THE DEATH OF DIVERSITY? AFFIRMATIVE ACTION IN THE WORKPLACE AFTER *PARENTS INVOLVED*

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I. INTRODUCTION

Soon after the Supreme Court of the United States handed down its "bitterly divided"[1] ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*,[2] news outlets launched debates about what the decision meant for the future of integration in public schools and the legacy of *Brown v. Board of Education*.[3] Less debated in the mainstream media is the effect that *Parents Involved* will have in the realm of employment law. While it may seem to be a tremendous leap to equate a ruling about education to the entirely distinct field of employment, a closer look at both jurisprudence and scholarly literature reveals that courts have often treated employers and educators with a similar level of deference.[4] After the Court's landmark decision in *Grutter v. Bollinger*,[5] scholars in the field of employment law

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[1] Jess Bravin & Daniel Golden, *Court Limits How Districts Integrate Schools—Race-Based Policy Ban Augurs Broad Changes; Clash Over Brown Case*, WALL ST. J., June 29, 2007, at A1.

[2] 127 S. Ct. 2738 (2007).

[3] *See, e.g.*, Robert Barnes, *Divided Court Limits Use of Race by School Districts*, WASH. POST, June 29, 2007, at A01; Bravin & Golden, *supra* note 1; Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race In Integration Plans*, N.Y. TIMES, June 29, 2007, at A1.

[4] Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of* Grutter*?*, 92 KY. L.J. 263, 270–71 (2003).

[5] 539 U.S. 306 (2004).

published a multitude of works[6] analyzing the probable effect of *Grutter* on affirmative-action programs in the workplace, both in the public sector, which is governed by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and in the private sector,[7] which is governed by Title VII of the Civil Rights Act of 1964.[8] While *Parents Involved* did not change the meaning of *Grutter* per se, it did explicitly limit the reach of *Grutter*'s holding to higher education.[9] Thus, *Parents Involved* potentially put in jeopardy the scholarly arguments and modes of legal interpretation that rested on *Grutter*'s foundation. The question arises: how did *Parents Involved* change the way scholars and courts must view workplace affirmative-action programs?

Both Title VII and the Equal Protection Clause prohibit racial discrimination, but they are not interpreted to impose the same restrictions. Title VII has long been interpreted to allow employers to engage in affirmative action not only to remedy their own past discrimination but also to open opportunities and to remedy racial imbalances in their workforce.[10] Equal protection has not afforded employers the same opportunities or, at least, has not done so as clearly as Title VII. Thus, Title VII is often described as being "more permissive" than the Equal Protection Clause when it comes to allowing employers to consider race in their employment decisions.[11]

Prior to *Parents Involved*, the distinctions between Title VII and the Equal Protection Clause played out in the form of two arguments

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[6] *See, e.g.*, Lorin J. Lapidus, *Diversity's Divergence: A Post-*Grutter *Examination of Racial Preferences in Public Employment*, 28 W. NEW ENG. L. REV. 199 (2006); Ronald Turner, Grutter*, The Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199 (2005); White, *supra* note 4.

[7] Employees can sue both private and public employers for violations of Title VII. *See* White, *supra* note 4, at 265. Typically, however, employees bring suits against public employers under the Equal Protection Clause of the Fourteenth Amendment. Stephen J. Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. U. L. REV. 93, 99–103 (1985) (describing the substantive differences between Title VII and 42 U.S.C. § 1983—the vehicle for bringing suit against the government for violation of constitutional rights, such as the Fourteenth Amendment— and explaining why some claimants might prefer the constitutional route). Thus, this Comment will refer to Title VII actions as those against "private" employers because those are the type of employers frequently sued under the statute.

[8] 42 U.S.C. § 2000e to 2000e-17 (2006).

[9] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2753 (2007) ("The specific interest found compelling in *Grutter* was student body diversity in the context of higher education.") (internal quotation marks omitted).

[10] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 203–07 (1979).

[11] *See, e.g.*, Eric A. Tilles, Casenote, *Lessons from* Bakke*: The Effect of* Grutter *on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451, 462–63 (2004).

in favor of diversity as a valid justification for affirmative action. The "parity" argument, which is the primary focus of this Comment, essentially claims that if diversity could be considered a compelling justification for workplace affirmative action in the public realm, especially after *Grutter*, then it should necessarily be considered a valid reason under Title VII.[12] That argument was significantly undermined by the decision in *Parents Involved*, but it may still find some support in Justice Kennedy's controlling concurrence. On the other hand, the "statutory" argument contends that the justification for diversity and affirmative action lies within the text and legislative history of Title VII itself.[13] While that argument receives significantly less attention, it may nonetheless be vitally important to the survival of diversity as a basis for affirmative action in employment because of both the *Parents Involved* decision and the current makeup of the Court.

The subject of this Comment is academically significant not only because of the freshness of *Parents Involved*, which has been a controversial decision that will produce a multitude of scholarly works, but also because *Parents Involved* seemingly undermines the current state of legal analysis in the realm of diversity and affirmative action in the workplace. The "parity" theory in favor of diversity in the workplace appears to hinge almost completely on Justice Kennedy's concurrence, and even there its survival is debatable. As for the "statutory" theory, the Court's recent history of narrow statutory interpretation makes the chances of success less likely, although the pro-business nature of the Court leaves some room for debate if employers could devise sufficient business justifications for diversity in the workplace.

Part II of this Comment discusses the history of Title VII jurisprudence to emphasize the greater deference historically granted to employers under Title VII as opposed to the Equal Protection Clause. Part II also analyzes the decision of the U.S. Court of Appeals for the Third Circuit decision in *Taxman v. Board of Education*,[14] a pre-*Grutter* decision, which held that, despite the broader range of permissible behavior sanctioned under Title VII's "remedial" concept, Title VII did not permit race-based employment decisions designed to promote diversity.[15] Part III provides analysis of the *Parents Involved* decision and specifically focuses on the definition of "diversity" as a compelling interest and its future application to employment cases. Part

[12] *See id.*

[13] *See* White, *supra* note 4, at 275.

[14] 91 F.3d 1547 (3d Cir. 1996).

[15] *Id.* at 1558 ("Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation.").

III also discusses the ways in which scholarly arguments about *Grutter* and Title VII are no longer as persuasive after *Parents Involved*. Finally, Part III inquires whether diversity can ever be used to justify affirmative action in employment in a way that would not violate Title VII.

II. CONTEXT OF THE DEBATE

While both Title VII and the Equal Protection Clause prohibit employment discrimination, they are not interpreted to impose the same restrictions. Courts are generally less stringent when interpreting Title VII, particularly with regard to the only court-approved justification for affirmative action in the work place—remedying prior discrimination.[16] Unlike its meaning under the Equal Protection Clause, the "remedial justification" for affirmative action under Title VII can extend beyond remedying prior discrimination at the specific workplace in question to remedying a more general "discrepancy" of the minority group in the workforce. Equal protection has not extended the meaning of "remedial" to such lengths or, at least, has not done so as clearly.

A. An Overview of Title VII Jurisprudence

The history of the Supreme Court's evaluation of affirmative-action programs under Title VII is relatively brief. The Court decided two cases, *United Steelworkers of America v. Weber*[17] and *Johnson v. Transportation Agency*,[18] which form the substance of American affirmative-action jurisprudence within the private sector as governed by Title VII. *Johnson*, the more recent of the two, was decided twenty years ago, and though there have been significant developments in other areas of race-conscious jurisprudence,[19] the Court has yet to offer any additional specific guidance to lower courts evaluating the validity of workplace affirmative-action programs under Title VII. Furthermore, while *Weber* and *Johnson* offer some bright-line rules for evaluating the statutory validity of workplace affirmative-action programs, the cases do not establish exclusive guidelines for what type of

[16] *See* Johnson v. Transp. Agency, 480 U.S. 616, 640 (1987) (holding an affirmative-action program statutorily valid even though it was intended not to remedy specific instances of past discrimination but instead to address a more general "conspicuous imbalance" of female and minority employees to white male employees in the field).

[17] 443 U.S. 193 (1979).

[18] 480 U.S. 616 (1987).

[19] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

rationale can be considered a "valid" reason for using a race-conscious program in employment.[20] This lack of exclusivity and guidance left room for scholars to argue over the future of this realm of judicial interpretation, and scholars have done so by often using *Grutter* as a signal of a more expansive approach on the part of the courts.[21]

1. *United Steelworkers of America v. Weber*

Weber was significant because it was the first Supreme Court case to address whether a workplace affirmative-action program was permissible under Title VII.[22] The case involved a group of white males who sued their union and employer for a violation of Title VII after they were not granted admission into a workplace training program for skilled craft workers even though they were technically more qualified than the black workers selected.[23] The union and employer adopted a plan that required fifty percent of the seats in the training program to go to black workers until such time as the number of black workers at the plant was proportional to the number of black workers in the workforce.[24] At issue was whether Title VII forbade private employers and unions from enacting voluntary race-based "bona fide" affirmative-action programs.[25] The Court held that Title VII did not forbid private employers and unions from adopting such plans.[26]

The plaintiffs challenged the program under 42 U.S.C. § 2000e-2(a),[27] which makes it unlawful for an employer to discriminate

[20] *See* White, *supra* note 4, at 274 ("Neither *Weber* nor *Johnson* categorically holds that affirmative action must be remedially-based to be statutorily permissible.").

[21] *See infra* Part III.A (describing post-*Grutter* scholarship in this area).

[22] Richard N. Appel, Alison L. Gray & Nilufer Loy, *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 561 (2005).

[23] *Weber*, 443 U.S. at 198–200.

[24] *Id.* at 199.

[25] *Id.* at 200.

[26] *Id.* at 208.

[27] 42 U.S.C. § 2000e-2(a) (2006). The statute states the following:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

against employees based on certain characteristics, such as race, sex, and ethnicity.[28] The Court refused to construe Title VII literally, which would have strictly prohibited even "beneficial" discrimination (such as affirmative action), and instead interpreted Title VII in accordance with the Court's understanding of legislative intent as expressed through the legislative history of the Civil Rights Act, with specific focus on Title VII.[29] The Court found that Congress intended Title VII to remedy racial discrimination in the workplace and that Congress intended to do so by encouraging private industry to take its own action (or, at least, not discouraging the industry from taking action).[30]

To ensure that employers did not abuse the seemingly broad discretion that the Court had given them to formulate affirmative-action programs, the Court developed a two-pronged analysis that focuses on congressional intent and the interests of white employees, which has subsequently been utilized by employers and courts in determining the legality of affirmative-action plans under Title VII.[31] First, the Court noted that the plan at issue mirrored the intent of Congress because its express purpose was to "break down old patterns of racial segregation and hierarchy."[32] In this case, though the specific labor union had not admitted to racially discriminatory practices, the Court recognized that black skilled craftworkers had "long been excluded from craft unions" in the labor force.[33] Thus, the Court held the voluntary program was justified because it was designed "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[34]

Second, the Court held that the plan did not "unnecessarily trammel" the interests of white employees.[35] It neither required the discharge of white workers and their replacement with new black hires nor created an absolute bar to the advancement of white employees.[36] Additionally, the Court opined that the plan was a "temporary measure"[37] designed to end as soon as the percentage of black

Id.

[28] *Weber*, 443 U.S. at 199–200.

[29] *Id.* at 201–08.

[30] *Id.* at 204–08.

[31] *Id.* at 208.

[32] *Id.*

[33] *Id.* at 198.

[34] *Weber*, 443 U.S. at 208 (internal quotation marks omitted).

[35] *Id.*

[36] *Id.*

[37] *Id.*

skilled craftworkers was roughly equal to the percentage of blacks in the local labor force.[38] Therefore, the Court concluded, private employers could enact voluntary affirmative-action plans if those plans met the requirements that *Weber* set forth.

2. *Johnson v. Transportation Agency*

In *Johnson*, the Court set forth additional guidelines enhancing the *Weber* Court's interpretation of permissible affirmative-action measures.[39] The issue in *Johnson* was whether an affirmative-action program that resulted in the hiring of a woman over an equally or better-qualified man violated Title VII.[40] The Court found that program to be legally valid. The *Johnson* Court established factors for determining both *when* it was appropriate for an employer to enact an affirmative-action program and *what type* of program was acceptable.[41] In addition to the more "traditional" remedial justification expressed by the employer in *Weber*, in which the employer used racial considerations to remedy its own specific instances of discrimination, the *Johnson* Court held that it was appropriate for an employer to adopt an affirmative-action program if the employer could identify a "conspicuous imbalance" in job categories traditionally segregated by race and sex.[42] Thus, the employer need not prove that there was any actual discrimination exhibited by the employer against blacks or women; the employer need merely prove that an imbalance existed.[43]

Additionally, the Court concluded that once an employer can justify the need for an affirmative-action plan, the plan needs to meet certain requirements. Primarily, the employer must demonstrate that the plan "represents a . . . flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women" in the workplace.[44] Therefore, employment decisions cannot be justified solely by reference to the imbalance but must rest on "a multitude of practical, realistic factors."[45] This focus on an individualized

[38] *Id.* at 208–09.

[39] *See* Appel, Gray & Loy, *supra* note 22, at 562–63.

[40] Johnson v. Transp. Agency, 480 U.S. 616, 619 (1987).

[41] *Johnson*, 480 U.S. at 640–41.

[42] *Id.* at 640.

[43] *Id.* at 630.

[44] *Id.* at 642.

[45] *Id.* at 640–41. Those factors include

> commit[ment] . . . to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. [It] earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position .

plan that considers race or gender as just one of many factors may seem familiar because it is similar to the type of race-conscious college admissions plan advocated by Justice Powell in his *Regents of University of California v. Bakke* opinion.[46] In fact, the *Johnson* Court cited *Bakke* with approval in that regard, stating that "[t]he Plan [at issue] thus resembles the 'Harvard Plan' approvingly noted by Justice Powell in *Regents of University of California v. Bakke*, which considers race along with other criteria in determining admission to the college."[47]

Thus, although the courts apply different standards for affirmative-action challenges under the Equal Protection Clause of the Fourteenth Amendment and those brought under Title VII, some overlap exists between the rationale used by courts to satisfy strict scrutiny in educational affirmative-action cases and the grounds advocated by the *Johnson* Court as satisfying Title VII affirmative-action considerations.[48] But the corresponding ideas between constitutional strict scrutiny and statutory analysis under Title VII relate only to the *means*. Neither the *Weber* Court nor the *Johnson* Court purported to adopt Justice Powell's suggested compelling *end* of diversity and instead restricted the permissible justification for Title VII affirmative action to remedial purposes, albeit the more "expansive" interpretation of "remedial" set forth in *Johnson*, in which an employer could remedy a "conspicuous imbalance."[49] Significantly, however, neither decision established the remedial justification as the *exclusive* rationale for employers seeking to use affirmative-action programs in the workplace.[50] Additionally, the *Johnson* majority suggests that any kind of affirmative action that would be permissible for the government

> . . . [Further], the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.

Id. at 641.

[46] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316–19 (1978).

[47] *Johnson*, 480 U.S. at 638.

[48] In *Bakke*, Justice Powell applied the following standard of strict scrutiny: "[I]n order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *Bakke*, 438 U.S. at 305 (internal quotation marks omitted). While Justice Powell found that the state's interest in promoting diversity in higher education was "constitutionally permissible," he found that the quota system was not necessary to accomplish that goal. *Id.* at 311–15. Instead, Justice Powell suggested individualized considerations of student backgrounds, such as those promulgated in the Harvard Plan, as a constitutionally permissible means of satisfying the compelling end of diversity. *Id.* at 315–17.

[49] *Johnson*, 480 U.S. at 640.

[50] White, *supra* note 4, at 274 ("Neither *Weber* nor *Johnson* categorically holds that affirmative action must be remedially-based to be statutorily permissible.").

under Equal Protection would also be permissible for an employer under Title VII and, thus, indicated that a compelling interest for the sake of strict scrutiny should also satisfy a Title VII inquiry.[51] The Court's statement plays a vital role in the future analysis of the topic.

B. Taxman*: Tightening the Reins*

Using *Johnson*'s broader meaning of "remedial" as a starting point, some employers established affirmative-action programs designed to further initiatives well beyond the traditional remedial context. Specifically, some employers engaged in race-based employment decisions designed to promote diversity,[52] which, prior to *Grutter*, some lower courts concluded that Title VII did not permit. The most significant example of this was a decision by the U.S. Court of Appeals for the Third Circuit in *Taxman v. Board of Education*.[53] While no lower court decided a Title VII case in a manner contrary to *Taxman* after the *Grutter* decision, legal theorists argued that *Grutter* strengthened at least one of the primary arguments for permitting diversity as a justification for racial considerations in the workplace.[54] After *Parents Involved*, those theories may have lost their foundation. Nevertheless, the second theory—that diversity as a permissible justification for affirmative action may be justified by Title VII itself—still remains. Thus, *Taxman* is significant because it clearly lays out the two arguments for allowing diversity to justify workplace affirmative action under Title VII. Additionally, *Taxman*'s importance is bolstered by the fact that current Supreme Court Justice Samuel Alito was one of the Third Circuit judges in the majority.

Sharon Taxman was a white schoolteacher working for the Piscataway Board of Education.[55] Deborah Williams was a black schoolteacher with the same level of seniority, ability, and qualifications as Taxman.[56] When the Board needed to lay off one teacher, it decided to use its affirmative-action policy as a "tiebreaker" between the two equally qualified candidates,[57] and the Board retained Williams be-

[51] *Johnson*, 480 U.S. at 628 n.6 ("[T]he *statutory* prohibition [in Title VII] with which that employer must contend was not intended to extend as far as that of the Constitution.").

[52] *See infra* text accompanying notes 62–66.

[53] 91 F.3d 1547 (3d Cir. 1996) (en banc).

[54] *See infra* notes 92–102 and accompanying text.

[55] *Taxman*, 91 F.3d at 1551.

[56] *Id.*

[57] The policy was used "to provide equal educational opportunity for students and equal employment opportunity for employees and prospective employees, and to make a concentrated effort to attract . . . minority personnel for all positions so

cause she was the only black teacher in the school's Business Department.[58] Taxman filed suit against the Board under Title VII, alleging unlawful discrimination.[59] Because the Board admitted that it used the affirmative-action program in rendering the employment decision, the only issue in the case was whether the program was valid under Title VII.[60]

The court began its analysis by noting the "two primary goals" that Title VII was designed to further: ending discrimination so as to guarantee equal opportunities for employment and remedying the effects of past segregation and underrepresentation of certain minority groups in the workplace.[61] The court derived the statute's purpose from its legislative history and the congressional debates surrounding its enactment.[62] Thus, the court concluded, "unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test."[63] The Board's affirmative-action plan explicitly contained no remedial purpose and instead was designed to ensure that the staff was "culturally diverse."[64] The court found that the Board's policy therefore failed to meet the *Weber* standard, and as a result, the Board violated the terms of Title VII when it invoked the program to fire Taxman.[65] The court performed a strict statutory interpretation of Title VII, and that assessment reflected a narrow reading of the statute and its legislative history. This focus on the language of Title VII was significant because while the issue of whether the statute itself permits diversity as a rationale for affirmative action in the workplace has been the subject of little focus and debate both in the courts and

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that their qualifications c[ould] be evaluated along with other candidates." *Id.* at 1550 (internal quotation marks omitted). The policy applied to "every aspect of employment including . . . layoffs." *Id.* Further, the

> policy did not have any remedial purpose; it was not adopted with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities within the Piscataway Public School System. At all relevant times, Black teachers were neither underrepresented nor underutilized in the Piscataway School District work force.

Id. at 1550–51 (internal quotation marks omitted).

[58] *Id.* at 1551–52.

[59] *Id.* at 1552.

[60] *Id.* at 1556. For an unknown reason, Taxman did not assert an Equal Protection claim. *Id.* at 1552 n.5.

[61] *Taxman*, 91 F.3d at 1557.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1550–52.

[65] *Id.* at 1558.

in academia, it may play a huge role in the future of diversity in workplace affirmative-action programs after *Parents Involved*.

Also significant was the court's rejection of the Board's attempt to use Fourteenth Amendment Equal Protection case law to justify diversity as a purpose that mirrors the intent of Title VII such that it would comprise a valid basis for an affirmative-action program.[66] The court's analysis is important because it addressed a "faulty premise" upon which the Board's argument was based and that many employment scholars invoked after *Grutter* to draw a connection between Equal Protection and Title VII.[67] This "faulty premise" is as follows: since the Supreme Court noted in *Johnson* that "'the statutory prohibition [in Title VII] with which an employer must contend was not intended to extend as far as that of the Constitution[,]'[] . . . a purpose which survives constitutional strict scrutiny necessarily passes muster under Title VII's permissible purpose test."[68]

The Third Circuit had two problems with that argument. First, the Third Circuit noted that the Supreme Court had not held that a purpose that satisfies strict scrutiny must necessarily satisfy Title VII.[69] The court viewed the language from *Johnson* quoted by the Board not as a holding but simply as the majority's response to Justice Scalia's dissent arguing that Title VII is in fact more restrictive than the Constitution.[70] Second, the court rejected the Board's argument that diversity was a compelling interest that satisfied strict scrutiny.[71] It dismissed the Board's reliance on *Bakke*, finding that "*Bakke*'s factual and legal setting, as well as the diversity that universities aspire to in their student bodies, are . . . different from the facts, relevant law and the racial diversity purpose involved in this case . . . ."[72]

Upon examining the court's second ground for rejecting the Board's argument, the rationale behind much of the post-*Grutter* scholarship arguing for equating diversity to a valid purpose for Title VII affirmative-action programs becomes evident. *Grutter* meant that, at last, a clear majority of the Court was validating diversity as a compelling interest that survived strict scrutiny.[73] Scholars argued that

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[66] *Id.* at 1559.

[67] *See, e.g.*, White, *supra* note 4.

[68] *Taxman*, 91 F.3d at 1559.

[69] *Id.* at 1560.

[70] *Id.* at 1560–61.

[71] *Id.* at 1560.

[72] *Id.* at 1562.

[73] The Court's decision validated an even broader concept of diversity than the First Amendment academic-freedom diversity suggested by Justice Powell in *Bakke*. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (describing academic-

Grutter expanded upon what the majority in *Johnson* suggested—that Title VII necessarily reaches *at least* as far as the Constitution, if not further—and, with *Grutter* as good law, scholars contended that diversity as the primary purpose behind a private affirmative-action program might be legal under Title VII.[74] The Court, however, has not reconciled Title VII and the Constitution, and *Parents Involved* likely stripped away the arguments for diversity in the workplace almost as quickly as they had arisen from *Grutter*.

III. DIVERSITY'S EVOLUTION

A. Grutter *and Title VII: Shaping Legal Analysis*

After the Court's decision in *Grutter*, scholars in the field of employment law jumped at the chance to analyze the Court's first opinion in more than twenty years about racial-preference programs in education.[75] What made *Grutter* more significant than other recent racial-preference cases related to employment was its compelling-interest rationale.[76] For the first time, a majority of the Court held that higher-education institutions had a compelling interest in achieving diversity on campus.[77] That was significant because the decision signaled a break from the "remedial paradigm" of race-conscious selection programs and permitted institutions to consider

freedom diversity). That is why *Grutter* was extraordinarily significant for the purposes of analyzing diversity in the workplace.

[74] *See, e.g.*, Tilles, *supra* note 11, at 463–64.

[75] The last case to discuss racial-preference programs in higher education was *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[76] Past employment discrimination decisions did not seem to support the idea that diversity could ever constitute a compelling governmental interest such that it could survive strict scrutiny; in fact, the decisions barely embraced the constitutionality of affirmative action for remedial purposes. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (stating that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (holding that the city "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race"). In *Adarand*, however, Justice O'Connor did not completely rule out the government's ability to demonstrate that it had a compelling interest for instituting diversity-based affirmative-action programs. *Adarand*, 515 U.S. at 237 (opining that strict scrutiny analysis is not "'strict in theory, but fatal in fact' . . . [and] [w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test"). Whether that suggestion expressed the opinion of the Court is unclear because that idea might be deemed inconsistent with Justice Scalia's concurrence and, thus, only the view of the plurality.

[77] Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

race even if there was no evidence of past discrimination at the particular institution.[78] To that end, the Court noted that colleges could use individualized considerations of race and gender, among other characteristics, as a narrowly tailored method of achieving that diversity.[79] The *Grutter* decision was especially important in the realm of employment law because the Court's rationale for finding diversity as a compelling interest was based not only upon Justice Powell's original First Amendment justification in *Bakke*[80] but also on sociological factors that included the American workforce.[81]

A logical connection exists between affirmative action in higher education and affirmative action in the public workplace because both types of programs are subject to judicial strict scrutiny under Equal Protection analysis;[82] thus, scholars discussed at length the potential impact of *Grutter* on public-employment affirmative action.[83] Additionally, the parties arguing in favor of diversity in *Grutter*, as well as Justice O'Connor's opinion, mentioned the need for diversity in the workplace, which made the topic ripe for academic discussion after the *Grutter* decision.[84] An examination of scholarly literature after *Grutter* demonstrates that this argument was the principal one advanced by legal theorists.[85] While many sophisticated and well-

[78] Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2d 215, 216–17 (2004).

[79] *Grutter*, 539 U.S. at 334.

[80] *Bakke*, 438 U.S. at 311–12 (A diverse student body is clearly "a constitutionally permissible goal for an institution of higher education. Academic freedom . . . long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

[81] *Grutter*, 539 U.S. at 330 ("These benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); *see also* Tilles, *supra* note 11, at 458 (classifying the "second" group of interests the Court identified in *Grutter* as "those interests that contribute to society by educating a diverse population"). Tilles further explains that

> [t]he interests identified in the second group, however, go well beyond *Bakke*'s rationale[, as they] . . . are concerned with meeting societal goals, not accommodating academic freedom . . . . The preeminent concern in this second group is the benefit received by *society* by providing an education to a diverse population.

Tilles, *supra* note 11, at 459 (emphasis added).

[82] *See generally* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict scrutiny to Equal Protection inquiries in public employment); *Bakke*, 438 U.S. at 361–62 (applying strict scrutiny to Equal Protection inquiries in higher education).

[83] *See, e.g.*, Lapidus, *supra* note 6; Turner, *supra* note 6; White, *supra* note 4.

[84] Grutter v. Bollinger, 539 U.S. 306, 330–33 (2003).

[85] *See, e.g.*, Lapidus, *supra* note 6; Turner, *supra* note 6; White, *supra* note 4.

respected employment-law academics hypothesized about the impact that *Grutter* would have on both public- and private-employment affirmative-action programs,[86] the few decisions relating to the topic did not quite match most scholars' expectations.[87] Additionally, even if those scholars correctly interpreted the state of legal affairs, *Parents Involved* seems to undermine those legal arguments by distinguishing *Grutter* and narrowing the scope of diversity as a justification for affirmative action in the public-education setting.[88]

Perhaps the most important distinction to keep in mind when analyzing the education decisions through the lens of employment law is the difference in judicial interpretation between public employment challenged under the Equal Protection Clause of the Fourteenth Amendment and private employment challenged under Title VII. The former cases are analyzed using strict scrutiny whereas the latter use the *Weber* test.[89] While all scholars addressed this distinction in their post-*Grutter* affirmative-action analyses, some chose to equate the two to make the analysis more succinct or to suggest a solution to the inherent inconsistencies between the two doctrines.[90] Other scholars argued that it was precisely the difference between the Equal Protection Clause and Title VII that meant *Grutter* would necessarily impact Title VII if it impacted public employment.[91] The latter line of arguments comprises this Part's focus. Essentially, scholars maintained that *if* diversity was considered a compelling interest for enacting race-conscious programs in public employment, diversity should

[86] *See generally* Lapidus, *supra* note 6, at 200 (analyzing the *Grutter* decision's potential impact on the diversity rationale for affirmative action in public employment); Turner, *supra* note 6, at 200 (discussing the prospect of employers "develop[ing] diversity-based justifications for voluntary affirmative action in their workplaces" after the Court's decision in *Grutter*); White, *supra* note 4, at 263 (discussing the extent to which *Grutter* might "affect a public or private employer's ability to voluntarily adopt an affirmative action plan in order to diversify its workforce").

[87] *See* Lomack v. City of Newark, 463 F.3d 303, 309 (3d Cir. 2006) (finding no compelling interest in promoting the "educational benefits" of diversity in a firehouse through a purely race-based reassignment program). *But see* Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2003) (relying very heavily on *Grutter* to find a compelling interest in diversity that justified the police department's use of racial classifications through an affirmative-action program).

[88] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2754 (2007).

[89] *See supra* notes 28–39 and accompanying text.

[90] *See, e.g.*, Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 WM. & MARY L. REV. 1091 (2006).

[91] Tilles, *supra* note 11, at 463.

be a permissible rationale for private employers.[92] Thus, similar to *Taxman*, the analysis was twofold: first, whether, after *Grutter*, courts would find that diversity was a compelling interest in *employment*; second, if diversity satisfied the Constitution, it necessarily meant that diversity could justify affirmative action under Title VII.

The issue of whether Title VII permitted, in private employment, workplace affirmative-action programs that would be permitted in the public sector under constitutional analysis was still debatable,[93] but many scholars argued that *Grutter* lent substance to the argument that diversity would be viewed as a compelling interest in the public sector.[94] That, in turn, made the argument that Title VII should include a diversity rationale more compelling. Some scholars argued that the underpinnings of the Constitution and Title VII were inherently the same and thus should be interpreted accordingly.[95] Specifically, one scholar noted that because Title VII and the Fourteenth Amendment "share a fundamental antidiscrimination and integrationist policy," the interests in diversity by corporate employers mentioned in the *Grutter* decision "remain the same when the legal analysis shifts from constitutional to statutory law."[96] Additionally, because "judicial deference to their decision-making is something educators and employers have in common,"[97] the Court's deference to institutions of higher education with regard to assessments of the need for and benefits of diversity may apply in the workplace.[98]

Still other legal theorists suggested that, although the constitutional and statutory interpretations were not identical, they should be interpreted the same way to resolve the "conflict" between Title VII and Equal Protection jurisprudence that would arise if diversity were held to be compelling in public employment but not the private sector.[99] Building on Justice O'Connor's concurrence in *Johnson*, in which she noted that the analysis under the two claims was essentially

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[92] *See, e.g.*, White, *supra* note 4, at 274.

[93] *Compare* White, *supra* note 4, at 274 ("*Johnson* could be read to suggest [Title VII] will be at least as accommodating as the Constitution.") *with* Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547, 1560 (3d Cir. 1996) ("While the Supreme Court may indeed at some future date hold that an affirmative action purpose that satisfies the Constitution must necessarily satisfy Title VII, it has yet to do so.").

[94] *See, e.g.*, White, *supra* note 4, at 270; Lapidus, *supra* note 6, at 250.

[95] *See, e.g.*, Turner, *supra* note 6, at 233.

[96] *Id.*

[97] White, *supra* note 4, at 271.

[98] Turner, *supra* note 6, at 233.

[99] Tilles, *supra* note 11, at 464.

the same and should be treated as such by the judiciary,[100] one scholar noted that "[i]ncorporating the *Grutter* approach into the Title VII analysis would permit a private employer to adopt an affirmative-action plan if it was able to establish that the affirmative-action plan yielded . . . similar societal good as the affirmative-action plan utilized by the University of Michigan Law School."[101]

Other scholars asserted that, even if diversity was not considered to be a compelling interest for affirmative action in public employment, it could still be considered a legal justification for affirmative action in the private sector.[102] Because *Johnson* permitted employers to institute affirmative-action programs for non-remedial purposes, even if they had not actually discriminated but if instead there was a "conspicuous imbalance" of certain minorities in the workforce, scholars noted that "employers ha[d] more freedom under Title VII to engage in *remedially*-based affirmative action than the [C]onstitution permits . . . . [A] private employer can engage in affirmative action in situations where a public employer, constrained by the Constitution, cannot."[103] That flexibility in the remedial realm, combined with the language in *Johnson* indicating that Title VII was not intended to be as limiting as the Constitution for employers,[104] provided support sufficient to make a reasonable argument that "the statute will be at least as accommodating as the Constitution."[105] Further, some scholars argued that the Court's refusal to limit affirmative action in the public realm under Equal Protection *only* to remedial purposes "suggests it will follow a similar approach in interpreting [Title VII]."[106]

That was the state of legal analysis until the decision in *Parents Involved*. While no court ruled on a Title VII diversity claim between the time the Court decided *Grutter* and *Parents Involved*, a number of courts decided cases challenging diversity as a compelling interest for workplace affirmative action under the Equal Protection Clause, and

[100] Johnson v. Transp. Agency, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring) ("[T]he proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause.").

[101] Tilles, *supra* note 11, at 464.

[102] White, *supra* note 4, at 275.

[103] *Id.* at 273.

[104] *Johnson*, 480 U.S. at 628 n.6 ("[T]he *statutory* prohibition [in Title VII] with which that employer must contend was not intended to extend as far as that of the Constitution.").

[105] White, *supra* note 4, at 274.

[106] *Id.* at 275.

those courts reached mixed results.[107] An analysis of *Parents Involved* will demonstrate that those scholars' arguments were largely undermined but that the statutory argument for using affirmative-action programs to further diversity in the workplace still remains.

B. Parents Involved*: A Case About Employment?*

Much like *Grutter*, *Parents Involved* is clearly not a case about employment law; its explicit application is in the realm of education. Just as *Grutter* did after it was decided in 2003, however, *Parents Involved* adds to the conversation on affirmative action, even in the private sector covered only by Title VII. The case restricts the reasoning of *Grutter*, which had allowed scholars to hypothesize about the expansion of permissible affirmative-action justifications beyond the remedial reasons to the concept of diversity.

In *Parents Involved*, the Court analyzed the constitutionality of two voluntary race-based school-assignment plans under which students were classified by race and the school districts used race as a deciding factor in some instances when determining what school a student would attend.[108] A majority of the Court held that the plans were unconstitutional under strict scrutiny.[109] But a majority of Justices could not reach agreement as to the rationale behind this decision. The Court held that the compelling interest purported to be achieved through the programs was neither remedial in nature[110] nor the diversity-in-higher-education rationale recognized in *Grutter*[111] and that the use of race was not *necessary* to accomplish the goals that the school districts sought to achieve.[112] The disagreement among the Justices was with regard to the most important issues when considering strict scrutiny: compelling interest and narrowly tailored means. For the purposes of this analysis, this Comment focuses only on the former consideration. Specifically, this Comment concentrates on whether *Parents Involved* leaves room for diversity to qualify as a com-

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[107] *See, e.g.*, Lomack v. City of Newark, 463 F.3d 303, 309 (3d Cir. 2006) (holding that diversity is not compelling in the public employment context by using *Grutter* rationale and applying strict-scrutiny analysis under the Equal Protection Clause); Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (holding that diversity is compelling under *Grutter* rationale but applying more of an operational-needs test than a strict *Grutter* analysis).

[108] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007).

[109] *Id.* at 2768.

[110] *Id.* at 2752.

[111] *Id.* at 2754.

[112] *Id.* at 2753–54, 2760.

pelling interest outside of the specific *Grutter* context of higher education.

The analysis of this consideration is further restricted by the lack of discussion of the matter in the plurality opinion, which thus gives no indication of how a majority opinion on this specific issue might rule. The plurality, composed of Chief Justice Roberts and Justices Alito, Thomas, and Scalia, did not consider whether racial diversity in schools was compelling because the Justices found that the *actual* end that each school districts attempted to achieve was racial balancing.[113] The Justices in the plurality found that the school districts' plans were "tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[114] The school districts used percentage ranges to determine whether the racial and ethnic goals in their districts were satisfied by making sure that the percentage of white or black enrollment in schools was within ten percentage points of the average number of whites or blacks living in the community.[115] Thus, the plurality stated that "[i]n design and operation, the plans are directed only to racial balance, pure and simple."[116]

The plurality firmly reiterated that racial balancing was an illegitimate objective that was not compelling for the purposes of strict-scrutiny analysis.[117] The Justices reached that conclusion by examining the means by which the school districts sought to achieve their purported ends of "diversity."[118] The plurality found that "the racial demographics in each district . . . drive the required 'diversity' numbers" and, thus, that the plans "are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits."[119] The plurality suggested that the plans are actually "tailored . . . to the goal . . . of attaining a level of diversity within the schools that approximates the district's overall demographics."[120] Thus, the plurality did not address whether diversity could be a compelling interest if a school district actually strove to accomplish diversity rather than mere racial balancing.

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[113] *Id.* at 2755.
[114] *Parents Involved*, 127 S. Ct. at 2755.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 2755–56.
[120] *Parents Involved*, 127 S. Ct. at 2755–56.

On the other hand, Justice Kennedy's concurrence, which is most likely controlling,[121] acknowledged that diversity *is* a compelling interest for a school district to pursue.[122] Justice Kennedy found the plans at issue to be unconstitutional because of their means, not their purported ends.[123] Justice Kennedy shared the plurality's skepticism that the districts' supposed ends of diversity were the actual ends and that the districts were not just racially balancing under the guise of "diversity."[124] Justice Kennedy, however, acknowledged that, in general, diversity is a compelling interest for a school district to attain.[125] Justice Kennedy asserted that the plurality was "too dismissive" of the government's legitimate interest in "ensuring all people have equal opportunity regardless of their race."[126] He then suggested ways in which school districts can "seek to reach *Brown*'s objective of equal educational opportunity" using "race-conscious measures . . . in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[127] But while Justice Kennedy was willing to acknowledge that diversity can be a compelling interest in certain situations, he was careful to note that racial classification should only be used to achieve this, or any other compelling interest, as a last resort.[128] Justice Kennedy did not elaborate on *why* diversity might be considered compelling in the school context, but he granted the school districts a certain level of deference in accepting the fact that diversity has "educational benefits".[129] He focused more on the means by which a school may achieve this goal.[130] Significantly, he did not address the "social benefits" aspect of diversity to which Justice O'Connor devoted so much of her opinion in *Grutter*.[131]

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[121] *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

[122] *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring).

[123] *Id.* at 2790–91.

[124] *Id.* at 2789–91.

[125] *Id.* at 2789.

[126] *Id.* at 2791.

[127] *Id.* at 2791–92.

[128] *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

[129] *Id.* at 2797.

[130] *Id.* ("What the government is not permitted to do . . . is to classify every student on the basis of race and to assign each of them to schools based on that classification.").

[131] Grutter v. Bollinger, 539 U.S. 306, 330–33 (2003).

Although Justice Kennedy's concurrence preserves the ability of public entities, at least in the field of education, to rely on diversity as a compelling interest in certain situations, that notion is far more limited than it was in *Grutter*. That restraint is most clearly demonstrated by Justice Kennedy's suggestions for narrowly tailored methods that might survive strict scrutiny.[132] Interestingly, he suggested methods that he alleged would not *trigger* strict scrutiny—that is, race-conscious but still race-neutral initiatives.[133] For example, he suggested "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of the neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion."[134] Thus, Justice Kennedy suggested that the executive and legislative branches take a more administrative approach towards achieving the goal of diversity in schools.[135]

The decision in *Parents Involved* indicates that the Court limited the interpretation of diversity expressed in *Grutter*—diversity on campus to promote a diverse society, both at school and beyond—to higher education. The majority specifically notes this point when it states that "[t]he specific interest found compelling in *Grutter* was student body diversity 'in the context of higher education.'"[136] Whether a broader concept of diversity might still apply was not even addressed by the plurality, and although Justice Kennedy confirmed that diversity can be compelling in education outside of colleges and universities, the methods that he suggested towards accomplishing that end are even more restrictive than *Grutter* with regard to the level of racial classification that can be considered. Although the decision

[132] *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

[133] *Id.* ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."). Why those means would not trigger strict scrutiny under *Washington v. Davis*, 426 U.S. 229 (1976), however, is far from clear. *Davis* stands for the proposition that a selection system with an underlying purpose that is discriminatory cannot avoid strict-scrutiny analysis merely because it uses race-neutral means. *Id.* at 241; Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1760 (2001). Professor Adams also notes that "the Equal Protection Clause is violated whenever state action is animated by a discriminatory purpose . . . . From this perspective, the fact that the state has chosen to use 'raceless' means—[such as] a percentage plan—to effectuate discriminatory ends will not insulate it from constitutional challenge." Adams, *supra*, at 1732. Justice Kennedy did not discuss this possibility in his concurrence.

[134] *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

[135] *Id.*

[136] *Id.* at 2753 (plurality opinion).

in *Parents Involved* is far from straightforward in terms of making a clear assertion about the future of diversity, both the plurality's and Justice Kennedy's close, careful analysis of the school district's actual ends, as opposed to accepting the purported ends of diversity at face value, limits diversity as a goal of affirmative-action programs. While diversity is not forever restricted only to the realm of higher education, the message of the plurality, and of Justice Kennedy in particular, is that diversity cannot be a broad term applied to programs in which racial considerations are factors.

The majority in *Parents Involved* was unabashed in its limitation to higher education of *Grutter*'s concept of diversity. The Court suggested that certain "key limitations" in *Grutter*'s "holding—defining a specific type of broad-based diversity and noting the unique context of higher education"—should not be overlooked by lower courts when they attempt to extend "*Grutter* to uphold race-based assignments in elementary and secondary schools."[137] Thus, the majority held that *Grutter* did *not* govern the school-assignment plans at issue and suggested that courts that applied the specific type of diversity referenced in *Grutter* to areas outside of the realm of higher education were simply incorrect.[138]

That narrowing of diversity as a compelling interest compromises the very foundation of many post-*Grutter* arguments for diversity in employment.[139] While Justice Powell's reasoning in *Bakke* stressed diversity for the sake of academic freedom and educational benefit to students,[140] Justice O'Connor's reasoning in *Grutter* emphasized diversity for the sake of society as a whole, including the workplace.[141] *Parents Involved* brought the focus of diversity back to an academic freedom rationale by emphasizing that even if diversity in higher education is compelling for more reasons than just academic freedom, that type of diversity does not extend beyond higher education.[142] Now, it seems that any public employer arguing that diversity was a compelling reason behind an affirmative-action program would

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[137] *Id.* at 2754.

[138] *Id.*

[139] *See, e.g.*, Tilles, *supra* note 11, at 464.

[140] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978).

[141] Grutter v. Bollinger, 539 U.S. 306, 330–33 (2003).

[142] *Parents Involved*, 127 S. Ct. 2738, 2754 (2007) ("In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of 'the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'" (quoting *Grutter*, 539 U.S. at 329)).

be much less likely to succeed, particularly if the employer uses *Grutter*'s sociological reasoning.

This in turn undermines the strongest argument that previously existed for diversity under Title VII—the parity argument. If Title VII and the Constitution are eventually interpreted to impose equivalent requirements, then it is likely that under neither will diversity be a valid reason to impose an affirmative-action program. Thus, after *Parents Involved*, the last remaining argument for diversity as a legal justification for affirmative action in private employment must be that diversity could stand if Title VII is interpreted to permit employers more leeway to promote workplace diversity than the Constitution allows.[143] If Title VII is so interpreted, then diversity, as a legal justification, must be found within the statutory confines of Title VII itself.

C. Diversity in the Workplace?

Parents Involved raises two key questions with regard to diversity and the workplace as governed by Title VII. First, is the argument for "parity" between Title VII and the Equal Protection Clause still plausible? Second, can Title VII still be interpreted statutorily to permit race-based employment decisions promoting diversity even if Equal Protection does not allow such affirmative action? Those are precisely the two grounds that the Board argued in *Taxman*, and the Third Circuit rejected them both.[144] Since the bulk of scholarship and legal analysis on this topic focuses on the former concern, this Comment analyzes the plausibility of the parity argument after *Parents Involved*; however, the arguments seem to overlap since the foundation for both is the same—the Court's interpretation of the statutory text.

If the Court interprets Title VII to grant private employers slightly more freedom than public employers are given under the Constitution, it is possible that diversity can be found to be a valid justification for an affirmative-action program. The Court has already granted the private sector more leeway when it comes to affirmative-action plans involving the remedial justification.[145] The Court could conceivably extend that leniency to include some modicum of diver-

[143] This assumes that the Constitution would not permit diversity in the public workplace at all after *Parents Involved*.

[144] Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547, 1558–59 (3d Cir. 1996).

[145] White, *supra* note 4, at 275 ("[E]ven if diversity is not a compelling state interest . . . , might the statute permit an employer to make employment decisions aimed at achieving racial diversity? [*Johnson*]'s view that the affirmative use of race under the statute was more permissive . . . at least for remedial purposes, suggests the answer is yes.").

sity. Without Justice Kennedy's concurrence in *Parents Involved*, arguing that diversity had a fighting chance in any realm outside higher education would be difficult. Justice Kennedy, however, left the door open ever so slightly for employers to attempt to use diversity to justify racial considerations in the workplace. Early in his concurrence, Justice Kennedy firmly stated that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[146] Thus, Justice Kennedy refused to extinguish the possibility of diversity existing as a valid justification for affirmative action outside of the remedial- and higher-education contexts. Any aspect of the workplace where this will be allowed, however, seemingly will be governed only by Title VII and not by the Constitution.

As demonstrated by the Court's analysis in *Parents Involved*, the Court no longer seems willing to grant substantial deference to entities that claim "diversity" as their compelling interest without inquiring into the substance of what they are *actually* achieving.[147] While the school districts claimed to be striving for diversity for "educational benefits," the plurality closely examined the methodology and determined that, in fact, the schools performed racial balancing.[148] While the Court might be more deferential to employers in the private sector claiming "diversity" as their justification, given the Court's recent restrictive, literal trend in statutory interpretation,[149] *Parents Involved* indicates that the Court more likely will view such a rationale with greater skepticism. This is signified by the unwillingness of both the plurality and Justice Kennedy to take the school districts' diversity rationales at face value.[150] Employers attempting to use the diversity rationale will have to develop persuasive arguments that demonstrate that diversity mirrors the intent of Title VII and that the methods employed to achieve that diversity do not "unnecessarily trammel" the interests of non-minority workers.[151]

After *Grutter*, a number of scholars suggested "goals that may be served by accepting diversity as a justification for affirmative action in

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[146] *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring).

[147] *Id.* at 2758 (plurality opinion) ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").

[148] *Id.* at 2755.

[149] White, *supra* note 4, at 274.

[150] *Parents Involved*, 127 S. Ct. at 2755 (plurality opinion), 2793 (Kennedy, J., concurring).

[151] United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979).

the private workplace."[152] One scholar argued that support for diversity in employment comes from the very place where diversity is still allowed to stand—higher education.[153] Because Justice O'Connor's rationale for allowing diversity as a compelling interest involved consideration of American businesses and the military, one scholar argued that it seems counterintuitive to prohibit diversity initiatives in the very areas that diversity in higher education is designed to benefit—namely, the workforce.[154] Similarly, another scholar noted that a diversified workplace benefits society by "counteract[ing] stereotypes and prejudices and cultivat[ing] broader and more inclusive trust and mutual regard within the workforce."[155] That argument may be one of the strongest in favor of diversity, but employers using it should proceed with caution.

Other scholars suggested justifications for diversity including increases in company productivity and a positive impact on general decision making because of the ability of a diverse workforce to better serve an exceedingly more diverse clientele.[156] In other words, "diversity is often good for business."[157] A company's business interest, however, would likely not be significant enough to justify the intentional discrimination that goes along with affirmative-action programs, which Title VII seems to literally prohibit yet also implicitly permit, according to *Weber*,[158] because of the statute's purpose.[159] The challenge to employers is to devise a way to justify diversity that will still further the intent of Title VII. Using the potential for greater profit is probably not the best way to accomplish such a goal because, as one scholar notes, "where profit is the or a predominant employer motivation, courts may be more skeptical of and less willing to validate diversity-based affirmative action practices that disfavor male and white employees."[160] The current Court, however, is one of the most pro-business Courts in a long time[161] and, thus, might be willing to defer to an employer's claim that diversity is good for business.

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[152] Appel, Gray & Loy, *supra* note 22, at 571.

[153] Turner, *supra* note 6, at 211.

[154] *Id.* at 219.

[155] Estlund, *supra* note 79, at 224.

[156] Appel, Gray & Loy, *supra* note 22, at 571.

[157] White, *supra* note 4, at 276.

[158] United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979).

[159] White, *supra* note 4, at 278.

[160] Turner, *supra* note 6, at 234.

[161] *You Need to Know: News: Briefs*, TENN. B.J., Aug. 2007, at 5, 6 ("At the end of . . . [the 2006–2007] U.S. Supreme Court term littered with heated 5-4 decisions, one bit of clarity is shining through: the Roberts Court . . . [is] very conservative and very

Even if an employer could devise a diversity-based justification for an affirmative-action program that would survive the *Weber* test, which will likely be viewed with an increasing level of skepticism by the Court, the employer would have to apply the program in a way that did not "unnecessarily trammel" the interests of non-minority employees.[162] The best way that an employer could go about doing this would be to devise initiatives similar to those suggested by Justice Kennedy as a means for constitutionally attaining diversity in schools.[163] While a private employer obviously does not have to worry about triggering strict scrutiny, which is Justice Kennedy's primary concern, the employer could use Justice Kennedy's suggestions as a guide by launching race-conscious but still race-neutral initiatives. Large national corporations wishing to appeal to a broad consumer base could meet their goal of diversity by targeting the areas in which they interview potential employees or by building new offices and stores in places where the demographics indicate that they will be able to successfully achieve a diversified workforce. So long as the employer focuses not on making evaluations based on race alone but on meeting the needs of its customers while also being conscious of the purposes of Title VII, those methods would probably not unnecessarily trammel the interest of non-minority workers. Thus, although *Parents Involved* narrowed and restricted legal arguments for finding diversity to be a valid justification for workplace affirmative action, conceivable options still exist through which the goal of diversity may be achieved in the employment setting.

IV. CONCLUSION

If it was true after *Grutter* that "employers considering and implementing diversity-based affirmative action plans . . . should proceed with caution and with full awareness that the law in this area is not settled,"[164] such a statement is certainly accurate after the Court's decision in *Parents Involved*. Diversity as a compelling interest in any realm outside of higher education is uncertain, although Justice Kennedy's concurrence still leaves room for its existence. While Title

pro-business—more so than any Supreme Court in decades."). *But see* Kenneth Starr, *The Roberts Court Gets Down to Business: The Business Cases*, 34 PEPP. L. REV. 599, 602–03 (2007).

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

[163] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007).

[164] Turner, *supra* note 6, at 237.

VII has been, and likely will continue to be, interpreted to give employers more freedom and deference than they have under the Constitution, *Parents Involved* undermined the "parity" argument that was so pervasive in the post-*Grutter* era with regard to affirmative action and diversity under Title VII. A successful affirmative-action program designed to promote diversity in the workplace would likely have to both use race-neutral means to promote its ends and fully demonstrate that the actual ends of diversity sought to be achieved comport with the purpose of Title VII.