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The Strange Persistence of Affirmative Action Under Title VII

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THE STRANGE PERSISTENCE OF AFFIRMATIVE ACTION UNDER TITLE VII

*Deborah C. Malamud**

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I. INTRODUCTION

Affirmative action has always been one of the most controversial topics in civil rights law—except within the domain of private employment, which is governed exclusively by Title VII (as opposed to the Equal Protection Clause of the Constitution).¹ Within the Title VII space, we have a very different situation. The Supreme Court has been silent on the substantive standards for affirmative action under Title VII for more than half of the life of the statute. *United Steelworkers v. Weber*² was decided in 1979. *Johnson v. Transportation*

* AnBryce Professor of Law, New York University School of Law. This Article is based on a presentation at the New York University School of Law 67th Annual Labor Conference, June 6, 2014, and is a lightly revised version of that presentation as published. See Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, in ANNE MARIE LOFASO, TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR (LexisNexis Publishing forthcoming 2015). I thank my research assistant, Alok Nadig, for his thoughtful comments.

¹ Note that the focus of this Article is Title VII; this Article does not survey federal-contractor practice under the administration of the Office of Federal Contract Compliance. For a general treatment of federal contractor affirmative action compliance under Executive Order 11246, see BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2567–2603 (C. Geoffrey Weirich et al. eds., 4th ed. 2007).

² 443 U.S. 193 (1979). *Weber* dealt with

*Agency*³ was decided in 1987. That was the Court's last word on the substantive standards for affirmative action under Title VII, and that was 28 years ago.

It is not only the Supreme Court that has been silent. The Equal Employment Opportunity Commission (EEOC) last promulgated guidelines on affirmative action in 1979, before the Supreme Court decided *Weber*. It has done nothing since. Congress included no provisions on affirmative action in the Civil Rights Act of 1991. Some sloppy language led commentators to suggest that the Act put affirmative action at risk,⁴ but that has not been reflected in the case law.

There is certainly a need for fresh legal guidance. In the years since *Weber* and *Johnson*, there has been a sea change in the actual practice of affirmative action in corporate America. The original rationale for affirmative action under Title VII was remedial. The diversity rationale currently in use is not.

I argue in Part II that affirmative action was understood by the Court in *Weber* and *Johnson* to be remedial in nature: It was aimed at remedying an imbalance caused by race or gender discrimination in labor markets. I show in Part III that the diversity rationale that dominates corporate affirmative-action advocacy today does not appear to be remedial in this sense. Its benchmark is the global marketplace—not the local labor market. Part III closely examines opinions by Justice Sandra Day O'Connor (the author of *Grutter v. Bollinger*⁵) and concludes that it is not safe to read *Grutter* as an endorsement by Justice O'Connor of this corporate diversity rationale. Part III then turns to Justice Anthony Kennedy (the key swing vote on the current Court) and concludes that he would oppose an extension of *Weber* and *Johnson* to diversity-based corporate affirmative action. Part IV goes beyond the particulars of the jurisprudence of Justices O'Connor and Kennedy to review the way the current Court would likely view both remedial and diversity-based affirmative action

[t]he legality of an affirmative action plan—collectively bargained by an employer and a union—that reserve[d] for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craft-workers in the plant [was] commensurate with the percentage of blacks in the local labor force.

Id. at 197.

³ 480 U.S. 616 (1987). In *Johnson*, the Court stated:

In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to [its Affirmative Action] Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision [was] whether in making the promotion the Agency impermissibly took into account the sex of the applicants

Id. at 619.

⁴ See, e.g., Don 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, 590–601 (1995).

⁵ 539 U.S. 306 (2003).

under Title VII. After considering some mitigating factors, Part V concludes that even if remedial affirmative action were to survive through the operation of *stare decisis*, the Court's discomfort with it will likely lead the Court to reject the extension of *Weber* and *Johnson* to diversity-based affirmative action.

II. REMEDIAL AFFIRMATIVE ACTION UNDER TITLE VII

The plan in *Weber*, the Court said, had “purposes [that] mirror those of the statute.”⁶ Both were “designed to break down old patterns of racial segregation and hierarchy.”⁷ Both were structured to “open employment opportunities for Negroes in occupations which have been traditionally closed to them.”⁸ The role of affirmative action was to allow employers to respond to a “manifest imbalance” in the racial/gender composition of their workforce when compared to some relevant labor market, with success measured in terms of labor market characteristics.⁹ So in *Weber*, where unskilled workers were to be given apprenticeship training, the comparison was between “the percentage of black skilled craftworkers” in the employer’s plant and “the percentage of blacks in the local labor force.”¹⁰

Furthermore, when the Court in *Weber* referred to “old patterns of racial segregation and hierarchy” or to the use of affirmative action to “eliminate conspicuous racial imbalance in traditionally segregated job categories,”¹¹ the Court was talking about circumstances in which discrimination (albeit not necessarily by the defendant employer) was the source of that imbalance. There, the employer “hired as craftworkers only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials.”¹² What followed was a footnote documenting judicial, administrative, and social scientific findings on discrimination by craft unions.¹³ Thus, while the Court did not insist that the discrimination at issue even arguably had been caused by

⁶ *Weber*, 443 U.S. at 208.

⁷ *Id.*

⁸ *Id.*

⁹ See LINDEMANN & GROSSMAN, *supra* note 1, at 2525–26 (discussing use of labor market comparisons in the “manifest imbalance” inquiry).

¹⁰ *Weber*, 443 U.S. at 208–09.

¹¹ *Id.*

¹² *Id.* at 198.

¹³ *Id.* at 198 n.1.

the particular employer,¹⁴ it was plain that discrimination was at the root of the problem. This is what “traditionally segregated” meant in *Weber*.¹⁵

Johnson was similar to *Weber* in that it involved skilled craft jobs. The case involved gender rather than race and arose in California rather than the Deep South, and so the connotations of calling the skilled craft jobs at issue “traditionally segregated” were different. Nonetheless, the similarities in these cases outweigh the differences. As in *Weber*, the Court in *Johnson* explained that there must be an imbalance based on an appropriate labor market comparison (with *Johnson* clarifying that “where a job requires special training, the comparison should be with those in the labor force who possess the relevant qualifications”—as would also be the case if the issue were proof of discrimination).¹⁶ And while the Court made very clear that it was not adopting a standard that required prima facie proof that the particular employer in question violated Title VII, it also made clear that it was using the requirement of a “traditionally segregated job category” to assure that affirmative action was being used “consistent with Title VII’s purpose of eliminating the effects of employment discrimination”¹⁷ The Court noted, in *Johnson*, that the employer’s Affirmative Action Plan cited the “limited opportunities that have existed in the past for [women] to work” in skilled craft positions¹⁸ and concluded that it was “as a result” of those limited opportunities¹⁹ that “women were concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred.”²⁰ While in *Weber* the traditional segregation was of black men into the ghetto of unskilled labor and in *Johnson* it was of [white] women into the pink-collar ghetto of office and clerical work,

¹⁴ See *id.* at 211–14 (Blackmun, J., concurring) (expounding on this “arguable violation” theory, which the Court did not adopt).

¹⁵ See *id.* at 212 (“The sources cited suggest that the court considers a job category to be ‘traditionally segregated’ when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.”); *id.* at 212 n.* (“There can be little doubt that any lack of skill [in the black population] has its roots in purposeful discrimination of the past, including segregated and inferior trade schools for blacks in Louisiana, . . . traditionally all-white craft unions in that State, . . . [false] union nepotism, . . . and segregated apprenticeship programs.” (citations omitted)).

¹⁶ *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987) (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (holding, in a pattern-or-practice context, that the proper comparison in determining underrepresentation in teaching positions was the percentage of blacks in the employer’s work force with the percentage of qualified black teachers in the area labor force)).

¹⁷ *Id.*

¹⁸ *Id.* at 621, 634.

¹⁹ *Id.* at 634.

²⁰ *Id.*

both cases were seen by the Court as involving past discrimination that limited employment opportunity.²¹

In his concurrence in *Johnson*, Justice Stevens wrote that remedial justifications were not the only acceptable ones, saying that affirmative action under Title VII might be valid “for any reason that might seem sensible from a business or social point of view.”²² But no one else joined that opinion. Indeed Justice O’Connor, in her concurrence in the judgment, expressly disagreed with it, reiterating *Weber*’s invocation of the manifest imbalance standard as tied to the statutory “purpose of eliminating the effects of employment discrimination.”²³

III. TODAY’S CORPORATE “DIVERSITY” AFFIRMATIVE ACTION

Unlike in *Weber* and *Johnson*, the dominant rationale for affirmative action under Title VII today is “diversity,” with a business-utilitarian spin that one commentator has called “racial realism” and another—more provocatively—“racial capitalism.”²⁴ Under the diversity rationale, employers seek to increase the representation of members in underrepresented groups not with reference to the “balance” that would exist absent discrimination (measured by some relationship to a relevant labor market), but rather with reference to one of any number of business goals their presence is said to serve.

Take as an example the Fortune-100 brief²⁵ submitted to the Supreme Court in *Fisher v. University of Texas*²⁶ (the Court’s most recent higher-education affirmative action case), which echoed the briefs filed by major corporations in support of affirmative action in the University of Michigan

²¹ In both *Weber* and *Johnson*, there were intimations that the employer might itself be vulnerable to suit under Title VII. See *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (disparate impact); *Johnson*, 480 U.S. at 656 (O’Connor, J., concurring) (pattern-or-practice). But the Court did not rely on them.

²² *Johnson*, 480 U.S. at 645 (Stevens, J., concurring).

²³ *Id.* at 650 (O’Connor, J., concurring in the judgment); see also Richard N. Appel et al., *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549 (2005).

²⁴ See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152–55 (2013) (defining “racial capitalism” as the use by whites and white institutions of “nonwhite people to acquire social and economic value” and critiquing it as an “instrumental view” that is “antithetical to a view of nonwhiteness—and race more generally—as a personal characteristic intrinsically deserving of respect”). See generally JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2014) (discussing “racial realism”). For a history of the corporate “rebranding [of] equal opportunity as diversity management,” see FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 133–60 (2009).

²⁵ Brief for Amici Curiae Fortune-100 and Other Leading American Businesses in Support of Respondents, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3418831.

²⁶ 133 S. Ct. 2411 (2013).

affirmative action cases in 2003.²⁷ According to this brief, diversity is needed to serve “the multi-cultural [domestic] consumer today[, who] is over a third of the population, and 80 percent of the population growth.”²⁸ Diversity will aid the rapid American corporate expansion into the global marketplace, which is the source of more than 55% of the total income earned by S&P 500 firms.²⁹ Furthermore, we are told, difficult economic times put a premium on creativity that cannot be achieved by homogeneous groups.³⁰ In sum, the brief argues, diversity is needed for “increased sales revenue, more customers, greater market share, and greater relative profits.”³¹

For all of these years during which diversity-based affirmative action practice has become “the new black” in the corporate setting (so to speak), there has been no Supreme Court case law approving it. The closest the Supreme Court has ever come to dealing with the question of whether “diversity” is an acceptable basis for affirmative action under Title VII was in 1996—19 years ago, now—in *Taxman v. Board of Education*.³² That case, which raised the question of “diversity” in the potentially incendiary context of a layoff decision, so scared civil rights advocates that they “encouraged” its

²⁷ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). For corporate briefs cited by the Court in *Grutter*, see Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399096 (arguing that affirmative action in higher education is needed to assure “racial and ethnic diversity in the pool of employment candidates from which the Nation’s businesses can draw their future leaders . . . [and] to obtain the manifold benefits of diversity in the managerial levels of their work forces,” which is needed to protect “the ability of American businesses to utilize fully the opportunities of the global market”) and Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 7, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399056 (citing global sales and arguing that “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”).

²⁸ Brief for Amici Curiae Fortune-100, *supra* note 25, at 8 (quoting William J. Holstein, *Diversity Is Even More Important in Hard Times*, N.Y. TIMES, Feb. 13, 2009, at B2).

²⁹ *Id.* at 8–9.

³⁰ *Id.* at 12.

³¹ *Id.* at 10 (quoting Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 219 (2009)).

³² 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997). In *Taxman*, the school board decided to reduce the size of the business department of Piscataway High School, a school with a racially balanced teacher workforce. *Id.* at 1551. The choice of whom to lay off came down to two teachers of equal seniority and merit. *Id.* One teacher (Taxman) was white, the other (Williams) was black—and the sole minority teacher in the business department. *Id.* Pursuant to its affirmative action policy, the school board laid off Taxman, citing its desire for a “diverse” work force at the departmental level. *Id.* The United States Court of Appeals for the Third Circuit, sitting en banc, held that Title VII does not permit “an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote ‘racial diversity.’” *Id.* at 1549–50.

settlement.³³ The result was dismissal while the case was pending before the Court.

If “diversity” as a basis for employer affirmative action (in principle and as practiced) is a “looming battlefield,” as one pair of commentators recently put it,³⁴ it is a deadly quiet one at present. Unlike the case of affirmative action in higher education, there is no conservative public interest group making Title VII affirmative action its *cause célèbre*. No state initiatives have used state law to target the practices of private-sector employers.³⁵ Nor are there many, if any, high-profile individual discrimination suits in which private corporations have used their “diversity” programs as a defense to individual claims of discrimination by disgruntled white/male job- or promotion-seekers.³⁶

Why the silence? The leading argument is that Justice O’Connor’s opinion for the Court in *Grutter v. Bollinger*³⁷ tied the benefits of higher-education diversity to the needs of the corporate world in a manner that essentially embraced corporate diversity-based affirmative action.³⁸ Justice

³³ For a discussion of the settlement in *Taxman*, see Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and Its Lessons About Interest Group Path Manipulation*, 9 GEO. MASON U. CIV. RTS. L.J. 207 (1999). *Taxman* was a case on awful facts, to be sure, in part because it involved a layoff decision rather than a hiring decision. But what was scariest about the case was that it threatened to present the “diversity” issue in a less-than-ideal posture.

³⁴ Corey A. Ciocchetti & John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U. PA. J. BUS. L. 283, 284 (2010) (proposing a *Grutter*-based justification for diversity-based, non-remedial, voluntary private-sector preference programs, but saying it is not likely to get five votes).

³⁵ If they did so, it is unlikely that the preemptive force of Title VII would stand in the way. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 710–11 (9th Cir. 1997) (holding that Title VII does not preempt California’s anti-affirmative action, Proposition 209: “Section 708 of Title VII provides: ‘Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.’ That is all Title VII pre-empts. Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII.”).

³⁶ For challenges to non-remedial affirmative action under Title VII, see, for example, *Lomack v. City of Newark*, 463 F.3d 303, 310 (3d Cir. 2006) (rejecting race-based transfers to achieve diversity within firehouses because diversity was not central to the firefighting mission); *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 497 (3d Cir. 1999) (holding, pre-*Taxman*, that Title VII affirmative action must be remedial and that there was no finding of historical or current discrimination in the industry or job category); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 437 n.3 (10th Cir. 1990) (rejecting, in the context of teacher workforce diversity, “a diverse, multi-racial faculty and staff” and “equity for all individuals” as the basis for affirmative action and instead limiting the school to remedial purposes it could not satisfy).

³⁷ 539 U.S. 306 (2003).

³⁸ There are other possible explanations for the absence of challenges to contemporary corporate affirmative action programs. Perhaps few private-sector employers actually engage in

O'Connor explained the corporate importance of educational diversity as follows:

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." . . . The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. . . . At present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." . . . To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." . . . We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.³⁹

In the years immediately after the Court upheld diversity-based affirmative action in higher education in *Grutter*, numerous commentators argued that Justice O'Connor's opinion embracing the diversity rationale for universities was so dependent on the asserted needs of the business community (and the military) that, essentially, the Court's rationale bootstrapped existing corporate

affirmative action any more (at least beyond "soft" forms, like outreach, that have never been considered actionable under Title VII). It is also possible that employers who are using the vocabulary of "diversity" to defend their affirmative action plans are, in fact, fully compliant with the requirements that *Weber* and *Johnson* set forth for remedial affirmative action. Exploring these explanations would require empirical work beyond the scope of this Article.

³⁹ *Grutter*, 539 U.S. at 330–31 (citations omitted).

diversity strategies into newfound legality.⁴⁰ Perhaps that was what Justice O'Connor intended. There is a long tradition in affirmative action case law of business-minded conservatives providing the deciding vote. Moderate business-oriented Republicans played a key role in the passage of Title VII, and they were particularly concerned to maintain as much management discretion as possible.⁴¹ Perhaps that business-oriented historical voice will always find an echo on the Court, leading it to take corporate America at its word about its need to be race- and gender-conscious to achieve "diversity" in support of its economic bottom line.

But I would not count on it—not as a reading of Justice O'Connor and not as a prediction about the current Court.

A. Reading Justice O'Connor

When parsing Justice O'Connor's dicta in *Grutter*, we must also pay attention to Justice O'Connor's opinion concurring in the judgment in *Johnson*. There, she expressly rejected the following statement by Justice Stevens of the pro-business position:

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

⁴⁰ Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005). Estlund's article is thoughtful and widely cited. The employer shift to diversity "put employers on a collision course with the precedents on which they would need to base a defense of their hiring policies," but *Grutter* helped because of its "valence and atmospherics," its reliance on corporate and military briefs, and its seeming endorsement of "the 'business case for diversity itself.'" *Id.* at 14–20. Ultimately, however, Estlund argues that business affirmative action practices would be better grounded in a workplace "civic [integrationist] imperative" than on profit-oriented business self-interest. *Id.* at 26. Even then, she is not certain that businesses would or should be allowed to "assert broad societal interests to justify overriding civil rights claims." *Id.* at 27. Perhaps only universities should be able to do so, in which case, she notes, *Grutter* leaves the business case for diversity no better off. *Id.* at 30–31; see also Cynthia L. Estlund, *Workplace Democracy for the Twenty-First Century? Rethinking a Norm of Worker Voice in the Wake of the Corporate Diversity Juggernaut*, 14 NEV. L.J. 309, 318 (2014) (concluding that "[t]he corporate commitment to diversity . . . goes beyond what the 'colorblind' version of the law permits" but is supported by alternative rationales).

⁴¹ In *Weber*, the Steelworkers' successful strategy was to go for Justice Stewart's vote by stressing the thread in the legislative history that was protective of managerial discretion (all heavily influenced by Everett Dirksen and the drive for bipartisan support). See Deborah C. Malamud, *The Story of United Steelworkers of America v. Weber*, in EMPLOYMENT DISCRIMINATION STORIES 173, 210–21 (Joel W. Friedman ed., 2006).

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.⁴²

Justice O'Connor rejected this view, arguing that it is inconsistent with the fact that "Congress intended to prohibit practices that operate to discriminate against the employment opportunities of nonminorities as well as minorities."⁴³ Justice O'Connor was prepared to find the right balance only where "the employer [can] point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie case" exists.⁴⁴ She drew that standard from her opinion concurring in part and concurring in the judgment the previous Term in *Wygant v. Jackson Board of Education*,⁴⁵ a constitutional law employment affirmative-action case. In *Wygant*, Justice O'Connor also made clear that she was no fan of basing affirmative action on "role model"-type theories or on the non-remedial benchmark the school district relied upon in litigating its case (i.e., the comparison between the racial composition of the district's teacher workforce and its student body).⁴⁶ *Wygant* was a constitutional case, and *Johnson* was not, but that did not make a difference in *Johnson*. Justice O'Connor did not draw sharp lines between constitutional and Title VII standards in affirmative action cases. In *Johnson*, she could have created a distinct Title VII standard (one perhaps less strict than the constitutional standard), but instead she harmonized Title VII with the Constitution. Title VII's standards for workforce affirmative action are, she explained, "entirely consistent" with those of the Constitution.⁴⁷ In both, what is needed is "evidence of past discrimination"⁴⁸ warranting "remedial action."⁴⁹ "Because both *Wygant* and *Weber* attempt to reconcile the same competing concerns, I

⁴² *Johnson v. Transp. Agency*, 480 U.S. 616, 645 (1987) (Stevens, J., concurring).

⁴³ *Id.* at 649 (O'Connor, J., concurring).

⁴⁴ *Id.* at 650–51.

⁴⁵ 476 U.S. 267, 290 (1986). *Wygant* involved a school district's collective bargaining agreement that provided for seniority-based layoffs, except that the percentage of minority personnel laid off could not exceed the current percentage of employed minority personnel. *Id.* at 270–71. The Court reversed the United States Court of Appeals for the Sixth Circuit and held that preference given to minority teachers had to be based on past discrimination. *Id.* at 272–73.

⁴⁶ *Id.* at 284–94 (O'Connor, J., concurring). Justice O'Connor did not address the specific question of whether faculty diversity was a permissible consideration, noting that the question had not been raised or considered below. *Id.* at 288.

⁴⁷ *Johnson*, 480 U.S. at 651 (O'Connor, J., concurring).

⁴⁸ *Id.* at 651.

⁴⁹ *Id.* at 650.

see little justification for the adoption of different standards for affirmative action [in employment] under Title VII and the Equal Protection Clause.”⁵⁰

One might say that the Justice O’Connor of *Wygant* was not yet on board with the diversity rationale for affirmative action in higher education, and that once she signed on to her version of the diversity rationale in *Grutter*, she threw her concurrences in *Johnson* and *Wygant* out the window. But O’Connor’s opinions can be internally reconciled by taking her at her word that *Grutter*, like *Regents v. Bakke*,⁵¹ is grounded on the special First Amendment status of universities. In *Grutter*, O’Connor was careful to reiterate the fact that, in *Bakke*, “Justice Powell grounded his analysis in the academic freedom that ‘long has been viewed as a special concern of the First Amendment.’”⁵² In deferring to the law school’s judgment that “diversity is essential to its educational mission,” O’Connor noted that:

Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy⁵³

One need not read *Grutter* as bootstrapping corporate practices into legality. The better reading—the reading more consistent with her jurisprudence—is that, in *Grutter*, Justice O’Connor allowed universities to use diversity-based affirmative action so that corporations do not have to. *Grutter* assures employers a racially diverse pool of elite college graduates from which they can hire purely “on the [traditional] merits” (with “diversity” not counting as “merit”)—except insofar as *Johnson* allows them to use affirmative action for remedial purposes.

⁵⁰ *Id.* at 652.

⁵¹ 438 U.S. 265 (1978).

⁵² *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents v. Bakke*, 438 U.S. 265, 314 (1978)).

⁵³ *Id.* at 328–29.

B. Reading Justice Kennedy

In any event, in the years since *Grutter*, the Court has grown less friendly to race-diversity-based affirmative action in higher education.⁵⁴ Justice O'Connor is gone; the outer limit of the law's tolerance for affirmative action is now what Justice Kennedy says it is. Justice Kennedy dissented in *Grutter*, and while he holds to *stare decisis*, he does so without enthusiasm. Furthermore, as we shall see, Justice Kennedy's jurisprudence in this field makes clear his preference for race-neutral remedies, even in the case of proven violations of antidiscrimination laws.

In *Parents Involved v. Seattle School District No. 1*,⁵⁵ Justice Kennedy concurred in Chief Justice Roberts's (writing for the majority) strict view of the circumstances in which race-conscious pupil assignment can permissibly be viewed as "remedial." According to Roberts, the mere presence of "segregation" in a community is not enough to support such pupil assignment; rather, the segregation must be the result of intentional discrimination.⁵⁶ The case turned on the distinction between "de jure" and "de facto" segregation in the K-12 educational setting, a distinction with a rich history.⁵⁷ Justice Kennedy joined in the section of the opinion in which Chief Justice Roberts wrote, "[w]e have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"⁵⁸ *Weber* and *Johnson* also use the term "segregation"—they limit affirmative action to remedying a "manifest . . . imbalance[] in traditionally segregated job categories."⁵⁹ As shown above, the concept of "segregation"

⁵⁴ All of these cases concern race, for which the constitutional standard is strict scrutiny. Gender, which is subject to intermediate scrutiny, presents a different picture. The prevailing view is that affirmative action is subject to the same level of scrutiny as "ordinary" discrimination—which, for gender-based affirmative action, is intermediate, and for class-based affirmative action, is rationality review. *See, e.g.,* *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1579 (11th Cir. 1994). *See generally* Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL'Y & L. 797 (2013).

⁵⁵ 551 U.S. 701 (2007).

⁵⁶ *Id.* at 720–21.

⁵⁷ *See id.* at 736. Chief Justice Roberts chided the dissent for supposedly ignoring this distinction as well as the lower court's determination that segregation was "de facto" rather than "de jure." *Id.* For more on the distinction, see *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) ("The differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.").

⁵⁸ *Parents Involved*, 551 U.S. at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

⁵⁹ *United Steelworkers v. Weber*, 443 U.S. 193, 197, 208 (1979); *see also* *Johnson v. Transp. Agency*, 480 U.S. 616, 620 (1987).

was linked in those cases to a history of employment discrimination. If that is the case, *Parents Involved* suggests that Justice Kennedy would be open to arguments that the racial imbalances in today's workforce are no longer due to the patterns of discrimination the Court found present in *Weber* and *Johnson*.

One might think it promising, in that light, that Justice Kennedy responded to the lack of a legally sufficient remedial justification for affirmative action in *Parents Involved* by endorsing the migration of the diversity rationale for affirmative action from higher education to K–12 education. But the type of consideration of race he was prepared to countenance in *Parents Involved* was quite limited. In rejecting explicit race-based student assignment (which was at issue in that case), he could simply have faulted the Seattle school district for assigning certain pupils solely on the basis of race and have required them to use race as no more than a “plus factor” in a holistic assignment process (as the analogy to *Grutter* would have required). But that is not what he did. Instead, the only techniques he endorsed were “race-conscious measures [that] address the problem in a general way,”⁶⁰ rather than ones that directly involve the selection of students. Kennedy explained:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.⁶¹

In *Fisher*, the Court, with Justice Kennedy writing, reiterated *Grutter*'s approval of diversity as a compelling interest for purposes of higher-education student admissions.⁶² At the same time, it noted both that “there is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity” and that the parties had not asked the Court to “revisit that aspect of *Grutter*'s holding.”⁶³ A reminder that a settled issue remains controversial, paired with a tacit invitation to parties in a future case to request reconsideration, is hardly a ringing endorsement. The holding of *Fisher*, that universities must exhaust race-neutral alternatives before considering race, places additional burdens on the pursuit of

⁶⁰ *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring).

⁶¹ *Id.* at 789.

⁶² 133 S. Ct. 2411 (2013).

⁶³ *Id.* at 2419.

“diversity” even within the higher-education sphere.⁶⁴ *Fisher* thus hardly reads like an endorsement of race-consciousness in pursuit of corporate diversity.

More recently, Justice Kennedy, writing for the Court in *Schuette v. Coalition to Defend Affirmative Action*,⁶⁵ cleared the pathway for state anti-affirmative action constitutional initiatives, including the Michigan initiative that rendered *Grutter* a dead letter for the University of Michigan. To achieve that end, the Court in *Schuette* trimmed back on previous case law that restricted states’ abilities to insist that access to racial remedies be governed at the statewide level.⁶⁶ These were cases that dated back to the core period of the Court’s most heightened concern with the problem of racial justice. The Court did not hesitate to adopt a reading of those cases that came pretty close to stripping them of stare decisis value. The high-minded dicta in Justice O’Connor’s opinion for the Court in *Grutter*, in which she arguably not merely deferred to, but in fact adopted, the university’s insights about the societal need for corporate and political elites trained in diverse environments, plays no part in Justice Kennedy’s opinion for the Court in *Schuette*. It is for the people to decide that issue, where state law permits, through the politically volatile (and generally elite-unfriendly) initiative process.

Finally, Justice Kennedy’s opinion for the Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,⁶⁷ again reflects the centrality of race-neutrality in his jurisprudence. In *Inclusive Communities*, the Court upheld the availability of the disparate impact cause of action⁶⁸ in cases arising under the Fair Housing Act but cautioned that constitutional concerns would arise “if disparate-impact liability . . . caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them.”⁶⁹ Because of these concerns, the Court stated that in fashioning remedies for proven disparate-impact violations, courts that choose to go beyond merely eliminating the offending

⁶⁴ The Court has granted certiorari a second time in the *Fisher* litigation in order to review the Fifth Circuit’s application of strict scrutiny on remand. *Fisher v. Univ. of Tex.*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (June 29, 2015).

⁶⁵ 134 S. Ct. 1623 (2014).

⁶⁶ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

⁶⁷ 135 S. Ct. 2507 (2015).

⁶⁸ “Disparate impact” is “[t]he adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity.” *Disparate Impact*, BLACK’S LAW DICTIONARY (10th ed. 2014). For the disparate impact cause of action’s origins in Title VII, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). For the Court’s rejection of the disparate impact cause of action for purposes of the Equal Protection Clause, see *Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁶⁹ *Inclusive Cmty.*, 135 S. Ct. at 2524.

practice “should strive” to use “race-neutral means.”⁷⁰ “When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”⁷¹ What *will* doom them, the Court suggests, is adopting expressly race-consciousness remedies—even in the face of proven violations of antidiscrimination law.⁷²

In sum, Justice Kennedy has adopted a jurisprudence of race-neutrality as the preferred mechanism for addressing the twin issues of race discrimination and racial “isolation” (i.e., de facto segregation) in American life. Whatever Justice O’Connor might have had in mind in *Grutter*, there is every reason to believe that Justice Kennedy would reject the transformation of the *Weber/Johnson* model of race-conscious affirmative action into a mechanism for assuring the “diversity” of corporate America.

IV. THINKING ABOUT THE FUTURE

If today’s Supreme Court did return to the issue of Title VII affirmative action, what would happen? In this Court, there would likely be considerable hostility even to “traditional” remedial affirmative action—let alone to any “diversity”-based extension of it. This is not to say that the Court will abandon *stare decisis*—it generally does not, especially not where statutes are at issue. But there would certainly be some strong advocacy for doing precisely that. The following sections will consider both the changing circumstances that might lead the court to reject “traditional” remedial affirmative action and the impediments to any extension of the doctrine.

A. Seven Critiques of “Traditional” Remedial Affirmative Action

First, there is the matter of statutory-interpretation methodology. *Weber* was the modern poster child for a style of statutory interpretation that is under great pressure nowadays: the *Weber* Court found the letter of the law “absurd” in light of its spirit and took a “dynamic” approach to making the 1964 statute meet the needs of the times. Neither this kind of “purposivism” nor this kind of “dynamic statutory interpretation” is popular in the current Supreme Court.⁷³ The Court in *Weber* relied heavily on the *Holy Trinity Church v. United*

⁷⁰ *Id.*

⁷¹ *Id.* at 2525.

⁷² *Id.*

⁷³ For a comprehensive review of modalities of statutory interpretation and their discontents, see WILLIAM N. ESKRIDGE, JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* (2014).

*States*⁷⁴ case's edict that "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."⁷⁵ *Holy Trinity* has become a laugh-line among textualists. One could rewrite *Weber* in a more textualist fashion, based on today's statutory interpretation fashions.⁷⁶ But the way in which the majority opinion is written makes it a ready target for reexamination.⁷⁷

Defenders of *Weber* insist that the case was rightly decided because using Title VII's antidiscrimination principle as an obstacle to employers' voluntary remedial efforts would be "ironic"⁷⁸ (or, a better buzzword for today's statutory-interpretation practitioners, "absurd"⁷⁹). Even from my standpoint as a hardened "purposivist" in my approach to statutory interpretation, this is a weak argument. Title VII stepped into an otherwise unregulated field—private-sector employment discrimination—and subjected it to regulation. It should have been no surprise that the loss of employer freedom to discriminate might prove to be a double-edged sword. When I teach statutory interpretation, I use *Weber* as a cautionary tale about the fact that purposivist statutory interpretation *done right* recognizes that there are hierarchies of purposes and congressionally-established limits to the acceptable methods for

⁷⁴ 143 U.S. 457 (1892).

⁷⁵ *Id.* at 459.

⁷⁶ Justice Brennan might have offered an interpretation of the word "discrimination" in the statute to mean "invidious discrimination," which he might then have endeavored to defend in ways acceptable to a modern-day textualist. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 100–04 (4th ed. 2007).

⁷⁷ This is not to say that today's Supreme Court slavishly adheres to the "plain meaning" of statutes. In *King v. Burwell*, 135 S. Ct. 2480 (2015), the Court relied on the "context and structure of the Act . . . to depart from what would otherwise be the most natural reading of the pertinent statutory phrase" in order to avoid a reading of the Patient Protection and Affordable Care Act (ACA) that the Court held would "destroy" the health insurance markets that the statute aimed to "improve." *Id.* at 2495–96. Justice Roberts's opinion for the majority provoked a spirited dissent, in which Justice Scalia accused the majority of having performed "somersaults of statutory interpretation" in support of a law the Court "favors" and "is prepared to do whatever it takes to uphold and assist." *Id.* at 2507 (Scalia, J., dissenting). As a purposivist myself, I would happily deem *King* a purposivist rather than a textualist decision (although the Court did not so admit). But however far *King* went, it did not go as far as *Weber* did. The majority in *King* did not rely on *Holy Trinity*, purporting instead to use well-established textualist tools (albeit ones that go beyond "plain meaning" at the level of the phrase or sentence). Furthermore, the Court made a far more compelling case in *King* than it did in *Weber* that a contrary ruling would have substantially undermined the statutory scheme.

⁷⁸ *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979) ("It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.").

⁷⁹ Even textualists are willing to reject "absurd" readings of statutes. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419–31 (2003).

their accomplishment. As Hart and Sacks wrote in their famous primer on statutory interpretation, “[p]urposes . . . may exist in hierarchies or constellations. *E.g.* (to give a very simple illustration), to do *this* only so far as possible without doing *that*.”⁸⁰ The Court in *Weber* essentially treated the “purpose” of protecting management discretion as co-equal to the statute’s core anti-discrimination purpose, which I think is out of line with sound purposivist interpretive practice.

Second, we must consider the social and political context out of which *Weber* emerged. The EEOC and the Department of Justice embraced affirmative action because the strategy of waiting for color-blind legal principles to do their work was too slow to be an effective societal response to the pressures of urban race riots and militant civil rights activism that had the problem of employment discrimination squarely in view.⁸¹ We have recently seen a rise in mass civil rights activism, but its main focus now is the criminal justice system.⁸²

Third, it is not merely the social/political context that has changed. So has the identity of the beneficiaries of affirmative action. Critics (and even some supporters) of race-based affirmative action have noted that, at least as it is practiced in the higher-education setting, race-based affirmative action is no longer primarily helping what commentators have called “legacy” or “ascendant” blacks (native-born African Americans) but is instead disproportionately helping the children of African and Caribbean immigrants and mixed-race African Americans.⁸³ Others have noted that it is primarily middle-class blacks who are helped by affirmative action in higher education.⁸⁴

⁸⁰ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1377* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁸¹ See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 127–33* (1996).

⁸² See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (discussing race-related issues specific to African-American males and mass incarceration in the United States); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014). Most recently, mass protests surrounding police violence against blacks in Ferguson, Missouri, and elsewhere have riveted the nation and led to the #blacklivesmatter social movement. For a retrospective of the events that put Ferguson in the spotlight and spurred a nationwide discussion on race relations, see *Ferguson: A Shooting that Caused the Nation to Shudder*, N.Y. TIMES (Aug. 7, 2015), <http://www.nytimes.com/2015/08/08/us/ferguson-a-shooting-that-caused-the-nation-to-shudder.html>.

⁸³ See, e.g., Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229 (2008); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007).

⁸⁴ See, e.g., Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2011). For a reflection of this issue in the *Fisher* oral argument, see Transcript of Oral Argument at 38–45, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345), in which

The same would be true, as well, of corporate affirmative action in so far as these corporations are recruiting from elite universities. Furthermore, the global-marketplace part of the corporate diversity justification would tend to put a high premium on the hiring of candidates from immigrant backgrounds. There is no reason to think the Court would be particularly sympathetic to using affirmative action in a way that favors recent immigrants. The global-marketplace approach would also put a particularly low premium on native-born African Americans.⁸⁵ This consciousness of a mismatch between the core societal-discrimination story underlying *Weber* and current practice might well surface if the Court were to reconsider race-based affirmative action under Title VII.

Fourth, the Supreme Court is not likely to care about any appearances of “racism” that abandoning affirmative action in employment would create. The Court’s decision in *Shelby County v. Holder*⁸⁶ to abandon the preclearance provisions of the 1965 Voting Rights Act shows a Court perfectly capable of deciding that extraordinary measures that were once perceived as necessary have outlived the circumstances that justified them.⁸⁷ In this Court, dynamic statutory interpretation is not a one-way ratchet. Nor should it be, in the view of its leading academic proponent, William Eskridge, Jr., who argues that decisions, including *Weber*, are properly subject to reconsideration on pragmatic grounds.⁸⁸

Fifth, to the extent that *Weber* and *Johnson* grew out of the Court’s sympathy for the predicament of employers who were likely to be faced with pattern-or-practice or disparate-impact suits if they were not able to self-cure by using affirmative action, times have changed. *Weber* arose when systemic

Justices Alito and Kennedy express skepticism about the argument that race-based affirmative action is needed as an add-on to Texas’s “top 10 percent plan” in order to make sure that *socioeconomically privileged* minorities are adequately represented within the university’s minority population.

⁸⁵ See Estlund, *Putting Grutter to Work*, *supra* note 40.

⁸⁶ 133 S. Ct. 2612 (2013).

⁸⁷ *Shelby County* also shows that this Court is not likely to be persuaded that the failure of Congress to legislate a contemporary solution to the problems faced by corporations in achieving diverse workforces means that it should allow older, unsuitable methods to remain in place until Congress acts.

⁸⁸ See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 203–04 (1994) (arguing that *Weber* should be open for reconsideration, but only on the basis of “critical arguments that *Weber* has contributed to racial polarization and resentment and not to increased economic opportunities for racial minorities. Although the more sophisticated analysts still consider that affirmative action yields beneficial results . . . the *Weber* debate needs to focus on what the consequences of workplace affirmative action have actually been. . . . If dynamic statutory interpretation is to have any positive payoff, interpreters need to test their own preconceptions . . . against the operation of their interpretation in the world.”).

litigation was at its high point.⁸⁹ There are fewer and fewer successful systemic suits, and the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,⁹⁰ which went a long way towards closing off some of the more creative theories underlying those suits, contributes to keeping the pressure off.

Sixth, the Court—again, through Justice Kennedy—signaled its discomfort with race-consciousness in the Title VII setting in *Ricci v. DeStefano*.⁹¹ *Ricci* made it harder for employers to use race-conscious measures to self-cure in the face of potential disparate-impact violations, adopting from Justice Powell's plurality opinion in *Wygant* the rule that such efforts count as remedial and are therefore permissible “only where there is ‘a strong basis in evidence’ that the remedial actions were necessary” to prevent or cure a Title VII violation.⁹² *Ricci* did not involve an affirmative action plan and did not address the *Weber/Johnson* standard for affirmative action plans. By its terms, then, *Ricci* left the option of adopting a full-blown remedial affirmative action plan available in appropriate circumstances (i.e., manifest imbalance in a traditionally segregated job category) for those employers capable of imposing such a plan unilaterally or through collective bargaining.⁹³ Indeed, the Court noted that the “strong basis in evidence” standard “leaves ample room for employers’ voluntary compliance efforts, which are essential to the statutory scheme and to Congress’s efforts to eradicate workplace discrimination,” citing

⁸⁹ *Weber* was decided soon after *Teamsters v. United States*, 431 U.S. 324 (1977), in which the Court sharply curtailed the particular litigation threat that had shaped the Steelworkers’ experiments with affirmative action—namely, the disparate-impact challenge to race-neutral seniority systems. See Malamud, *supra* note 41. Nowhere in *Weber* did the Justices note the significance of *Teamsters*. In any event, other forms of disparate-impact and pattern-or-practice litigation remained robust, and critics of systemic litigation have long complained that it tends to propel employers towards affirmative action. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting) (“By its holding today, the Court may force employers either to eliminate tests or rely on expensive, job-related, testing procedures For state and local governmental employers with limited funds, the practical effect of today’s decision may well be the adoption of simple quota hiring.”).

⁹⁰ 131 S. Ct. 2541 (2011). *Wal-Mart* involved a class-action suit by Wal-Mart employees who claimed to have been discriminated against on the basis of sex. *Id.* at 2547. The Court rejected the argument that a policy granting substantial discretion to local managers amounted to a corporate culture or policy of discrimination. *Id.* at 2554–55. The holding undercut the rationale for many large systemic discrimination claims.

⁹¹ 557 U.S. 557 (2009); see Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017 (2011) (arguing that, although *Ricci* was not an affirmative action case, it “should chasten any expectation that the Court will take its next available opportunity to extend the diversity rationale for affirmative action”).

⁹² *Ricci*, 557 U.S. at 582 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986))).

⁹³ See *United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011) (drawing a distinction between affirmative action plans permitted by *Weber/Johnson* and impermissible individualized race-conscious remedies barred by *Ricci*).

an affirmative action case.⁹⁴ But the mismatch between the strictness of *Ricci* and the laxness of *Weber* as to the preconditions for remedial race-consciousness creates a tension in the law that a future Court might well aim to cure by cutting back on remedial affirmative action. That mismatch is made even clearer by *Inclusive Communities*, in which the Court suggested that race-conscious remedies would raise constitutional concerns even in cases with fully proven disparate-impact violations.⁹⁵ Stare decisis is often set aside when subsequent cases are in tension with early precedents.⁹⁶ In the case of the *Weber/Johnson* model, tensions abound.

Finally, one might read the Court's *Schuette* decision as reflecting the view that affirmative action is sufficiently problematic that it ought to require high-level political control. The Court was clearly uncomfortable with locking into place the control that individual universities exercise over affirmative action decision making. The radical decentralization of voluntary affirmative action in the employment setting might, for some Justices, be a strike against it in the contemporary political environment.

B. Roadblocks to Going Beyond "Remedy" to "Diversity"

Let us assume that stare decisis holds at least as to traditional remedially-based voluntary affirmative action. Members of the Court who view the traditional doctrine as illegitimate would be loath to extend it, just as a matter of general principle. But I suspect they would have other, more specific objections as well.

On the question of statutory interpretation, the "absurdity" argument upon which *Weber* relied is far weaker for diversity-based affirmative action than for remedial affirmative action. Regulatory requirements routinely constrain corporate profit seeking, and the core purpose of Title VII was not the increase in employer profitability. There's no irony here.

⁹⁴ *Ricci*, 557 U.S. at 583 (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (involving an affirmative-action consent decree)).

⁹⁵ In *Inclusive Communities*, the Court sought to minimize the extent of race-consciousness in disparate-impact remediation as an exercise in constitutional avoidance. The Court has, in fact, never held that strict scrutiny applies to court-ordered race-conscious remedies for proven cases of discrimination. See *United States v. Paradise*, 480 U.S. 149, 163 (1987) (noting that "although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); see also LINDEMANN & GROSSMAN, *supra* note 1, at 2736 ("Few courts have addressed the issue of race-conscious, court-ordered relief," but "nearly every court to have done so has applied a strict scrutiny standard.").

⁹⁶ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (holding that stare decisis can be rejected when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine").

One of the key requirements of *Weber* and *Johnson* is that affirmative action plans be “temporary”—they are supposed to set reasonable goals that can be met in some foreseeable future and (in one of the less-sensible aspects of the case) can be used to “attain” but not to “maintain” racial (etc.) balance.⁹⁷ *Grutter*, too, pressed on the temporariness issue by declaring the expectation (something less than a requirement, something more than a hope?) that affirmative action in higher education will not be needed in 25 years.⁹⁸ But there is no reason to believe that the American workforce will, any time soon, mirror corporate America’s diverse global consumer base. If that is the endpoint, there is no end in sight. To a limited extent, employers can use Title VII’s bona fide occupational qualification (BFOQ) defense to justify diversity-based hiring on a permanent basis. But the BFOQ defense has its limitations; the most important being that it is unavailable for discrimination based on race and color. Courts have been prepared to turn a blind eye to BFOQ problems in policing and corrections⁹⁹ and would likely do so in theatrical casting if anyone ever brought such a case. But when the reason is customer preference, or some abstract notion that better decision making comes out of racially diverse working groups, the no-race-BFOQ prohibition might be more robust.

Even where race matters, this is a Court that likes stealth. The higher-education diversity rationale is now, post-*Fisher*, clearly tied to a requirement that universities make genuine efforts to attain racial diversity through race-neutral means.¹⁰⁰ True, race neutrality is a requirement of strict scrutiny, and strict scrutiny is a constitutional rather than a statutory doctrine. But the Court has drawn constitutional limitations into Title VII analysis before (see, for example, *Ricci* and *Inclusive Communities*) and might well do it again. In the constitutional setting, the Court has required exhaustion of race-neutral means because it believes that candidate-specific race-conscious decision making is socially dangerous and personally demeaning. A future Supreme Court that so

⁹⁷ *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

⁹⁸ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁹⁹ See, e.g., *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (upholding, under the Equal Protection Clause, race-conscious hiring of correction boot-camp sergeants); *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (extending *Wittmer* to urban policing). For the suggestion that this rationale would not carry over into non-law-enforcement Title VII private employment, see Appel et al., *supra* note 23.

¹⁰⁰ See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (“I have said before [in *Gratz*] and reiterate here that only an ostrich could regard the supposedly neutral plans as race unconscious.”). Note that there is considerable tension between the Court’s encouragement of the adoption of race-neutral plans for race-conscious reasons in the recent cases and the Court’s earlier holdings that race-conscious measures chosen “‘because of,’ not merely ‘in spite of,’ their racial effects are subject to strict scrutiny.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). *Feeney* was a gender case, but its principle is applicable to race cases as well.

believes might well impose a race-neutrality requirement on corporate decision making as well.

One might argue that after all these years of silence (and, perhaps in the case of *Grutter*, acquiescence) in the face of the corporate shift to “diversity,” the Court would be hesitant to ruffle corporate feathers by rejecting a diversity rationale for corporate affirmative action under Title VII. But this is not a Court that hesitates to unsettle reliance-based expectations. In *Parents Involved*, the Court made clear that it was willing to unsettle expectations and practices that had grown up around previous Supreme Court dicta during years of judicial silence on issues of key importance. There, school districts had, for decades, followed dicta in the *Swann v. Charlotte-Mecklenburg Board of Education*¹⁰¹ case that suggested that school systems were free to voluntarily use race-conscious pupil assignment systems of a sort that courts could order only upon a finding of “de jure” segregation.¹⁰² The Court announced in *Parents Involved* that it was simply a mistake for school systems to have so relied.

C. Mitigating Considerations

Let me not be entirely negative here about what would happen if the Court took on the question of corporate “diversity” based affirmative action under Title VII.

The Roberts Court is marked by a combination of ideological conservatism and business conservatism: it has a strong pro-business bent.¹⁰³ Such a Court might hesitate before overturning practices that leading corporations say that they need to be competitive in the global marketplace. Justice Kennedy is no exception. He wrote the Court’s much-maligned opinion in *Citizens United v. Federal Election Commission*,¹⁰⁴ in which the Court rejected restrictions on political speech by corporations. In *Burwell v. Hobby Lobby Stores, Inc.*,¹⁰⁵ the Court protected corporations as “free exercisers” of religion. In his concurrence, Justice Kennedy waxed eloquently about dignity and “the right to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community”¹⁰⁶—meaning that corporations, not just persons, are bearers of dignity and a sense of self. That being said, I doubt that this constitutional enhancement of the societal status of

¹⁰¹ 402 U.S. 1 (1971).

¹⁰² *Id.* at 16.

¹⁰³ See Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html>.

¹⁰⁴ 558 U.S. 310 (2010).

¹⁰⁵ 134 S. Ct. 2751 (2014).

¹⁰⁶ *Id.* at 2785 (Kennedy, J., concurring).

the American corporation will be taken far enough to warrant the level of deference that *Bakke* and *Grutter* gave to universities on the diversity question.

Justice Kennedy remains an integrationist. To the extent that corporate hiring is based on subjective and multi-factor selection criteria, “diversity” in the corporate setting may operate in an even stealthier manner than does the “plus factor” of *Bakke/Grutter* fame, and would thus have very little in common with the blatant racial classifications the Court accepted in *Weber* or those Justice Kennedy rejected in *Ricci* and *Parents Involved*. If Justice Kennedy were to embrace some version of corporate diversity-based affirmative action, the result would not be an extension of *Weber* and *Johnson*. Rather, it would likely be the harnessing of a wide range of what the Court deems to be race-neutral mechanisms to achieve race-conscious diversity goals.

V. CONCLUSION

Fortunately for American corporations, conservative public interest groups are not targeting corporate affirmative action policies. But the silence is unlikely to last forever, and the time will come for a serious consideration of contemporary corporate affirmative action policy. When it does, it is by no means clear that even the remedial affirmative action permitted by *Weber* and *Johnson* will survive. It is even less likely, in my view, that this Court will see *Grutter* as creating a safe haven for corporate diversity practice. Even if the Court permits diversity-based affirmative action under Title VII, it is likely to harmonize its Title VII and constitutional jurisprudence by requiring the exhaustion of race-neutral means for achieving race-conscious ends.¹⁰⁷ Stealth will be the new order of the day.

¹⁰⁷ The Court will have more to say about the precise contours of that requirement in *Fisher v. Univ. of Tex.*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (June 29, 2015) (No. 14-981).

