

TITLE VII AND DIVERSITY

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One of the most widely accepted bromides in today's corporate world is that diversity is essential to the effective functioning of the workplace. Diversity in the workforce is necessary, it is said, because corporations "operate and compete in a global environment, serving and working with people and cultures of all kinds."¹ Military leaders declare it a "strategic imperative."² In furtherance of diversity, employers grant racial preferences in hiring and promotion, although the extent of the preferences is difficult to measure,³ and corporations insist on diversity among suppliers of both goods and services, including legal

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¹ Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

² Daniel de Vise, *Naval Academy Defends Move to Adjust Image on National TV; Membership of Color Guard at World Series Was Revised to Reflect School's Diversity*, WASH. POST, Nov. 11, 2009, at B1.

³ Although many companies publicly tout their commitment to diversity, *see infra* note 51, they are understandably less forthcoming about the concrete measures that they employ to achieve it—that is, whether they actually give preference to "diverse" candidates or merely seek to "cast a wide net." *See* Corey A. Ciocchetti & John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U. PA. J. BUS. L. 283, 315 n.150 (2010). Nonetheless, empirical evidence suggests that such preferences are widespread. *See, e.g.*, Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1758 (2006) (concluding that strong racial preferences are granted in law firm hiring). Those involved in recruiting are quite explicit about what they do. For example, the search firm Jack Hurst and Associates states on its website that "[w]e provide Diversity Recruiting services for our client companies that are utilized when our clients have specific senior level diversity recruiting requirements." *Diversity Recruiting*, JACK HURST & ASSOCIATES, http://www.jackhurst.com/diversity_recr_serv.html (last visited Apr. 30, 2014). It notes that it is committed to presenting "only diversity candidates during the scope of the diversity search project" and to "[s]taff each position with a superior diversity candidate." *Client Benefits*, JACK HURST & ASSOCIATES, http://www.jackhurst.com/diversity_recr_benefits.html (last visited Apr. 16, 2014). Similarly, the search firm of Hale & Estrada offers a "Specific Diversity Candidate Search." *Our Services*, HALE & ESTRADA, LLC, http://www.hale-estrada.com/website/HandE_Information_2009.swf (last visited Apr. 30, 2014). The search firm Next Level Executive Search invites "diversity candidate[s]" to register as such if they would like to be included in their "diversity candidate database." *Join Our Diversity Pool*, NEXT LEVEL EXECUTIVE SEARCH, <http://www.nextlevelexecutive.com/diversity/join.htm> (last visited Apr. 30, 2014). At least some who advise applicants for jobs encourage them to self-identify themselves as "diverse." *See* Karen Kelsky, *How to Identify Yourself as a Diversity Hire*, PROFESSOR IS IN (May 3, 2013), <http://www.theprofessorisin.com/2013/05/03/how-to-identify-yourself-as-a-diversity-hire/> ("One of the most important things a job document can do is communicate an applicant's status with regard to diversity hiring. If you qualify as a diversity hire, you must make sure the committee knows it.")

services.⁴ It is almost unthinkable today that a large corporation would issue a public statement expressing the slightest doubt about the value of diversity.⁵

Given the widespread emphasis on diversity and the apparently common use of racial preferences to achieve it, there is surprisingly little case law under Title VII addressing the use of preferences outside the remedial context. With the 50th anniversary of the enactment of Title VII approaching, this is quite a remarkable fact.⁶ The statutory language itself seems to forbid any use of race in employment decisions,⁷ and although the Supreme Court has decided two cases upholding the use of preferences under Title VII (one for race⁸ and one for sex⁹), those cases are firmly rooted in a remedial rationale.

Although based on the Equal Protection Clause rather than Title VII, the Court's approval of the use of race to further diversity in higher-education admissions in *Grutter v. Bollinger*¹⁰ encouraged a number of observers to conclude that the use of race in employment decisions is likewise permissible.¹¹ However, the *Grutter* decision lends little support for that conclusion for three reasons. First, the Court in *Grutter* granted a great deal of deference—rooted in the First Amendment—to the University's judgment that a diverse student body was critical to its educational mission. Although purporting to apply "strict scrutiny" to university admission decisions, in fact it applied what can only be oxymoronically described as "deferential strict scrutiny," which it would be unlikely to apply to the hiring decisions of most public employers.¹² Second, *Grutter* involved an equal protection challenge, and although the actions of public employers must satisfy the Equal Protection Clause, they must also satisfy Title VII (as must the actions of private employers), and current Title VII

⁴ Molly McDonough, *Demanding Diversity: Corporate Pressure is Changing the Racial Mix at Some Law Firms*, 91 A.B.A. J. 52, 54 (2005); Sander, *supra* note 3; Ian Worthington, *Corporate Perceptions of the Business Case for Supplier Diversity: How Socially Responsible Purchasing Can 'Pay,'* 90 J. BUS. ETHICS 47, 47, 50 (2009).

⁵ In the UK, large corporations similarly tout their commitment to diversity, although a study of small and medium enterprises found that, although a third of the participants believed that ethnic diversity enhanced performance, slightly more than that number disagreed. Jonathan Moules, *Benefits of Ethnic Diversity Doubted*, FIN. TIMES (Feb. 20, 2007, 2:00 AM), <http://www.ft.com/cms/s/0/bee7058-c087-11db-995a-000b5df10621.html#axzz2vEVuT07p>.

⁶ Perhaps it is no more remarkable, however, than the fact that it took a quarter of a century to establish that federal courts do not have exclusive jurisdiction over Title VII claims. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990).

⁷ *See infra* notes 14–16 and accompanying text.

⁸ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

⁹ *Johnson v. Transp. Agency*, 480 U.S. 616, 641–42 (1987).

¹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹¹ *See infra* note 136.

¹² The logic of *Grutter* arguably could be extended to faculty hiring but probably not much beyond that. The *Grutter* Court invoked Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978), for the proposition that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Grutter*, 539 U.S. at 329. That freedom, one might conclude, could extend as well to selection of its faculty. Even this extension, however, would presumably require some empirical showing of a link between faculty racial diversity and student outcomes and not merely an assertion about the need for minority role models. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986). Moreover, the separate question of whether preferences in faculty hiring are consistent with Title VII would still remain.

doctrine differs from equal protection doctrine in ways that may turn out to be important. Finally, in *Fisher v. University of Texas at Austin*,¹³ the Court qualified the extent of deference a university is entitled to, seemingly approving deference to the university's decision that diversity was essential to its educational mission, but not to its decision that its means were "narrowly tailored" to achieve its compelling need.

If current affirmative-action doctrine does not justify the use of race and sex preferences in employment, there might arguably be other statutory grounds to do so, but it seems unlikely. The "bona fide occupational qualification" (BFOQ) defense is a very narrow one, and it does not apply to race at all. Although early lower-court decisions suggested that employers might rely on a "business necessity" defense, that route has now been foreclosed both by Supreme Court precedent and statutory amendment. Thus, if race preferences for purposes of achieving diversity have any hope of being lawful, a statutory amendment would seem to be required.

I. AFFIRMATIVE ACTION UNDER CURRENT TITLE VII DOCTRINE

The primary federal anti-discrimination law governing employment is Title VII of the Civil Rights Act of 1964, which applies to both private and public employers. Its primary operative provision is section 703(a)(1), which makes it an unlawful employment practice for an employer "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."¹⁴ Prior to considering the affirmative-action issue, the Supreme Court had interpreted this language as providing symmetrical protection to minorities and non-minorities. In *McDonald v. Santa Fe Trail Transportation Co.*, the Court reviewed a lower-court holding that a company's dismissal of white employees charged with theft while not dismissing a similarly charged black employee did not state a claim under Title VII.¹⁵ Rejecting the employer's argument that Title VII did not protect the white plaintiffs because they had committed a crime against their employer, the Court stated that although the employer is free to discharge employees who have stolen from it, it must apply that criterion without regard to race. Title VII, the Court said, "proscribe[s] racial discrimination in private employment against whites on the same terms as racial discrimination against non-whites."¹⁶

Despite the seemingly unambiguous language of the statute and the racial symmetry of *McDonald*, the Supreme Court in *United Steelworkers v. Weber* upheld an affirmative-action plan that guaranteed at least 50 percent of the

¹³ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

¹⁴ 42 U.S.C. § 2000e-2(a)(1) (2012).

¹⁵ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278 (1976).

¹⁶ *Id.* at 279. The Court noted that "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." *Id.* at 280, n.8 (internal citation omitted). *Cf.* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (stating that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed").

positions in a new training program to blacks.¹⁷ The program had been adopted in a collective-bargaining agreement between Kaiser Aluminum and the Steelworkers' Union. At the time the program was adopted, only 5 of 273 skilled-craft workers at the Gramercy, Louisiana, plant were black, although the District Court found that Kaiser had not engaged in discrimination against blacks in hiring into skilled-craft positions, a finding that was not disturbed on appeal. Until Kaiser adopted the challenged training program, however, it hired only applicants with previous craft experience, and because unions had excluded blacks from their ranks, few blacks had such experience, leading to the dearth of blacks in Kaiser's skilled-craft ranks.¹⁸

In upholding Kaiser's plan, the Court acknowledged that Weber's argument that Title VII's unambiguous command prohibits all racial discrimination in employment was "not without force."¹⁹ It stated, however, that the language must be "read against the background of the legislative history of Title VII and the historical context from which the Act arose."²⁰ Although virtually all of the explicit statements in the legislative history on the issue indicated that employers would not be permitted to favor *either* whites or blacks under the statute,²¹

¹⁷ United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979).

¹⁸ *Id.* at 197–98. Although most Title VII cases involve lawsuits against employers, unions are also subject to the strictures of the Act. 42 U.S.C. §2000e-2(c) (2012).

¹⁹ *Weber*, 443 U.S. at 201.

²⁰ *Id.*

²¹ Justice Rehnquist's dissent collected a number of such statements:

"... The Bill would do no more than prevent . . . employers from discriminating against *or in favor* of workers because of their race, religion, or national origin." *Id.* at 233 (statement of Rep. Celler).

"The truth . . . is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII." *Id.* at 238 (statement of Sen. Humphrey).

"Employers and labor organizations could not discriminate *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind." *Id.* (statement of Sen. Kuchel).

"Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—*or indeed permitted*—to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" *Id.* at 240 (interpretive memorandum of Sens. Clark & Case).

"Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. . . . Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident, to reasonable men. Those who say that equality means favoritism do violence to common sense." *Id.* at 242 (statement of Sen. Williams).

"The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, *the title would prohibit preferential treatment for any particular group*, and any person, whether or not a member of any minority group would be permitted to file a complaint of discriminatory employment practices." *Id.* at 243 (statement of Sen. Humphrey).

the *Weber* Court largely ignored these details of the legislative history and instead invoked the statute's "spirit." "Congress' primary concern," said the Court, "was with 'the plight of the Negro in our economy.'"²² Thus, "the purposes of [Kaiser's] plan mirror those of the statute [because b]oth were designed to break down old patterns of racial segregation and hierarchy."²³ The employer's attempt to remedy the "manifest racial imbalances" in "traditionally segregated job categories" was thus in furtherance of Congress's goals.²⁴ The Court ignored the fact that Congress had adopted a particular mechanism—namely a bar against the use of race in employment decisions—in furtherance of its goals.

The *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but noted that the plan in question fell on the permissible side of the line.²⁵ The plan was only "temporary"—slated to end when the percentage of skilled-craft workers at Gramercy equaled the percentage of blacks in the local labor market (39 percent at the time)—and it was not intended to maintain racial balance.²⁶ Moreover, it did not "unnecessarily trammel" the interests of white employees, as it neither acted as an absolute bar to their advancement nor required their discharge and replacement with black workers.²⁷

The reasoning of *Weber* is difficult to take seriously (although this article assumes the binding force of the decision). As Philip Frickey has noted: "[w]ith all due respect for Justice Brennan . . . the opinion is a failure: it so lacks persuasive methodological power as to raise questions . . . about the Court's candor in identifying the real reasons why five Justices voted as they did."²⁸ However, Frickey's preferred justification for the result in *Weber* is scarcely more persuasive. He argues that the key is to interpret the term "discriminate" in Title VII to mean "invidious" discrimination rather than all distinctions based upon race.²⁹ He argues that section 703(d), which governs discrimination

The bill "provides no preferential treatment for any group of citizens. In fact, *it specifically prohibits such treatment.*" *Id.* at 248 (statement of Sen. Saltonstall).

"It has been said that the bill discriminates in favor of the Negro at the expense of the rest of us. It seeks to do nothing more than to lift the Negro from the status of inequality to one of *equality* of treatment." *Id.* at 251 (statement of Sen. Muskie).

²² *Id.* at 202.

²³ *Id.* at 208.

²⁴ *Id.* at 197.

²⁵ *Id.* at 208.

²⁶ *Id.* at 199, 208–09. The Court's "finding" that the plan was not intended to maintain racial balance seems in some tension with the testimony of the industrial relations superintendent at the Gramercy plant, who testified at trial:

Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. The idea, again, being to have a minority representation in the plant that is equal to that representation in the community work force population.

Id. at 223–24 n.3 (Rehnquist, J., dissenting).

²⁷ *Id.* at 208.

²⁸ Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1177 (2000).

²⁹ *Id.* at 1180.

in admission to training programs, was the relevant provision of Title VII in *Weber*. That provision makes it unlawful “to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.”³⁰ Because *Weber* was not excluded from the training program because of hostility to his race, Frickey argues that ambiguity of the term “discriminate” may provide a textual basis for the result in *Weber*.³¹ Thus, rather than defying an unambiguous command not to make distinctions on the basis of race, the *Weber* majority was, under this view, simply selecting between one of two textually supportable meanings.

There are several problems with interpreting the word “discriminate” to mean only invidious discrimination. First, presumably Congress was not intending the term “discriminate” in section 703(d) to mean something different from the term “discriminate” in section 703(a)(1). The latter provision, it will be recalled, makes it unlawful “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”³² Thus, to fail to hire someone on account of his race is explicitly barred without recourse to the term “discriminate,” unless one argues that the term “otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” actually limits the earlier language involving failing to hire someone because of race.³³ Second, if the word “discriminate” means what Frickey says it may mean, then there would be no bar at all to explicit quotas based on the notion that each race should get a “fair share” of apprenticeship positions. That is, if the employer’s action does not constitute “discrimination,” because not motivated by racial animus, then there would be no need to determine whether the action could be justified by the lack of “unnecessary trammeling” of the interests of non-minority employees. Third, it is difficult to make sense of the BFOQ provision of Title VII if all that is forbidden by the prohibitory provisions is invidious discrimination. It is hard to see how conduct that constitutes invidious discrimination, which Frickey interprets to mean discrimination based on a view that members of a particular group are inferior or loathsome,³⁴ could ever be a “bona fide occupational qualification reasonably necessary to the normal operation” of the business. Finally, the narrower definition of “discriminate” is difficult to square with statements in the legislative history of Title VII. Opponents of Title VII claimed that the reach of the statute was uncertain because the term “discriminate” was unclear. Senator Hubert Humphrey responded to such concerns, stating, “[T]he meaning of racial or

³⁰ 42 U.S.C. § 2000e-2(d) (2012).

³¹ Frickey, *supra* note 28, at 1181-82.

³² 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

³³ *Id.* The more plausible interpretation of the phrase “otherwise to discriminate”—falling as it does after a list of adverse employment actions that are not to be taken on forbidden grounds—is that in addition to barring hiring and firing on forbidden grounds, the statute also more broadly bars adverse actions in compensation and other terms, conditions, and privileges of employment on the same forbidden grounds.

³⁴ Frickey, *supra* note 28, at 1180.

religious discrimination is perfectly clear . . . it means a distinction in treatment given to different individuals because of their different race, religion, or national origin.”³⁵ Thus, in concluding that Title VII authorizes preferential treatment by race, the *Weber* majority was pretty clearly not just choosing between reasonable, let alone equally plausible, interpretations of the statute.

After *Weber*, a split developed among the circuits over whether an employer was limited to overcoming prior discrimination that could in some way be laid at its own door.³⁶ In *Johnson v. Transportation Agency*, the Court made clear that no showing of discrimination by that particular employer was necessary.³⁷ The Santa Clara Transportation Agency had an even greater sex imbalance in its skilled-craft workforce than the racial imbalance at issue in *Weber* (0 of 238 skilled-craft workers were women).³⁸ As in *Weber*, there was an undisturbed finding of fact that the employer had not engaged in prior discrimination.³⁹ The Court held that under Title VII, an employer may attempt to remedy societal practices that had resulted in a “manifest imbalance” in a “traditionally segregated job category,” even though the employer itself had engaged in no discrimination.⁴⁰

The Court in *Johnson* emphasized that a mere statistical disparity in a job classification was not enough to justify preferences. Instead, the Court stated: “The requirement that the ‘manifest imbalance’ relate to a ‘traditionally segregated job category’ provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII’s purpose of eliminating the effects of employment discrimination.”⁴¹ Thus, *Johnson* expanded the Title VII affirmative-action rule beyond *Weber*, which had involved remedying imbalances that could be tied specifically to actions made unlawful by Title VII—discrimination by craft unions that resulted in a virtual absence of qualified black applicants for skilled-craft positions.⁴² Yet, *Johnson* still embraced a

³⁵ 110 CONG. REC. 5,422 (1964) (remarks of Sen. Humphrey), quoted in *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 236 (1979) (Rehnquist, J., dissenting).

³⁶ *Compare Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984) (rejecting the proposition that statistical imbalance is a sufficient justification for an affirmative-action plan), *vacated*, 481 U.S. 1001 (1987), *with Johnson v. Transportation Agency*, 770 F.2d 752, 755, 758–759 (9th Cir. 1984) (holding that “manifest imbalance” in a “traditionally segregated job categor[y]” is sufficient), *aff’d*, 480 U.S. 616 (1987).

³⁷ *Johnson*, 480 U.S. at 630–632. Although the employer in *Johnson* was a governmental employer, the plaintiff sued only under Title VII. As a result, the Court had no occasion to rule on the constitutionality of the challenged action. *Id.* at 620 n.2.

³⁸ *Id.* at 621.

³⁹ *Id.* at 659 (Scalia, J., dissenting). Unlike in *Weber*, however, the employer did not guarantee a fixed percentage of openings for women but simply considered sex along with other factors in making employment decisions. *Id.* at 621–622.

⁴⁰ *Id.* at 632.

⁴¹ *Id.* See also *Id.* at 630 (characterizing the holding in *Weber* as “grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace”).

⁴² The perceived expansion of *Weber* caused Justice White, who had joined the majority in *Weber*, to join Justice Scalia’s *Johnson* dissent, which called for *Weber* to be overruled. *Id.* at 657 (White, J., dissenting). Justice White stated: “My understanding of *Weber* was, and is, that the employer’s plan did not violate Title VII because it was designed to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories” and described the *Johnson* holding as “a perversion of Title VII.” *Id.*

remedial rationale. Concededly, the *Johnson* majority's comment that "[a] plethora of proof is hardly necessary to show that women are generally under-represented in such positions and that strong social pressures weigh against their participation"⁴³ is somewhat weaker tea than *Weber*'s statement that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."⁴⁴

Justice O'Connor concurred separately in *Johnson*, characterizing the majority's reasoning as "expansive and ill-defined," preferring instead a test that looked to whether the employer had a "firm basis for believing that remedial action was required."⁴⁵ Such a basis would exist only if the employer could identify a statistical disparity sufficient to support a prima facie case of intentional discrimination by the beneficiaries of the plan, a test that she found easily satisfied given the magnitude of the statistical under-representation of women.⁴⁶

In contrast to Justice O'Connor's concern that the Court was going too far, Justice Stevens' concurrence suggested that the Court should have gone much farther. Although he acknowledged that interpreting Title VII to permit race- and sex-conscious preferences was "at odds with [his] understanding of the actual intent of the authors of the legislation," he urged that the statute not be interpreted as requiring a remedial rationale for such preferences.⁴⁷ Rather, he suggested, employers should be permitted to give preferences to under-represented groups for "forward-looking" reasons, intimating that a private employer should "be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view."⁴⁸ That suggestion was based not on the statutory language or the legislative history—indeed it could

⁴³ *Id.* at 634 n.12 (quoting *Johnson*, 748 F.2d at 1313).

⁴⁴ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 n.1 (1979). Justice Scalia, dissenting in *Johnson*, specifically took issue with the justification offered by the Court, labeling as absurd the notion that the failure of road-maintenance crews to achieve proportional representation by sex "is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel." *Johnson*, 480 U.S. at 668 (Scalia, J., dissenting).

⁴⁵ *Johnson*, 480 U.S. at 648–649 (O'Connor, J., concurring in the judgment).

⁴⁶ *Id.* at 649, 656. Contrary to Justice O'Connor's conclusion, it is far from clear that the employer would have had a firm basis for believing that remedial action was required. The lower court found that there had been no discrimination, and the statistical comparison is meaningful only under the assumption that the dearth of women was suggestive of discrimination by the employer rather than because of a lack of interest or qualifications on the part of women. See Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies"*, 68 WASH. L. REV. 477, 506–513 (1993). In fact, there are large differences between the sexes in occupational interest and experience, especially in blue-collar jobs. KINGSLEY R. BROWNE, *BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY* 50–67 (2002); Kingsley R. Browne, *Evolved Sex Differences and Occupational Segregation*, 27 J. ORGANIZATIONAL BEHAV. 143, 150 (2006). A statistical comparison that does not take into account differences in interest and qualifications can hardly be said to account for the "major factors" influencing the decision. See *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (Brennan, J., concurring in part).

⁴⁷ *Johnson*, 480 U.S. at 644 (Stevens, J., concurring).

⁴⁸ *Id.* at 645.

not plausibly be drawn from those sources—but rather on Justice Stevens’ view of the logic of *Weber* and the Court’s earlier *Bakke* decision.⁴⁹

So, with *Johnson*, the Court gave employers broad freedom to engage in remedial affirmative action. Within a few years, however, the corporate focus shifted from backward-looking affirmative action to more forward-looking, instrumental rationales.

II. FROM REMEDIAL TO INSTRUMENTAL RATIONALES

Up through the time of *Johnson* and until around the early 1990s, most employer support of affirmative action focused on what *Weber* and *Johnson* had authorized. Affirmative action was viewed as a means to “level the playing field” for groups that had historically been excluded from full participation in the workplace, and it was firmly rooted in a compensatory rationale. As time went on, the rationale shifted to a more forward-looking one, with the label tending to shift from “affirmative action” to “diversity,”⁵⁰ a move that also changed the focus from the mechanism to the result. No longer was affirmative action just “the right thing to do”; it was also “good business,”⁵¹ although the shift in terminology from “affirmative action” to “diversity” allowed those making the latter claim to elide the question of exactly what they were doing to foster diversity.

A variety of justifications for “the business case for diversity” have been offered, ranging from improved marketplace understanding, a desire of corporations to have a workforce that mirrors its customer base, the addition of new perspectives that are thought to lead to greater creativity and innovation and better problem-solving, adaptation to a global marketplace, and good will created within its diverse customer base.⁵² The underlying assumption is that diversity enhances the bottom line because, for a variety of reasons, a more diverse workforce produces better results than a more homogeneous one.⁵³

Unfortunately for proponents of the business case for diversity, there is little empirical evidence to support it. A review of fifty years of diversity

⁴⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Justice Stevens was one of four justices in *Bakke* to conclude that the affirmative-action plan at issue violated Title VI; those justices therefore had no reason to reach the constitutional question. *Id.* at 411, 421.

⁵⁰ See generally RACHAEL ROSS & ROBIN SCHNEIDER, *FROM EQUALITY TO DIVERSITY: A BUSINESS CASE FOR EQUAL OPPORTUNITIES* (1992).

⁵¹ A Google search on July 26, 2013, for documents containing all three of the phrases “affirmative action,” “right thing to do,” and “good business” yielded 1.3 million hits. Substituting “diversity” for “affirmative action” yielded 281,000 hits. The phrase “business case for diversity” by itself yielded 465,000 hits.

The rhetoric now seems to have come full circle. See David Casey, *Diversity: It’s Good for Business, and Here’s Why*, *PROFILES IN DIVERSITY J.* (Mar. 21, 2011), available at <http://www.diversityjournal.com/1776-diversity-its-good-for-business-and-heres-why/> (“Today, having thoroughly established the business case for diversity, . . . we can start framing our message this way: *Diversity isn’t just good for business. It’s the right thing to do, and here’s why.*”).

⁵² Gail Robinson & Kathleen Dechant, *Building a Business Case for Diversity*, 11 *ACAD. MGMT. EXECUTIVE* 21, 25–27 (1997).

⁵³ Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 *HUM. RESOURCES MGMT.* 3, 4 (2003).

research concluded that there were few consistent patterns, with some studies finding positive effects of diversity on individual or group performance, some finding negative effects, and some finding no effects at all.⁵⁴ Some studies found a positive relationship between diversity and a firm's financial performance, some found negative effects, and some found no effects.⁵⁵ Some studies have found a positive correlation between racial diversity and conflict within groups (that is, more diversity leads to more conflict), while others have found no relationship.⁵⁶ After canvassing the results of five decades of research, the researchers concluded that "it is unthinkable to assume a pure and simple relationship between diversity and performance without considering a series of variables which affect the relationship."⁵⁷

Despite the fact that large corporations virtually unanimously tout their adherence to the view that greater diversity yields better performance,⁵⁸ few, if any, firms collect the data necessary to evaluate whether their diversity efforts actually have any impact on firm performance. In 1997, responding to the paucity of empirical evidence linking diversity and performance, a nonprofit organization known as Business Opportunities for Leadership Diversity (BOLD) commissioned a group of researchers from a number of universities (the "Diversity Research Network") to design a field research project with the purpose of measuring the relationship between diversity and business perform-

⁵⁴ Carlos Ricardo De Abreu Dos Reis et al., *Diversity and Business Performance: 50 Years of Research*, 1 SERVICE BUS. 257, 259 (2007).

⁵⁵ *Id.*

⁵⁶ *Id.* at 259–260.

⁵⁷ *Id.* at 271.

⁵⁸ See Brief for Amici Curiae 65 Leading American Businesses, *supra* note 1, at 1. Many large corporations profess their devotion to diversity on their websites. See, e.g., *Business Case for Diversity*, CHUBB GRP. OF INS. COS., <http://www.chubb.com/diversity/chubb4450.html> (last visited Apr. 30, 2014) ("Those who perceive diversity as exclusively a moral imperative or societal goal are missing the larger point. Workforce diversity needs to be viewed as a competitive advantage and a business opportunity."); *The Business Case for Diversity*, WELLS FARGO, <https://www.wellsfargo.com/about/diversity/importance/case> (last visited Apr. 30, 2014) ("Diversity is absolutely integral to Wells Fargo's vision, strategy, and continued success." Quoting John Stumpf, Wells Fargo Chairman and CEO: "Diversity is not only good policy, it's good business.").

The apparent unanimity of corporations' view that more diversity is, in itself, a desirable end—if not a morally and economically required one—suggests that the approach of many courts in "reverse discrimination" claims is suspect. A number of courts have held that reverse-discrimination plaintiffs must meet a higher standard for establishing a prima facie case than is required by more conventional plaintiffs. See, e.g., *Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006) (requiring an additional showing of "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.") (quoting *Yeager v. Gen. Motors Corp.*, 265 F.3d 389, 397 (6th Cir. 2001)); *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) (same) (quoting *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985)). But see *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1102–03 (11th Cir. 2001) (rejecting "background circumstances" rule); *Iadimarco v. Runyon*, 190 F.3d 151, 159–60 (3d Cir. 1999) (same). Given the enthusiasm of corporations for diversity, it may be that the "unusual employer" is one that does *not* discriminate against the majority. In any event, the "background circumstances" rule makes sense only if one believes that Title VII prohibits only discrimination resting on group-based animus.

ance.⁵⁹ The first finding of that five-year project, led by Thomas Kochan at the MIT Sloan School of Management, came early, as the researchers learned that “not only had none of the organizations we contacted ever conducted a systematic examination of the effects of their diversity efforts on bottom-line performance measures, very few were interested in doing so.”⁶⁰

The findings of the Diversity Research Network mirrored the findings of the fifty-year survey. After collecting and analyzing both quantitative and qualitative data on business-unit cultures, managerial practices, workforce demographics, and business performance at the studied companies—characterized as “large firms that have well-deserved reputations for their longstanding commitments to building a diverse workforce and managing diversity effectively”⁶¹—Kochan and colleagues described their findings as follows:

We found that racial and gender diversity do not have the positive effect on performance proposed by those with a more optimistic view of the role diversity can play in organizations—at least not consistently or under all conditions—but neither does it necessarily have the negative effect on group processes warned by those with a more pessimistic view.⁶²

The researchers concluded that “[t]he simplistic business case of the past is simply not supported in our research.”⁶³ The business case should be modified, they argue, from one that suggests that diversity itself will lead to superior results to one that recognizes that diversity is a fact of life and that it is a challenge and opportunity that should be properly managed. In other words, their findings suggest that employers would be well advised to make efforts to ensure that the diversity that they have “works,” but not that employers would be well advised to work to increase their level of diversity.

There are, as noted, some studies that do find a positive relationship between diversity and firm profitability, but it is important not to confuse correlation with causation. Moreover, even if some causal relationship can be assumed, it is perilous to simply assume which direction the causal arrow is pointing. One might posit that a diverse workforce is a more productive workforce leading to greater profitability, for example, or one might posit that diversity is a luxury good that only the most profitable firms can afford to devote substantial resources to.⁶⁴

A recent example of the difficulty of disentangling cause and effect is provided in a recent study of law-firm profitability by Brayley and Nguyen.⁶⁵ They found a positive correlation between profits per partner and racial diversity in the 200 largest law firms in the country. The researchers tested three explanations for the relationship: 1) clients may pressure law firms to enhance diversity as a condition of receiving their business, thereby rewarding firms for

⁵⁹ Kochan *et al.*, *supra* note 53, at 3.

⁶⁰ *Id.* at 8. Thus, only four of the more than twenty large Fortune 500 companies with which the researchers had engaged in discussions agreed to participate.

⁶¹ *Id.* at 16.

⁶² *Id.* at 17.

⁶³ *Id.*

⁶⁴ See Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 220 (2009).

⁶⁵ Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 2 (2009).

greater diversity; 2) diverse firms may be more productive because they are able to recruit and retain more talented lawyers; and 3) successful firms may be able to devote more resources to enhancing diversity than less successful firms.⁶⁶ They found no evidence to support number 2, and they found only indirect evidence for number 3.⁶⁷ The strongest of the findings was between law firm diversity and representation of clients who have taken a pledge “to end or limit . . . relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.”⁶⁸ The researchers conclude that “in a striking confluence, ethical and economic arguments for diversity align: Doing good means doing well.”⁶⁹

Brayley and Nguyen’s conclusion, it should be noted, is not the standard justification of the business case for diversity, which is that diverse workforces perform better than more homogeneous workforces. Rather, it is that some clients prefer diversity and are willing to “vote with their feet” if the law firm does not provide it. Thus, it reflects a form of “customer preference” rather than enhanced competence.⁷⁰

One of the surprising aspects of the diversity literature (outside parts of the specifically legal literature) is how little concern is expressed about whether the practices that are urged with such fervor raise any legal concerns. Even in the legal literature, by far the lion’s share of attention on the subject has been focused on equal-protection issues, and then primarily in education. Yet, as will be shown below, race- or sex-based employment decisions that are aimed at enhancing diversity have a very shaky legal foundation under Title VII (and, in fact, under the Equal Protection Clause, as well).⁷¹

III. BEYOND SUPREME COURT AFFIRMATIVE-ACTION DOCTRINE

The only lower-court case that has given extended treatment to the application of *Weber* and *Johnson* to instrumental use of racial preferences is *Taxman v. Board of Education of Township of Piscataway*.⁷² In *Taxman*, the Third Circuit held *en banc* that a local school board violated Title VII when it made a race-conscious decision to retain a black high-school teacher and lay off an equally qualified white teacher with equal seniority. The purpose of the school board’s decision was to further the educational goal of promoting racial

⁶⁶ *Id.* at 2–3.

⁶⁷ *Id.* at 36.

⁶⁸ *Id.* at 25 (footnote omitted).

⁶⁹ *Id.* at 36.

⁷⁰ It is not always possible to distinguish between customer preference and enhanced competence. For example, Avon Company reportedly enhanced its formerly unprofitable inner-city markets by placing black and Hispanic managers in charge of marketing to inner-city populations. Similarly, Maybelline, Inc., hired minorities to market a line of cosmetics aimed at women with darker skin tones. Robinson & Dechant, *supra* note 52, at 26–27 (stating that to the extent that these strategies were effective, one might imagine that there were multiple contributors, perhaps including both customer preference and “cultural competence” of the employees).

⁷¹ See generally Kingsley R. Browne, *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 12 LAB. LAW. 451, 451–53 (1997).

⁷² *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (*en banc*).

diversity, because the layoff of the black teacher would have resulted in an all-white business department in the high school.⁷³ Reviewing Supreme Court case law, statutory language, and legislative history, the court concluded that “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.”⁷⁴ The Third Circuit viewed *Weber* and *Johnson* as sustaining preferences “only because the Supreme Court, examining those plans in light of congressional intent, found a secondary congressional objective in Title VII that had to be accommodated—i.e., the elimination of the effects of past discrimination in the workplace.”⁷⁵ In contrast, noted the court, “there is no congressional recognition of diversity as a Title VII objective requiring accommodation.”⁷⁶

If *Weber* and *Johnson* do not extend to preferences for purposes of achieving diversity, as opposed to remedying disparities that are linked at least in some attenuated way to prior discrimination, there remains the question of whether any other existing doctrine would allow such actions. That is, is there any provision of Title VII that would allow an employer to engage in race- or sex-conscious decision-making on forward-looking grounds, such as those invoked by companies that assert that a diverse workforce will allow them better to compete in the global marketplace? It does not appear that there is.

A. *The BFOQ Defense*

An exception to what appears to be Title VII’s flat prohibition of discriminatory actions is provided in section 703(e) of the statute, the “bona fide occupational qualification” (BFOQ) exception. That section provides that reliance on an otherwise impermissible criterion may be permissible if it is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁷⁷ The BFOQ defense is an affirmative defense on which the employer bears the burden of persuasion.⁷⁸

The most obvious limitation of the BFOQ exception is that, by its terms, it applies only to religion, sex, and national origin and does not provide a defense for actions taken on the basis of race or color. Although the Supreme Court has never specifically addressed the question of whether the BFOQ exception could be extended to race, there can be little doubt that it would hold that it does not. Lower courts have been unanimous on the question. In *Swint v. Pullman-Standard*, the Fifth Circuit stated:

⁷³ *Id.* at 1551.

⁷⁴ *Id.* at 1557.

⁷⁵ *Id.* at 1558.

⁷⁶ *Id.* The Supreme Court granted the school district’s petition for certiorari in *Taxman*, 521 U.S. 1117 (1997), and the case was set for oral argument. Shortly before the argument was to be held, however, a coalition of civil rights groups, fearful of an adverse precedent from the Court, put up several hundred thousand dollars to settle the lawsuit, after which the Court dismissed the petition as moot. Abby Goodnough, *Financial Details Are Revealed in Affirmative Action Settlement*, N.Y. TIMES, Dec. 6, 1997, at B5, available at <http://www.nytimes.com/1997/12/06/nyregion/financial-details-are-revealed-in-affirmative-action-settlement.html>.

⁷⁷ 42 U.S.C. § 2000e-2(e) (2012).

⁷⁸ *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 221–22 (1991).

We believe that the omission of race and color as bona fide occupational qualifications was deliberate and intentional on the part of Congress. Our interpretation of the legislative history of this section is that Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business.⁷⁹

Numerous other courts have reached the same conclusion. For example, in *Ferrill v. Parker Group, Inc.*,⁸⁰ the employer attempted to defend its practice of matching the race of its telemarketers to the race of the target in making “get-out-the-vote” calls.⁸¹ The court rejected the defendant’s BFOQ defense on the ground that there is no BFOQ defense for race.⁸² The court noted that “[t]he crucial issue . . . is whether a defendant who acts with no racial animus but makes job assignments on the basis of race can be held liable for intentional discrimination” and concluded that “[c]learly, the answer is yes.”⁸³

Similar reasoning was applied in *Miller v. Texas State Board of Barber Examiners*.⁸⁴ The plaintiff, an undercover investigator for the defendant, argued that he had been illegally discriminated against because he was assigned almost entirely to investigate black barbershops.⁸⁵ The Fifth Circuit noted that race was “conspicuously absent” from the BFOQ defense, and therefore, if such a practice was to be justified, it must be justified on a different basis.⁸⁶ Similarly, in *Knight v. Nassau County Civil Service Commission*, the Second Circuit held that it was a violation of Title VII to assign a black person, on the

⁷⁹ *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980). Referring to an amendment that would have extended the BFOQ exception to race and color, Representative Emanuel Celler argued: “[T]he basic purpose of title VII is to prohibit discrimination in employment on the basis of race or color. Now the substitute amendment, I fear would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole, that could well gut this title.” 110 CONG. REC. 2556 (statement of Rep. Celler).

⁸⁰ *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468 (11th Cir. 1999).

⁸¹ *Id.* at 471. It might be argued that in *Parker* there was no adverse employment action, although plaintiff argued that the “terms, conditions, and privileges of her employment were adversely affected.” The jury awarded \$500 in compensatory damages, apparently for “humiliation.” *Id.* at 476.

⁸² *Id.* at 473. Although *Parker* was brought under section 1981, because the plaintiff was an employee of a temporary agency rather than of the defendant, the court stated that the standards for liability under section 1981 and Title VII were the same. It is not entirely clear why, even if Title VII contained a BFOQ exception for race, such an exception should be implied into a statute that was passed almost a century earlier, other than out of a recognition that the drafters of section 1981 almost certainly did not intend it to cover private acts of discrimination at all. *See Runyon v. McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring); *Id.* at 192 (White, J., dissenting).

⁸³ *Ferrill*, 168 F.3d at 473.

⁸⁴ *Miller v. Tex. State Bd. of Barber Exam’rs*, 615 F.2d 650 (5th Cir. 1980).

⁸⁵ *Id.* at 651–52. White investigators refused to investigate black barbershops because of fear of physical violence, perhaps arising from the fact that their undercover status would be compromised in obvious ways.

⁸⁶ *Id.* at 652. Even though the practice could not be justified as a BFOQ, the court held that Title VII provided him no remedy, because he lost no wages on account of the practice. *Id.* at 654; *Cf. Segar v. Civiletti*, 508 F. Supp. 690, 713 (D.D.C. 1981) (finding that disproportionate assignment of black DEA agents to undercover work impaired their prospects for promotion and was not a BFOQ because there is no BFOQ for race).

basis of race, to minority recruitment.⁸⁷ Despite the fact that the Commission apparently (and perhaps reasonably) believed that a black employee would develop a better rapport with members of the minority groups it was attempting to recruit, the assignment was held to violate Title VII.⁸⁸

Although not available for claims of race or color discrimination, the BFOQ defense is available for decisions based upon sex, religion, and national origin (and age under the Age Discrimination in Employment Act), and so could potentially be used to support diversity preferences on those bases. However, the Supreme Court has interpreted the exception very narrowly. According to the Court, qualifications must “be something more than ‘convenient’ or ‘reasonable’; they must be ‘reasonably necessary . . . to the particular business,’ and this is only so when the employer is *compelled* to rely on” an otherwise prohibited criterion.⁸⁹ The exception is applicable only in “narrow circumstances,” and it “prevents the use of general subjective standards and favors an objective, verifiable requirement.”⁹⁰

Thus, even with respect to the permissible grounds for a BFOQ under Title VII (sex, religion, and national origin), the employer justifications that will support a BFOQ defense are limited. In *Automobile Workers v. Johnson Controls*, for example, the employer attempted to justify its practice of excluding fertile women from battery-manufacturing jobs because ambient lead levels posed a risk to fetuses. Although the Court did not challenge the employer’s sincerity, it held that the BFOQ exception could not be extended to cover this rationale. The BFOQ exception, said the Court, “is not so broad that it transforms this deep social concern [fetal safety] into an essential aspect of battery making.”⁹¹ The exception focuses on the employee’s ability to do the job, and “[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else.”⁹² The employer’s “professed moral and ethical concerns about the welfare of the next generation,” the Court stated, “do not suffice to establish a BFOQ.”⁹³

The Court in *Johnson Controls* distinguished its earlier case of *Dothard v. Rawlinson*,⁹⁴ which had held that exclusion of women from certain contact positions in a male penitentiary was justified as a BFOQ. The exclusion in *Dothard* was not justified by the fact that the prison environment—which contained many convicted sex offenders—was dangerous to the women themselves. Title VII leaves it to the individual woman, the Court said, to decide whether to take that risk. Rather, the exclusion was justified because “[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other

⁸⁷ *Knight v. Nassau Cnty. Civil Serv. Comm’n*, 649 F.2d 157, 162 (2d Cir. 1981).

⁸⁸ *Id.*

⁸⁹ *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (emphasis added).

⁹⁰ *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201–02 (1991).

⁹¹ *Id.* at 204.

⁹² *Id.* at 206.

⁹³ *Id.*

⁹⁴ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

security personnel.”⁹⁵ The *Johnson Controls* Court also distinguished its earlier decision in *Western Airlines, Inc. v. Criswell*, in which it had recognized that an airline might satisfy the BFOQ exception of the Age Discrimination in Employment Act by showing that its exclusion of older workers was justified by flight safety.⁹⁶ Both *Dothard* and *Criswell*, the Court acknowledged, had recognized that the well-being of third parties could be a justification for otherwise impermissible actions, but in both of those cases the third parties were “indispensable to the particular business at issue”⁹⁷—prison inmates in the former and airline passengers in the latter. The Court stated that “[t]he unconceived fetuses of Johnson Controls’ female employees . . . are neither customers nor third parties whose safety is essential to the business of battery manufacturing.”⁹⁸ As a result, the fetal-protection policy could not be justified as a BFOQ.

If an employer’s “deep social concern” about issues such as fetal safety is not sufficient to establish a BFOQ, neither is an employer’s general interest in the bottom line. One of the earliest BFOQ cases involved an airline that limited its flight-attendant positions to women.⁹⁹ The airline had shown that substantial majorities of both men and women preferred female flight attendants, and it introduced the testimony of a noted psychologist explaining that preference. In an early rejection of the “customer preference” defense, the court stated that it would be “totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid,” especially in light of the fact that “it was, to a large extent, these very prejudices the Act was meant to overcome.”¹⁰⁰ The preference for female flight attendants would be permissible, said the court, only if it was necessary to further the “essence” of the employer’s business, which was “to transport passengers safely from one point to another.”¹⁰¹ Providing a “pleasant environment” was “tangential to the essence of the business”¹⁰² and did not justify limiting the positions to women.

A similar case involved Southwest Airlines, which began its business catering largely to businessmen on regional flights.¹⁰³ It created an image as the “love airline” and limited flight-attendant positions to women.¹⁰⁴ The court noted that it was undisputed that “Southwest’s unique, feminized image played and continues to play an important role in the airline’s success”¹⁰⁵ but nonetheless held the policy unlawful. The court stated that the BFOQ test “focuses on the company’s ability ‘to perform the primary function or service it offers,’ not

⁹⁵ *Id.* at 336.

⁹⁶ *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985).

⁹⁷ *Johnson Controls*, 499 U.S. at 203.

⁹⁸ *Id.*

⁹⁹ *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (noting that “[n]o one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another”).

¹⁰⁰ *Id.* at 389.

¹⁰¹ *Id.* at 388.

¹⁰² *Id.*

¹⁰³ *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 294 (N.D. Tex. 1981).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 295.

its ability to compete.”¹⁰⁶ A “potential loss of profits or possible loss of competitive advantage” does not establish a BFOQ.¹⁰⁷

Thus, the BFOQ cases strongly suggest that an employer’s desire for diversity would not be a sufficient justification for preferences even if limited only to those classes for which the BFOQ defense is potentially available under Title VII (sex, religion, and national origin). The “moral” case for diversity—that is, the argument that it is the socially “right” thing to do—runs into the limitations espoused by the Court in *Johnson Controls*. A corporation whose purpose is simply to declare its “values” to its shareholders, employees, and customers¹⁰⁸ can surely be in no stronger a position than a corporation whose purpose is to prevent lead poisoning in fetuses. On the other hand, the company that argues that it is pursuing diversity because it will allow the company to increase performance (even if it were able to marshal empirical evidence to support its claim) is simply asserting that it is profitable for it to do so, not that the “essence of the business” requires it. An employer might be able to show that it is cheaper to employ men because women consume more healthcare and have higher rates of absenteeism, but presumably no one would argue that the employer would therefore be legally justified in refusing to hire women. Similarly, the argument of a law firm that is responding to pressure from clients to increase the number of lawyers from protected categories would likewise be insufficient, because “customer preference” does not justify otherwise unlawful conduct, except in quite limited circumstances. In fact, the presence of that pressure—or pressure from federal bureaucracies to do the same thing¹⁰⁹—might ultimately prove harmful to an employer’s defense in a discrimination case, since a showing that it was under such pressure might support an inference that it was influenced by it.¹¹⁰

¹⁰⁶ *Id.* at 304 (quoting *Diaz*, 442 F.2d at 389).

¹⁰⁷ *Id.*

¹⁰⁸ David Casey, the Vice President and Diversity Officer of CVS Caremark, a large pharmacy and healthcare corporation, justifies diversity programs in part on the ground that corporations “are judged as much for their contributions to society as they are their returns to shareholders.” Casey, *supra* note 51. He elaborates: “The pursuit of profit without regard for a company’s broader role in society today is a losing strategy in the marketplace, where stakeholders, ranging from customers to employees, increasingly say they prefer companies that share their values.” *Id.*

¹⁰⁹ See *Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Request for Comment*, FED. RES. SYS. (Oct. 22, 2013), <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20131023a1.pdf>.

¹¹⁰ See *Ricci v. DeStefano*, 557 U.S. 557, 597–99 (2009) (Alito, J., concurring); *Rudin v. Lincoln Land Comty. Coll.*, 420 F.3d 712, 717–18, 727 (7th Cir. 2005) (overturning summary judgment for employer on ground that there was a genuine issue of material fact on the question whether white plaintiff was subjected to racial discrimination, in part because the department chair had indicated that he was under administrative pressure to hire a minority candidate for a faculty opening); *Bishopp v. Dist. of Columbia*, 788 F.2d 781, 783–84 (D.C. Cir. 1986) (stating that political pressure to promote a minority because of his race, pressure to promote minorities in general, and proposed affirmative action plans can be “background circumstances” supportive of reverse-discrimination plaintiff’s prima facie case).

B. *The Business Necessity Defense*

If the BFOQ defense is not available, perhaps some version of the “business necessity” defense that is recognized under the disparate-impact theory¹¹¹ might be, and there have been a few courts that have adverted to that possibility. However, courts have been loath to uphold preferences that are based upon assertions that a person of a particular race is needed for a job. After all, many of these defenses sound a great deal like the “customer preference” defense that has generally been rejected under the BFOQ exception. For example, in *Rucker v. Higher Educational Aids Board*, the Seventh Circuit rejected the suggestion that a state agency providing counseling services to disadvantaged youth was entitled “to consider the preferences of its clientele, which is apparently largely black, for a counselor of the same race.”¹¹² Judge Posner’s opinion noted that “[c]ustomer preference has repeatedly been rejected as a justification for discrimination against women” and that, in any event, a BFOQ exception for race, upon which a customer-preference argument would rest, was intentionally not included in Title VII.¹¹³ The court concluded, however, that “[s]ubject, possibly, to an extremely narrow judge-made exception for ‘business necessity,’ . . . Title VII is a blanket prohibition of racial discrimination, rational and irrational alike, even more so than of other forms of discrimination attacked in Title VII.”¹¹⁴ Similarly, in *Miller v. Texas State Board of Barber Examiners*, the Fifth Circuit suggested in dictum that a race-based assignment of a black undercover investigator to black barber shops might have been justified by business necessity, since “it is difficult to imagine a caucasian successfully disguised as a shoeshine boy in or as a patron of an all black barber shop.”¹¹⁵

Whatever plausibility a business-necessity argument in defense of intentionally discriminatory decisions might have had at the time that *Rucker* and *Miller* were decided, it is now clear that this defense applies only to disparate-impact challenges to facially neutral practices. In *Johnson Controls*, the Supreme Court rejected the employer’s business-necessity defense of its fetal-protection policy, holding that “[t]he beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.”¹¹⁶ In the Civil Rights Act of 1991, Congress codified that rule, providing that “[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this [title].”¹¹⁷

¹¹¹ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (stating that in a disparate-impact case, the employee must demonstrate that the employer uses a practice that has a disparate impact on a protected class, even though the employer may not have intended that result. Once the employee does so, the employer may successfully defend by showing that the practice is “job related for the position in question and consistent with business necessity.”).

¹¹² *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982).

¹¹³ *Id.*

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *Miller v. Tex. State Bd. of Barber Exam’rs*, 615 F.2d 650, 654 (5th Cir. 1980).

¹¹⁶ *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991).

¹¹⁷ 42 U.S.C. § 2000e-2(k)(1)(C)(2) (2012).

Even if the business-necessity defense could be invoked, it would not justify diversity preferences for most employers. The Civil Rights Act of 1991 codified that defense to require that the employer shoulder the burden of proving that the challenged practice is “job related for the position in question and consistent with business necessity,”¹¹⁸ although it did not define those terms. But even the definition of “business necessity” that the Court employed in *Wards Cove Packing Co. v. Atonio*¹¹⁹—a definition that prompted the statutory amendment because critics contended it was too weak¹²⁰—could not be satisfied by most employers attempting to justify diversity preferences. In *Wards Cove*, the Court stated that the question was whether the challenged practice “serves, in a significant way, the legitimate employment goals of the employer.”¹²¹ It is not enough that the employer reasonably believes that the practice will serve its goals; the question is whether it does, in fact, advance those goals—a point on which the employer bears the burden of proof after the 1991 Civil Rights Act. Thus, an employer’s reasonable and good faith belief that the benefits would be what a diversity consultant promised would be insufficient. Given the equivocal empirical evidence discussed above about the effects of diversity, it seems doubtful that the employer would be able, at least absent extraordinary circumstances, to satisfy its burden.

Thus, there is no room under current Title VII doctrine for diversity preferences to be justified as business necessities. Explicit preferences can be justified only as bona fide occupational qualifications, which sex classifications will seldom be and race classifications will never be. Those who argue that diversity-based preferences can be justified by client or customer preference now pin their hopes on the Court’s willingness to import some of its case law under the Fourteenth Amendment into its Title VII jurisprudence, although they seldom explain how to do so in a way that would not do violence to the statutory language.

IV. THE EQUAL PROTECTION CLAUSE AND ITS RELEVANCE TO TITLE VII

Most of the case law and commentary about the legality of preferences to obtain diversity has arisen under the Equal Protection Clause. There are a variety of reasons for this, probably most importantly the fact that decision-making by public actors is often more transparent and more constrained by procedures than that of private actors. Moreover, plaintiffs sometimes bring only constitutional claims and do not raise the Title VII issue.¹²² Sometimes, in violation of the general principle that the constitutional question should be avoided if a statutory analysis will decide a question, courts first address the equal-protection argument and do not “reach” the Title VII issue.¹²³

¹¹⁸ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹¹⁹ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658 (1989).

¹²⁰ See Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 339–48 (1993).

¹²¹ *Wards Cove*, 490 U.S. at 659.

¹²² See, e.g., *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

¹²³ See, e.g., *Lomack v. City of Newark*, 463 F.3d 303, 306 (3d Cir. 2006) (holding that race-based transfers to ensure that there were no single-race fire companies in city violated

Although racial preferences to achieve diversity in public university admissions have been around since they received the seal of approval from Justice Powell's separate opinion in *Bakke*, it was another quarter-century before they were placed on a sound legal footing in *Grutter v. Bollinger*, when the Supreme Court upheld the admissions policy of the University of Michigan Law School that gave substantial weight to race.¹²⁴ Although the Court in *Grutter* purported to apply the strict scrutiny that the Court has required for even "benign" racial classifications since *City of Richmond v. J.A. Croson Co.*,¹²⁵ it was strict in name only, given the Court's explicit deference to the University's judgment that diversity was essential to its educational mission and its presumption that the University was acting in good faith.¹²⁶ Such an approach seems a far cry from the "searching judicial inquiry into the justification for such race-based measures" that the Court purported to be engaging in.¹²⁷

It is doubtful that the evidence presented in the University of Michigan cases would have survived the searching inquiry that the Court's precedents suggested was in order; indeed the Court gave almost total deference to the University's judgment. The question of whether student-body diversity has important positive educational effects is an empirical one. Different people have different intuitions about the answer to the question, but the empirical evidence on the point is both weak and inconsistent. To the extent that any measurable positive effects are found, they are relatively small, and in fact many negative effects (similarly small) have also been found.¹²⁸ Moreover, although the *Grutter* Court seemed impressed by the amicus briefs from corporations and retired military officers, those briefs, though impassioned, were also largely free of empirical evidence, mostly reciting the kinds of paeans to diversity that corporations display on their websites. Such bland assertions would be plainly insufficient to satisfy an employer's obligations under either the BFOQ or business-necessity defenses. In the end, the Court's deference was critical to its decision, as it allowed the Court to accept the *ipse dixit* of the University and its witnesses, as well as the supporting *ipse dixit* of its amici, without

the Equal Protection Clause because stated reasons—to improve morale and “make our Fire Department the mirror of the City of Newark”—did not constitute compelling interests; did not address Title VII argument); *Perrea v. Cincinnati Pub. Sch.*, 709 F. Supp. 2d 628, 641–42 n.4 (S.D. Ohio 2010) (striking down staff racial-balance provision under the Equal Protection Clause and “declin[ing] to consider whether the provisions could be struck down” under Title VII).

¹²⁴ *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003).

¹²⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

¹²⁶ *Grutter*, 539 U.S. at 328–29.

¹²⁷ *Id.* at 326.

¹²⁸ See generally Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761 (2006); see also Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, CTR. FOR EQUAL OPPORTUNITY, <http://www.ceousa.org/attachments/article/534/Gurin%20Critique.pdf> (last visited Apr. 30, 2014); see also Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, NAT'L ASS'N OF SCHOLARS (May 1, 2001), http://www.nas.org/articles/race_and_higher_education.

requiring the Court to independently scrutinize the equivocal social-science evidence.

Grutter, of course, has not been the last word from the Supreme Court on the subject of race preferences in college admissions. At the end of the 2012–2013 term, the Supreme Court issued its decision in *Fisher v. University of Texas at Austin*,¹²⁹ a case challenging the university's use of race in admissions decisions. What set *Fisher* apart from *Grutter* was the fact that even without racial preferences the University of Texas had a substantial number of black and Hispanic students. After the Fifth Circuit's 1996 decision in *Hopwood v. Texas*,¹³⁰ which had struck down the use of preferences in higher-education admissions, the state of Texas adopted a "top ten percent" plan that guaranteed admission to the state university of their choice to students graduating at the top of their high school class. The university also considered "special circumstances," such as speaking a language other than English in the home or the student's general socioeconomic condition. After *Grutter*, the University adopted a plan giving explicit racial and ethnic preferences, but by then it already had more black and Hispanic students than it did when it explicitly considered race prior to *Hopwood*.¹³¹

The Fifth Circuit in *Fisher* approved the university's consideration of race, concluding that under *Grutter* the university was entitled to deference with respect to both its conclusion that additional diversity was essential to its educational mission and its conclusion that the means chosen were narrowly tailored to its goal.¹³² The Supreme Court first noted its agreement with the Fifth Circuit that *Grutter* had held that "some, but not complete judicial deference" was due the university in its conclusion that diversity was essential to its educational mission.¹³³ It went on to note that "[t]here is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity," but noted that the parties were not asking the Court to revisit that holding.¹³⁴ However, the Court held that the university was entitled to no deference in its conclusion that the means chosen to achieve diversity were "narrowly tailored" to accomplish its goal. This holding rejected the Fifth Circuit's conclusion that the university is only required to reach its decision in "good faith" and that its good faith was to be presumed. Instead, the Supreme Court ruled that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."¹³⁵

¹²⁹ *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013).

¹³⁰ *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (holding that the university's desire for a diverse student body did not constitute a compelling interest).

¹³¹ *Fisher*, 133 S.Ct. at 2415–16.

¹³² *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

¹³³ *Fisher*, 133 S.Ct. at 2419.

¹³⁴ *Id.*

¹³⁵ *Id.* at 2420. There is a substantial question whether the alternatives already in use in Texas could fairly be said to be "race neutral," as they were specifically adopted for the purpose of increasing minority representation. See generally Kingsley R. Browne, "Race-Neutral" Schemes for Diversity, 15 ACAD. QUESTIONS 19 (2001). See also *Fisher*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting) ("I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious.").

The Court's endorsement in *Grutter* of the diversity rationale in higher-education admissions led a number of commentators to suggest that the Supreme Court may be similarly open to supporting preferences in employment under Title VII based on a diversity rationale.¹³⁶ After all, the Court in *Grutter* was willing to go beyond its earlier cases, such as *Croson*, that had seemed to require a remedial rationale to support racial preferences.¹³⁷ Thus, these commentators reasoned, the Court may (or should) be similarly prepared to go beyond *Weber* and *Johnson*, which seemed to require a remedial rationale, to embrace forward-looking preferences under that statute.¹³⁸

Indeed, a couple of courts have upheld operational justifications for racial preferences in employment under the equal protection clause. For example, in *Petit v. City of Chicago*,¹³⁹ decided shortly after *Grutter*, the Seventh Circuit rejected a challenge to a race-based adjustment by the Chicago Police Department to results of a test used in promoting patrol officers to sergeant.¹⁴⁰ Compared to the higher-education admissions at issue in *Grutter*, the court stated, "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago."¹⁴¹ The court specifically noted that it was granting deference to "the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the CPD."¹⁴²

¹³⁶ See, e.g., Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 19 (2005) (noting that "emanations of the Supreme Court's affirmative action decisions are [not so] easily cabined"); Ronald Turner, *Grutter, The Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 219 (2005) ("Given the Court's specific reference to employers' desire for and promotion of racial diversity, a strong argument can be made (and I would conclude) that a public employer's adequately supported diversity justification should receive the same deference given to public colleges and universities") (internal citations omitted); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 275 (2003) ("[T]he *Grutter* Court's refusal to restrict affirmative action only to remedial purposes in interpreting the Fourteenth Amendment suggests it will follow a similar approach in interpreting [Title VII]. It seems unlikely the Court would interpret a statute aimed at achieving equal opportunity as precluding a public employer's use of race in situations where its need to do so is compelling.").

¹³⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., opinion) (stating that racial classifications must be "strictly reserved for remedial settings"); *Id.* at 511 (Stevens, J., concurring) (stating that the premise of both *Croson* and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) seems to be "that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong").

¹³⁸ Turner, *supra* note 136, at 233. See also *id.* at 237 (suggesting that employers "may consider race for the purpose of achieving a diverse work force, [but] that consideration must not rest on a bald assertion and must be supported by a demonstrable business need"). Needless to say, the standard of "demonstrable business need" sounds a lot like the "business necessity" standard that is denied employers in cases of intentional discrimination.

¹³⁹ *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

¹⁴⁰ The test-score adjustment occurred prior to the effective date of the Civil Rights Act of 1991, which outlawed such adjustments. 42 U.S.C. § 2000e-2(l) (2012). In any event, the plaintiffs did not bring a Title VII claim.

¹⁴¹ *Petit*, 352 F.3d at 1114.

¹⁴² *Id.* Cf. *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213–14, 217–18 (4th Cir. 1993) (affirming summary judgment for plaintiffs despite the City's contention that its interest in effective law enforcement justified use of a race-based promotion

In an earlier case, the Seventh Circuit had held that the Illinois Department of Corrections did not violate the Equal Protection Clause when it made a race-conscious selection of a black correctional officer to the position of lieutenant at a correctional “boot camp.”¹⁴³ The court reasoned:

The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut.¹⁴⁴

The experts upon whom the Department of Corrections relied “did not rely on generalities about racial balance or diversity” or “defend a goal of racial balance.”¹⁴⁵ Instead, “[t]hey opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.”¹⁴⁶ As the Seventh Circuit noted, the defendant’s burden is to show “that they had to do something and had no alternative to what they did.”¹⁴⁷ This is, to state the obvious, a higher burden than ABC Insurance or XYZ Bank is likely to be able to satisfy, even if it could prove that its profits might increase marginally through racial preferences.

Some have argued that any preference that passes muster under the Equal Protection Clause must necessarily be permissible under Title VII, because under existing case law the standard for upholding affirmative action is more relaxed under Title VII than it is under the Constitution.¹⁴⁸ That argument is based on a comparison of *Croson* and *Johnson v. Transportation Agency*. In the former case, the Court struck down a minority contracting set-aside program on the ground that it was not aimed at remedying any discrimination that the City had participated in.¹⁴⁹ It was not enough, the Court said, to point to an interest in remedying “societal discrimination.”¹⁵⁰ In contrast, the Court in *Johnson* upheld the employer’s plan under Title VII, despite the finding that the employer had not engaged in discrimination.¹⁵¹ Thus, the reasoning goes, scrutiny of preferences is less intense under Title VII, so any preference that would survive an equal-protection challenge necessarily would survive a challenge under Title VII.¹⁵² That conclusion does not follow, however. The fact that a broader *remedial* rationale applies under Title VII¹⁵³—that is, the

policy to achieve diversity within the police department; the only evidence the City offered was the opinion of the chief of police and reports prepared in response to the Detroit riots).

¹⁴³ Wittmer v. Peters, 87 F.3d 916, 920–21 (7th Cir. 1996).

¹⁴⁴ *Id.* at 920.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 918.

¹⁴⁸ See White, *supra* note 136, at 273, 275.

¹⁴⁹ City of Richmond v. J.A. Croson Co., 488 U.S. 499, 511 (1989).

¹⁵⁰ *Id.* at 499.

¹⁵¹ Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).

¹⁵² See John R. Schmidt, *Post-Adarand Guidance on Affirmative Action in Federal Employment*, Office of the Assoc. Att’y Gen., Feb. 29, 1996, available at 2009 WL 3883809.

¹⁵³ In *Johnson*, the Court stated that “The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.” *Johnson*, 480 U.S. at 627–28 n. 6. That statement was made in response to Justice Scalia’s implication that

employer may act on the basis of not only its own discrimination but also “societal discrimination”—does not mean that employers have more leeway (or even as much leeway) under Title VII to adopt *non-remedial* preferences. It certainly is not true as a general matter that conduct that would not violate the Equal Protection Clause does not violate Title VII.¹⁵⁴

The meaning of the language of the Equal Protection Clause—guaranteeing the “equal protection of the laws”—is not self-evident and is largely indeterminate, creating a great deal of space for interpretation. What is a “compelling” interest to five Justices may not be for four others. The statute, on the other hand, is more specific and presumably less subject to the whim of the interpreter, although admittedly that did not stop the *Weber* Court from authorizing employer action that is plainly inconsistent with the statutory language.¹⁵⁵

An example of the difference between the Equal Protection Clause and Title VII is shown by *Wittmer v. Peters*, the case involving the correctional “boot camp.” The strict-scrutiny analysis that the Seventh Circuit undertook was effectively the same as the analysis that would be applied if it were analyzing a BFOQ defense under Title VII. It would be an odd result to say that Congress intended there to be no BFOQ for race (and no “business necessity” defense for intentional discrimination, *contra* Judge Posner in *Rucker*) but then to read an exception into the statute that is the functional equivalent of a race-based BFOQ (or business necessity) exception.¹⁵⁶

In sum, misplaced analogies to equal-protection doctrine cannot justify actions by employers that are forbidden them by Title VII.

CONCLUSION

If diversity preferences are to be made legal, at least in the private sector, it will take either a statutory amendment or a lawless decision by the Supreme Court that goes even farther than *Weber* and *Johnson*. Congress has determined that race is not to be the basis for employment decisions, and that sex can be the basis for employment decisions in only the limited circumstances that satisfy the BFOQ exception. It is true that the Court in *Weber* and *Johnson* placed its imprimatur on certain preferences designed to remedy the effects of employ-

it was anomalous to interpret Title VII to allow a public employer to remedy societal discrimination, when that defense would not be open to it in an equal-protection challenge. It did not suggest anything about relative permissiveness of Title VII and the Equal Protection Clause with respect to non-remedial justifications.

¹⁵⁴ Perhaps the most obvious example of a practice that does not violate the Equal Protection Clause but does violate Title VII is a facially neutral practice with a racially disparate impact that is not supported by “business necessity.” Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), with *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁵⁵ See *supra* notes 19–31 and accompanying text.

¹⁵⁶ Admittedly, the Supreme Court’s affirmative-action jurisprudence is hardly coherent. For example, the BFOQ defense, which is explicitly created by the statute, is an affirmative defense on which the employer bears the burden of persuasion. *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991). On the other hand, the Court has held that if the employer acts pursuant to an affirmative-action plan, the plaintiff bears the burden of demonstrating that the affirmative-action plan is invalid under Title VII. *Johnson*, 480 U.S. at 626. In contrast, the defendant bears the burden of justifying race- or sex-conscious actions under the equal protection clause. *Id.*

ment discrimination, but that is a far cry from the justifications that are now offered in support of diversity.

The difficulty for proponents of diversity is in fashioning a statute that permits preferences that they like and prohibits preferences that they do not like—that is, to allow the use of race and sex for operational reasons in a way that would not, to quote Congressman Emanuel Celler, “establish a loophole, that could well gut this title.”¹⁵⁷ Proponents of an amendment must decide whether they want a court’s ruling on the propriety of race or sex preferences to turn on a court’s reading of the sociological evidence, as it may not always lead in directions they like. For example, should a finding that increased diversity of hospital employees leads to greater incivility toward patients¹⁵⁸ justify a hospital’s use of race-conscious employment practices to reduce diversity? Or, should a finding that stock prices decline after receiving an award for being among the best companies for minorities¹⁵⁹ justify employer actions aimed at avoiding being given such an award? Moreover, if it should be permissible, say, for an employer to consider race in hiring an employee for outreach to the minority community, can it likewise consider race in deciding which existing employee to transfer to such a position if it means transferring an unwilling minority employee rather than a willing non-minority?

The central problem for those who might desire a statutory amendment to expand the circumstances in which employers might consider race or sex in employment decisions is that there is virtually no chance that Congress would pass such a bill. Although many congressmen and senators might like a bill that would allow operational justifications for preferences for women and minorities, large numbers would not and would insist that any change apply to minorities and non-minorities and men and women alike. Even if a majority were willing to limit the preferences to women and minorities, there is a further hurdle that would have to be cleared, which is whether a statute allowing preferences so limited would be consistent with the equal protection clause, and there is good reason to think it would not be.¹⁶⁰

¹⁵⁷ 110 CONG. REC. 2556 (statement of Rep. Celler).

¹⁵⁸ See Eden B. King et al., *Why Organizational and Community Diversity Matter: Representativeness and the Emergence of Incivility and Organizational Performance*, 54 ACAD. MGT. J. 1103, 1110 (2011).

¹⁵⁹ See Alison Cook & Christy Glass, *Does Diversity Damage Corporate Value? Measuring Stock Price Reactions to a Diversity Award*, 34 ETHNIC & RACIAL STUD. 2173, 2182 (2011) (finding that stock price declines after receiving Fortune Magazine’s “Best Companies for Minorities” award).

¹⁶⁰ See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1512 (2004) (arguing that although allowing disparate-impact claims by white males is inconsistent with the underlying logic of the theory, it is constitutionally required).