

# What the Supreme Court's Diversity Doctrine Means for Workplace Diversity Efforts

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## Introduction

The Supreme Court's 2003 decision in *Grutter v. Bollinger*,<sup>1</sup> approving race-conscious college admissions plans (RCAPs) adopted by public higher education institutions to increase student body diversity,<sup>2</sup> provided many lessons for pursuing diversity in other contexts, including employment. *Grutter* generated many predictions about whether the Court would similarly embrace in the employment context the diversity interest it had recognized in higher education. The Court's more recent decision in *Fisher v. University of Texas at Austin*<sup>3</sup> offers additional guidance on the Court's developing diversity doctrine and its likely application beyond higher education. This Article identifies the current contours of the Supreme Court's diversity doctrine, as developed in cases from *Grutter* to *Fisher*, and predicts the Court's likely response to a future case adjudicating the diversity interest in employment.

The scholarly literature generated in response to *Grutter* cast doubt on the prospect that the Supreme Court would (or should) embrace diversity in the workplace.<sup>4</sup> This Article takes a more optimistic view about how the Supreme Court will likely respond to workplace diversity efforts in the wake of *Fisher*.<sup>5</sup> These predictions benefit

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1. 539 U.S. 306 (2003).

2. *Id.* at 343–44.

3. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

4. *See, e.g.,* Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D 215 (2004). Estlund expresses skepticism about workplace diversity efforts generally but suggests that employers could possibly defend them on instrumental grounds if courts can identify proper limits to prevent these efforts from overriding claims of individual rights. *Id.* at 222. For a fuller discussion of these post-*Grutter* scholarly predictions, see generally Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 FORDHAM L. REV. 2457 (2015).

5. Justice Kennedy's recent retirement and replacement by Justice Kavanaugh make these predictions less certain, but not entirely foreclosed.

not only from the added lessons in *Fisher*, but also from a significant and growing body of cases adjudicating workplace diversity efforts that have been decided by lower federal courts since *Grutter*.

The predictions made in this Article—that the Court will likely continue its embrace of diversity even outside the higher education context—should be welcome news to employers who were among the chief defenders of diversity in higher education. But not all the predictions are reassuring. Synthesis of the decided cases also reveals a cautionary tale about the emerging diversity doctrine, which cuts a narrow path through the Supreme Court’s equality jurisprudence. Universities and employers alike should beware the precarious path they must tread in pursuit of diversity.

Part I of this Article reviews the Supreme Court’s diversity doctrine by looking at four cases decided over fifteen years, with particular attention to the key decisions in *Grutter* and *Fisher*. Part II compares and contrasts the pursuit of diversity in higher education with the pursuit of diversity in the workplace as a prelude to Part III, which examines the many post-*Grutter* lower federal court cases challenging workplace diversity efforts. Finally, Part IV offers new predictions about how the Supreme Court will likely respond to a legal challenge to workplace diversity efforts after its most recent decision in *Fisher*.

## I. The Supreme Court’s Diversity Doctrine

The value of diversity in our increasingly multicultural society has been touted in many different contexts, from primary and secondary schools to colleges and universities, and, perhaps most often, in the workplace.<sup>6</sup> Despite its widely recognized social value, pursuing diversity remains controversial as a matter of law.<sup>7</sup> However, its legal status is becoming increasingly settled thanks to recent Supreme Court decisions adjudicating RCAPs designed to increase student body diversity in higher education.

RCAPs themselves are hardly new. The Supreme Court first considered them in 1978 in *Regents of the University of California vs. Bakke*.<sup>8</sup> Bakke argued that the University of California, Davis Medical School violated the Equal Protection Clause by reserving sixteen of

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6. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (arguing for importance of diversity in elementary and secondary school); *Grutter*, 539 U.S. at 307 (arguing for importance of diversity in higher education); *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003) (arguing for importance of diversity in employment of police officers).

7. New cases have already been filed challenging race-conscious admissions plans (RCAPs) at colleges. See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 1:14-CV-954, 319 F.R.D. 590 (M.D.N.C. 2017); *Students for Fair Admissions, Inc. v. Harvard*, 1:14-CV-14176-ADB, 308 F.R.D. 39 (D. Mass. 2015); see also Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1022 (2016) (uncertain legal status of diversity initiatives in corporate America).

8. 438 U.S. 265 (1978).

one hundred seats in its entering class for minority students.<sup>9</sup> Justice Lewis Powell, writing alone in a plurality opinion, suggested that a university's interest in achieving student body diversity could justify these RCAPs.<sup>10</sup> Ultimately, the Court struck down the RCAP in *Bakke*, but there was no majority consensus on the reason for rejecting the plan.<sup>11</sup> Instead, a plurality concluded that regardless of the asserted interest, the RCAP was not narrowly tailored and admonished the university to refrain from using racial quotas or outright racial balancing, which the Court has said are "patently unconstitutional."<sup>12</sup> *Bakke*'s plurality decision left universities uncertain about the precise constitutional contours restricting the use of race in college admissions. This uncertainty persisted for twenty-five years.

#### A. Grutter v. Bollinger

Then in 2003, the Supreme Court once again considered the constitutionality of RCAPs in a pair of cases involving the University of Michigan (Michigan). *Grutter v. Bollinger*<sup>13</sup> challenged the Michigan Law School's denial of admission to a white female applicant.<sup>14</sup> *Gratz v. Bollinger*<sup>15</sup> challenged the Michigan undergraduate RCAP.<sup>16</sup> The petitioners in both cases alleged that Michigan violated the Equal Protection Clause by improperly considering race in admissions.<sup>17</sup>

Taking its cue from Justice Powell's plurality opinion in *Bakke*, Michigan defended its RCAP by asserting an interest in realizing the educational benefits that flow from a diverse student body.<sup>18</sup> In approving this interest, the Court described these educational benefits as three-fold: (1) pedagogical (improving student learning by expanding the range of perspectives and experiences represented in the classroom); (2) functional (better preparing students for work by

9. *Id.* at 266. Equal protection race claims are subject to strict scrutiny, which means the university was required to (1) identify a compelling interest for adopting the RCAP; and (2) demonstrate the plan was narrowly tailored to meet that interest. *Id.* at 299.

10. *Id.* at 311–12 (attaining a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education"). However, the Court rejected the university's proffered interest in remedying societal discrimination as insufficiently compelling to satisfy the strict scrutiny standard applicable to government uses of race. *See id.* at 299.

11. Though Justice Powell reasoned that the plan did not satisfy equal protection strict scrutiny because it did not allow for individualized consideration, *id.* at 320, four justices would have decided the issue on statutory (Title VI) rather than constitutional (equal protection) grounds. *Id.* at 408–12 (Stevens, J., concurring in part and dissenting in part).

12. *See id.* at 324–26; *see also* *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

13. 539 U.S. 306.

14. *Id.* at 316.

15. 539 U.S. 244.

16. *Id.* at 251.

17. *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 252.

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

fostering the cultural competence necessary to succeed in a diverse labor market); and (3) socio-political (ensuring that future civic leaders engender public trust by reflecting the diversity of the populations they serve).<sup>19</sup> *Grutter* was the first time a majority of the Court held that a university's interest in achieving the educational benefits of student body diversity is sufficiently compelling to justify the use of race in admissions.<sup>20</sup>

Although the decision in *Grutter* surprised many, the value of diversity is fairly uncontroversial.<sup>21</sup> Even critics of RCAPs often acknowledge that diversity is a laudable goal.<sup>22</sup> Instead, it is typically the race-conscious means employed to achieve diversity that elicits objections.<sup>23</sup> Given this concern for means rather than ends, what was more shocking than *Grutter*'s recognition of diversity as a constitutionally compelling end was the Court's willingness to approve the use of both numeric goals and race-conscious means in pursuit of student body diversity.<sup>24</sup> The Court upheld the law school's goal of reaching a "critical mass" of underrepresented minority students, finding that this quantitative goal satisfied strict scrutiny's narrow tailoring requirement because it was not tantamount to an impermissible racial quota.<sup>25</sup> The Court was further convinced that race-neutral alternatives would be incapable of achieving the school's admissions goals because they "would require a dramatic sacrifice to diversity, the academic quality of all admitted students, or both."<sup>26</sup> Nevertheless, the Court clarified that when higher education institutions employ race-conscious means to achieve diversity, they must be as narrow as possible in scope and time.<sup>27</sup> These scope and time limitations require that (1) race not be used as a first resort, but only after race-neutral efforts have proved unavailing; (2) even when special consideration is given to underrepresented minorities, all applicants receive individualized consideration

19. *Id.* at 330–32.

20. *Id.* at 343–44.

21. *Grutter* was only the second time the Court found an interest other than remedying past discrimination sufficiently compelling to satisfy strict scrutiny. The other interest was national security. See *Korematsu v. United States*, 323 U.S. 213 (1944). However, *Korematsu* has been criticized and its holding condemned by jurists and scholars alike. See, e.g., Trump v. Hawaii, 585 U.S. \_\_\_ (2018) (repudiating the decision in *Korematsu*); Carol J. Williams, *Legal Scholars Examine the U.S. High Court's "Supreme Mistakes,"* L.A. TIMES (Apr. 2, 2011), <http://articles.latimes.com/2011/apr/02/local/la-me-sctotus-scandals-20110402> (citing *Korematsu* as one of the Court's most glaring mistakes).

22. See Robert F. Nagel, *Diversity and the Practice of Interest Assessment*, 53 DUKE L.J. 1515, 1528 (2004).

23. *Id.* at 1526.

24. *Id.* at 1516–17.

25. *Grutter*, 539 U.S. at 334.

26. Notably, race-neutral alternatives need not be exhausted, or even tried, before race-conscious means can be adopted. *Id.* at 339–40.

27. *Id.* at 342.

of their ability to contribute to a diverse educational environment; and (3) RCAPs must be discontinued when they are no longer necessary to achieve student body diversity.<sup>28</sup> In no event may RCAPs operate indefinitely.<sup>29</sup> The Court found that Michigan Law School had satisfied each of these requirements. Still, in much cited dicta, Justice Sandra Day O'Connor predicted that there would no longer be a need for RCAPs in twenty-five years.<sup>30</sup>

*Grutter* laid the foundation for the Court's diversity doctrine by establishing unequivocally that diversity is a compelling interest sufficient to justify governmental consideration of race.<sup>31</sup> Emphasizing the uncontroversial nature of the diversity interest, the Court stated that it would defer to a university's good faith assertion of an interest in student body diversity,<sup>32</sup> but the Court also affirmed that any use of race in pursuit of diversity would still face strict scrutiny.<sup>33</sup>

### B. Gratz v. Bollinger

*Grutter*, upholding the law school's RCAP, contrasts with the Court's concurrent decision in *Gratz v. Bollinger*,<sup>34</sup> striking down Michigan's undergraduate RCAP. *Gratz* also recognized the compelling interest in achieving the educational benefits of student body diversity but found the undergraduate program was not narrowly tailored as required by strict scrutiny.<sup>35</sup> The difference in outcomes between these two cases highlights the precise constitutional contours of the narrow tailoring requirement. *Gratz* struck down the undergraduate RCAP because the university assigned a numerical value to race in evaluating applicants, resulting in what the Court called a "mechanical" use of race, rather than the flexible and individualized use of race required by narrow tailoring.<sup>36</sup> The Court reasoned that "the factor of race [was] . . . decisive for virtually every minimally qualified underrepresented minority applicant."<sup>37</sup> By contrast, the law school's RCAP considered race merely as one "plus" factor among many possible diversity considerations.<sup>38</sup>

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28. *See id.* at 309–10.

29. *See id.* at 343.

30. *Id.* Justice O'Connor herself has since questioned the accuracy of that prediction. *See* DAVID L. FEATHERMAN ET AL., *THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* (2010).

31. *Grutter*, 539 U.S. at 307.

32. *See id.* at 329.

33. *Id.*

34. 539 U.S. 244.

35. *Id.* at 270.

36. *Id.* at 280. In contrast with the more individualized and holistic review process the law school employed in *Grutter*, the undergraduate admissions plan was a quantitative process that automatically assigned twenty points of the 100 needed for admission to every underrepresented minority applicant. *Id.* at 270.

37. *Id.* at 272.

38. *Grutter*, 539 U.S. at 334.

*Grutter* rejected the prevailing “colorblind” view that characterized the Court’s earlier equal protection jurisprudence by approving of RCAPs, while *Gratz* reinforced the narrow constitutional contours within which permissible government consideration of race must operate.<sup>39</sup> Given the specific context of college admissions, many questioned whether the Court’s approval of the diversity interest in *Grutter*, or the constitutional limits imposed on its race-conscious pursuit in *Gratz*, might apply in other contexts.<sup>40</sup> Because a record number of amicus briefs were filed in support of Michigan in *Grutter* and *Gratz*, many arguing that student body diversity was critical for preparing students “for an increasingly diverse workforce,” the employment context in particular stood out among the possibilities.<sup>41</sup> *Grutter* approvingly cited these corporate amici as a basis for sustaining the university’s interest in student body diversity, noting the business-driven rationale of fostering workplace cultural competence.<sup>42</sup> Unsurprisingly then, much post-*Grutter* scholarly speculation focused on how, if at all, the Court’s decision in *Grutter* would apply to workplace diversity efforts.<sup>43</sup>

### C. *Parents Involved in Community Schools*

The Court’s next case, however, did not address workplace diversity efforts, but rather diversity in K-12 public schools. In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>44</sup> parents challenged race-based student assignment plans voluntarily adopted by the Seattle and Louisville school boards to achieve racial integration.<sup>45</sup>

As in *Bakke* three decades before, the Court issued a plurality opinion in which five justices agreed to strike down the student assignment plans, but they disagreed about why the plans were unconstitutional.<sup>46</sup> As Justice Powell did in *Bakke*, Justice Anthony Kennedy,

39. See *id.* at 343. Some praised *Grutter* for rejecting the prevailing colorblind view of equal protection but condemned the Court’s narrow restrictions on using race to pursue diversity. See, e.g., *id.* at 345 (Ginsburg, J., concurring) (approving use of race in admissions but lamenting the twenty-five-year limit predicted by Justice O’Connor). Others condemned the Court for rejecting the prevailing colorblind view of equal protection but applauded *Grutter*’s adoption of strict scrutiny even when race is used to pursue diversity. See, e.g., *id.* at 351 (Thomas, J., dissenting) (rejecting majority’s approval of race-conscious admission plans but agreeing that strict scrutiny properly applied and endorsing Justice O’Connor’s twenty-five year limit on use of race in admissions).

40. A later decision only added to this uncertainty. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

41. See, e.g., Brief of Gen. Motors Corp. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306, *Gratz*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 399096, at \*22–23.

42. *Grutter*, 539 U.S. at 330–31.

43. See, e.g., Estlund, *supra* note 4, at 215 (arguing *Grutter* will affect public and private employment).

44. 551 U.S. 701 (2007).

45. *Id.* at 709–10.

46. Chief Justice Roberts, in a plurality opinion joined by Justices Scalia, Thomas, and Alito, reasoned that student body diversity was not a compelling interest outside of

writing alone, joined the four liberal members of the Court in affirming the compelling nature of the diversity interest even outside the context of higher education,<sup>47</sup> but he voted with the conservative justices to strike down the particular plans at issue.<sup>48</sup> Perhaps most notably, Justice Kennedy was unwilling to join the conservative plurality in finding these race-based student assignment plans unconstitutional *per se*.<sup>49</sup> In a forceful response to Chief Justice John Roberts's insistence on constitutional colorblindness, Justice Kennedy observed: "The enduring hope is that race should not matter; the reality is that too often it does."<sup>50</sup>

Justice Kennedy acknowledged the modern realities of race while also affirming the distinction between permissible and impermissible uses of race as set forth in *Grutter* and *Gratz*. He emphasized that the plan at issue involved the type of mechanical use of race proscribed in *Gratz*, rather than the nuanced and flexible use of race approved in *Grutter*.<sup>51</sup> Thus, while acknowledging that race-conscious assignment may sometimes be permitted to achieve the goal of student body diversity, Justice Kennedy concluded that Seattle and Louisville had not proven the need for the "crude" ways they had used race to assign students to schools.<sup>52</sup>

#### D. Fisher v. University of Texas at Austin

Buoyed by the *Gratz* win and the favorable plurality decision in *Parents Involved*, opponents of diversity continued searching for opportunities to limit, or even overturn, the Court's new diversity doctrine.

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higher education. *Id.* at 724–25; *see also id.* at 771 (Thomas, J., concurring). Moreover, the race-conscious student assignment plans at issue were not narrowly tailored to meet any such interest in diversity. *Id.* at 726.

47. *See id.* at 787–88 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy reasoned that the goals of avoiding racial isolation and ensuring racial integration among public elementary and secondary schools were distinct from, but still related to, the interest in student body diversity recognized in *Grutter*. *Id.* at 789–90. Justice Kennedy explicitly disagreed with the plurality's rejection of a diversity interest as compelling outside of higher education. *Id.* at 791.

48. *Id.* at 798. Importantly, Justice Kennedy had not joined the majority in upholding the RCAP in *Grutter*. 539 U.S. 306, 387–89 (Kennedy, J., dissenting). Although he agreed that student body diversity was a compelling interest there, he disagreed with the majority that the law school's consideration of race was narrowly tailored. *Id.* Instead, he found the law school's use of race to be more like the racial balancing proscribed in *Bakke* than the individualized and flexible use of race required by strict scrutiny. *Id.*

49. *Parents Involved*, 551 U.S. at 782–83 (Kennedy, J., concurring in part and concurring in the judgment).

50. *Id.* at 787.

51. *Id.* at 792–93 ("If *Gratz* is to be the measure, the racial classification systems here are *a fortiori* invalid."). Justice Kennedy called the Seattle plan "systematic, individual typing by race" and found Louisville's student assignment plan too ambiguous to allow for judicial determination of whether it was narrowly tailored. *Id.* at 784–85, 789.

52. *Id.* at 786–87. Justice Kennedy found that Seattle failed to substantiate the need for racial balancing in schools, while Louisville failed to demonstrate its use of race was necessary to achieve desired diversity. *Id.*

RCAPs remained an obvious target because they were widely used at the country's most selective colleges and universities.<sup>53</sup> This opposition effort led to *Fisher v. University of Texas at Austin*.<sup>54</sup>

*Fisher* challenged the University of Texas at Austin's (UT) RCAP by similarly arguing that it violated the constitutional guarantee of equal protection.<sup>55</sup> The Supreme Court granted certiorari in *Fisher*, despite having already resolved the constitutionality of RCAPs, because UT's RCAP differed in one material respect from the RCAP upheld in *Grutter*, or even the one struck down in *Gratz*. Unlike the plans in *Grutter* and *Gratz*, admissions at UT were largely determined by a race-neutral plan.<sup>56</sup> *Fisher* argued that UT's success in achieving student body diversity through this race-neutral plan made its supplemental RCAP unnecessary.<sup>57</sup> In other words, *Fisher* contended that, despite more than a decade remaining on the twenty-five-year clock Justice O'Connor announced in *Grutter*, the time for RCAPs had expired at UT. The Supreme Court rejected both arguments. *Fisher* affirmed *Grutter*, and once again approved the diversity interest generally and RCAPs specifically.<sup>58</sup> The Court in *Fisher* also took the opportunity to clarify and refine the precise constitutional contours of its diversity doctrine.<sup>59</sup>

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53. These challenges show no signs of abating. Cases have more recently been filed against Harvard University challenging the race-conscious plan on which Powell's plurality ruling in *Bakke* was based, and against the University of North Carolina. See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 1:14-CV-954, 319 F.R.D. 590 (M.D.N.C. 2017); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 1:14-CV-14176-ADB, 308 F.R.D. 39 (D. Mass. 2015).

54. *Fisher* appealed twice to the Supreme Court, generating two separate decisions. The first was a fairly uncontroversial decision clarifying the applicable standard of review. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (*Fisher I*). The second forms the basis of the Court's refinement of its diversity doctrine and is the subject of analysis here. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*).

55. *Fisher II*, 136 S. Ct. at 2207.

56. *Fisher I*, 133 S. Ct. at 2416. This plan, known as the "Top Ten Percent Plan," granted admission to the top ten percent of the state's graduating high school seniors. It was adopted by the state legislature in response to a post-*Bakke* case in which the Fifth Circuit ruled the University of Texas's RCAP unconstitutional. *Id.*; see also *Hopwood v. Texas*, 78 F.3d 932, 996 (5th Cir. 1996).

57. After the Supreme Court's decision in *Grutter* effectively overruled the Fifth Circuit's decision in *Hopwood*, UT once again adopted a RCAP but only to supplement, not supplant, the otherwise race-neutral Top Ten Percent Plan. See *Fisher II*, 136 S. Ct. at 2205.

58. *Id.* at 2214. The Court specifically rejected the claim that universities must support asserted interests in diversity by demonstrating some strong basis in evidence. *Id.* at 2210. Instead, the Court defined the more deferential standard of proof as only requiring universities to offer some "reasoned, principled explanation" for an asserted interest in diversity. *Id.* at 2211.

59. *Fisher I* clarified that judicial deference to universities pursuing student body diversity is applicable only under the first prong of strict scrutiny, when determining whether the interest in diversity is compelling. See *id.* at 2208 (citing *Fisher I*, 133 S. Ct. at 2419–20). However, universities receive no deference when a court evaluates the constitutionality of RCAPs under the second, narrow-tailoring prong of strict scrutiny. *Id.*

The Court clarified the meaning of “critical mass.” In rejecting Fisher’s argument that “critical mass” represents some fixed numeric quantity, the Court instead said the goal need only be measurable in some way that would permit judicial review of the university’s progress toward the goal.<sup>60</sup> In once again affirming the interest in student body diversity, the Court made clear that the crux of a college or university’s defense of its RCAP is the evidentiary proof required to demonstrate how the RCAP is helping to realize the educational benefits of student body diversity.<sup>61</sup>

The Court cautioned UT that it bore an ongoing evidentiary burden to collect and analyze data about the impact of both its race-conscious and race-neutral efforts to achieve diversity to permit future determinations of its continued need to consider race in admissions.<sup>62</sup> Echoing Justice O’Connor’s concern that RCAPs be limited in time, Justice Kennedy warned that the outcome in cases challenging RCAPs, particularly those like UT’s whose race-neutral efforts might suffice to achieve its diversity goals sooner rather than later, might not be so favorable for colleges and universities in the future.<sup>63</sup>

#### *E. The Prevailing Law of Diversity*

Several key elements of the Court’s diversity doctrine emerge from these four cases. First, the Court defers to institutional decision-makers in determining the importance of student body diversity to their educational missions.<sup>64</sup> Second, notwithstanding some attention to underrepresented minorities, this is not the traditional interest in remedying past discrimination most often addressed in the Supreme Court’s equal protection jurisprudence.<sup>65</sup> Diversity is a new instrumental interest signifying the broader social import of achieving goals such as expanding viewpoints to improve learning, fostering the cultural competence necessary to succeed in the twenty-first century global workplace, and promoting the ideal of democratic equality on behalf of an increasingly diverse citizenry. Third, and perhaps most important, race may be used only as a last resort and may not be used in any systematic or mechanical way, even in pursuit of these unquestionably worthy ends.<sup>66</sup> To withstand judicial review, any consideration of race must avoid becoming outcome-determinative.<sup>67</sup> Importantly, pursuit of

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60. *Id.* at 2210–11.

61. *Id.* at 2211.

62. *Id.* at 2210.

63. *Id.* at 2214–15.

64. This deference is in part an acknowledgment of the relatively uncontroversial nature of the legitimacy of the diversity interest. See Nagel, *supra* note 21, at 1518.

65. See, e.g., *Weber v. United Steelworkers of Am.*, 443 U.S. 193 (1979) (approving remedial uses of race in employment); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (approving remedial uses of race in education).

66. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

67. *Grutter v. Bollinger*, 539 U.S. 306, 334–35 (2003).

some “critical mass” of underrepresented minorities, or other numeric goals, are not fatal.<sup>68</sup> Finally, consideration of race may not last indefinitely.<sup>69</sup> The Court continues to aspire to constitutional colorblindness, despite its willingness to acknowledge the need for temporary race-consciousness.<sup>70</sup>

## II. Race-Conscious Admissions Versus Workplace Diversity Efforts: Common Ends, Different Means

The question remains how, if at all, the Court’s diversity doctrine as developed from *Grutter* through *Fisher* will translate to other contexts outside of education. One of the most likely contexts for its application may be employment, where companies have long engaged in workplace diversity efforts, and their support of diversity was instrumental to the Supreme Court’s approval of RCAPs in higher education.<sup>71</sup> In trying to predict how the Supreme Court’s diversity doctrine might apply in employment, it is first important to understand the similarities and differences between RCAPs and workplace diversity efforts.

### A. Common Ends

RCAPs share common goals with workplace diversity efforts, but there are also material differences between the two. What connects the two is that instrumental rather than remedial concerns motivate both. Diversity efforts, regardless of context, generally seek to achieve one or more of three instrumental goals:

- Pedagogical or Epistemic Benefit—improve classroom learning (education) and problem-solving (business);
- Functional Benefit/The “Business Case”—reduce racial isolation, break down stereotypes (education), and promote cross-cultural competence (business); and
- Democratic Equality/Corporate Social Responsibility Benefit—allow organizations to reflect the demography of relevant stakeholder populations, such as the citizenry (education) or customers (business), to generate trust or goodwill with these groups.<sup>72</sup>

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68. However, diversity goals may not be reduced to mere numbers. See *Fisher II*, 136 S. Ct. at 2210.

69. *Grutter*, 539 U.S. at 342.

70. This aspiration for constitutional colorblindness has been expressed in various forms, even by those justices who endorsed diversity’s importance. See *Grutter*, 539 U.S. at 337–43; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

71. See, e.g., Estlund, *supra* note 4, at 215; Hawkins, *supra* note 4, at 2461–62.

72. See Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75, 79 (2012).

Despite these similar motivations, RCAPs often elicit much greater objection than workplace diversity efforts.<sup>73</sup> RCAPs have been a litigation target<sup>74</sup> in part because college admissions are viewed as a meritocratic process that ought to reject non-meritocratic considerations such as race.<sup>75</sup> But they have also been targeted because consideration of race is more explicit, and therefore more visible, in admissions than in employment.

### B. Different Means

Admissions decisions are aggregated at a single decision point, most often concentrated in the fall admissions cycle. The sheer volume of decisions college admissions officers make at this single decision point necessarily makes the admissions process data-driven and quantitative.<sup>76</sup> When admissions officers must select thousands of students for admission at once out of tens of thousands of applicants, they must rely heavily on a limited number of objective selection criteria and efficient sorting methods.<sup>77</sup> These sorting methods mean the criterion of race operates more uniformly, and its effect can often be quantified with statistical precision.<sup>78</sup> This makes college admissions an easier litigation target because of the empirical proof available about the extent to which race affects outcomes.

Employment decisions, by contrast, are more diffuse and disaggregated. They occur much more frequently and in relative isolation from one another. Even if a single employer hires thousands of employees, it makes hiring decisions separately at many discrete decision points. Employment decisions are much more likely to involve numerous

73. In part, this difference may be because the debate in the educational context continues to use the unpopular term “affirmative action,” but the debate in employment largely involves the more amenable term “diversity.”

74. See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 1:14-CV-954, 319 F.R.D. 590 (M.D.N.C. 2017); *Students for Fair Admissions, Inc. v. Harvard*, 1:14-CV-14176-ADB, 308 F.R.D. 39 (D. Mass. 2015).

75. This objection, however, rings hollow in light of the many other non-meritocratic considerations for admission, such as legacy status, athletics, geography, and socioeconomic preferences, that do not elicit similar opposition.

76. *How Colleges Make Admissions Decisions*, C. DATA, [https://www.collegedata.com/cs/content/content\\_getinarticle\\_tpl.jhtml?articleId=10047](https://www.collegedata.com/cs/content/content_getinarticle_tpl.jhtml?articleId=10047) (last visited Apr. 23, 2018) (large institutions file data electronically and may automatically deny applicants based on GPA or test scores).

77. In particular, many colleges and universities rely on academic credentials, such as grade point average and standardized test scores, in admissions decisions. See *Gratz v. Bollinger*, 539 U.S. 244, 274 (2003) (“The bulk of admissions decisions are executed based on selection index score parameters set by the [admissions committee].”).

78. In *Grutter*, *Gratz*, and *Fisher II*, petitioners made their case, at least in part, by demonstrating the statistical effect of race on admissions decisions. Numerous scholars have also analyzed admissions data from selective colleges and universities, offering empirical analyses about the statistical impact of various selection criteria, including race, on admissions. See, e.g., Peter Arcidiacono et al., *A Conversation on the Nature, Effects and Future of Affirmative Action in Higher Education Admissions*, 17 U. PA. J. CONST. L. 683, 685 (2015).

subjective selection criteria and individualized decision-making. As a result, these more qualitative employment decisions do not so easily lend themselves to the types of statistical analyses that render admissions decisions vulnerable to legal attack. Instead of race being a quantifiable variable, race rarely figures explicitly, transparently, or statistically into individual employment decisions.<sup>79</sup> Of course, job applicants can and do still challenge employment decisions when disparate racial effects are identified.<sup>80</sup> However, workplace diversity efforts operate less often in a racially explicit way.

### C. *Hiring for Diversity Versus Admitting a Diverse Student Body*

To illustrate the difference between hiring for diversity and admitting a diverse student body, consider, for example, a U.S.-based global manufacturing company attempting to hire an employee to oversee operations in Latin America. If the employer values diversity, a legitimate business concern for cultural competence, in addition to industry-based skill and experience, might inform the hiring decision.<sup>81</sup> The company might seek someone who is not only fluent in Spanish, but who is also sufficiently familiar with Latin American social norms and culture to negotiate effectively with local business partners and interact with personnel in the region. The company might presume that targeting Hispanic applicants will yield good candidates, but that does not mean non-Hispanic applicants are excluded from consideration.<sup>82</sup> More importantly, each candidate will be evaluated individually, and the company will ultimately hire a candidate based on the applicant's qualifications and ability to serve the company's interests in Latin America. Among a diverse group of applicants, the successful candidate could be Hispanic, but the decision will be justified not by the candidate's ethnicity, but on the basis of skill, experience, and ability.<sup>83</sup> As explained in *Gratz*, "the critical criteria [for diversity] are often indi-

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79. The exception is when job applicants file disparate impact claims. In such cases, courts view hiring decisions in the aggregate to permit the same statistical impact analysis of race that occurs in admissions. However, the basis for such claims is that a race-neutral policy has adverse racial effects, not that employers use race impermissibly to make employment decisions. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

80. Even claims that race had a less explicit, but no less harmful, impact in the hiring process can be raised under a disparate impact theory of liability. See *id.*

81. There might initially be hundreds of applicants for a position, but modern recruiting software allows employers to cull applicants so efficiently that only several dozen are actually considered for the position and even fewer are interviewed. See Arnie Fertig, *How to Get Your Online Job Application Past the Filters*, BUS. INSIDER (Oct. 25, 2013, 7:31 AM), <http://www.businessinsider.com/how-to-get-your-job-application-past-the-filters-2013-10>.

82. Targeted recruitment is one of the most legally defensible race-conscious employment practices. See Hawkins, *supra* note 4, at 2480–81.

83. This is not the same as "[p]referring members of any one group for no reason other than race or ethnic origin," which the Court called "discrimination for its own sake." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citation omitted).

vidual qualities or experiences *not dependent upon race but sometimes associated with it.*<sup>84</sup>

By contrast, colleges and universities often make decisions collectively, not individually, when considering applicants for admission.<sup>85</sup> At the nation's most selective colleges and universities, admissions decisions are not about finding the right candidate for a single job, but about identifying hundreds or thousands of students to admit in an entering class.<sup>86</sup> Admissions officers determine which criteria are most important for admission and then assign them a value allowing for numerous simultaneous admissions decisions.<sup>87</sup> For instance, most colleges and universities consider an applicant's academic credentials, such as grade point average and standardized test scores, in determining admissions.<sup>88</sup> Often, students are presumptively admissible if they score above certain academic thresholds and presumptively inadmissible below other thresholds.<sup>89</sup> Admissions officers may read individual applications to screen for other factors, but applicants are sorted at least in part according to grades and test scores.<sup>90</sup>

Colleges and universities increasingly consider the extent to which an applicant will contribute to student body diversity.<sup>91</sup> Here, too, admissions officers frequently make threshold determinations about individual qualities that will make valuable contributions to diversity. These qualities might include geographic residency, socioeconomic status, gender, race, or ethnicity.<sup>92</sup> Students from distant geographic regions or from a lower socioeconomic background may be perceived as contributing to diversity in the same way as students

84. *Id.* at 272–73 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978)).

85. The University of Texas, for instance, described its admissions process as sorting applicants into groups based on pre-determined admissions criteria and then deciding admission for entire groups rather than by individual applicant. *Fisher II*, 136 S. Ct. 2198, 2206–07 (2016).

86. In 2015, the acceptance rate for the Ivy League ranged from five percent to fifteen percent. Peter Jacobs, *Ivy League Admissions Letters Just Went Out—Here Are the Acceptance Rates for the Class of 2019*, BUS. INSIDER (Mar. 31, 2015, 5:00 PM), <http://www.businessinsider.com/ivy-league-acceptance-class-of-2019-2015-3>. Harvard University was the most selective, admitting just 1,990 students of the 37,307 who applied. *Id.*

87. THOMAS J. ESPENSHADE & ALEXANDRA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* 75 (2009).

88. *How Colleges Make Admissions Decisions*, *supra* note 77.

89. See Arcidiacono et al., *supra* note 79, at 695 (“In general, academic factors alone explain about [eighty percent] of admissions decisions at selective schools.”); *How Colleges Make Admissions Decisions*, *supra* note 77.

90. *How Colleges Make Admissions Decisions*, *supra* note 77.

91. See Arcidiacono et al., *supra* note 79, at 692 (“Many colleges and universities consider the ability to amass sufficient racial and ethnic diversity among their student bodies as essential to their educational and institutional missions.”); *How Colleges Make Admissions Decisions*, *supra* note 77.

92. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2206 (2016) (socioeconomic status considered along with race).

from underrepresented minority groups.<sup>93</sup> Students whose overall profile does not automatically qualify or disqualify them for admission may be assessed more closely, but the sheer volume of decisions lends itself to statistical analysis of how each student's credentials, whether grades or diversity, affect admissibility.<sup>94</sup>

The key difference between higher education and employment is that admissions decisions in education are largely made in the aggregate on the basis of limited, objective criteria. By contrast, employers typically select employees on an individualized and subjective basis. Both colleges and employers may pursue diversity, but admissions decisions more often involve explicit consideration of race or ethnicity in ways far less common in the workplace. Consequently, workplace diversity efforts are likely less vulnerable to legal challenge than RCAPs because of their more nuanced and flexible consideration of race and ethnicity consistent with the limits imposed in *Gratz*.

### III. Post-*Grutter* Title VII Diversity Cases

Since the Supreme Court first embraced the interest in student body diversity in *Grutter*, many (both practitioners and academics) have been waiting for the Court to decide a case addressing workplace diversity. That day has yet to come, but lower federal courts have decided dozens of cases adjudicating workplace diversity efforts, in part by interpreting and applying *Grutter*. The Court's newest diversity decision in *Fisher* as well as this growing body of lower court cases offers new insights into how the Supreme Court might ultimately decide whether workplace diversity efforts are subject to the same legal standards as RCAPs, and whether they are equally likely to be sustained against challenge.

#### A. Analysis of the Decided Cases

Lower federal courts have decided dozens of cases challenging workplace diversity efforts under Title VII.<sup>95</sup> In many of these cases, courts have sided with employer defendants in much the same way the Supreme Court sided with the defendant universities in *Grutter* and *Fisher*.<sup>96</sup> In cases where workplace diversity efforts have been struck

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93. See John Baughman, *Teaching a Diverse Student Body: Characteristics of Personal Identity*, CTR. FOR TEACHING EXCELLENCE, <http://cte.virginia.edu/resources/teaching-a-diverse-student-body-practical-strategies-for-enhancing-our-students-learning/teaching-a-diverse-student-body-2/characteristics-of-personal-identity> (last visited Jan. 26, 2018).

94. See Arcidiacono et al., *supra* note 79.

95. A trial or appellate court in each of the federal circuits (excluding the Federal Circuit) has decided at least one case challenging workplace diversity efforts. See Hawkins, *supra* note 4, at 2469.

96. In a quantitative survey of forty-four cases decided between 2003 and 2014, twenty-two decisions favored the employer, nineteen favored the employee, and three had mixed results. See *id.* at 2468–69.

down, courts have condemned how race was used to pursue diversity, not the interest in diversity itself, much like the decisions in *Gratz* and *Parents Involved*.<sup>97</sup> In some cases, courts expressly cited *Grutter* in recognizing the legitimacy of an employer's interest in workplace diversity.<sup>98</sup> Others merely affirmed the Supreme Court's reasoning in both *Grutter* and *Fisher* that workplace diversity is important because it generates instrumental benefits comparable to those articulated in the higher education context, such as providing employers with a competitive edge by increasing cultural competence<sup>99</sup> or generating goodwill by reflecting their community's demography.<sup>100</sup>

Between 2003 when *Grutter* was decided and 2014 when the Supreme Court first considered *Fisher*, lower federal courts decided forty-four cases challenging workplace diversity efforts.<sup>101</sup> Employers prevailed in just over half of those cases.<sup>102</sup> However, the table at the end of this Article demonstrates that this average rate of success obscures employers' much greater success defending workplace diversity efforts when they are merely race-conscious but do not explicitly consider race or ethnicity in the decision-making process, than when workplace diversity efforts involve explicit racial or ethnic preferences. Employers were successful in defending the former eighty percent of the time,<sup>103</sup> but, in the latter cases, employers' win rate fell to just fifteen percent.<sup>104</sup> This difference in outcomes is attributable to the different standards of proof that apply, depending on whether or not plaintiffs allege employers explicitly considered race in the decision-making process.

Plaintiffs alleging violations of Title VII most often elect the indirect method of proof,<sup>105</sup> by which the fact-finder must infer that unlawful discrimination motivated the challenged employment action.<sup>106</sup> If plaintiffs elect this indirect method of proof, courts apply the *McDonnell*

97. See *id.* at 2472–73.

98. See, e.g., *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

99. See *Bissett v. Beau Rivage Resorts Inc.*, 442 F. App'x 148, 152–53 (5th Cir. 2011); *Roy v. Soar Corp.*, No. 13-2846, 2014 WL 4209549 (E.D. Pa. Aug. 25, 2014).

100. See *Musa v. Soar Corp.*, No. 13-2847, 2014 WL 6809019 (E.D. Pa. Dec. 1, 2014).

101. For a full explanation of the methodology behind this research and analysis, see *Hawkins*, *supra* note 4, at 2467–68 n.50.

102. See *infra* Table 1.

103. Employers succeeded in nineteen out of twenty-four cases adjudicating diversity plans that were race-conscious but did not involve explicit consideration of race or ethnicity. *Id.*

104. Employers won just three of twenty cases in which diversity plans used explicit racial or ethnic preferences. *Id.*

105. A plaintiff may also proceed with the direct method of proof. See *Sinio v. McDonald's Corp.*, No. 04 C 4161, 2007 WL 869553, at \*7 (N.D. Ill. Mar. 19, 2007) (“The direct method of proving unlawful discrimination requires that the plaintiff offer evidence [that] . . . if believed, proves that the employer's actions were motivated by discriminatory intent without reliance on inference or presumption.”).

106. *DeBiasi v. Charter Cty. of Wayne*, 537 F. Supp. 2d 903, 921 (E.D. Mich. 2008).

*Douglas Corp. v. Green* burden-shifting framework, which proceeds in three stages.<sup>107</sup> First, the plaintiff-employee must minimally establish a prima facie showing of discrimination.<sup>108</sup> The burden of production (but not of persuasion) then shifts to the defendant-employer to offer some legitimate, nondiscriminatory reason for the challenged action.<sup>109</sup> Finally, the burden shifts back to the plaintiff-employee, who must ultimately persuade the trier of fact that unlawful discrimination more likely than not motivated the challenged decision.<sup>110</sup>

If at the second stage the employer does not dispute that the employment decision was based at least in part on race or ethnicity, but instead asserts that the action was taken to balance the racial and/or ethnic composition of the workforce, rather than proceeding to the third step of *McDonnell Douglas*, the employer must instead prove that it operated pursuant to a valid affirmative action plan (AAP) by meeting the *United Steelworkers of America v. Weber* standard.<sup>111</sup> Under *Weber*, employers may consider race/ethnicity in employment decisions, but they must first prove that doing so is necessary to remedy a “manifest racial imbalance” in the workforce.<sup>112</sup> Additionally, employers must demonstrate that any racial or ethnic preferences used do not “unnecessarily trammel the interests of the [nonminority] employees.”<sup>113</sup> *Weber* establishes a high burden of proof for employers.

As the table at the end of this Article demonstrates, in the majority of cases in which employers conceded their use of racial or ethnic preferences as a part of workplace diversity efforts, more often than

107. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

108. See *id.* Plaintiff employees need only offer evidence that (1) they are members of a protected class; (2) they were qualified for the position sought (in the case of failure to hire or promote), or met the employer’s legitimate expectations (in the case of termination or discipline); and (3) the employer treated similarly situated employees differently or took adverse action under circumstances giving rise to an inference of discrimination. *Id.* In the case of some reverse discrimination claims, rather than prove membership in a protected class, plaintiffs must instead prove that background circumstances demonstrate the employer discriminated against the majority. However, only some jurisdictions require that reverse discrimination plaintiffs demonstrate “background circumstances” to establish a prima facie case. See Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1065–71 (2004) (discussing origins of the “background circumstances” requirement and its adoption and rejection by courts).

109. *McDonnell Douglas*, 411 U.S. at 802–03.

110. *Id.* at 807.

111. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

112. *Id.* at 198–99.

113. *Id.* at 208. The *Weber* standard is analogous to the equal protection strict scrutiny standard applicable to race-conscious action, and courts often treat such claims arising under both Title VII and equal protection the same. See, e.g., *Murray v. Vill. of Hazel Crest*, No. 06 C 1372, 2011 WL 382694, at \*2 (N.D. Ill. Jan. 31, 2011) (“[T]he standards for proving discrimination that apply to Title VII are essentially the same as those applicable to [equal protection] employment discrimination claims.”).

not they were treated as AAPs and subjected to the *Weber* standard.<sup>114</sup> However, if employers' workplace diversity efforts did not involve any explicit consideration of race or ethnicity, and they were able to proffer some "legitimate, non-discriminatory reason" for the challenged action, employers were overwhelmingly successful in defending these diversity efforts under the *McDonnell Douglas* standard.<sup>115</sup>

Employers have been most successful in defending workplace diversity efforts in two types of cases. First, federal courts have consistently held that race-conscious diversity efforts—such as targeted or expanded recruitment, or mere diversity goals—are not per se unlawful even when, and most often precisely because, they can be justified by legitimate business concerns.<sup>116</sup> In cases where plaintiffs point only to employer commitments to workplace diversity generally, without offering discrete evidence that race or ethnicity was considered in making the challenged employment decision, courts have found this insufficient to satisfy even the minimal burden of establishing a prima facie case of discrimination at the first stage of *McDonnell Douglas*.<sup>117</sup> At the second stage of *McDonnell Douglas*, federal courts have been unwilling to second-guess employer proffers that racial or ethnic minorities hired or promoted through workplace diversity efforts were selected for their qualifications, not because of their race or ethnicity.<sup>118</sup>

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114. See, e.g., *Humphries v. Pulaski Cty. Special Sch. Dist.*, 580 F.3d 688 (8th Cir. 2009); *Dean v. Shreveport*, 438 F.3d 448 (5th Cir. 2006); *Frank v. Xerox*, 347 F.3d 130 (5th Cir. 2003); *Finch v. City of Indianapolis*, 886 F. Supp. 2d 945 (S.D. Ind. 2012). *But cf.* *Shea v. Kerry*, 796 F.3d 42, 46 (D.C. Cir. 2015) (affirmative action plan satisfied *Weber* by resting on adequate remedial predicate); *United States v. City of New York*, 308 F.R.D. 53, 66 (E.D.N.Y. 2015) (race-conscious remedies justified by an indisputably "long history of discrimination").

115. Additional cases decided since this study continue to show the same general pattern, with courts typically sustaining diversity efforts against challenge, absent evidence of explicit racial or ethnic preferences. *Compare Brown v. Del. River Port Auth.*, 10 F. Supp. 3d 556, 566 (D.N.J. 2014) (change in hiring requirements to improve diversity of candidates considered for hire did not support an inference of discrimination), *and Martin v. City of Atlanta*, 579 F. App'x 819, 822–23 (11th Cir. 2014) (affirming judgment for employer because desire to achieve diversity to "roughly mirror the city in which it serves" was insufficient to establish discrimination), *with Locascio v. BBDO Atlanta, Inc.*, 56 F. Supp. 3d 1356, 1360, 1371 (N.D. Ga. 2014) (denying employer's motion to dismiss when plaintiff alleged employer was required to hire based on race rather than qualifications to meet diversity goals), *and Blakely v. Big Lots Stores, Inc.*, No. 2:10 CV 342, 2014 WL 4261239, at \*2, \*16 (N.D. Ind. Aug. 28, 2014) (allowing discrimination claim to proceed to trial when plaintiff alleged termination for refusing to hire white employees instead of black employees to racially balance staff).

116. See, e.g., *Mlynczak v. Boldman*, 442 F.3d 1050 (7th Cir. 2006); *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005); *Keating v. Paulson*, No. 96 C 3817, 2007 WL 3231437 (N.D. Ill. Oct. 25, 2007); *Groesch v. City of Springfield*, No. 04-3162, 2006 WL 3842085 (C.D. Ill. Dec. 29, 2006); *Rogers v. Haley*, 421 F. Supp. 2d 1361 (N.D. Ala. 2006).

117. See, e.g., *Coppinger v. Walmart Stores, Inc.*, No. 3:07cv458/MCR/MD, 2009 WL 3163211 (N. D. Fla. Sept. 30, 2009); *Jones v. Bernake*, 493 F. Supp. 2d 18 (D.D.C. 2007).

118. See *Plumb v. Potter*, 212 F. App'x 472 (6th Cir. 2007); *Maples v. City of Columbia*, No. 3:07-3568-CMC-JRM, 2009 WL 483818, at \*6 n.6 (D.S.C. Feb. 23, 2009) (granting

### B. *The Prevailing Title VII Law of Diversity*

Federal courts have long declared that in deciding Title VII cases, they will not “sit as a super personnel agency,” second-guessing employers’ managerial prerogatives.<sup>119</sup> Although the source of this judicial deference differs across the educational and employment contexts, the effect is the same. Courts have accorded equivalent deference to employers in valuing workplace diversity as they have to universities pursuing student body diversity. This should not be surprising, given the interest colleges and universities espoused in better preparing students for work, and the Supreme Court’s express citation to these corporate amicus briefs when approving the diversity interest in *Grutter*.<sup>120</sup>

Moreover, workplace diversity efforts differ from RCAPs under *Grutter* and even traditional, remedial AAPs under *Weber* in how explicitly they consider race.<sup>121</sup> Workplace diversity efforts are race-conscious but do not (or should not) involve explicit racial or ethnic preferences. As the example above illustrates, workplace diversity efforts are characterized by individual, subjective hiring decisions based on an applicant’s ability to serve the employer’s legitimate diversity interests. They involve neither the mechanical uses of race *Gratz* rejected, nor the kind of racial balancing frequently struck down under *Weber*.<sup>122</sup> Rather than using race or ethnicity as a proxy for an applicant’s ability to contribute to diversity, as asserted in the admissions context, employers can assess each applicant’s individual contribution to workplace diversity.<sup>123</sup> This difference arguably makes workplace diversity efforts less vulnerable to legal challenge than many RCAPs have been.

## IV. Post-Fisher Predictions

Predicting the future of Supreme Court jurisprudence is always difficult, and wisdom cautions prudence. Nevertheless, in the wake of *Fisher*, and in light of the significant number of lower court cases adjudicating workplace diversity efforts decided since *Grutter*, it is possible

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summary judgment to employer because decision about qualifications “remains vested in the sound business judgment of the employer” and, even when combined with employer’s comments about diversity, does not prove discrimination) (citations omitted); *Coppinger*, 2009 WL 3163211, at \*8 (“[T]he fact that an employer based a hiring decision on purely subjective criteria will rarely, if ever, prove [discrimination] under Title VII.”) (citation omitted); *DeBiasi v. Charter Cty. of Wayne*, 537 F. Supp. 2d 903 (E.D. Mich. 2008); *Jones*, 493 F. Supp. 2d 18; *Keating*, 2007 WL 3231437.

119. See, e.g., *Johnson v. Metro. Gov’t of Nashville*, 502 F. App’x 523, 539 (6th Cir. 2012) (The Court “do[es] not act as a super personnel department overseeing and second-guessing employer’s business decisions . . .”) (internal quotations omitted).

120. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

121. For a fuller discussion of the difference between affirmative action plans (AAPs) and workplace diversity efforts, see Hawkins, *supra* note 73, at 90.

122. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 280 (2003).

123. Cf. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (diversity “takes many forms” in the Court’s view).

to offer some renewed predictions about the future of the diversity doctrine and its likely application in employment.

### A. Renewed Predictions Post-Fisher

#### 1. Deferring to Employers

In *Grutter*, *Gratz*, and *Fisher*, the Supreme Court demonstrated its willingness to defer to universities' asserted interest in pursuing student body diversity and to recognize that interest as presumptively legitimate.<sup>124</sup> The same will likely be true of workplace diversity efforts,<sup>125</sup> particularly in light of federal courts' traditional reluctance to "second guess" employers' personnel decisions.

#### 2. The Legitimacy of Workplace Diversity

Businesses voiced their support for the educational benefits of student body diversity in their amicus briefs in *Grutter* precisely because they were already convinced of diversity's value in the workplace.<sup>126</sup> Justice O'Connor cited to these corporate amici when describing workplace benefits as "not theoretical but real."<sup>127</sup> Unsurprisingly, after *Grutter*, a number of federal courts recognized employers' interest in workplace diversity as legitimate.<sup>128</sup> In fact, most federal courts that have addressed the issue have refused to find that merely having a workplace diversity program, or professing a commitment to diversity, is sufficient to prove Title VII discrimination.<sup>129</sup> They have instead said that diversity is a "worthy goal" and "admirable" for employers to pursue.<sup>130</sup> This suggests the Supreme Court is likely to find workplace diversity as legitimate as the pursuit of student body diversity.<sup>131</sup> Success or failure in future cases will instead depend on how diversity is pursued. Employers, just like colleges and universities, will need to satisfy their evidentiary burden of proving that race is not being used improperly even in pursuit of diversity.

#### 3. Race-Conscious Without Racial Preferences

Synthesizing the Supreme Court's diversity doctrine from *Grutter* through *Fisher*, in the equal protection context public employers must

124. *Id.* at 2214–15.

125. *See supra* note 119 and accompanying text.

126. Business support for workplace diversity efforts is overwhelming. Although these efforts began as early as the 1970s, they became widespread in the early 1990s. *See Hawkins, supra* note 73, at 84 (proliferation of corporate diversity efforts following settlement of "megacases" of racial discrimination in the early 1990s).

127. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Justice O'Connor acknowledged that the interest in student body diversity was compelling in part because diversity "better prepares students for an increasingly diverse workforce and society." *Id.* (citation omitted).

128. *See supra* note 116 and accompanying text.

129. *See supra* note 117 and accompanying text.

130. *See supra* note 117 and accompanying text.

131. This outcome has become less certain now that Justice Kennedy, who authored the *Fisher II* decision, has been replaced on the Court by Justice Kavanaugh.

ensure they factor race into employment decisions in an appropriately narrow way. They should first investigate race-neutral alternatives and, only after showing that such alternatives are unlikely to succeed in achieving workplace diversity, should they use race in making employment decisions, and then only in an individualized and flexible way. This will prevent race/ethnicity from becoming overly determinative in the decision-making process in ways that proved fatal in both *Gratz* and *Parents Involved*. Title VII cases suggest that private employers are well-advised to ensure that diversity plans do not involve the type of explicit racial or ethnic preferences typical of AAPs. It may well be that there is greater latitude for the explicit consideration of race or ethnicity in public employment than in private employment.<sup>132</sup>

Examples of defensible race-conscious workplace diversity efforts include targeted recruitment, employee affinity groups, and adoption of diversity goals. These efforts recognize the value of racial diversity in the workplace, but do not involve explicit racial preferences. By contrast, examples of explicit racial preferences include attempts to racially balance the workforce and insisting that certain positions be filled based on race or ethnicity. When employers use explicit racial preferences, courts are inclined to treat these efforts as AAPs, as some scholars predicted they would, even if the employer justifies them in part by concerns for diversity, and these efforts rarely have been sustained when challenged.<sup>133</sup>

Similar to college admissions, race should not be the determinative factor in employment decisions.<sup>134</sup> Race should not be used as a proxy for diversity given the discrete and subjective nature of most employment decisions. When employers evaluate each individual candidate for the ability to contribute to workplace diversity, courts will be less likely to “second guess” these decisions.<sup>135</sup> Applying these standards, case law suggests employers will likely be just as successful defending workplace diversity efforts against legal challenges as colleges and universities have been defending RCAPs.

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132. This possibility was also raised in the scholarly predictions made in the wake of *Grutter*. See Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451, 461 (2004). Although private employers are never subject to equal protection, public employers are subject to both equal protection and Title VII.

133. See Hawkins, *supra* note 4, at 2472.

134. This is true of narrow tailoring standards under the Supreme Court’s diversity doctrine and is equally true of prevailing Title VII standards as applied to workplace diversity efforts. See *supra* note 114 and accompanying text.

135. For example, when employers assert that candidates are chosen on the basis of individual merit, rather than simply on the basis of race, lower federal courts have overwhelmingly found employment decisions defensible under Title VII, even if the decision is motivated in part by diversity considerations. See *supra* note 119 and accompanying text.

## B. Guiding Principles

The Supreme Court's diversity doctrine may well have settled the normative question of diversity's importance, but the empirical question of whether and how long race may be considered in pursuing diversity remains highly contested. The Court's continuing aspiration for constitutional colorblindness suggests that, at some point, consideration of race will likely be proscribed regardless of reason or context. Employers should recognize these limitations in the Court's diversity doctrine and proceed with caution.<sup>136</sup>

Two principles should guide employers' workplace diversity efforts. First, employers should be mindful of the difference, both practical and legal, between race-conscious efforts and explicit racial or ethnic preferences. This difference may prove critical to defending workplace diversity efforts. Rather than relying on explicit racial or ethnic preferences to achieve diversity goals, employers should consider whether race-conscious efforts would suffice, or even prove superior, in realizing diversity's instrumental benefits. For instance, employers should not assume that race or ethnicity is a suitable proxy for cultural competence, particularly if the selection process allows for individualized assessment. While employers may aspire to diversity in hiring and even recruit diverse applicants, employers should not expressly rest employment decisions on the race or ethnicity of applicants.

Second, with the normative value of diversity well-established, future cases will likely focus on empirical support for considering race or ethnicity in the particular context. Just as Justice Kennedy warned the University of Texas in *Fisher*, employers should take care to marshal the evidence required to demonstrate either (1) that their efforts are race-conscious without involving explicit racial or ethnic preferences; or (2) that racial and ethnic preferences are necessary to achieve diversity's benefits.<sup>137</sup> Perhaps most important, potential defendants must be prepared to demonstrate that their use of racial or ethnic preferences has some end in sight.

## Conclusion

The Supreme Court has recognized that diversity is a constitutionally compelling interest in education. Numerous lower federal courts have extended this recognition to the workplace, and it seems

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136. This is perhaps more true today given the Court's new composition and is predicted shift even further to the right. See Phillip Bump, *How Brett Kavanaugh Would Shift the Supreme Court to the Right*, WASH. POST (July 10, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/07/10/how-brett-kavanaugh-would-shift-the-supreme-court-to-the-right/?utm\\_term=.323a52517c70](https://www.washingtonpost.com/news/politics/wp/2018/07/10/how-brett-kavanaugh-would-shift-the-supreme-court-to-the-right/?utm_term=.323a52517c70).

137. Explicit consideration of race or ethnicity by public employers may be more defensible than in the private employment context. See *supra* note 133 and accompanying text.

likely the Supreme Court will endorse this judicial extension of the normative value of diversity in our increasingly multicultural society. Reviewing the diversity doctrine in the educational context offers an important window into how the Supreme Court might decide a future case challenging workplace diversity efforts. Not only is the Court likely to approve diversity in employment, it is also likely to impose the same limitations on workplace diversity efforts that it has imposed on RCAPs. Taking cues from the decided cases, colleges, universities, and employers alike now have critical insight into how best to structure their diversity efforts in the future to ensure they achieve the instrumental benefits of diversity while also insulating themselves from legal liability.

**Outcomes of Federal Cases Challenging Workplace Diversity**

	Plaintiff	Defendant	Mixed
Favorable Decision	19	22	3
Racial/Ethnic Preferences or Affirmative Action Plans	15	3	2
Race-Conscious Only	4	19	1
Direct Evidence	2 (both AAPs)	0	1
<i>McDonnell Douglas</i>	8 (5 AAPs)	18	1
<i>Weber</i>	3	0	1
Other	6	4	3

