Taking *Grutter* to Work

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Among the many powerful friends of the Court that lined up in support of affirmative action in *Grutter v. Bollinger* were numerous "major American businesses."[1] In defense of the elite and integrated institutions from which they draw much of their managerial workforces, they argued successfully that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[2] But they may also have been planting the seeds for a defense of their own employment policies. Affirmative action undoubtedly plays some role in the hiring and promotion decisions that go into creating the diverse workforces whose virtues these companies tout; a day of reckoning cannot be far off.

The legality and limits of affirmative action in employment have not been the subject of Supreme Court scrutiny since its 1987 decision in *Johnson v. Transportation Agency*, which upheld an affirmative action plan under Title VII.[3] That long silence is due partly to the paucity of lower court decisions, and to the infrequency with which employers defend against "reverse discrimination" claims – rare to begin with – on the basis of a lawful affirmative action plan. Employers' reluctance to mount such a defense is itself partly due to the nature of the only firmly established justification for race and gender preferences. The Supreme Court's few and aging Title VII precedents – *Johnson* and its predecessor *Weber*[4] – permit the preferential hiring or promotion of minorities or women (provided the preferences are not too rigid or too burdensome on the dispreferred) where there is a "manifest imbalance" reflecting underrepresentation of the relevant group in "traditionally segregated job categories."[5] That

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1 Grutter v. Bollinger, 123 S. Ct. 2325, 2340 (2003), *citing* Amicus Briefs of 3M et al. and of General Motors Corp.

2 *Grutter*, 123 S. Ct. at 2340.

3 Johnson v. Transportation Agency, 480 U.S. 616 (1987).

4 Steelworkers v. Weber, 443 U.S. 193 (1979).

5 *Johnson*, 480 U.S. at 631.

formulation might point toward the sheer *fact* of underrepresentation, the discriminatory *origins* of such underrepresentation, or the employer's *purpose* of remedying such underrepresentation. But the decisions are conventionally read to call upon employers to claim a remedial *purpose*, and to hint at (though not quite admit or prove) their own complicity in past segregation and current inequities. Few employers have chosen to go down that road.

The other problem with the remedial argument is that it does not match up with the rhetoric surrounding most workforce diversity programs. Within the corporate world, remedial arguments are passé. They have been largely supplanted by the "business case for diversity": the proposition that a diverse workforce is essential to serve a diverse customer base, to gain legitimacy in the eyes of a diverse public, and to generate marketable products and services within a global economy. A company's public embrace of workforce diversity on the basis of its competitive virtues might undercut an effort to prove a remedial purpose in court. The upshot is that, while corporate America may dodge the issue for a while longer, there is a perilous gap between the precedent and the practices of affirmative action in the workplace.

Does *Grutter* fill that gap? Does it 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? In particular, does it provide some legal underpinnings for non-remedial arguments for enhancing workforce diversity by race-conscious means?

As a formal matter, *Grutter* might be thought to bear only, if at all, on the *constitutionality* of affirmative action in *public* employment. However, both the constitutional and the statutory inquiries begin with the issue of permissible justifications, which is my focus here. Insofar as Title VII affords *more* room for affirmative action preferences than does the Constitution,[6] it seems fair, or at least useful for present purposes, to assume that whatever greater tolerance *Grutter* portends for affirmative action in employment under the Constitution is likely to spill over into Title VII and the private sector as well. Doctrinal purists beware.

I

The valence and atmospherics of *Grutter* are plainly encouraging for the proponents of workforce diversity programs. First, the majority's express reliance on the arguments of corporations and of retired generals[7] in support of affirmative action in higher education implies some recognition of and receptivity to the existence of affirmative action *beyond* higher education. The proponents of workforce diversity can rightly take some comfort in the affirmation that student body diversity "'better prepares students for an increasingly diverse workforce and society.'"[8]

Importantly, *Grutter* placed a Supreme Court majority squarely behind the "diversity rationale" that animated Justice Powell's solo opinion in *Bakke*.[9] That is important both because of what the diversity rationale is and because of what it is *not*. It is decidedly *not* a remedial argument; it is instrumental and forward-looking. It is not about making up for the sins of the past, but about making a better future. *Grutter* thus decisively broke from the

6 *Id.* at 628 n.6.

7 *See* Consolidated Brief of Lt. Gen. Julius W. Becton, et al. as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

8 *Grutter*, 123 S. Ct. at 2329.

9 Regents of University of California v. Bakke, 438 U.S. 265 (1978).

remedial paradigm of affirmative action – the notion that institutions were entitled to do only what they were virtually obliged to do to rectify past wrongs.

In elucidating the diversity rationale, the majority began by citing extensively and approvingly from *Bakke* on the "paramount importance" of assembling a body of "students as diverse as this Nation of many peoples," who can "contribute the most to the 'robust exchange of ideas.'"[10] *Grutter* reinforced this argument, accepting the law school's claim that "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[11] It remains to be seen whether ordinary employers, with neither an educational mission nor the protective cloak of "academic freedom," can claim analogous objectives. Still, Justice Powell's – and now *Grutter*'s – diversity rationale for affirmative action resonates with the prevailing shape and rhetoric of workforce diversity programs far better than do conventional remedial arguments.

Finally, *Grutter* reached beyond Powell in its understanding of the value of diversity. The traditional Powellesque argument for diversity in higher education pointed to the educational value of interaction among students with varied backgrounds, experiences, and viewpoints. Racial and ethnic diversity within a student body, though often characterized as a *goal* of affirmative action, is a means of securing that variety. This claim seems unexceptionable, as the *Grutter* majority observed, "in a society, like our own, in which race unfortunately still matters."[12] But before *Grutter*, the diversity argument was often counterposed to remedial arguments, and rhetorically stripped of any reference to the past and present facts of racial subordination and segregation.[13] When it is reduced to a paean to the value of variety, "diversity" is an awkward argument for racial and ethnic preferences.

For some thoughtful observers, the "diversity as difference" argument risked reflecting and promoting stereotypical generalizations about individuals and imposing expectations about their contribution to classroom debate that were narrowing rather than liberating. For others, racial and ethnic preferences seemed a blunt instrument for securing diversity of experiences and viewpoints; why not look directly for the latter? Did African Americans and Latinos contribute greater diversity of views than, for example, fundamentalist Christians? And how exactly did diversity of views and experiences contribute to education in physics or mathematics? The diversity argument, standing alone, didn't explain especially well either the choice of beneficiaries for preferences or the scope of the programs.[14]

The *Grutter* majority deflected many of those concerns by broadening its vision of what is at stake, and including in that vision some recognition of the inequality and segregation that is not yet past. *What is at stake is the possibility of an integrated future in a still-unequal and still-divided society*. Student body diversity

10 *Grutter*, 123 S. Ct. at 2336.

11 *Id*. at 2340.

12 *Id*. at 2341.

13 *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

14 For several thoughtful critiques of diversity arguments, see Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 Ohio St. L.J. 669 (1998); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla. L. Rev. 861 (2000); Sanford Levinson, Wrestling With Diversity (Duke U. Press 2003); Deborah C. Malamud, *Values, Symbols, & the Facts in the Affirmative Action Debate*, 95 Mich. L. Rev. 1668 (1997); Peter Schuck, Diversity in America (Harv. U. Press 2003).

contributes to that compelling goal in two ways. First, it both signals and insures the openness of public institutions "to all segments of American society, including people of all races and ethnicities." The Court proclaimed that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[15] Second, student body diversity operates at an interpersonal level. It "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[16] *Grutter* recognized that students within a diverse student body not only encounter different perspectives, but *bridge* differences and make connections in a divided society. *Grutter* thus partially recast diversity as a means of furthering *integration*.

The shift of focus from difference and variety to integration and connectedness is subtle but important. As I have written elsewhere, "[t]he integration argument does not use race … as a proxy for distinct experiences or views. … Rather, it recognizes that race … as such triggers stereotypes, biases, and divisions, and that intergroup cooperation can help to overcome those social ills."[17] In a society in which race still divides people, both geographically and psychically, convening people of different races to cooperate in pursuit of shared objectives helps build a more integrated society. If this is the aim of affirmative action, it explains why preferences go chiefly to African Americans and Latinos: It is not that they are somehow more "diverse," but that these large ethnic groups have been plagued by a history of segregation, division, and prejudice. The proliferation of interpersonal bonds across these historically-fraught lines of division is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*'s integration argument looks to the future, but its vision is suffused with memory and conscience.

Grutter thus stands for two diversity rationales: a familiar Powellesque appeal to the instrumental value of differences within an institution devoted to learning, and a newer integration argument that is informed by both history and the needs of civil society. With these two strokes, *Grutter* both broke the stranglehold of the conventional remedial paradigm, in which history was reduced to a parsimonious reckoning of institutional debts owed, and cured the historical amnesia of the conventional diversity argument.

II

The combination of the diversity and integration arguments potentially fortifies the case for programs that give an edge in hiring and promotions to members of racial and ethnic groups that are otherwise grossly underrepresented in a workplace or a particular layer of the workplace. Following the tracks laid by *Grutter*, employers can point to the diversity of perspectives that comes with demographic diversity, as well as to the connectedness and mutual respect that can grow among diverse workers.

Or can they? The arguments that prevailed in *Grutter* encounter some additional hurdles when transposed into the workplace context. Take first the traditional *Bakke* rationale: the educational value of confronting different perspectives and experiences, of discussions that are "livelier, more spirited, and simply more enlightening and interesting" because of the diverse backgrounds and viewpoints of the

15 *Grutter*, 123 S. Ct. at 2340-2341.

16 *Id.* at 2339-2340.

17 Cynthia L. Estlund, Working Together: How Workplace Bonds Strengthen a Diverse Democracy 148 (Oxford U. Press 2003).

participants. The educational value of such discussions is obvious, and hardly needed to be sanctified, as it was in *Grutter*, by the invocation of academic freedom. Indeed, the educational value of such discussions does not depend on the educational setting or the age of the participants. Discussions among diverse adult co-workers are also "livelier, more spirited, and simply more enlightening and interesting." Unlike educational institutions, however, few employers could credibly embrace as their mission or purpose the edification of their employees or the promotion of stimulating workplace discourse. If employers must justify affirmative action by reference to their particular institutional objectives – a crucial "if" to which I will return – then employers must show that a diversity of viewpoints and the enrichment of employee discourse helps them achieve their instrumental goals of producing and selling goods and services.

Of course, employee knowledge, learning, and problem-solving are crucial to modern production, and may be improved by diversity among participants. We may call this the internal face of the "business case for diversity." Unfortunately, the evidence on this point is somewhat mixed. There is evidence that workgroup diversity – including racial diversity – helps to expand the range of ideas considered and of alternatives generated at early stages of decisionmaking. But diversity can also bring friction, along with "lower levels of satisfaction and commitment … and higher levels of absenteeism and turnover." One review of the research concluded that, on balance, "[u]nless steps are taken to actively counteract [the negative] effects, … by itself, diversity is more likely to have negative than positive effects on group performance."[18]

Of course, steps *can* be taken to counteract the negative and cultivate the positive potential of workforce diversity. And, where diversity is a given, the experience of intergroup cooperation can improve intergroup relations and attitudes.[19] But that is a different claim – one that resonates more with the integrationist strand of *Grutter*, and to which I will return shortly. The evidence that racial diversity as such improves workplace decisionmaking and productivity is more equivocal.

There is also an external version of the "business case for diversity," which points to the increasingly diverse nature of firms' clientele and contractors, and the credibility, legitimacy, and cultural knowledge that a diverse workforce brings to the project of capturing and pleasing those external constituencies. This argument points to demographic and economic realities of which the *Grutter* majority itself took notice. Yet this argument has its limitations, especially as a justification for preferring African-Americans and Latinos. While it looks beyond white Anglo constituencies, it is still skewed toward those who hale from, or are only a generation or two removed from, more economically vibrant parts of the world. Indeed, as Professor Malamud pointed out recently, to the extent this argument invokes the preferences of those with market power for dealing with "their own kind," it echoes employers' discredited efforts to cite discriminatory "customer preferences" as a justification for their own discrimination.[20] While workforce-wide diversity programs are a far cry from the exclusionary hiring practices that Title VII targetted, the echo is still an eerie one.

18 *See* Katherine Y. Williams & Charles A. O'Reilly III, *Demography & Diversity in Organizations: A Review of 40 Years of Research*, 20 Research in Org. Behavior 77 (1998).

19 *See* Estlund, Working Together, at 69-83.

20 Comments at 2004 AALS Conference attended by the author. Recall, too, the conspicuous omission of race as a potential "bona fide occupational qualification" under Title VII. 29 U.S.C. 2000e-2(3)(1).

Both the "improved decisionmaking" and "market legitimacy" arguments for workforce diversity may be modestly fortified by *Grutter*'s affirmation of the value of "diversity as difference." But both arguments face difficulties and limitations that *Grutter* does not address.

III

That brings us to *Grutter*'s innovation. *Grutter* recognizes that diversity among participants in a shared endeavor promotes integration, connectedness, and cross-racial understanding in a society still suffering from segregation, division, and prejudice. This aspect of *Grutter* could provide support for the legality of affirmative action in employment, for workplace diversity promotes this same compelling interest. As I develop in a recent book,[21] cooperation among diverse co-workers builds interpersonal bonds, combats stereotypes, and promotes understanding and empathy across racial lines. Indeed, the experience of working together may do these things more effectively (and for more people for more years) than the experience of attending college with diverse classmates. College classmates are rarely compelled to cooperate directly with others whom they do not choose to work with; yet that happens all the time in the workplace.

It happens in the workplace partly because the process of working together both depends on and helps to produce relatively constructive intergroup relations. Of course, harassment and other forms of discrimination – subtle and overt, conscious and unconscious – still occur. But where racial and ethnic diversity is a fact of workplace life, employers and employees, and the psychology and economics of workplace relationships, do much of the work of making those relationships constructive and even amicable much of the time. Conversations and relationships among diverse co-workers contribute to interracial connectedness, and to a more integrated future, regardless of the nature of the employer's business or the identity of its customers. Working together across racial lines thus does many of the very things that in *Grutter* added up to a compelling societal interest in the higher education context.

This argument might be translated into a "business argument for diversity": Where diversity is a given among the multiple constituencies with which a firm's employees interact – suppliers, contractors, customers, and employees scattered throughout the far-flung units of a global enterprise – the experience of working with diverse co-workers will prepare employees to deal more effectively with those constituencies. Indeed, where *some* diversity is a given within the workforce itself, the *greater* diversity that is achievable through race-consciousness may be preferable to the *minimal* diversity that otherwise exists. Real integration, with a "critical mass" of non-white employees, may yield better intergroup relations and internal cohesiveness than token levels of non-white representation, and it may do so precisely by combatting stereotypes and building cross-racial understanding and competence.[22] So whether or not diversity within workgroups improves the quality of decisionmaking and performance directly, there is solid evidence that diversity within work groups improves the capacity to cooperate and communicate within diverse work groups. That may sound circular, but it is not: If diversity is a given within an organization, or within the organization's web of constituencies, the cultivation of interracial learning, cooperation, and connectedness within that organization will pay off in the long term.

21 *See* Estlund, Working Together.

22 For some empirical support, see *id.* at 79-80.

But something is lost in this translation. It does not tap into the reservoir of support that *Grutter* evinces for the *civic* imperative of building a more integrated and egalitarian society, and it does not make use of the powerful evidence that interracial cooperation in the workplace contributes to that very goal. A more direct invocation of *Grutter* seems in order: Employers that seek to integrate predominantly white workplaces or layers of the workplace by consciously putting a thumb on the scale in favor of those who are otherwise grossly underrepresented – for whatever reason they do it – contribute to the bridging of stubborn historical cleavages and to a more integrated and egalitarian future.

That more direct invocation of *Grutter* faces one more hurdle: Bridging racial divisions and building cross-racial understanding is a compelling *societal* interest, and it is, says *Grutter*, a compelling *educational* interest; but is it one that an *employer* (public or private) can assert in support of its affirmative action program? Even having been freed from the confines of the remedial justification, the question remains. Can an employer defend pro-integration preferences based on the interracial bonds, warmer attitudes, and cross-racial empathy that employees carry *outside* the workplace into civic life? Or can an employer assert only its own institutional interests in support of integrative racial and ethnic preferences?

IV

Grutter faced no dichotomy between the pursuit of the greater social good and the pursuit of institutional objectives. Building cross-racial understanding and breaking down stereotypes, though obviously accruing to the benefit of the whole society, are just as obviously *educational* processes. Indeed, anything that students learn contributes *both* to the educational mission of their institution *and* to the society they enter as graduates. Whatever stray doubts might have remained about the educational value of cross-racial understanding were quelled in *Grutter* by invoking universities' "academic freedom" to define their educational mission to include the cultivation of these virtues.[23] Employers enjoy no particular privilege to define their own mission, and would be hard-pressed in any event to claim a mission of preparing their employees for a more integrated and egalitarian civic life.

Given the great social good that flows from workplace integration, it may seem paradoxical to demand that an employer assert a narrow self-interest – some contribution to productivity or profitability – in order to justify the affirmative pursuit of integration. But if we step up one level of abstraction, and ask whether employers may assert broad societal interests to justify overriding individual rights claims, the paradox begins to acquire a certain logic. One catches glimpses of such a logic in a range of settings. Within Title VII, for example, the Court has rejected an employer's purported concern for "the welfare of the next generation" as a justification for excluding women from certain jobs; protecting potential fetuses from the risk of toxic exposure *in utero* is simply not "part of the 'essence' of [the employer's] business," and could not justify discriminatory exclusion.[24]

In other contexts, too, institutions seeking to counter rights claims are required to justify their actions in terms of their particular mission and not some broader notion of the public good. For example, to justify punishing an employee's otherwise-protected speech, a public employer must show that the speech interfered with "the effective functioning of

23 *Grutter*, 123 S. Ct. at 2339.

24 International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 195 (1991).

the public employer's enterprise,"[25] not with the public interest at large. Similarly, random drug testing that infringes employees' constitutional right to be free from unreasonable searches may be justified by an agency's "special needs" and the employees' particular jobs, but not by a desire by the state to "display[] its commitment to the struggle against drug abuse," however important that struggle may be.[26] The particular cases may be distinguishable, but taken together they suggest some scepticism toward employers, public or private, relying on broad societal interests as a justification for overriding individual employee rights.

An insistence on institutional self-interest – if that is indeed a robust principle – might make sense as a way of giving substance to the competing rights. Where rights claims can be trumped, we protect the right partly by limiting the class of potential trumping justifications, and by requiring justifications that are bounded and testable. Institutional interests may fit that bill better than broad public interests. The point of insisting on a legitimate self-interested justification might also be to flush out illegitimate motives. Bad ulterior motives may be thought to find readier refuge behind broad public-regarding arguments than behind concrete institutional interests.

Along these lines, it might be argued that only concrete institutional arguments for affirmative action should be admitted, both to give substance to the right of white employees to be free from racial discrimination and to guard against the covert and illicit pursuit of "racial balance … for its own sake." If an employer can point to the broad societal interest in racial integration to justify affirmative action, then every employer could do so, whatever their "real reasons." The equality rights of whites would wither, and "outright racial balancing" would flourish.[27]

This reasoning begs one question and leads to another. It begs the question of how the law *should* define the individual right to be free from race-conscious preferences that promote the integration of predominantly white institutions. *Grutter*'s recognition of the compelling societal interest in integrating institutions and bridging racial divisions effectively and properly narrows the right of white college applicants to be free from consideration of race in admissions; it should equally narrow the antidiscrimination rights of white applicants to predominantly white workplaces.

As for guarding against the illicit pursuit of "racial balance … for its own sake," the question is this: Is there really much reason to worry that institutions with jobs to do and bottom lines to watch – especially private firms with profits to maximize – will covertly pursue racial balancing "for its own sake"? At least in the private sector, can we not rely on the employer's own compelling interest in pursuing productivity and profits to constrain the excessive use of hiring preferences that, by hypothesis, operate in favor of marginally less-qualified job candidates? Can we not at least

25 Rankin v. McPherson, 483 U.S. 378, 388 (1987) (reinstating clerical employee who was overheard expressing approval for the shooting of President Reagan); *compare* Connick v. Myers, 461 U.S. 138, 150 (1983) (upholding discharge based on speech that purportedly threatened morale and working relationships).

26 Chandler v. Miller, 520 U.S. 305, 321 (1997) (rejecting random drug testing for candidates for state elective office); *compare* National Treasury Employees Union v. Von Raab, 482 U.S. 656 (1989) (upholding drug testing for Customs employees engaged in drug interdiction).

27 Similar reasoning seems to underly the Court's insistence that "remedying societal discrimination" is not an adequate constitutional justification for preferences. Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986).

rely on the second branch of the analysis – the insistence (reinforced in *Grutter* and *Gratz*[28]) that preferences not be too rigid or too burdensome on whites – to guard against excesses in the name of diversity?

Still, the cases do evince some skepticism – even some warranted skepticism – toward institutions' relying on broadly public-regarding justifications for trumping individual rights claims. If that is so, then employers may not be heard to assert the public interest in integration in support of their workforce diversity programs. If that is so, then *Grutter*'s new appreciation for the good that racially integrated institutions do in our society may do little to fortify the defense of affirmative action in employment.

V

But perhaps the integrationist dimension of *Grutter* enters the equation at a different point. Rather than expanding the repertoire of justifications that employers can cite in support of their programs, it may counsel a more deferential judicial approach to pro-integration preferences, and to the review of employers' professed objectives. *Grutter* itself shows the way, and offers both a reason for courts to take a more benign view of such preferences within predominantly white institutions, and a demonstration of that approach within the sphere of higher education.

It has been noted that *Grutter*'s version of "strict scrutiny," with its invocation of academic freedom and deference to institutions' own definition of their educational mission, does not look very strict at all. One might equally say, however, that what paraded as "deference" in *Grutter* wasn't very deferential at all. The majority did not so much defer to the Law School's view of its educational mission as it was apparently convinced of that view – convinced that "attaining a diverse student body is at the heart of the Law School's *proper* institutional mission,"[29] and that powerful social good has come from the integration of major American institutions, universities, corporations, and the military among them. In short, the majority was less than strict in its scrutiny of the University of Michigan's goals because it was more than convinced of the social good that flowed from the integration of elite universities.

Courts can carry that recognition into the assessment of affirmative action in employment without necessarily allowing employers to invoke the public interest in integration and interracial connectedness directly. Courts that follow the logic of *Grutter* into the workplace – at least the private workplace – might accord some deference toward employers' institutional justifications for preferences that in fact tend to diversify and integrate workplaces. Such deference would be grounded not in any privilege of employers to define their own mission, but primarily in the recognition that workplace integration is a great social good that is consistent with the desegregative objectives of antidiscrimination law. The case for deference is fortified by two common-sense observations about workforce diversity programs: First, even if employers are not wholly driven by the pursuit of productivity and profits, they have limited latitude to depart from those legitimate self-interested objectives; and, second, in a predominantly white workplace, there is virtually no risk that employers are using these programs to indulge or accommodate invidious prejudices against white applicants. For all of these reasons, courts have little ground to suspect the motives behind such efforts and little reason to fear they may run amuck.

28 Gratz v. Bollinger, 123 S. Ct. 2411 (2003).

29 *Grutter*, 123 S. Ct. at 2339 (emphasis added).

Courts might accordingly engage in something like "rational basis" review of the business arguments for diversity – of an employer's claim that racial and ethnic diversity is necessary to attract and serve the firm's diverse global constituencies, or to promote practical problem-solving in a fast-moving global economy. In particular, courts might find support within *Grutter* itself for the argument that, in a workforce in which *some* diversity is a given, *greater* diversity tends to counteract stereotyping and prejudices and cultivate broader and more inclusive trust and mutual regard within the workforce.

Can this approach be reconciled with Title VII caselaw? This is not the place for doctrinal exegesis. But such an undertaking would begin with the Court's recurring recognition in *Johnson* and *Weber* of the value of voluntary employer action that advances Title VII's desegregative objectives.[30] It would recognize that, whether it goes under the name of "affirmative action" or "workplace diversity," and whether it aims to appeal to an increasingly diverse customer base, to redress past injustice, or to promote interracial learning and social capital, a program that operates to integrate racial and ethnic minorities into predominantly white workplaces is fully "consistent with Title VII's objective of 'break[ing] down old patterns of racial segregation and hierarchy,'"[31] as well as with the compelling societal interest in the creation of integrated social institutions proclaimed in *Grutter*.

30 *See Johnson*, 480 U.S. at 628-29, 630 & n.8, 640, 642.

31 *Id.* at 628, citing *Weber*, 443 U.S. at 208.