Racial Preferences in Employment After *Students for Fair Admissions v. Harvard*

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"[W]hy were you talking about corporate America?"[1]

INTRODUCTION

The Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[2] (*SFFA*) will no doubt precipitate a battle royal over the legality of those aspects of the ubiquitous diversity, equity, and inclusion (DEI) programs of American businesses that involve the use of racial preferences in hiring or promotion. The Supreme Court has never addressed the question whether an employer can lawfully give a preference to a Black applicant in pursuit of operational benefits, such as increased innovation or improved problem-solving, associated with a more racially diverse workforce.[3] The forces that have kept the issue out of the courts have shifted, and DEI programs are now squarely in the crosshairs of well-organized and well-funded opponents of racial preferences.[4]

While reasonable minds disagree about the relative importance of the admissions practices of America's elite colleges and universities, no one can deny that the human resources practices of the country's employers impact the well-being of more than 150 million American workers.[5] The stakes are high. The aim of this Essay is to provide a modest contribution to the conversation about the upcoming battle by describing the extant doctrine, previewing some of the arguments on which the fate of racial preferences[6] in employment may turn, and making a few predictions.

Employers will likely lose the fight for the right to use racial preferences to pursue operational goals. On the other hand, the Supreme Court's precedents permit employers to use racial preferences to reduce a manifest underrepresentation of Black employees in a workforce,

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[1] Transcript of Oral Argument at 98, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199) (Justice Alito questioning Solicitor General Prelogar).

[2] 600 U.S. 181, 230 (2023) (holding that Harvard College and the University of North Carolina violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment by giving preference to minority applicants in order to assemble a diverse student body and realize the attendant educational benefits).

[3] *See, e.g.*, Frans Johansson & Claire Hastwell, *Why Diverse and Inclusive Teams Are the Engines of Innovation*, GREAT PLACE TO WORK (June 1, 2023), https://www.greatplacetowork.com/resources/blog/why-diverse-and-inclusive-teams-are-the-new-engines-of-innovation [https://perma.cc/JLD4-RXM8].

[4] *See, e.g.*, Darreonna Davis, *Two Law Firms Sued Over DEI Programs After Affirmative Action Overturned*, FORBES (Aug. 23, 2023, 10:47 AM), https://www.forbes.com/sites/darreonnadavis/2023/08/22/two-law-firms-sued-over-dei-programs-after-affirmative-action-overturned/?sh=67201fed1322 (discussing legal actions against two law firms' diversity fellowship programs by the nonprofit American Alliance for Equal Rights).

[5] *See* Press Release, Bureau of Labor Statistics, Dep't of Labor, The Employment Situation—December 2023, https://www.bls.gov/news.release/pdf/empsit.pdf (last visited Jan. 10, 2023) (citing more than 133 million full-time and more than 27 million part-time workers in the United States as of December 2023).

[6] This Essay focuses on the use of racial preferences because they were the focus of *SFFA*. The lawfulness of gender-based preferences, for example, may be subject to different legal standards.

and Black employees are currently underrepresented in many job categories at many companies.[7] This "manifest imbalance doctrine" could offer a way forward for many employers interested in using racial preferences to further integrate their workforces.[8]

The Essay proceeds as follows. Part I reviews the Court's holding and rationale in *SFFA* and Part II reviews the Court's Title VII affirmative action jurisprudence. Part III is the attempt to predict, in the wake of *SFFA*, whether the Court would permit an employer to use racial preferences to achieve operational benefits or to reduce a manifest underrepresentation of Black employees in its workforce.

I. THE DECISION IN *SFFA*

The Court in *SFFA* held that Harvard College and the University of North Carolina (UNC) violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment by giving preferences to minority applicants to assemble a diverse student body and reap the attendant educational benefits.[9] The Court effectively (albeit silently) overruled its 2003 decision in *Grutter v. Bollinger*, which held that the University of Michigan Law School could do just that.[10]

The Harvard and UNC programs did not survive the strict judicial scrutiny of ends and means required when a state or private actor's use of racial preferences is challenged under the Constitution or Title VI. The Court concluded that the desired end, the educational benefit of diversity, was not "sufficiently coherent" to "be subjected to meaningful judicial review."[11] The Court also found that the means the schools employed to reap those educational benefits were not narrowly tailored to achieve that goal because (1) the racial categories employed were opaque,[12] (2) giving a preference to applicants from some racial groups meant giving a minus to applicants

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[7] *See infra* Section III.B; *see also, e.g.*, Stephanie Bornstein, *Confronting the Racial Pay Gap*, 75 VAND. L. REV. 1401, 1423–26 (2022) (reviewing studies showing Black workers are overrepresented in the lowest paid occupations and underrepresented in the highest paid occupations and industries throughout the U.S. economy).

[8] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979) (holding that companies have discretion under Title VII to create plans to "eliminate a manifest racial imbalance").

[9] SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023). The primary beneficiaries of these preferences were African-American and Latinx applicants. *Id.* at 2155.

[10] 539 U.S. 306, 343 (2003) (holding that the law school's consideration of an applicant's race as one factor in its admissions policy did not violate the Equal Protection Clause because the admissions program was narrowly tailored to the compelling interest of assembling a diverse student body, and the program used a holistic process to evaluate each applicant). As Justice Thomas wrote in his *SFFA* concurrence, "[t]he Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled." *SFFA*, 600 U.S. at 287 (Thomas, J., concurring). For the two decades that *Grutter* was the law, colleges and universities designed admissions programs that comported with its guidelines. Brief for the United States as Amicus Curiae Supporting Respondent at 5, 23–24, *SFFA*, 600 U.S. 181 (No. 20-1199) (stating that "universities around the country—including the Nation's service academies—have relied on *Grutter* in structuring their admissions systems"). The programs at Harvard and UNC would almost certainly have been lawful under *Grutter*.

[11] *SFFA*, 600 U.S. at 214. More specifically, the Court explained that the educational benefits of racial diversity are impossible to measure. For example, how could a court test the assertion that racial diversity promoted a "robust exchange of ideas?" *Id.* What is a "robust exchange?" *Id.* When does it become sufficiently robust? How much less robust would it be without the use of racial preferences? The interests, concluded the Court, "though plainly worthy, are inescapably imponderable." *Id.* at 215.

[12] *Id.* at 216–17. Both schools categorized applicants as "Asian," "Native Hawaiian or Pacific Islander," "Hispanic," "White," "African-American," and "Native American." *Id.* at 216. The Court found that some of the categories were "overbroad" (such as Asian), some were "underinclusive" (there was no category for applicants from the Middle East), and some were "arbitrary and undefined" ("Hispanic"). *Id.*

from other groups (particularly white and Asian applicants),[13] and (3) using an applicant's race as a proxy for the capacity to add to student body diversity was an impermissible racial stereotype.[14] Moreover, the Court explained, the programs were not narrowly tailored because they had no logical endpoint.[15] Both schools acknowledged they planned to continue using preferences if necessary to achieve sufficient diversity in each incoming class, and neither school could even suggest a date when it would be able to obtain that diversity without the use of racial preferences.[16]

The majority opinion concluded with language that has drawn particular attention. Schools were not required to make admissions decisions without knowing or considering the race of applicants.[17] Neither the Constitution nor Title VI, Chief Justice Roberts wrote, prohibits "universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise," and how those life experiences would help the applicant make a unique contribution to the university.[18]

Just like that, the admissions programs designed by colleges and universities in compliance with *Grutter* were unlawful.[19] Administrators, faculty, and legal counsel for schools nationwide raced to modify their programs as the current admissions cycle began to pick up steam.[20]

By contrast, the impact of *SFFA* on the use of racial preferences in employment is unclear. That issue was not before the Court, and none of the six opinions made any reference to how Title VII of the Civil Rights Act of 1964, the governing federal employment discrimination statute, treats the use of racial preferences by employers.[21] Moreover, because the Court's Title VII affirmative action jurisprudence never had a *Grutter* analog—a case in which the Court approved an employer's use of racial preferences to obtain operational benefits associated with a more diverse workforce[22]—the impact of the demise of *Grutter* on Title VII is difficult to predict. In its two Title VII affirmative action cases, the Supreme Court approved the use of modest preferences where an employer's workforce had a manifest racial imbalance in a traditionally segregated job category and the employer used those preferences to more closely match the racial makeup of its workforce and the relevant labor pool.[23]

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[13] *Id.* at 218–19.

[14] *Id.* at 217–21.

[15] *Id.* at 212–13.

[16] *Id.* at 213.

[17] *Id.* at 230.

[18] *Id.*

[19] *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 10.

[20] *See, e.g.*, Neil H. Shah, *A Month After the Fall of Affirmative Action, How Can Colleges Uphold Diversity?*, HARV. CRIMSON (July 28, 2023), https://www.thecrimson.com/article/2023/7/28/admissions-post-supreme-court/ [https://perma.cc/HEQ3-E74E].

[21] 42 U.S.C. §§ 2000e to e–17; *see SFFA*, 143 S. Ct. at 256 (Thomas, J., concurring); *id.* at 290, 301–02 (Gorsuch, J. concurring).

[22] *C.f. Grutter*, 539 U.S. at 343 (approving a law school's use of racial preferences to obtain educational benefits associated with a more diverse student body).

[23] *See* United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979) (holding lawful an affirmative action plan reserving for Black employees fifty percent of the openings in a training program for jobs previously held almost exclusively by white workers because the employer's goal of having a workforce that more closely reflected the racial makeup of the local labor pool was "within the area of discretion left by Title VII"); Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 641–42 (1987) (holding that an affirmative action program taking account of the sex of an applicant for a job promotion was proper under Title VII due to the lack of representation of women in the employer's workforce).

II. TITLE VII AND THE USE OF RACIAL PREFERENCES IN EMPLOYMENT BEFORE *SFFA*

The next step in determining the legality of the use of racial preferences in employment **after** *SFFA* is understanding the state of the law under Title VII **before** *SFFA*. Title VII's core prohibition on employment discrimination reads:

> It shall be an unlawful employment practice for an employer—(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.[24]

The Court first addressed the question whether the statute prohibited covered employers from using racial preferences in 1979 in *United Steelworkers of America v. Weber*.[25] Kaiser Aluminum and the United Steelworkers had a collective bargaining agreement with an affirmative action plan designed to increase the number of Black skilled craft workers at a plant in Louisiana.[26] Only 1.83% of the skilled craft workers at the plant were Black, although the local labor force was approximately 39% Black, and Kaiser had for years hired only experienced craft workers, knowing that Black people were excluded from craft unions.[27] The plan obligated Kaiser to reserve for Black employees 50% of the openings in an in-plant craft training program until the percentage of Black skilled craft workers at the plant approximated the percentage of Black people in the local labor market.[28]

A white employee denied admission to the program claimed Kaiser had discriminated against him on the basis of race in violation of Title VII.[29] The majority denied his claim, refusing to interpret Title VII as "the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[30] The plaintiff's reading, wrote the Court, was flatly inconsistent with the statute's purpose, which was to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[31]

The Court ruled that the plan was lawful because (1) it was consistent with that purpose, and (2) it did not unnecessarily harm white workers.[32] It was consistent with the purpose of Title VII because it was aimed at reducing a "manifest racial imbalance" in a traditionally segregated job category.[33] The plan did not unnecessarily harm white workers because no white workers were discharged, there were still abundant opportunities for white workers to enter the training program, and the plan was temporary—it was designed to eliminate the existing racial imbalance in the workforce and not to maintain balance thereafter.[34]

The Court's only other Title VII affirmative case was decided eight years later, in 1987. The

[24] 42 U.S.C. § 2000e–2(a)(1).
[25] 443 U.S. 193, 200 (1979).
[26] *Id.* at 197–98.
[27] *Id.* at 198–99.
[28] *Id.* at 199.
[29] *Id.*
[30] *Id.* at 204.
[31] *Id.* at 203 (quoting 110 CONG. REC. 6548 (1964) (statement of Sen. Hubert Humphrey)).
[32] *Id.* at 208.
[33] *Id.*
[34] *Id.* at 208–09.

Court in *Johnson v. Transportation Agency of Santa Clara County*[35] applied the two-pronged test conceived in *Weber*. It approved the employer's decision to give a preference to a female applicant for promotion into a job category without a single female employee where women made up 36% of the labor pool from which those jobs were filled.[36] As in *Weber*, the Court found that the plan was consistent with the purpose of Title VII because it was aimed at reducing a manifest underrepresentation of women in a traditionally segregated job category.[37] The Court concluded the plan did not unnecessarily harm male employees because (1) an applicant's sex was simply one factor considered in a holistic hiring process, (2) no particular vacancies were set aside for women, and (3) the goal of the plan was to attain more gender balance in the workforce, not to maintain that balance thereafter.[38]

The Court has not decided a Title VII affirmative action case in the thirty-six years since *Johnson*; however, during that period, employers articulating the desire to more fully integrate their workforces increasingly shifted from remedial or social justice arguments to the "business" or "operational" case for diversity—the argument that increasing the racial diversity of their workforces would lead to improved company performance.[39] Given the paucity of the case law, employers could only predict how courts might respond to a Title VII challenge to the use of a racial preference for that purpose. *Weber* and *Johnson* had focused on reducing manifest imbalances in traditionally segregated job categories,[40] but American businesses were increasingly focused on using racial preferences to improve their bottom lines.[41]

The Court flirted with the issue in 1997 when it granted certiorari in *Piscataway Township Board of Education v. Taxman*,[42] a Title VII challenge to a public school's decision to use race to determine which of two equally qualified high school teachers—one white and one Black—to lay off during a reduction in force.[43] The Board explained that it laid off the white teacher not because of an underrepresentation of Black people in its overall teacher workforce, but because of the educational benefits associated with having a racially diverse teacher cohort in every academic department.[44]

The district court and the court of appeals ruled for the plaintiff because the school board did not attempt to show that its affirmative action plan was adopted to remedy past discrimination or to address a manifest underrepresentation of Black people in its overall teacher workforce.[45] However, the case settled because the school board and civil rights groups feared the Court was prepared to deal a fatal blow to the use of racial preferences in employment to reap the operational

[35] 480 U.S. 616, 631 (1987).

[36] *Id.* at 621, 641–42.

[37] *Id.* at 631–37.

[38] *Id.* at 637–39.

[39] *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, 4 (2005); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553–60 (2004).

[40] *See* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979); *Johnson*, 480 U.S. at 631–37.

[41] *See* Estlund, *supra* note 39; Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385, 1411 (2003).

[42] 521 U.S. 1117 (1997). Certiorari was later dismissed. 522 U.S. 1010 (1997).

[43] Taxman v. Bd. of Educ., 91 F.3d 1547, 1551 (3d Cir. 1996).

[44] *Id.* at 1551–52.

[45] *Id.* at 1552, 1563. The Third Circuit also concluded the decision was unlawful because discharging the white teacher would have caused her significant harm. *Id.* at 1564.

benefits of diversity.[46]

Given that affirmative action has been one of the most hotly debated legal and social issues of the last half century,[47] it may seem curious that the courts have been silent on the legality of the business or operational justification for affirmative action in employment. One explanation is that the defendant employers in *Weber* and *Johnson* had (like the colleges and universities in *Grutter* and *SFFA*) adopted detailed, transparent plans for using preferences to increase the racial and gender diversity of their workforces and thus had litigation targets on their backs.[48] The plan in *Weber* was in a collective bargaining agreement, and the plan in *Johnson* had been adopted by a public transit system board of supervisors.[49] Employers pursuing diversity for operational reasons were more likely to make employment decisions on an ad hoc basis, which made it more difficult for a potential plaintiff to suspect and prove that she did not get a job because of a racial preference given to another applicant.[50] Moreover, because the rulings in *Weber* and *Johnson* discourage employers from using affirmative action to discharge white workers on the ground that a discharge causes acute harm, employers are much more likely to use preferences in hiring or promotion decisions.[51] There are special transaction costs and other disincentives to suits challenging discrimination in hiring,[52] and incumbent employees may be unlikely to litigate when they are denied promotions, particularly if they will have another opportunity for a promotion in the future. Regardless, because of the silence after *Johnson*, when the Supreme Court in *Grutter* permitted colleges and universities to consider race in admissions in pursuit of the educational benefits of diversity,[53] there was significant speculation about whether its rationale could be extended to employment and Title VII.[54]

III. TITLE VII AND THE USE OF RACIAL PREFERENCES IN EMPLOYMENT AFTER *SFFA*

What does it mean for Title VII that *Grutter* is a dead letter? That question will not go unanswered for long. Even before *SFFA*, organizations opposed to affirmative action in employment were notifying corporate boards that their diversity programs were unlawful.[55] After *SFFA*, one of those organizations filed a formal request that the Equal Employment Opportunity

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[46] *See* Linda Greenhouse, *Settlement Ends High Court Case on Preferences: Tactical Retreat*, N.Y. TIMES (Nov. 22, 1997), https://www.nytimes.com/1997/11/22/nyregion/affirmative-action-settlement-overview-settlement-ends-high-court-case.html.

[47] *See, e.g.*, *What Bakke Means: Quotas: No Race: Yes*, TIME, July 10, 1978, at Cover.

[48] United Steelworkers v. Weber, 443 U.S. 193, 198 (1979); Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 620–21 (1987).

[49] *Weber*, 443 U.S. at 197–98; *Johnson*, 480 U.S. at 620.

[50] *See* Estlund, *supra* note 39, at 3–4.

[51] *See Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 637–38.

[52] *See, e.g.*, Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 411–13 (1993).

[53] *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

[54] *See generally*, Estlund, *supra* note 39 (discussing how *Grutter* could be applied to workplace affirmative action).

[55] For example, in a February 2023 letter to the directors and officers of American Airlines, the American Civil Rights Project argued that American's announced goals for increasing the percentage of Black employees in various management and staff positions were unlawful. Daniel I. Morenoff, *Open Letter to Officers and Directors of American Airlines Group, Inc.*, AM. C. R. PROJECT BLOG (Feb. 28, 2023), https://www.americancivilrightsproject.org/blog/submissions/open-letter-to-officers-and-directors-of-american-airlines-group-inc/ [https://perma.cc/B6HH-M743].

Commission investigate Kellogg's for allegedly violating Title VII by taking race-conscious steps to increase the percentage of underrepresented employees in its management workforce to 25%.[56] In August 2023, the American Alliance for Equal Rights, whose president, Edward Blum, was behind the litigation in *SFFA*, filed suit against two law firms, alleging that their diversity fellowship programs excluded certain applicants based on race in violation of Title VII.[57] Finally, in July and August 2023, America First Legal, the organization headed by Stephen Miller, a former senior advisor to President Trump, began seeking plaintiffs for legal challenges to workplace DEI programs.[58]

When the lawsuits materialize, what can we expect? Let's begin by considering the justification most closely associated with contemporary DEI programs—the diversity justification, or the business case for diversity.

A. THE BUSINESS CASE FOR DIVERSITY: AN UPHILL BATTLE

The standard iteration of the operational justification for affirmative action in employment is that there are competitive advantages to increasing the number of employees from traditionally underrepresented groups in a workforce.[59] Although the Court has stated that Title VII gives employers more leeway to use racial preferences than the Constitution,[60] Title VII may present its own obstacles to the business case for racial preferences.

First, in a few instances, Title VII singles out race discrimination for special scrutiny. For example, under section 703(e)(1), an employer may engage in intentional discrimination on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[61] The omission of race from this "bona fide occupational qualification" defense (BFOQ) was intentional, and it was based on Congress' determination that race-based employment discrimination should not be permitted on operational grounds.[62]

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[56] Letter from Reed D. Rubinstein, Am. First Legal, to Michelle Eisele, Dir. & Kenneth Bird, Reg'l Att'y, EEOC Ind. Dist. Office (Aug. 9, 2023), https://media.aflegal.org/wp-content/uploads/2023/08/09153805/Kelloggs-EEOC-08092023.pdf?_ga=2.130655819.576760010.1691610714-1311470253.1691610714 [https://perma.cc/679A-2C7H].

[57] Julian Mark & Taylor Telford, *Conservative Activist Sues 2 Major Law Firms over Diversity Fellowships*, WASH. POST (Aug. 23, 2023, 9:28 AM), https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment/; Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html.

[58] Chris Geidner, *Stephen Miller's Group Seeks to Fight "Racial Preferences" with ... Racial Preferences*, L. DORK BLOG (July 25, 2023), https://www.lawdork.com/p/stephen-miller-america-first-legal-diversity [https://perma.cc/SSS3-WFV8].

[59] More specifically, arguments in favor of the business case for diversity include assertions that a "diverse workforce is necessary to appeal to and deal effectively with increasingly diverse *external* constituencies." Estlund, *supra* note 39, at 7. Also, "diversity within a firm's leadership enhances its competence and legitimacy with [ ] increasingly diverse workforce[s]." *Id.* Lastly, diversity leads to more creative and productive "group decision-making." *Id.*

[60] Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 627 n.6 (1987).

[61] Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e–2(e)(1).

[62] *Id.*; *see* Yelnosky, *supra* note 41, at 1412 & n.124; Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 196–98 (2009) (explaining that the primary reason "Congress excluded a race-based BFOQ was the concern that any allowance of racial discrimination would damage Title VII's effectiveness in prohibiting discrimination").

However, the BFOQ defense may not apply to affirmative action. The BFOQ is undoubtedly an affirmative defense to otherwise prohibited intentional discrimination,[63] but the Court in *Johnson* held that reliance on an affirmative action plan is not an affirmative defense requiring the employer to prove the plan's validity. "The burden of proving [the plan's] . . . invalidity remains on the plaintiff."[64]

If the BFOQ does apply, and even if it permits the use of racial preferences in some extraordinary circumstances, it is hard to ignore that courts have regularly concluded that there is no "customer preference" defense to discrimination otherwise prohibited by the statute.[65] Thus, a law firm that gave a preference to a Black associate being considered for partnership in part to attract and retain clients who have pledged to give their business to firms with racially diverse groups of lawyers may not find a sympathetic ear in Title VII litigation challenging the associate's promotion over a similarly situated white colleague.

Turning to the impact of SFFA, there is undoubtedly tension between the Court's treatment of the ends sought and means employed by Harvard and UNC and the business case for pursuing diversity.[66] Like the educational benefits of a racially diverse student body, the operational benefits of a racially diverse workforce are difficult to measure and, therefore, difficult for an employer to prove. Is a racially diverse work team actually more innovative than a homogeneous team? How much more innovative? And how much diversity is necessary to improve innovation?[67] On the latter question, it is noteworthy that both Harvard and UNC gave up on using "critical mass" as a target for the number of underrepresented students necessary to realize educational benefits, even though the Court had approved of the concept in *Grutter*.[68]

The *SFFA* majority's takedown of the means employed by Harvard and UNC is likewise foreboding because employers must use similar means when giving preferences to members of certain racial groups.[69] First, the categories employers use to measure racial diversity are opaque. Are individuals of Spanish descent Hispanic? Is an employee with one white and one Black parent Black? Are individuals of Indian descent Asian? Next, an employer using an applicant's race as a proxy for the ability to add to the diversity of the workforce would likely be characterized by the *SFFA* majority as relying on a racial stereotype.[70] Finally, articulating an endpoint for the use of racial preferences to obtain operational business benefits seems challenging. An employer might

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[63] Stephen F. Befort, *BFOQ Revisited:* Johnson Controls *Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 9 (1991).

[64] *Johnson*, 480 U.S. at 627.

[65] *See* Yelnosky, *supra* note 41, at 1413 & n.126; *see, e.g.*, Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981).

[66] *See* SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 214–15 (2023).

[67] Indeed, firms themselves are beginning to rethink the business case for diversity. Catalyst, a global nonprofit that produces research and shares best practices about diversity, equity, and inclusion initiatives, is now urging companies to "get beyond the business case" for diversity "because research can only establish a correlation" between diversity and improved firm performance but "not causation[] between the two." *The Business Case for DEI: Ask Catalyst Express*, CATALYST: RSCH (Aug. 7, 2023), https://www.catalyst.org/research/business-case-resources/ [https://perma.cc/5W2Z-9T7X]; *see also* Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV. (Nov.–Dec. 2020), https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case [https://perma.cc/HHP2-JVYC] (arguing that the lack of progress in increasing diversity among top management "suggests that top executives don't actually find the business case terribly compelling").

[68] *SFFA*, 600 U.S. at 228 ("[N]either Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means."); *see* Grutter v. Bollinger, 539 U.S. 306, 340 (2003).

[69] *See SFFA*, 600 U.S. at 215–16.

[70] *Id.* at 220.

argue it should be able to make race-conscious decisions anytime hiring or promoting a member of a particular racial group will yield operational benefits. As in the college and university admissions context, the Supreme Court would likely shudder at the thought.[71]

I quoted Justice Alito in a sort of "subtitle" of this Essay because two questions he asked at oral argument provide a preview of how the Court's majority will likely respond to an employer asserting an operational justification for the use of racial preferences. In her opening statement, the Solicitor General of the United States, Elizabeth Prelogar, explained that a ban on race-conscious admissions would reduce minority enrollment at selective colleges and universities, which would have negative downstream consequences for "corporate America" where "diversity is essential to business solutions."[72] Justice Alito jumped in to ask the first question; was she arguing that *Grutter* should be extended to employment?[73] When she explained that she was not, Justice Alito responded, "Then why were you talking about corporate America?"[74]

The tone and content of the Justice's follow-up seemed disproportionate. Solicitor General Prelogar's point was clear, and it had also been made in several amicus briefs submitted by corporations concerned about constricting the pipeline of Black graduates from selective undergraduate institutions.[75] Second, the use of racial preferences by employers was decidedly not before the Court. No one could have reasonably understood Prelogar to be arguing *Grutter* should be extended to employment.[76] Justice Alito seemed eager to fight about the issue, and I do not believe he will be the only one loaded for bear when it does come before the Court.[77]

On the other hand, the concluding paragraphs of the majority opinion in *SFFA* may suggest an alternative approach for employers committed to the use of racial preferences for operational reasons. Recall that the Court emphasized that schools would not be discriminating on the basis of race if they "consider[ed] an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[78] Thus, schools are free under *SFFA* to give applicants a tip for their determination, courage, skills, wisdom, or leadership even where, for example, the courage was forged in facing racial discrimination, or the special skills were developed in order to succeed as a Black student in a predominantly white high school.[79]

This play in the joints may give employers room to pursue the operational benefits that come from a diverse workforce by defining that diversity in less explicitly racial terms, by refraining from giving preferences based on race alone, and by instead directly assessing an applicant's or incumbent's particular work-related characteristics, defined broadly. In addition to some of the

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[71] *See id.* at 221–25.

[72] Transcript of Oral Argument at 96, *SFFA*, 600 U.S. 181 (No. 20-1199).

[73] *Id.* at 97; *see Grutter*, 539 U.S. at 345.

[74] Transcript of Oral Argument at 97–98, *SFFA*, 600 U.S. 181 (No. 20-1199).

[75] *See, e.g.*, Brief for Applied Materials, Inc. et al. as Amici Curiae Supporting Respondents at 6, 24, *SFFA*, 600 U.S. 181 (Nos. 20-1199 & 21-707).

[76] *See Grutter*, 539 U.S. at 345.

[77] In a footnote, the majority reserved the question whether America's military academies could give racial preferences to applicants "in light of the potentially distinct interests that military academies may present." *SFFA*, 600 U.S. at 213 n.4 (2023). Any such exemption from the scope of *SFFA* would likely be limited to military or law enforcement training, prompting Justice Jackson to write that the majority apparently believes that "racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom," an outcome she described as "perverse, ahistorical, and counterproductive." *Id.* at 411 (Jackson, J., dissenting).

[78] *Id.* at 230.

[79] *See id.* ("[A] benefit to a student . . . must be tied to *that student's* unique ability to contribute to the university. . . . based on his or her experiences as an individual—not on the basis of race.").

attributes listed above, employers could focus on work experience, education, hobbies, travel, family background, socioeconomic status, other personality traits, and other life experiences. Under this reading of *SFFA*, employers would be free to give preferences to applicants or incumbents with valued personal or professional characteristics that may be related to their race.

B. THE MANIFEST IMBALANCE JUSTIFICATION: NEW WINE IN OLD BOTTLES?

In *Weber* and *Johnson*, the Court blazed a trail that could lead to a successful outcome for employers seeking to use racial preferences to better integrate their workforces. Under those precedents, so long as an employer can show a "conspicuous racial imbalance in [a] traditionally segregated job categor[y]," the employer is free to use racial preferences as one factor in a holistic consideration of candidates for hiring or promotion until the workforce more closely reflects the racial makeup of the relevant labor pool.[80] Many DEI programs aim to increase the number of Black and other underrepresented employees in a workforce, but unlike *Weber* and *Johnson*, the business case for diversity does not explicitly target or depend on "manifest" or "conspicuous" underrepresentation.[81] Not every employer desirous of using racial preferences will be able to point to the requisite imbalance, but given the persistence of occupational segregation, many employers will be able to do so across one or more job categories.

A 2021 study by McKinsey concluded that "Black workers are underrepresented in both the highest-growth geographies and the highest-paying industries" and "overrepresented in low-growth geographies and industries and in frontline worker jobs, which tend to pay less."[82] Another recent study concluded that 87% of U.S. occupations are "racially segregated," defined as occupations in which Black men are "disproportionately represented 'relative to their share of the civilian population that meets the educational requirements' for the job."[83] Black men and women are also underrepresented among the ranks of chief executives and legislators, lawyers and judges, surgeons and physicians, and nurse anesthetists, just to name a few additional examples.[84]

The second part of the manifest imbalance calculation requires a comparison of the racial makeup of the workforce with the racial makeup of the relevant labor pool.[85] Most sources report

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[80] United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979); *see* Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 640–41 (1987).

[81] *Weber*, 443 U.S. at 198, 208; *Johnson*, 480 U.S. at 630–31. For example, McDonald's is tying executives' compensation to increasing the share of historically underrepresented groups in corporate leadership roles, ultimately aiming to reach 35% representation of these groups by 2025. *See, e.g.*, Paolo Gaudiano, *How Ovia Health, McDonald's and FirstEnergy Drive Diversity and Inclusion Through Compensation*, FORBES (Sept. 21, 2021, 9:00 AM), https://www.forbes.com/sites/paologaudiano/2021/09/21/how-ovia-health-mcdonalds-and-firstenergy-drive-diversity-and-inclusion-through-compensation/?sh=132b9db4371e.

[82] MCKINSEY & CO., RACE IN THE WORKPLACE: THE BLACK EXPERIENCE IN THE US PRIVATE SECTOR 13 (2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/race-in-the-workplace-the-black-experience-in-the-us-private-sector#/ [https://perma.cc/78F8-PHRY].

[83] Bornstein, *supra* note 7, at 1424 (quoting Darrick Hamilton, Algernon Austin & William Darity Jr., *Whiter Jobs, Higher Wages: Occupational Segregation and the Lower Wages of Black Men* 3 (Econ. Pol'y Inst., Briefing Paper No. 288, 2011), https://files.epi.org/page/-/BriefingPaper288.pdf [https://perma.cc/ZP6M-8XY8]).

[84] Kate Bahn & Carmen Sanchez Cumming, *Four Graphs on U.S. Occupational Segregation by Race, Ethnicity, and Gender*, WASH. CTR. FOR EQUITABLE GROWTH (July 1, 2020), https://equitablegrowth.org/four-graphs-on-u-s-occupational-segregation-by-race-ethnicity-and-gender/ [https://perma.cc/7GUE-V4AX].

[85] As the Court explained in *Johnson*,

> In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require

that Black people make up 12% to 13% of the overall U.S. labor force,[86] but the specific percentage varies depending on the qualifications for the particular job in question and the geographic scope of the relevant labor pool. In neither *Weber* nor *Johnson* did the majority do anything resembling a rigorous comparison of employer workforce and labor pool demographics. In *Weber*, the Court concluded without explanation that the program was properly "designed to break down old patterns of racial segregation and hierarchy" because only 1.83% of the skilled craft workers in the workforce were Black although the local labor pool was 39% Black.[87] And in *Johnson*, the Court simply called the difference between zero female skilled craft workers and a county labor pool that was 36.4% female an "obvious imbalance in the Skilled Craft category."[88] In upcoming litigation, it is more likely that there will be consequential disputes over the racial composition of the relevant labor pool as well as the quantum of disparity between workforce and labor pool compositions in determining whether an imbalance is manifest.

Weber and *Johnson* provide little guidance, particularly on the latter issue. Cynthia Estlund has ventured that all that can be said on the subject after *Weber* and *Johnson* is that a "manifest imbalance" includes no representation and "token representation," but not everything short of "proportional representation."[89] A more precise formulation would no doubt be of comfort to a Court concerned about judicial oversight of employers' use of racial preferences, not to mention white applicants or employees. Justice O'Connor's concurring opinion in *Johnson* offered more precision. She concluded that Title VII permitted the use of racial preferences "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of [that] discrimination."[90] Thus, she reasoned, an employer would have to "point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination."[91] Although a disparity of that magnitude may not leave sufficient room for voluntary employer actions to more fully integrate their workforces, the relative certainty of a numerical approach is attractive.

How would Justice O'Connor's approach work, and how might it be modified to give employers' integration efforts more breathing room? Consider a simple example. Assume Black people make up 10% of the relevant labor pool for store manager positions at Walmart. By contrast, assume Black people hold 8.8% of those positions at Walmart—396 of 4,500. Would that disparity permit Walmart to give preferences to Black applicants for store manager positions under Justice O'Connor's test?

In *Johnson*, Justice O'Connor borrowed the test employed by the Court in a trio of cases decided in 1977, each of which involved the role of statistics in proving intentional race discrimination—two in employment and one in grand jury selection.[92] The test is based on

> no special expertise . . . . Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.

480 U.S. at 631–32.

[86] *See, e.g.*, *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR (Jan. 25, 2023), https://www.bls.gov/cps/cpsaat18.htm.

[87] United Steelworkers v. Weber, 443 U.S. 193, 198–99, 208 (1979).

[88] *Johnson*, 480 U.S. at 621, 637.

[89] Estlund, *supra* note 39, at 36–37.

[90] *Johnson*, 480 U.S. at 649 (O'Connor, J., concurring).

[91] *Id.* She found that standard was met, although the district court found no history of discrimination against women in fact, because at the time the affirmative action plan was adopted, there were no women in skilled craft positions, and women constituted approximately 5% of the local labor pool of skilled craft workers. *Id.* at 656.

[92] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 301, 312 (1977) (employment); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 328, 340 (1977) (employment); Castaneda v. Partida, 430

probability theory. In our example, if Walmart randomly selected 4,500 store managers from a labor pool that was 10% Black, the expected number of Black store managers selected would be 450, or 10% of 4,500. In any random selection, however, there will be some deviation from the expected result (100 coin flips will not always result in 50 heads and 50 tails). A binomial distribution is a measure of the likelihood of a particular result—potentially ranging from zero Black managers to 4,500 Black managers. That distribution will show that the most likely outcomes will be clustered just above and below the expected result of 450.[93]

Calculating the standard deviation from the expected result returns a measure of the predicted fluctuations. For example, 68% of all outcomes will fall between one and two standard deviations from the expected result of 450. The Court stated in the "pattern or practice" cases upon which Justice O'Connor relied that if the difference between the expected result and the observed result was greater than two or three standard deviations, it was reasonable to infer the disparity was a product of discrimination.[94] Applying that approach to the hypothetical suggests it would have been an edge case for Justice O'Connor. A store manager cohort consisting of 396 Black managers and 4,104 others selected from a labor pool that was 10% Black is -2.48 standard deviations from the expected number of 450 Black managers, a result with a 6.6% probability in a random draw.

The majority in *Johnson* was explicit that a "manifest imbalance need not be such that it would support a prima facie case [of discrimination] against the employer."[95] Therefore, imagine instead a definition of manifest imbalance as an observed result in a workforce more than two standard deviations from the expected result. Under such a regime, Walmart would be able to use racial preferences as part of a holistic process for hiring store managers in the hypothetical because it has fewer than 410 Black store managers (two standard deviations from the expected result of 450) and it could do so only until approximately 410, or 9.1%, of its store managers were Black.[96] If an employer can make the required showing of a manifest imbalance, nothing in *Weber* or *Johnson* suggests that employer may not take race conscious steps to better integrate its workforce just because it is motivated in some way by a desire to realize the operational benefits of a more diverse workforce.[97]

Of course, the Court could throw cold water on all of this by overruling *Weber* and *Johnson*, and this Court has certainly shown a willingness to overrule precedent.[98] *SFFA* is just the latest example. However, this Court has also drawn a distinction between constitutional and statutory precedents, explaining that where the former are involved, stare decisis "is at its weakest" because of the importance of constitutional law and because only the Court (with the exception of a constitutional amendment) can correct an erroneous interpretation of the Constitution.[99]

As statutory precedents, *Weber* and *Johnson* are entitled to more deference under that framework. "The Supreme Court has long given its cases interpreting statutes special protection

U.S. 482, 483–84, 500–01 (1977) (grand jury selection).

[93] *See Castaneda*, 430 U.S. at 496 n.17.

[94] *Id.*; *Hazelwood Sch. Dist.*, 433 U.S. at 311 n.17, 312.

[95] *Johnson*, 480 U.S. at 632.

[96] Recall that both *Weber* and *Johnson* emphasized that an employer could use preferences to "attain" a more integrated workforce but not to "maintain" that level of integration. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979); *Johnson*, 480 U.S. at 639.

[97] *See* Estlund, *supra* note 39, at 11–12, 35–36.

[98] The most prominent example is *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

[99] *Id.* at 264 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

from overruling."[100] The legislative power is implicated in statutory cases. Congress, as the primary policy making body in our constitutional structure, has the power and responsibility to alter any Supreme Court interpretation of a federal statute with which Congress disagrees.[101]

Indeed, just weeks before the opinion in *SFFA* was released, a majority of the Court emphasized a commitment to robust statutory stare decisis. In *Allen v. Milligan*, the majority declined Alabama's request to overrule its earlier interpretation of the Voting Rights Act, explaining that "Congress is undoubtedly aware of our [interpretation] . . . . It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course."[102] In his concurrence, Justice Kavanaugh seemed to embrace the doctrine even more forcefully:

> [T]he *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict. . . . Congress and the President may enact new legislation to alter statutory precedents . . . . In the past 37 years, however, Congress and the President have not disturbed [the doctrine in question], even as they have made other changes to the Voting Rights Act. . . . "[T]he Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process."[103]

However, the Court can proclaim fealty to a statutory precedent and instead "clarify" it in what amounts to a significant reinterpretation or practical repudiation of that precedent. For example, in *Groff v. DeJoy*,[104] also decided in June 2023, the Court nominally refused to overrule an almost fifty-year-old Title VII precedent—*Trans World Airlines, Inc. v. Hardison*[105]—that was universally understood to require an employer to grant an employee's request for a religious accommodation only if doing so would impose no more than *de minimis* costs on the employer.[106] Nevertheless, the Court held that the "no more than de minimis costs" standard required an employer to provide a religious accommodation unless it could show the accommodation would impose <u>substantial</u> increased costs, a rather aggressive "clarification."[107] Justices Sotomayor and Jackson concurred, in part to explain that the majority correctly applied the doctrine of statutory stare decisis in refusing to overrule *Hardison*.[108]

The "manifest imbalance" affirmative action framework from *Weber* and *Johnson* is an interpretation of Title VII, it has been in place for over forty years, and Congress has substantially amended Title VII during that period, in many instances to specifically change interpretations of the statute with which Congress disagreed.[109] In fact, in *Johnson*, Justice Scalia argued that it was inappropriate to build on *Weber* because the Court in Weber "rewrote the statute it purported to

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[100] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005).

[101] *Id.* at 317–19.

[102] 599 U.S. 1, 10–11, 15, 39 (2023).

[103] *Id.* at 42 (Kavanaugh, J., concurring) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part)).

[104] 600 U.S. 447, 468 (2023).

[105] 432 U.S. 63 (1977)

[106] *Groff*, 600 U.S. at 464–67 (explaining that lower courts viewed the "more than *de minimis*" standard as controlling)

[107] *Id.* at 471.

[108] *Id.* at 475 (Sotomayor, J., concurring).

[109] United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979); Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 631–32 (1987); *see Groff*, 143 S. Ct. at 475.

construe."[110] The majority rejected that argument based on the doctrine of statutory stare decisis, explaining that "Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation [in *Weber*] was correct."[111] The passage of time has only made that reasoning more powerful.

CONCLUSION

The *Weber–Johnson* doctrine should survive, even if a majority of the current Justices disagree with its interpretation of Title VII. However, the Court could read the cases narrowly without overruling them and effectively shut down programs that do not closely mirror the "manifest imbalance" framework and the remedial impulse of those cases. By no means does the doctrine clearly protect programs that were created in the atmospherics of *Grutter's* approval of the use of racial preferences to build diverse student bodies and improve an institution's educational product.[112] However, as I have tried to show, some number of those programs, perhaps a substantial number, should be able to withstand judicial scrutiny with just a tweak of the existing doctrine.

On the other hand, the business case for diversity as such seems unlikely to survive judicial scrutiny.

Although the ebbs and flows of affirmative action are likely to continue well into the future, for now the approaches most likely to keep alive employer freedom to better integrate their workplaces are the *Weber–Johnson* doctrine and the possibility of reconfiguring race-based programs under more broadly defined characteristics and experiences.

[110] *Johnson*, 480 U.S. at 670 (Scalia, J., dissenting).
[111] *Id.* at 629 n.7.
[112] *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).