in mind, business proponents of the DSR would be ill-served by creating any diversity-based preference plan without acknowledging this precedent. For timeframe purposes, an appropriate duration is likely less than or equal to the twenty-five-year period approved by the majority in *Grutter*.<sup>185</sup> It would be even more beneficial to define diversity more broadly than just race and ethnicity.<sup>186</sup> Proponents of the DSR, however, have not chosen such a broad approach in the past.

Both affirmative action proponents and opponents would agree that diverse workforces are a benefit to society. The difference occurs with how such workforces are attained. At the end of the “attainment” period, the hope is that the racism that does exist in America will diminish, and that maintaining a diverse workforce can be achieved solely on a merit basis.

2. Must require individualized consideration of applicants and employees. The key to Michigan’s success in *Grutter* stemmed from the fact that each applicant received individualized consideration.<sup>187</sup> The opposite of that is a quota or a set-aside

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184. See *Johnson*, 480 U.S. at 640 (stating:

“[S]ubstantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency’s express commitment to ‘attain’ a balanced workforce, there is ample assurance that the Agency does not seek to use its Plan to ‘maintain’ a permanent racial and sexual balance.”).

185. See *Grutter*, 539 U.S. at 343 (“[The majority] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

186. See Jonathan A. Segal, *Diversity: Direct or Disguised? Recent Supreme Court Decisions Don’t Resolve Whether and When You Can Focus on Race in Hiring Decisions*, H.R. MAGAZINE, Oct. 1, 2003, at 123, 127, available at <http://www.allbusiness.com/public-administration/administration-human/664553-1.html> [hereinafter *Diversity*] (stating:

“In upholding the [University of Michigan Law School’s] affirmative action plan, Justice O’Connor weighed heavily the fact that diversity was not limited to race and ethnicity but also included non-EEO factors. As a result, employers should define diversity broadly to include not only EEO factors but also non-EEO factors such as experiences, education and interests.”).

187. See *Grutter*, 539 U.S. at 309 (stating:

“The Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single ‘soft’ variable.”).

system where applicants cannot compete for certain positions. Lack of such consideration was the downfall of the affirmative action plans in *McDonald*,<sup>188</sup> *Bakke*,<sup>189</sup> *Gratz*,<sup>190</sup> and *Parents Involved*.<sup>191</sup> Therefore, any preference plan promulgated under the DSR cannot include quotas, set-asides, or similar mechanisms. Instead, such plan can consider the diversity of employees or applicants as plus factors in any employment or admissions decision. This might bring the plan more within the *Grutter* framework approved by the Court.

3. Must not unnecessarily trammel the rights of non-minority employees and applicants. Affirmative action plans can preference minorities but only to a certain extent. Case law will allow race or ethnicity to be used as a plus factor but limits preference plans from “unnecessarily trammeling the rights of white applicants or employees.”<sup>192</sup> A recent Third Circuit decision struck down a voluntary affirmative action plan, in part, because

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188. See *McDonald*, 427 U.S. at 282-83 (stating:

“Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white.”).

189. See *Bakke*, 438 U.S. at 319-20 (Powell, J., plurality opinion) (stating:

“[I]t is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.”).

190. See *Gratz*, 539 U.S. at 274 (stating:

“The bulk of admissions decisions are executed based on selection index score parameters set by the [admissions committee administering the affirmative action policy]. . . . Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University’s version of a ‘plus’ that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.”).

191. See *Parents Involved*, 551 U.S. at 273 (“Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here ‘do not provide for a meaningful individualized review of applicants’ but instead rely on racial classifications in a ‘nonindividualized, mechanical’ way.”) (citations omitted).

192. See *Weber*, 443 U.S. at 208 (“[The affirmative action plan in question] does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to the advancement of white employees . . . .”) (citations omitted).

it unnecessarily interfered with the rights of a white employee who was terminated in lieu of an equally qualified black employee.<sup>193</sup> Therefore, preferences promulgated under the Diversity Spotlight Rationale cannot lead to: (1) the elimination of a white employee's position, or (2) the restriction of employment opportunities for white applicants.<sup>194</sup> Preferences can lead to the denial of a particular promotion or other similar consequences that are less serious than a termination or immovable ceiling on advancement.

The incorporation of these three key components into a voluntary affirmative action plan will not guarantee success at the Supreme Court. However, omitting any of these elements is the death knell for any plan under the DSR. The final substantive section of this paper evaluates whether an affirmative action plan promulgated under the Diversity Spotlight Rationale, and contains each of the three components, is likely to withstand a Title VII challenge under a conservative-leaning Supreme Court.

#### IV. THE DIVERSITY SPOTLIGHT RATIONALE BEFORE THE ROBERTS COURT

Today's Supreme Court is proving to be more conservative than the Rehnquist Court, which decided *Grutter* in 2003.<sup>195</sup> Generally, the Justices

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193. See *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1563-64 (3d Cir. 1996) (stating:

"The Board admits that it did not act to remedy the effects of past employment discrimination. The parties have stipulated that neither the Board's adoption of its affirmative action policy nor its subsequent decision to apply it in choosing between Taxman and Williams was intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the Piscataway School District's teacher workforce as a whole. Nor does the Board contend that its action here was directed at remedying any *de jure* or *de facto* segregation.").

194. See, e.g., *Weber*, 443 U.S. at 208 ("[T]he plan does not unnecessarily trammel the interests of the white employees.").

195. See Edward Lazarus, *Under John Roberts, Court Re-Rights Itself*, WASH. POST, July 1, 2007, at B1 ("Cumulatively, the court of Chief Justice John G. Roberts Jr. announced itself as even more conservative than William H. Rehnquist's court, which, from 1986 to 2005, undercut many of the progressive initiatives from Earl Warren's era."); Nina Totenberg, *Supreme Court More Conservative, Fragmented*, NPR, July 4, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5531678> ("For the first time in 11 years, the Supreme Court had a new membership, a new ideological makeup, and a new chief justice . . . . With the departure of Justice Sandra Day O'Connor and the arrivals of Chief Justice John Roberts and Justice Samuel Alito, the court shifted to the right, as expected.").

of the Roberts Court are aligned in three quite distinct camps.<sup>196</sup> The conservative block is made up of Justices Clarence Thomas, Antonin Scalia, Samuel Alito, and Chief Justice John Roberts.<sup>197</sup> The liberal block is made up of Justices John Paul Stevens, Ruth Bader Ginsburg, retiring Justice David Souter, and Steven Breyer.<sup>198</sup> Although no one can predict future political alliances on the Court, it appears likely that Souter's likely replacement, Justice Sonia Sotomayer,<sup>199</sup> will join this liberal block rather than create a one-Justice, liberal-leaning swing vote.<sup>200</sup> The third camp—

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196. See Editorial, *The Roberts Court Returns*, N.Y. TIMES, Sept. 30, 2007, at 11, 11 available at <http://www.nytimes.com/2007/09/30/opinion/30sun1.html> (“There are three hardened camps: four very conservative justices, four liberals, and a moderate conservative, Justice Anthony Kennedy, hovering in between.”).

197. See *id.* (“[I]n reality Chief Justice Roberts quickly settled into a bloc with his fellow conservatives Samuel Alito, Antonin Scalia and Clarence Thomas.”); Daphne Eviatar, *Next President to Reshape Court*, WASH. INDEP., Sept. 12, 2008, available at <http://washingtonindependent.com/5745/next-president-to-reshape-supreme%20court> (“If you add one more Scalia or Thomas or Roberts or Alito to this bench, you’ve got a very hard 5-person conservative majority.”).

198. See Maria Godoy, *Parsing the High Court’s Ruling on Race and Schools*, NPR, June 28, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=11659428> (discussing the votes in *Parents Involved* and stating that “Justice Stephen Breyer wrote a dissent that was joined by the court’s three other liberal justices [Stevens, Ginsburg and Souter]”).

199. See Press Release, Office of the Press Sec’y, Remarks by the President in Nominating Judge Sonia Sotomayer to the United States Supreme Court, White House, May 26, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayer-to-the-United-States-Supreme-Court/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayer-to-the-United-States-Supreme-Court/) (“After completing this exhaustive process [of searching for a nominee to replace Justice Souter], I have decided to nominate an inspiring woman who I believe will make a great justice: Judge Sonia Sotomayer of the great state of New York.”).

200. See Jess Bravin and Nathan Koppel, *Record Shows Rulings Within Liberal Mainstream*, WALL ST. J., May 27, 2009, [http://online.wsj.com/article/SB124338260937756559.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB124338260937756559.html?mod=googlenews_wsj) (stating:

“Judge Sonia Sotomayer has built a record on such issues as civil rights and employment law that puts her within the mainstream of Democratic judicial appointees. . . . Judge Sotomayer would be succeeding Justice David Souter, generally a liberal vote on social issues, and her selection isn’t likely to change the outcome on cases where the Supreme Court typically splits 5-4.”).

But see Kevin Russell, *Where Would Justice Souter’s Replacement Make a Difference? Part I*, SCOTUSBLOG, May 27, 2009, [hereinafter *Difference Part I*] available at <http://www.scotusblog.com/wp/where-would-justice-souter%E2%80%99s-replacement-make-a-difference-part-i/#more-9642> (analyzing recent cases “where it is at least possible that [Justice Souter’s] likely successor, Judge Sotomayer, might vote differently”). Justice Souter has proven to be a reliable liberal vote. In fact, since Justice Alito joined the Court for the 2005 term, Justice Souter has only joined the current conservative majority seven times even though he was appointed by a conservative president. See Kevin Russell, *Where Would Justice Souter’s Replacement Make a Difference? Part II*, SCOTUSBLOG, May 29, 2009, available at <http://www.scotusblog.com/wp/where-would-justice-souter%E2%80%99s-replacement-make-a-difference-part-ii/> (stating that there have been seven cases since 2005 where Justice Souter sided with Chief Justice Roberts, and Justices

one best categorized as conservative-leaning—is composed of Justice Anthony Kennedy.<sup>201</sup> Statistics from the 2007 term show that nineteen cases produced split five to four decisions on political lines; Justice Kennedy sided with the conservative

At the same time, the Court is clearly becoming more ideologically divided. While the “Rehnquist Court had its share of divided rulings . . . the new conservative ascendancy has prompted a striking reaction from the dissenting liberals, John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer.”<sup>202</sup> These days, members of the liberal block are: (1) filing unified dissenting opinions and (2) bucking the tradition of merely filing dissents and, instead, reading their opinions aloud from the bench.<sup>203</sup> This bitter divide has become prominent in the affirmative action arena, as well, stemming most recently from the controversial five to four decision in the *Parents Involved* case.<sup>204</sup>

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Ginsburg, Kenney, and Alito). It is also fair to assume that the Obama Administration will nominate an appointee at least as liberal as Souter had become upon his retirement. See *Difference Part I* (“One would predicate that—at least on hot-button issues, like abortion and affirmative action—the President would not have nominated Judge Sotomayor unless he were fairly confident that she would vote consistently with Justice Souter’s liberal-leaning record.”). It appears very likely that a liberal nominee will take Justice Souter’s seat on the Court for the 2009-2010 term.

201. See Robert Barnes, *In Second Term, Roberts Court Defines Itself - Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative*, WASH. POST, June 25, 2007, at A3, A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401367.html> (“Justice Anthony M. Kennedy, the only member of the court to be in the majority in all 16 of this term’s 5 to 4 decisions, has sided more consistently with conservatives in recently announced cases.”); Laura Smith-Spark, *US Supreme Court’s Swing to the Right*, BBC NEWS, Oct. 1, 2007, available at <http://news.bbc.co.uk/2/hi/americas/7021922.stm> (discussing the current Court’s swing to the right and stating that:

“[the] [k]ey to that will be the actions of Justice Anthony Kennedy, most often the swing voter on the court. In the 2006 session, of 19 cases that divided 5-4 along ideological lines, the conservative block won 13 and the liberal block six - and almost every time, Mr. Kennedy’s was the deciding vote.”);

Jeffrey Toobin, Editorial, *Five to Four*, NEW YORKER, June 25, 2007, at 35, 35, available at [http://www.newyorker.com/talk/comment/2007/06/25/070625taco\\_talk\\_toobin](http://www.newyorker.com/talk/comment/2007/06/25/070625taco_talk_toobin) [hereinafter *Five to Four*] (“Kennedy holds the balance of power in the Roberts Court, much the way Sandra Day O’Connor did in the Rehnquist years. Kennedy is more conservative than O’Connor, so the Court is, too.”).

202. *Five to Four*, *supra* note 201, at 36.

203. See, e.g., Robert Barnes, *Supreme Court Leans Conservative*, WASH. POST, June 25, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501047.html> (“[The] liberal justices have responded in unified dissents to amplify their unhappiness . . . . And the term may well be remembered for the normally modest Ginsburg’s decision to buck tradition and read dissents twice from the bench.”).

204. See, e.g., Bill Mears, *Divided Court Rejects School Diversity Plans*, CNN, June 28, 2007, <http://www.cnn.com/2007/LAW/06/28/scotus.race/index.html> (“[A] bitterly divided

*A. Changes on the Court and the Potential Impact on Affirmative Action*

At the end of the day, the replacement of conservative Chief Justice William Rehnquist with conservative Chief Justice John Roberts did not alter the Court's stance on affirmative action. Both Rehnquist and Roberts issued opinions firmly against the practice, especially with preferences justified by something akin to the Diversity Spotlight Rationale.<sup>205</sup> A more important change—the appointment of Justice Samuel Alito to replace Justice Sandra Day O'Connor—has likely decreased support on the Court for affirmative action. As discussed in Part II, Justice O'Connor proved to be the pivotal fifth vote in the *Grutter* decision.<sup>206</sup> It was O'Connor's opinion that allowed the forward-looking use of preferences to foster a diverse student body. The evidence indicates that Justice Alito would not have voted on O'Connor's side in *Grutter*. For example, prominent interest groups challenged Alito's nomination stating that the:

[M]ost recent claim against Judge Alito is that his advocacy record before the Supreme Court during his tenure in the Reagan-administration solicitor general's office shows that he's to the extreme right of Justice O'Connor, particularly on matters

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U.S. Supreme Court . . . issued what is likely to be a landmark opinion - ruling that race cannot be a factor in the assignment of children to public schools."'). As discussed in Part I, the conservative block plus Justice Kennedy voted to strike down the plan. The liberal block would have upheld it. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. District No. 1*, OYEZ, [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_908](http://www.oyez.org/cases/2000-2009/2006/2006_05_908) (last visited May 29, 2009) (showing the votes of the Justices in this case in pictorial form).

205. *See, e.g., Grutter*, 539 U.S. at 378-79 (Rehnquist, C.J., dissenting) (discussing Michigan's non-remedial affirmative action plan and stating that:

"I agree with the Court that, 'in the limited circumstance when drawing racial distinctions is permissible,' the government must ensure that its means are narrowly tailored to achieve a compelling state interest. I do not believe, however, that the University of Michigan Law School's . . . means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a "critical mass" of underrepresented minority students. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.");

*Parents Involved*, 551 U.S. at 748 (discussing a non-remedial affirmative action plan and stating that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

206. Justice O'Connor provided the swing vote when she joined the liberal block of the Court to form a majority in *Grutter*. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003), OYEZ, [http://www.oyez.org/cases/2000-2009/2002/2002\\_02\\_241/](http://www.oyez.org/cases/2000-2009/2002/2002_02_241/) (showing the votes of the Justices in this case in pictorial form and indicating that Justice O'Connor voted in favor of the diversity-based, voluntary affirmative action plan). *But see Gratz v. Bollinger*, 539 U.S. 244 (2003), OYEZ, [http://www.oyez.org/cases/2000-2009/2002/2002\\_02\\_516/](http://www.oyez.org/cases/2000-2009/2002/2002_02_516/) (showing that Justice O'Connor voted with the conservative majority in striking down the forward-looking, voluntary affirmative action plan in *Gratz*).



pertaining to affirmative action. For example, People for the American Way declares “Alito’s record strongly suggests that if he had been on the Court instead of O’Connor, affirmative action by government institutions would have been completely prohibited instead of being preserved.” The NAACP Legal Defense Fund maintains that “During [Justice O’Connor’s] long tenure on the Court, she has cast significant votes in many decisions to uphold affirmative action.” And the National Congress of Black Women contends that “If he is confirmed to replace Justice O’Connor, Judge Alito will almost certainly, based upon his past performance, shift the current 5-4 balance on the court on affirmative action.”<sup>207</sup>

This evidence indicates that the Alito-for-O’Connor substitution is material - at least pertaining to affirmative action. In fact, the predictions made below would likely be very different with O’Connor still on the Court. There is evidence from her *Grutter* opinion that she might have voted to extend the majority’s reasoning into the private workplace arena. In *Grutter*, O’Connor made it a point to “dispel the notion that the Law School’s argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action . . . . But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”<sup>208</sup> To make this leap from government action to private, voluntary preferences, O’Connor might have argued that the scrutiny required by the Fourteenth Amendment is less rigid under Title VII and that the Court should defer to the expertise of the executives promulgating DSR plans.<sup>209</sup> She might then have picked up on Justice Brennan’s reasoning in *Weber* and claimed that nothing in Title VII states that the Remedial Rationale is the only legal justification for preferences.<sup>210</sup> As interesting as this tangent is, however, the remaining sections of this paper will deal with the Court as it is currently composed.

### *B. The Diversity Spotlight Rationale before the Current Supreme Court*

The following analysis predicts the likely decision of a conservative-

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207. Peter Kirsanow, *Alito Accuracy*, NAT’L REV. ONLINE, Jan. 6, 2006, <http://www.nationalreview.com/comment/kirsanow200601060712.asp>.

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

209. *See id.* (stating also that the “Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

210. *Weber*, 443 U.S. at 208 (“[The majority] need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans.”).

leaning Supreme Court (minus O'Connor, plus Alito) when confronted with a diversity-based preference plan under the Diversity Spotlight Rationale. More specifically, the goal is to predict how each Justice might analyze a voluntary affirmative action plan crafted by a private company for the sole purpose of attaining a diverse workforce. The discussion assumes that: (1) such a plan will be evaluated under the history and precedent analyzed in Part I and (2) the positions of the Justices have not materially changed since their last affirmative action decisions and public comments on the topic.

(1) The Liberal Block

The Justices of the liberal block would likely uphold a preference-based plan under the Diversity Spotlight Rationale against a Title VII challenge. This section discusses the rationale for each of the four Justices included in this camp.

Since joining the Court in 1993, Justice Ginsburg has been pro-affirmative action, whether the type promoted by the government under the Remedial Rationale in *Adarand* or the Diversity Spotlight Rationale in *Gratz*, *Grutter*, and *Parents Involved*. Ginsburg's passion about the topic led her to pen separate dissents in two of the three cases where the Court struck down an affirmative action plan on her watch. She did so in *Adarand* rather mildly, suggesting that the Court defer to Congress' institutional competence to overcome the discrimination of the past and stating that:

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects . . . . Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods."<sup>211</sup>

She did so in *Gratz* more forcefully, focusing on the theme of continuing and persistent racial discrimination in America and stating the following:

[Educational institutions are not barred from any and all consideration of race when making admissions decisions . . . . [The Court's] insistence on "consistency," would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. . . . But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned

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211. *Adarand*, 515 U.S. at 273 (citations omitted).

inequality remain painfully evident in our communities and schools.”<sup>212</sup>

Justice Ginsburg more easily accepts the “benign” discrimination promoted by the Diversity Spotlight Rationale as long as it does not “trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.”<sup>213</sup> She is also likely to defer to the expertise of the executives promulgating the plans as she did in *Adarand*. As for race-based preferences outside of a remedial context, while on the District of Columbia Circuit Court of Appeals, Ginsburg stated, “[f]urther, in his separate opinion in *Croson*, Justice Stevens reasoned, and I agree, that remedy for past wrong is not the exclusive basis upon which racial classification may be justified.”<sup>214</sup> It appears that Justice Ginsburg would likely uphold a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

Justice Breyer’s position on affirmative action was clarified in a recent speech he gave at a Stanford University diversity conference. Breyer claimed that the majority opinion he joined in *Grutter* was the most important decision since his appointment to the Court.<sup>215</sup> Breyer stated that he believed that Michigan’s “affirmative action policies were sound efforts to level the playing field for disadvantaged minorities . . . [but] followed that remark with the admonition that he doesn’t believe that all affirmative action efforts are right.”<sup>216</sup> Of all the Justices forming the liberal block, Breyer is the most likely to jump ship and strike down a preference plan under the DSR. However, this appears unlikely for three key reasons. First, Justice Breyer views “benign” discrimination as more constitutionally acceptable than invidious discrimination.<sup>217</sup> In a recent speech he stated

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212. *Gratz*, 539 U.S. at 304 (citations omitted) (stating:

“[The] stain of generations of racial oppression is still visible in our society . . . and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment-and the networks and opportunities thereby opened to minority graduates-whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage.”).

213. *Gratz*, 539 U.S. at 302.

214. *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) (stating also that Judge Ginsburg concurred with the majority in this case “with the understanding, made clear by *Croson*, that minority preference programs are not per se offensive to equal protection principles, nor need they be confined solely to the redress of state-sponsored discrimination.”) (emphasis added) (citations omitted).

215. Ray Delgado, *Breyer Says Affirmative Action Case Was His “Most Important,”* STAN. REP., May 5, 2004, <http://news.stanford.edu/news/2004/may5/breyer-55.html>.

216. *Id.*

217. *See, e.g., Gratz*, 539 U.S. at 281-82 (Breyer, J., concurring in the judgment but not

that:

There's a difference between positive and negative discrimination; there's a difference between affirmative action and invidious discrimination . . . . The reason there's a legal difference is that it flows from a view of the 14th Amendment that says, 'What's it there for? What did these people have in mind? What were they trying to do?' And they would have seen it . . . as trying to give a helping hand rather than a kick in the face."<sup>218</sup>

Preference plans under the Diversity Spotlight Rationale can be considered a form of benign discrimination favoring minorities. Second, his dissent in *Parents Involved* stated that courts should apply strict scrutiny, even to benign discrimination, but also that the Court can defer to the experts when it comes to improving their programs.<sup>219</sup> Finally, Justice Breyer has voted to support race-based preferences in each of the four prominent affirmative action cases he has presided over since joining the Court in 1994<sup>220</sup> and at least two times as an appellate judge.<sup>221</sup> Therefore,

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the opinion and dissenting in part) ("I agree with Justice Ginsburg that, in implementing the Constitution's equality instruction, government decision makers may properly distinguish between policies of inclusion and exclusion . . . for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally.").

218. Lauren Henry & Andrew Mangino, *Breyer Weighs In on Constitution, Politics*, YALE DAILY NEWS, Sept. 15, 2006, available at <http://www.yaledailynews.com/articles/view/17882>.

219. *Parents Involved*, 551 U.S. at 866 (stating:

"And what of respect for democratic local decision-making by States and school boards? For several decades this Court has rested its public school decisions upon [the] basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.") (citations omitted).

He also stated that "a longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it." *Id.*

220. See *Adarand*, 515 U.S. 200 (Breyer, J., dissenting); *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244 (Breyer, J., concurring in the judgment but not the opinion) (showing that Justice Breyer only concurred because he wanted to reiterate Justice O'Connor's view of the constitutionality of government-sponsored preference plans); *Parents Involved*, 551 U.S. 702, 574 (Breyer, J., dissenting).

221. See, e.g., *Breyer's Civil Liberties Record: ACLU Finds Centrist, Practical Judge*, LECTLAW, July 5, 1994, <http://www.lectlaw.com/files/jud02.htm> (last visited Nov. 11, 2009) (stating:

"Judge Breyer has twice upheld the Boston Police Department's affirmative action efforts against legal challenge. In the first case, he rejected the argument that a voluntary affirmative action plan must be limited to the actual victims of

Justice Breyer would likely uphold a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

Justice Sotomayer, assuming a successful confirmation, appears to be a proponent of affirmative action. The press is reporting that:

Judge Sotomayer, whose parents moved to New York from Puerto Rico, has championed the importance of considering race and ethnicity in admissions, hiring and even judicial selection at almost every stage of her career: as a student activist at Princeton and at Yale Law School, as a board member of left-leaning Hispanic advocacy groups and as a federal judge arguing for diversity on the bench.<sup>222</sup>

As for her recent judicial record, as part of a three-judge Second Circuit panel, Sotomayer voted to uphold a district court decision allowing the City of New Haven to avoid certifying the results of promotional examination.<sup>223</sup> The City chose this path because no African-Americans and only one Hispanic firefighter qualified for promotion based on the exam and it wanted to avoid a potential discrimination lawsuit under Title VII.<sup>224</sup> Sotomayer's panel rejected a reverse discrimination claim under Title VII by a white applicant/test-taker who likely would have received a promotion had the test been certified.<sup>225</sup> In doing so, the panel stated that:

[I]t simply does not follow that [the white plaintiff] has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.<sup>226</sup>

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past discrimination. In the second case, he ruled against a constitutional claim of reverse discrimination raised by white police officers.”).

222. David D. Kirkpatrick, *Sotomayer's Focus on Race Issues May be Hurdle*, N.Y. TIMES, May 29, 2009, <http://www.nytimes.com/2009/05/30/us/politics/30affirm.html>.

223. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (stating:

“[New Haven] found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.”).

In June 2008, Judge Sotomayer was part of a seven to six majority, which refused to allow a rehearing en banc by the entire Second Circuit. *Id.* The case made its way to the Supreme Court styled as *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

224. *Id.*

225. *Id.*

226. *Id.* at 87 (stating:

This sort of language indicates that Judge Sotomayer would likely uphold a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

Finally, Justice Stevens appears to be solidly in the pro-affirmative action camp. This was not always the case as, early in his career on the Court, Stevens joined the unanimous decision against the racial preferences under Title VII in *McDonald*<sup>227</sup> and claimed that the Constitution was colorblind in *Bakke*.<sup>228</sup> Stevens also claimed in a recent speech that he would have joined Rehnquist's dissent in *Weber* had he not been disqualified from the case.<sup>229</sup> Today, however, his views on affirmative action have changed and it is likely that he would vote to uphold a voluntary, diversity-based workplace preference plan under the Diversity Spotlight Rationale. He made this position clear in a dissenting opinion issued in *Wygant v. Jackson Board of Education*.<sup>230</sup> In *Wygant*, a public board-of-education crafted a preference plan whereby minority teachers could avoid certain lay-offs regardless of seniority.<sup>231</sup> The majority held that the plan was not narrowly tailored enough to survive scrutiny under the Fourteenth Amendment and struck it down.<sup>232</sup> Justice Stevens disagreed

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“[T]he Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated.”).

227. *McDonald*, 427 U.S. at 274.

228. See *Bakke*, 438 U.S. at 418 (“[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.”).

229. See Fordham University School of Law Centennial Conference, Justice John P. Stevens, Remarks at Fordham University School of Law Centennial Conference: Learning on the Job, 13-14, Sept. 30, 2005, available at <http://law.fordham.edu/newsfiles/news-stevens.pdf> [hereinafter *Stevens' Remarks*] (stating that he still agrees with Rehnquist's interpretation of the legislative history undergirding Title VII but, since Congress has acquiesced in the holding of *Weber*, he is bound by precedent to uphold subsequent similar cases)

230. *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting).

231. *Id.* at 270-71 (detailing the agreement between the board and the union which stated that:

"In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for position for which he is certificated maintaining the above minority balance.”).

232. *Id.* at 283-84.

and advocated for an early form of the Diversity Spotlight Rationale:

In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.<sup>233</sup>

Stevens honed in on whether the preferences produced some legitimate public purpose.<sup>234</sup> If they did, the procedures used to implement the preferences must be fair and the public purpose must transcend the nature of the harm to non-preferenced individuals.<sup>235</sup> If the preference plan passes this test, it is constitutional under the Fourteenth Amendment.

Stevens also made the argument that benign discrimination is much different under the Equal Protection Clause than invidious discrimination.<sup>236</sup> Stevens reiterated his support for forward-looking affirmative action in a concurrence in *Croson* although he voted to strike down the preference plan at issue.<sup>237</sup> Since *Croson*, Stevens has voted to

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233. *Id.* at 313.

234. *See id.* at 315 (“[In *Wygant*] the collective bargaining agreement between the Union and the Board of Education succinctly stated a valid public purpose.”).

235. *See id.* at 317 (stating that even if there is a valid purpose:

“to the race consciousness, however, the question that remains is whether that public purpose transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers. In my view, there are two important inquiries in assessing the harm to the disadvantaged teacher. The first is an assessment of the procedures that were used to adopt, and implement, the race-conscious action. The second is an evaluation of the nature of the harm itself.”).

236. *See id.* at 316 (stating that:

“[an] inclusionary decision [i.e., benign discrimination] is consistent with the principle that all men are created equal; the exclusionary decision [i.e., invidious discrimination] is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality.”).

237. *See Weber*, 448 U.S. at 511, 545 (stating:

“[A] central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens. In order to achieve that goal, we

uphold preference-based affirmative action plans in *Adarand*, *Grutter*, *Gratz* and *Parents Involved*. At the end of the day, Stevens believes that “we have learned that there is a critical difference between using race as a criterion for hiring when the race of the employee is not directly related to the objectives of the employer . . . and recognizing its relevance in law enforcement and educational contexts.”<sup>238</sup> With all of this evidence considered, Justice Stevens would likely uphold a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

## (2) The Conservative Block

An analysis of the conservative block is much easier than an analysis of the liberal block or of Justice Kennedy. This is because the conservative Justices are not shy about their opinions against almost all forms of affirmative action. For example, Justice Antonin Scalia has made his position on racial preferences crystal clear: “To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”<sup>239</sup> Along these same lines, Scalia feels that *Weber* should be overruled.<sup>240</sup> In a dissent in *Johnson*, Scalia stated that the

Court today completes the process of converting this from a guarantee that race or sex will *not* be the basis for employment determinations to a guarantee that it often *will*. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace.<sup>241</sup>

In *Grutter*, he stated that the “Constitution proscribes government

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must learn from our past mistakes, but I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future. I therefore do not agree with the premise that seems to underlie today's decision . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.” (citations omitted).

238. *Stevens' Remarks*, *supra* note 229, at 14-15.

239. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

240. *Johnson*, 480 U.S. at 673 (Scalia, J., dissenting).

241. *Id.* at 658 (Scalia, J., dissenting) (emphasis in original).



discrimination on the basis of race, and state-provided education is no exception.”<sup>242</sup> Justice Scalia is skeptical of courts remedying societal discrimination<sup>243</sup> and believes that the Equal Protection Clause protects individuals and, therefore, one individual cannot be injured even to assist an entire group of minorities.<sup>244</sup>

When it comes to a workplace affirmative action plan under the DSR, Scalia is likely to hold that prohibitions against discrimination in Title VII are as strict as those prohibited by the Constitution.<sup>245</sup> He also calls into question the motives of some of the businesses that file amici briefs in affirmative action cases. Scalia has expressed his belief by stating that it is less costly for employers to argue for preference plans in the courts as amici so that they can hire less qualified workers and avoid the costs of Title VII racial discrimination lawsuits brought by minorities who can prove institutional discrimination.<sup>246</sup> With such strong statements on the record, Justice Scalia is nearly certain to strike down a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

Justice Thomas believes that the “government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”<sup>247</sup> Justice Thomas has said that strict scrutiny applies to any government classification on the basis of race and it is likely that his scrutiny will be fatal regardless of whether the preferences are benign or invidious.<sup>248</sup> He has said: “In my mind, government-sponsored racial discrimination based on benign prejudice is

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242. *Grutter*, 539 U.S. at 349 (Scalia, J., dissenting).

243. *Johnson*, 480 U.S. at 664 (Scalia, J., dissenting)

244. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

245. *See Johnson*, 480 U.S. at 664 (Scalia, J., dissenting) (“[While] Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public actors than is established by the Constitution.”).

246. *See id.* at 677 (stating that the Johnson majority opinion will not:

“displease the world of corporate and governmental employers (many of whom have filed briefs as *amici* in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less--and infinitely more predictable--than the cost of litigating Title VII cases and of seeking to convince federal agencies by non-numerical means that no discrimination exists.”).

247. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

248. *See id.* at 240-41 (explaining that strict scrutiny applies to all government classifications based on race and good intentions on the part of the government will not provide it refuge).

just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.”<sup>249</sup> This will likely doom the benign racial preferences in play under the DSR - even though it is a private employer rather than the government executing the preferences. In addition, Justice Thomas’ record is solidly against affirmative action, having dissented from the judgment in *Grutter*<sup>250</sup> and joined with the opinion of the Court in *Gratz* and *Parents Involved*. With these steadfast and long-held positions, Justice Thomas is nearly certain to strike down a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

Justices Roberts and Alito have not made their positions on affirmative action as clear as Justices Scalia and Thomas. They did, however, join with Scalia and Thomas in striking down the race-based preference plan in *Parents Involved*.<sup>251</sup> Chief Justice Roberts made a strong anti-affirmative action statement in *Parents Involved*, writing that the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>252</sup> He rejected the argument that benign classifications on the basis of race should receive lighter scrutiny than invidious classifications and stated that the “argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past . . . and has been repeatedly rejected.”<sup>253</sup> Additionally, the Chief Justice does not appear to be a big fan of deference to decision-makers in the context of affirmative action. He rebutted Justice Breyer’s claim that the Court should defer to the expertise of the local school boards by stating that such “deference ‘is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.’”<sup>254</sup> An important part of the DSR is the dereference granted to company

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249. *Id.* at 241.

250. *Grutter*, 539 U.S. at 387 (Thomas, J., concurring in part and dissenting from the judgment) (stating:

“[the Court] in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School’s program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of ‘fit’ between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.”).

251. *See Parents Involved*, 551 U.S. at 708 (announcing the Justices forming the majority/plurality of the Court).

252. *Id.* at 748.

253. *Id.* at 743 (“Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.”).

254. *Id.* at 744 (citing *Johnson* 534 U.S. at 506).

executives to determine what constitutes the most effective and profitable workforce.

Similarly, Justice Alito joined Roberts' opinion in *Parents Involved* in its entirety. More telling is that, as a judge on the Third Circuit, he joined an opinion in a case styled *Taxman v. Board of Education of the Township of Piscataway*.<sup>255</sup> The issue in this extremely relevant case was whether "Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote 'racial diversity'".<sup>256</sup> This issue is directly on-point to the challenge that will eventually be made under the DSR.<sup>257</sup> Then-Judge Alito joined a majority of eight Third Circuit judges to strike down this preference plan. The court used the *Weber* and *Johnson* standards detailed in Part II above and found that Title VII relevant caselaw "convinces us that a non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII."<sup>258</sup> In the end, the Third Circuit concluded:

While we have rejected the argument that the Board's non-remedial application of the affirmative action policy is consistent with the language and intent of Title VII, we do not reject in principle the diversity goal articulated by the Board. Indeed, we recognize that the differences among us underlie the richness and strength of our Nation. Our disposition of this matter, however, rests squarely on the foundation of Title VII. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures.<sup>259</sup>

This is a strong statement against the DSR as applied to Title VII. It is also the primary Circuit Court case law on point. The Supreme Court nearly granted certiorari in this case but it was settled at the last minute. Interestingly, various civil rights groups paid most of the settlement money to avoid a potential bad result in the Supreme Court – an action that foreshadows the predications made in this paper.<sup>260</sup> Therefore, based on the

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255. *Taxman*, 91 F.3d at 1547.

256. *Id.* at 1549.

257. The only difference lies in the fact that the preferences in *Taxman* were crafted by a public employer and this article anticipates a Supreme Court challenge against a private employer based on the amici briefs in *Grutter*.

258. *Taxman*, 91 F.3d at 1563.

259. *Id.* at 1567.

260. See, e.g., Abby Goodnough, *Financial Details are Revealed in Affirmative Action Settlement*, N.Y. TIMES, Dec. 6, 1997, available at <http://www.nytimes.com/1997/12/06/nyregion/financial-details-are-revealed-in-affirmative-action-settlement.html> (stating:

"[The] coalition, in a highly unusual move, offered last month to pay most of the \$433,500 settlement to Sharon Taxman, a white teacher at Piscataway High School whom the board had dismissed in a 1989 budget reduction to preserve a

evidence above, it appears that both Chief Justice Roberts and Justice Alito would strike down a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

### (3) Justice Kennedy

This may indeed be the era of the Kennedy Court instead of the Roberts Court.<sup>261</sup> Anthony Kennedy currently presides as the decisive vote between two camps of Justices each seeking to form a majority. Although he votes with the conservative block more often than not, Justice Kennedy often writes separately “to moderate the result.”<sup>262</sup> When it comes to affirmative action, Kennedy has stated that a racial preference, “when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”<sup>263</sup> He has also opined that to “make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.”<sup>264</sup>

However, Justice Kennedy does believe that racial preferences can be constitutional, but only in “one context” – to foster student diversity in the public educational arena.<sup>265</sup> In this particular context, Kennedy requires governmental preferences to undergo a strict scrutiny analysis to meet the requirements of the Equal Protection Clause.<sup>266</sup> This adherence to strict

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black teacher's job.”). “The abrupt settlement, on Nov. 21, ended the eight-year-old case against the school board just two months before it was scheduled to be heard by the United States Supreme Court. Civil rights leaders offered to help finance the settlement because they feared the Supreme Court would use the case to strike down almost all affirmative action programs.” *Id.*

261. David Cole, *The “Kennedy Court,”* THE NATION, July 14, 2006, <http://www.thenation.com/doc/20060731/cole> [hereinafter *Kennedy Court*]. *But see* Linda Greenhouse, *At Supreme Court, 5-4 Rulings Fade, But Why?*, N.Y. TIMES, May 23, 2008, available at [http://www.nytimes.com/2008/05/23/us/23memo.html?\\_r=1](http://www.nytimes.com/2008/05/23/us/23memo.html?_r=1) (“[Justice Kennedy’s] dominance last term was so complete that, of 68 decisions, he cast only two dissenting votes. He has already dissented five times [during the 2007-2008] term. So have Justices Samuel A. Alito Jr., Stephen G. Breyer and John Paul Stevens. In other words, no longer the essential justice, Anthony Kennedy now looks like just one of the pack.”).

262. *Kennedy Court*, *supra* note 261. *See, e.g., Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring).

263. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

264. *Parents Involved*, 551 U.S. at 782.

265. *See, e.g., Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting).

266. *See, e.g., Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (stating that:

Powell’s *Bakke* opinion “is based on the principle that a university admissions program may take account of race as one, non-predominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted

scrutiny is what caused Kennedy to dissent in *Grutter*<sup>267</sup> and join the Court in striking down affirmative action plans in *Gratz*<sup>268</sup> and *Parents Involved*<sup>269</sup> (albeit with a more moderate concurrence).<sup>270</sup> Each of those three cases had diversity as the justification for the affirmative action plans in controversy. The primary difference between *Grutter*, *Gratz* and *Parents Involved* and a future workplace preference plan is the one thing that matters most to Kennedy – the special context of the educational arena.

Today, it appears that Kennedy's position on race-based preferences has not changed drastically. A recent exchange from oral arguments in *Ricci v. DeStefano* indicates that he is still skeptical of racial classifications by the government which take away opportunities from non-preferenced individuals:

JUSTICE KENNEDY: Counsel, [the employer city that failed to certify the test] looked at the results, and it classified the successful and unsuccessful applicants by race.

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meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny.”).

267. *Id.* at 387 (Kennedy, J., dissenting) (“[The] Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”).

268. *Gratz*, 539 U.S. at 270 (joining the majority opinion which stated that:

“[t]o withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs ‘narrowly tailored measures that further compelling governmental interests.’ Because ‘[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,’ . . . our review of whether such requirements have been met must entail ‘a most searching examination.’” We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”) (citations omitted).

269. *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) (“[As the Seattle] district fails to account for the classification system it has chosen, despite what appears to be its ill fit, Seattle has not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny.”).

270. *Id.* at 782 (stating:

“I agree with The Chief Justice that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III-A and III-C for reasons provided below. My views do not allow me to join the balance of the opinion by The Chief Justice, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause.”).

MR. KNEEDLER: It -- it--

JUSTICE KENNEDY: And then -- and you want us to say this isn't race? I have -- I have trouble with this argument.

MR. KNEEDLER: No, with respect, it did not classify according to race; it looked in general terms. It did not have the names of individual people. It looked in general terms at what the racial disparity of the test was. It just --

CHIEF JUSTICE ROBERTS: It didn't look at names; it just looked at the label of what their race was. That's all they were concerned about.

MR. KNEEDLER: Title VII's disparate impact test requires -- requires an employer to be aware of and respond --

JUSTICE KENNEDY: But that's inconsistent with your answer to the Chief Justice who was exploring whether or not what we have here is a -- is a racial criteria, pure and simple, and you say, well, it's general. And then we point out that each applicant didn't have his name, but they had his or her race.<sup>271</sup>

This back and forth—picked up on by the conservative Chief Justice—is reminiscent of Kennedy's concurrence in *Croson* where he stated that the “moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”<sup>272</sup> When it comes to such classifications, Kennedy's concurrences in general appear to favor the use of race *only as a last resort*. He would instead encourage affirmative action proponents to strive to promote diversity by non-referential means. Although Kennedy was not on the Court for the *Weber* and *Johnson*, the evidence indicates that he will likely limit his approval of affirmative action to the educational arena -- the “one context” he deems it legitimate. This means that Justice Kennedy would likely strike down a preference-based plan justified by the Diversity Spotlight Rationale when challenged under Title VII.

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271. Transcript of Oral Argument at 39-40, *Ricci v. DeStefano*, Apr. 22, 2009, (Nos. 07-1428, 08-328), [available at](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1428.pdf) [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-1428.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1428.pdf). It appeared that Justice Kennedy “seemed troubled by the city's decision to throw out all results of a promotion exam only after officials learned that no African-American candidates had scored high enough to be promoted.” Warren Richey, *Reverse-Discrimination Case Splits Supreme Court*, C.S. MONITOR, Apr. 22, 2009, <http://www.csmonitor.com/2009/0423/p02s01-usju.html%20>.

272. See, e.g., *Croson*, 488 U.S. at 518 (Kennedy, J., concurring).

#### (4) The Votes

Considering precedent, prior public statements of the current Justices and the potential conflict between the DSR and the express language of Title VII – it is likely that a voluntary, diversity-based workplace affirmative action plan will be struck down by the current Court.<sup>273</sup> This paper predicts a five to four split decision with the conservative block and the conservative-leaning Justice Kennedy in the majority. This paper also predicts the issuance of strong and passionate dissenting opinions from the liberal block.

The majority opinion might utilize any or each of the following reasons to limit *Grutter* to the academic context: (1) the workplace is much different from the academic environment where academic freedom might allow racial and gender preferences to attain a diverse student body of future leaders; (2) taking away opportunities under the Diversity Spotlight Rationale is not as compelling as doing so under the Remedial Rationale—especially in the business context where diversity is utilized in part increase profits; and (3) Title VII was enacted to eliminate racial discrimination of any type—including so-called reverse discrimination against white employees and applicants and the language of the statute makes this mandate expressly clear. To justify this result, the Court might dispense with the *Weber* and *Johnson* tests and, instead, import the strict scrutiny test from the Fourteenth Amendment Equal Protection cases to its Title VII analysis of the DSR. This option would not require Justice Kennedy to overrule *Weber* or *Johnson* – he could merely limit those holdings to workplace preferences justified by the Remedial Rationale.

In summary, the following chart predicts the particular votes of the current Justices in the hypothetical case of DSR preference program challenged under Title VII:

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273. See also Jonathan A. Segal, *Diversity: Direct or Disguised? Recent Supreme Court Decisions Don't Resolve whether and when you Can Focus on Race in Hiring Decisions*, H.R. MAGAZINE, Oct. 1, 2003, at 1, available at <http://www.allbusiness.com/public-administration/administration-human/664553-1.html> (stating:

“[Some] commentators believe these ground-breaking decisions [*Grutter* and *Gratz*], which generally recognize the importance of student-body diversity in public higher education, provide a green light for employers to consider race and ethnicity for the purpose of achieving a diverse workforce. However, such an interpretation is probably a mistake. Nothing in the court's opinions . . . expressly protects consideration of race, ethnicity or other protected classifications in the private employment context.”).

HYPOTHETICAL CASE	JUSTICE	OPINION TYPE	RULING
<i>Doe v. Private Sector Employer</i>	ALITO	MAJORITY	DSR PLAN VIOLATES TITLE VII
	KENNEDY	MAJORITY	DSR PLAN VIOLATES TITLE VII
	ROBERTS	MAJORITY	DSR PLAN VIOLATES TITLE VII
	SCALIA	MAJORITY	DSR PLAN VIOLATES TITLE VII
	THOMAS	MAJORITY	DSR PLAN VIOLATES TITLE VII
	BREYER	DISSENT	DSR PLAN DOES NOT VIOLATE TITLE VII
	GINSBURG	DISSENT	DSR PLAN DOES NOT VIOLATE TITLE VII
	SOTOMAYOR	DISSENT	DSR PLAN DOES NOT VIOLATE TITLE VII
	STEVENS	DISSENT	DSR PLAN DOES NOT VIOLATE TITLE VII

V. CONCLUSION

The Supreme Court has decided only a dozen prominent cases on the



topic of affirmative action.<sup>274</sup> The impact of each decision, however, has profoundly shaped public policy and societal expectations. Few topics generate such passion and controversy within academia, business, government, the legal profession and the social sciences – not to mention among the citizenry and the press.<sup>275</sup> The paper demonstrates that the affirmative action of our parents will not be the affirmative action of our children. What is significantly different today is that the justification for preference plans has changed drastically from backward-looking to forward-looking. The Remedial Rationale is fading into history and the Diversity Spotlight Rationale is emerging as the new frontier.

In the private workplace arena, prominent businesses now claim an interest in fostering diversity within their ranks to better compete, market and think in an ever-globalizing economy. Diversity Spotlight Rationale-based arguments such as these butt heads with the express language and anti-discriminatory thrust of Title VII and with affirmative action opponents. This article predicts that the current Supreme Court will side with a strict statutory interpretation of Title VII and strike down a voluntary, forward-looking, diversity-based workplace affirmative action plan. This prediction is based on Justice Kennedy's general anti-affirmative action stance, a conservative-learning Court and the written positions staked out by Justices Thomas, Scalia, Alito, Roberts and Kennedy (i.e., the dissents in *Grutter*, the majority opinions in *Gratz* and *Parents Involved* and Justice Alito's vote in *Taxman*). Casey Stengel warned that people should "never make predictions, especially about the

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274. See, e.g., *Supreme Court Collection: Topic: Affirmative Action*, CORNELL UNIV. LAW SCHOOL, [http://www.law.cornell.edu/supct/cases/topics/tog\\_affirmative\\_action.html](http://www.law.cornell.edu/supct/cases/topics/tog_affirmative_action.html) (linking to twelve Supreme Court decisions on affirmative action) and *Timeline of Affirmative Action Milestones*, INFOPLEASE, <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited May 30, 2009) (presenting a timeline of key affirmative action decisions from the Supreme Court).

275. See, e.g., Pew Research Center for the People & the Press, *Conflicted Views of Affirmative Action*, May 14, 2003, available at <http://people-press.org/report/184/conflicted-views-of-affirmative-action> (stating:

"[A] new Pew Research Center nationwide survey finds a growing majority of the public supporting the general idea of affirmative action. But the poll results also reflect the public's complicated and sometimes contradictory attitudes about the subject. There is support for the rationale of affirmative action such as overcoming past discrimination or increasing the diversity of students in college. But at the same time, Americans question the fairness of such programs, the rationale notwithstanding. When the details of specific affirmative action programs are raised, public reservations increase. Further, when people are questioned about programs involving preferential treatment for minorities, opinion turns negative. On all questions about affirmative action there are predictable racial differences in opinion, but significant gender differences are evident as well, even when the issue of gender inequality is not mentioned in the question.")

future.”<sup>276</sup> This statement is partially true in the sense that predicting Supreme Court opinions—especially those of Justice Kennedy—can be dicey.<sup>277</sup> Only time will tell how the current Court will handle the first affirmative action case coming from the private workplace under the Diversity Spotlight Rationale. However, one fact is clear – nearly one hundred prominent American businesses stated unabashedly in *Grutter* that they support and may create forward-looking preference plans based solely on diversity for the sake of diversity. The seriousness of this fact makes predictive papers such as this an important part of the discussion.

As this Diversity Spotlight Rationale gains prominence in the workplace, it is only a matter of time before a white employee loses an employment opportunity and brings a reverse discrimination lawsuit. The controversial nature of forward-looking, diversity-based preference plans combined with the history of circuit splits regarding affirmative action should provide compelling reasons<sup>278</sup> for the Supreme Court to grant certiorari upon appeal.<sup>279</sup> In generating a decision, the Justices have two

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276. See, e.g., “Famous Quotes about Predictions,” QUOTESDADDY, <http://www.quotesdaddy.com/quote/153924/casey-stengel/never-make-predictions-especially-about-the-future> (last visited May 31, 2009).

277. See, e.g., Associated Press, *DeLay Slams Supreme Court Justice Kennedy*, MSNBC, Apr. 20, 2005, available at <http://www.msnbc.msn.com/id/7550959/> (“[Although Justice Kennedy] was appointed to the Supreme Court by President Reagan, a conservative icon, he has aroused conservatives’ ire by sometimes agreeing with the court’s more liberal members.”).

278. The Supreme Court has discretion to grant or deny certiorari under Rule 10 of the Rule of the Supreme Court. CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI, SUP. CT. R. 10, available at <http://www.law.cornell.edu/rules/supct/10.html> (last visited May 31, 2009) (“[Review] on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”).

279. *Id.* at 10(a) and 10(c) (stating:

“In granting certiorari, the Court is likely to look to: (a) [whether] a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . and/or (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.”).

The Third Circuit has held that Title VII does not allow for workplace affirmative action plans justified by the DSR. *Taxman v. Bd. of Ed. of the Twp of Piscataway*, 91 F.3d 1547, 1563 (3d Cir. 1996) (holding that “[o]ur analysis of the statute and the caselaw convinces us that a non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII.”). There is a strong chance that a least one of the other twelve circuit courts of appeals will rule differently – as they have for decades in the affirmative action area. See, e.g., Dahlia Lithwick, *No-Good Lazy Justices*, SLATE, July 15, 2004, <http://www.slate.com/id/2103909/> (“[W]e live with circuit splits all the time. It felt like the circuits were split over affirmative action for about a million years. The Supreme Court eventually takes these cases and resolves them, as is its mandate.”). This will create the circuit split that the Justices can use as a compelling reason for granting certiorari.

primary options: (1) restrain the reach of *Grutter* and limit Justice O'Connor's opinion to the public higher education arena or (2) expand the DSR as legitimate under Title VII within the private workplace arena. Although this paper predicts that the current conservative-leaning Court will opt for option (1), there is little doubt that the Diversity Spotlight Rationale has taken its place at the frontier of affirmative action jurisprudence. Even if the Court strikes down an early DSR program, employers and interest groups will continue to tweak their plans seeking judicial approval. Additionally, the public policy and public opinion battle revolving around affirmative action is sure to continue before and after the Supreme Court enters the fray.

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Additionally, the Diversity Spotlight Rationale under Title VII and its clear anti-discrimination mandate is certainly an important question of federal law that has not been settled by the Supreme Court. This provides a compelling reason for a grant of certiorari.