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**THE LONG ARC OF DIVERSITY BENDS TOWARDS EQUALITY:
DECONSTRUCTING THE PROGRESSIVE CRITIQUE OF WORKPLACE
DIVERSITY EFFORTS**

Stacy L. Hawkins*

ABSTRACT

Workplace diversity efforts have many critics. More notable perhaps than the attack from the right in the form of legal challenges alleging workplace diversity efforts amount to reverse discrimination is the normative critique of workplace diversity efforts from the left. Progressive responses to workplace diversity efforts range from cautious ambivalence to highly suspicious. This article deconstructs this progressive critique of workplace diversity efforts and in the process identifies two primary strands of opposition, one principled and the other practical. The article responds to this critique by situating workplace diversity efforts within the context of their equal employment opportunity origins and by highlighting their beneficial effects for women and racial minorities. This response reveals the true progressive concern as less about how workplace diversity efforts are justified in principle than about how they might operate in practice. Taking this pragmatic concern seriously, this article relies on theories of law and organizational theory to suggest that Title VII law and doctrine should be interpreted and applied by courts in response to workplace diversity efforts in ways that promote their equality-enhancing effects and otherwise restrict their potential to incur the kinds of practical harms that most concern progressive scholars.

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“*The arc of the moral universe is long, but it bends towards justice.*”
– Martin Luther King, Jr.

INTRODUCTION

A person of color is photo-shopped into an otherwise all-white brochure touting an institutional commitment to diversity.¹ A Black employee who lives in an all-white suburban neighborhood is forced to commute across town to manage a store in an urban Black neighborhood.² One candidate is selected over another of the same race because he is less “ethnic.”³ These hypotheticals exemplify the claim often made by many “progressive” scholars⁴ that workplace diversity efforts⁵ (“WDE”) are more harmful to those who ought

¹ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013).

² JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 87 (2013).

³ DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA 136–38 (2013) (this example has been modified slightly from the original to conform to the hypothetical presented at the end of this article, see *infra* Part IV.B.1.).

⁴ The term “progressive” has been used in the legal literature to denote a scholar who advocates for social justice through liberal interpretation of laws bearing on equal opportunity for underrepresented groups, including in particular women and racial minorities. See Soohan Kim et al., *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171, 175 (2012). In the context of Title VII, “progressive” scholars include those who advocate for affirmative action in employment. *Id.* The term “progressive” is admittedly imprecise in designating a wide-ranging group of scholars. *Id.* However, this term is used herein as a shorthand because of its common association with this broad liberal or progressive ideology. See Jack R. Weinstein, *On the Meaning of the Term Progressive: A Philosophical Investigation*, 33 WM. MITCHELL L. REV. 1, 49–50 (2006). Despite the disagreement with the general progressive critique of WDE expressed herein, I consider this article a contribution to that body of progressive scholarship. The disagreement is a matter of means, not disagreement with the end of achieving social justice on behalf of women and racial minorities.

⁵ WDE can involve a wide range of activities, including recruitment and hiring of diverse employees, managing supplier diversity initiatives, and sponsoring employee affinity groups, among other things. See Stacy Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a Twenty-First Century View of Equality*, 2 COLUM. J. RACE & L. 75, 82 (2012) [hereinafter Hawkins, *A Deliberative Defense of Diversity*] (describing modern workplace diversity efforts). These efforts are most often motivated by instrumental business concerns rather than remedial or egalitarian concerns. See *id.*, 84–90 (describing these instrumental concerns as leveraging cultural competence, increasing innovation and demonstrating social responsibility). The focus here is exclusively on those

instead to be its beneficiaries, and therefore these efforts ought to be condemned in principle and/or curtailed in practice.⁶ It is true that WDE can sometimes go awry in practice, causing unintended and in some cases even harmful consequences, as demonstrated by these examples.⁷ However the progressive critique of WDE as problematic in principle or deserving of categorical rebuke ignores the many ways they foster equal opportunities in the workplace, particularly for women and racial minorities.⁸ These equality-enhancing effects, often ignored or minimized in these critiques, have become all the more important for promoting the workplace interests of women and racial minorities as robust enforcement of anti-discrimination laws designed to curb workplace discrimination has waned in recent years.⁹

This article responds to the progressive critique of WDE by suggesting a more hopeful consideration of their potential to aid in the progressive project of transforming workplaces from places of inequality into places of both diversity and equality. In other words, despite some occasional missteps, if we were to follow the long arc of WDE, we would find that, on the whole, they do in fact move workplaces *towards* equality rather than away from it. Therefore,

WDE that are directed towards employees and that might implicate employer liability under prevailing anti-discrimination law. Although some might elide the distinction between WDE and affirmative action, this conflation misses the mark between these two distinct phenomena both as a matter of legal and practical significance. *See infra* Parts II.A.1–2.; *see also* Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 *FORDHAM L. REV.* 2457, 2460 n.9 (2015) [hereinafter Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*] (discussing the difference in treatment under Title VII of WDE and remedial affirmative action plans). Thus, throughout this article, the term WDE signifies instrumental workplace diversity efforts and is used in contrast with remedial affirmative action.

⁶ *See infra* Part III.A.

⁷ *See supra* notes 1–3 and accompanying text.

⁸ *See infra* Part II.B. All references herein are to race and/or racial minorities.

However, it is acknowledged that many of the same issues involving race and/or racial minorities addressed herein could equally apply to ethnicity and/or ethnic minorities. *See* 42 U.S.C. § 2000(a) (2012) (acknowledging that Title VII protects workplace discrimination on the basis of national origin to the same extent it protects race and gender discrimination).

⁹ *See infra* Part III.C.

rather than the broad, principled rejection of WDE found in the literature, progressive scholars ought to seek productive ways to leverage the equality-enhancing potential of these efforts by focusing the critique more narrowly on those practical aspects of WDE that might have equality-suppressing effects. This paper outlines that more targeted normative approach.

This article is divided into three parts. Part One provides a primer on WDE, emphasizing in particular the points of divergence, and a critical point of alignment, with traditional, remedial affirmative action.¹⁰ The account of WDE provided highlights the erroneous assumptions that lay hidden beneath the surface of the progressive critique, as well as the unacknowledged benefits generated by WDE for women and racial minorities in particular.¹¹

Part Two first synthesizes then deconstructs the progressive critique based on this fuller account of WDE. This part reveals that these efforts are more allied with the equality goals underlying Title VII than the progressive critique admits, suggesting the possibility that WDE might prove more helpful in the cause to advance workplace equality on behalf of women and racial minorities than this critique acknowledges.¹²

Finally, Part Three addresses some of the legitimate practical concerns raised by the progressive critique of WDE. Drawing on theories of law and organizational theory that explain how Title VII law has responded to these efforts to date, this Part offers some prescriptions for how Title VII law and doctrine can be interpreted and applied in response to WDE to ensure its continued alignment with the equality goals underlying Title VII.¹³

I. WORKPLACE DIVERSITY VS. AFFIRMATIVE ACTION: A PRIMER

WDE are characterized by policies and practices designed to expand opportunities for and inclusion of all persons in the workplace,

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part II.B.

¹² See *infra* Part III.A–C.

¹³ See *infra* Part IV.A–B.

but they especially target those persons who are, or traditionally have, been underrepresented, such as women and racial minorities.¹⁴ Accounts differ about the exact origins of WDE, but there is universal agreement that they have proliferated over the last several decades.¹⁵ In their earliest form WDE were more closely and explicitly aligned with equal employment opportunity (EEO) compliance, but as they expanded WDE have transcended these EEO origins.¹⁶ Having once been justified largely in terms of EEO compliance, WDE are now pursued predominantly for instrumental business reasons.¹⁷

A. *Diversity & Affirmative Action: Materially Different But Critically Aligned*

Importantly, WDE differ materially from traditional affirmative action plans.¹⁸ The most widely-cited difference is that

¹⁴ See, e.g., *Inclusion at Starbucks*, STARBUCKS.COM, <http://www.starbucks.com/responsibility/community/diversity-and-inclusion> (last visited Dec. 29, 2016). In this way, WDE resemble the pursuit of student body diversity. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (discussing the fact that while the university recognizes “many possible bases for diversity admissions,” there is “special reference to the inclusion...of African-Americans, Hispanic and Native American[] [students who otherwise] might not be represented in [the] student body in meaningful numbers.”).

¹⁵ Compare Kim et. al, *supra* note 4, at 186 (claiming, as is often cited, that WDE date to the 1980s), with Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 704 (2004) (claiming that WDE emerged as early as the late 1960s). See, e.g., Patrick S. Shin and Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1049 (2011) (noting it is “beyond doubt” that “diversity initiatives on the part of private employers have expanded over the past few decades.”).

¹⁶ See *infra* Part II.A.3.

¹⁷ *Id.*

¹⁸ Although some scholars treat WDE as merely one form of affirmative action, see, e.g., Ronald Turner, *Grutter*, *The Diversity Justification and Workplace Affirmative Action*, 43 BRANDEIS L. J. 199, 233–34 (2005) (referring to the instrumental diversity rationale as a form of “private affirmative action”), others have defined affirmative action as distinctly remedial in nature, and distinguishable from WDE, see, e.g., Monique C. Lillard et al., *The Effects of the University of Michigan Cases on Affirmative Action in Employment: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination, Labor Relations and Employment Law and Minority Groups*, 8 EMP. RTS. & EMP. POL’Y J. 127, 146 (2004) (noting “I have not seen a Supreme Court decision yet that gives us a definition of what affirmative action is...[but] I tend to think about

WDE are justified by forward-looking, instrumental rationales; whereas traditional affirmative action plans are justified by a backward-looking, remedial rationale.¹⁹ Another significant distinction between the two is the difference between the explicit racial and gender preferences emblematic of traditional affirmative action plans and the inexplicit race- and gender-consciousness of WDE.²⁰ These are important and often overlooked distinctions.²¹ But WDE's origins in EEO compliance offers a critical point of alignment with affirmative action that similarly goes unacknowledged in the progressive critique.²²

EEO compliance arises out of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race and gender, among other things.²³ Enacted against the historic

affirmative action in terms of a plan that takes race and sex into account as one factor as a remedy for past, present, or continuing discrimination.”).

¹⁹ See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 79 (“Suddenly corporations were awash in diversity programming focused on diversity recruiting and hiring, affinity groups, and supplier diversity initiatives, among other things.”); see also Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D 215, 216–17 (2004) [*hereinafter* Estlund, *Taking Grutter to Work*] (describing the diversity rationale as instrumental and forward-looking rather than remedial and backward-looking); Corey Ciocchetti & John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U. PA. J. BUS. L. 283, 320–21 (2010) (distinguishing between the remedial rationale and the “forward-looking” diversity rationale); Helen Norton, *Stepping Through Grutter’s Open Doors: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking*, 78 TEMP. L. REV. 543, 545–46 (2005) (describing the “forward-looking” and “instrumental” rationales of diversity as contrasting with the “moral justification” of remediation underlying affirmative action).

²⁰ See *infra* Part II.A.2.

²¹ *Id.*

²² See *infra* Part II.A.3. Even the EEOC has acknowledged the nature of both these differences and this critical alignment between diversity and the workplace equality goals of Title VII. EEOC DIRECTIVES TRANSMITTAL 915.003: EEOC COMPLIANCE MANUAL § 12-I: RELIGIOUS DISCRIMINATION (2008).

²³ See 42 U.S.C. § 2000e-2 (2012). Title VII also prohibits discrimination in employment based on color, national origin and religion. *Id.* Other legal bases exist for enforcing the guarantee of non-discrimination in employment, including Section 1981 of the Civil Rights Act of 1866 (which governs racial discrimination only) and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. See 42 U.S.C. § 1981; see also U.S. CONST. amend. XIV. Although these other laws raise legitimate concerns for their application to WDE, treatment of WDE under

backdrop of the Civil Rights Movement, and with the goal of ending Jim Crow segregation in the American workplace, it is no surprise that Title VII is believed to embody not just a general prohibition on discrimination in hiring and employment on the bases proscribed by the statute, but also a normative commitment to ensuring workplace equality for women and racial minorities specifically.²⁴ It is this latter goal that progressive scholars believe WDE frustrate, or even betray.²⁵

1. Instrumental Diversity & Remedial Affirmative Action

In contrast with Title VII's indisputably remedial purpose to correct and prevent workplace discrimination,²⁶ modern WDE are, more often than not, justified in instrumental business terms such as: (1) ensuring responsiveness to culturally diverse markets, (2) improving performance through innovation; and (3) signaling the openness of the workplace to both internal (employees) and external (customers/other stakeholders) audiences.²⁷ Sociologist and self-

Section 1981 and the Equal Protection Clause is beyond the scope of this article. For a discussion of the interaction between WDE adjudicated under Title VII and those adjudicated under the equal protection clause, see Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* n. 5 at 2465, n. 41 (noting "courts have often treated [workplace discrimination] claims arising under both Title VII and equal protection doctrine the same.").

²⁴ See generally J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION AND THE SEARCH FOR JUSTICE (2006) (discussing the history of affirmative action in the public and private sectors including its legal aspects)

²⁵ See *infra* Part II.A.1.

²⁶ See generally KELLOUGH, *supra* note 24.

²⁷ See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 84–90 (discussing each of these instrumental interests and designating them the business, functional and social responsibility rationales respectively). This emphasis on instrumental goals does not mean that WDE are not, or cannot be, justified in moral, remedial, or social justice terms as well, or motivated in part by these concerns. *Id.* There is, for instance, in the legal profession, an ongoing debate about the competing force of the "business case" versus the "moral case." See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, at 2459. Additionally, many modern corporate diversity programs are aligned with their corporate social responsibility efforts, demonstrating that businesses recognize both the instrumental and social value of WDE. See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 88. Increasingly, however, the "business cases" has come to dominate the managerial rhetoric regarding the value of WDE.

described progressive John Skrentny denotes the difference between WDE and affirmative action as one between an employer's belief in "racial realism" (*i.e.*, WDE) and its commitment to "affirmative action liberalism" (*i.e.*, affirmative action).²⁸ Skrentny identifies two different strands of racial realism or WDE: (1) a belief in "racial abilities," and (2) a commitment to "racial signaling."²⁹ The racial abilities strand of racial realism parallels WDE's instrumental concerns for responding to diverse markets and improving business innovation.³⁰ The racial signaling strand aligns with WDE's instrumental concern for signaling the openness of the workplace.³¹ Skrentny contrasts the "racial realism" associated with WDE with the more approving "affirmative action liberalism," which emphasizes redressing inequality and ensuring equal opportunities.³² This perceived fundamental disjunction between WDE on the one hand and affirmative action on the other hand reflects the broader progressive critique of WDE as diametrical to the goal of workplace equality.³³

WDE are not, however, antagonistic to the goal of workplace equality; to the contrary, they are allied with that goal.³⁴ A statement on Starbucks' corporate website reflects and underscores how WDE and their instrumental goals transcend, without diminishing, the goal of equal opportunity:

At the heart of our business, we seek to inspire and nurture the human spirit - understanding that each

See discussion *infra* Part II.A.3.

²⁸ SKRENTNY, *supra* note 2, at 3.

²⁹ *Id.* at 11.

³⁰ *Id.* According to Skrentny, "racial abilities" refers to the productive use of race through the "common [practice] of racial matching...when it comes to dealing with clients or citizens of the concordant race" or for creating racially diverse groups to "generate more ideas and thus more innovation, more productivity, and better overall performance." *Id.*

³¹ *Id.* at 13. Skrentny defines "racial signaling" as the use of race to "gain a favorable response from an audience through the strategic deployment of an employee's race." *Id.*

³² *Id.* at 6.

³³ See *infra* Part III.A.1-2; see also Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, S. CAL. L. REV. 2 (forthcoming 2016), <http://ssrn.com/abstract=2620545> (positing that instrumental diversity is "orthogonal, or even hostile to equality").

³⁴ See *infra* notes 35-38 and accompanying text.

person brings a distinct life experience to the table. Our partners are diverse not only in gender, race, ethnicity, sexual orientation, disability, religion and age, but also in cultural backgrounds, life experiences, thoughts and ideas.

*Embracing diversity only enhances our work culture, it also drives our business success. It is the inclusion of these diverse experiences and perspectives that create a culture of empowerment, one that fosters innovation, economic growth and new ideas.*³⁵

As this statement demonstrates, despite deliberate attention to racial and gender inclusion in the workforce, contemporary WDE often do not directly seek to realize Title VII's remedial goal of redressing workplace inequality.³⁶ They emphasize instrumental business concerns.³⁷ Nevertheless, these efforts do promote more inclusive work cultures and foster greater workplace equality.³⁸

2. Race & Gender Conscious, NOT Racial & Gender Preferences

Another material difference between WDE and affirmative action is that WDE are merely race- and gender-conscious, but employment decisions need not and ought not be based expressly on the race or gender of candidates.³⁹ By contrast affirmative action is typified by explicit racial and gender preferences.⁴⁰ The progressive critique elides this important distinction, but it has material consequences for how WDE ought to be administered in practice and how they are treated in law.⁴¹

³⁵ See *Inclusion at Starbucks*, STARBUCKS.COM, <http://www.starbucks.com/responsibility/community/diversity-and-inclusion> (last visited Dec. 29, 2016).

³⁶ See *supra* note 19 (distinguishing between the remedial goals of affirmative action and the instrumental goals of WDE).

³⁷ See *supra* note 27 and accompanying text.

³⁸ See *infra* Part II.B.

³⁹ See *infra* note 44 and accompanying text.

⁴⁰ See *infra* notes 42–46 and accompanying text.

⁴¹ See *infra* Part III.A.

Traditional, remedial affirmative action plans are most often associated with racial and gender preferences, as exemplified in the seminal Title VII cases *United Steelworkers of Am. v. Weber*⁴² and *Johnson v. Transportation Agency*.⁴³ *Weber* approved of a union training program that reserved half of the available training slots for Black steelworkers in an attempt to remedy past discrimination in the union trades.⁴⁴ In sustaining this training program against challenge, the Supreme Court held that Title VII permits employers to adopt voluntary affirmative action plans that involve explicit racial preferences when they serve to remedy past discrimination by eliminating a “manifest racial imbalance” in the workforce.⁴⁵ Subsequently, in *Johnson* the Supreme Court upheld affirmative action plans involving explicit gender preferences.⁴⁶

By contrast WDE do not depend on, and ought not involve, explicit racial or gender preferences.⁴⁷ Rather, WDE entail race- and

⁴² 443 U.S. 193 (1979).

⁴³ 480 U.S. 616 (1987).

⁴⁴ *Weber*, 443 U.S. at 208.

⁴⁵ *Id.*

⁴⁶ See *Johnson*, 480 U.S. at 641–42. In *Johnson*, a male challenged the promotion of a female and the employer defended the selection on the ground that the employer was operating pursuant to an affirmative action plan designed to cure a gender imbalance in its workforce. *Id.* The Court approved the affirmative action plan based on the gender imbalance of the workforce, *i.e.*, none of the positions in the job category were held by women. *Id.* at 637–38. The EEOC ultimately issued regulatory guidance for employers on how to take advantage of the “safe harbor” established under Title VII when adopting voluntary affirmative action plans pursuant to the standards articulated in *Weber* and *Johnson*. See 29 C.F.R. § 1608 *et seq.* (setting forth the regulations for voluntary affirmative action); see also EEOC DIRECTIVES TRANSMITTAL 915.003: EEOC COMPLIANCE MANUAL § 15-VI.C: RACE AND COLOR DISCRIMINATION (2006), <http://www.eeoc.gov/policy/docs/race-color.pdf>.

⁴⁷ See *infra* note 49 and accompanying text. Nor are they race and gender exclusive. See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 82. This broad scope raises another progressive objection to WDE, *i.e.*, that they dilute the focus on workplace equality for women and racial minorities. See, e.g., Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219 (2011) (addressing the issue from a feminist perspective on workplace protections for women). Responding to that objection is beyond the scope of this paper, but it is notable that WDE still generate workplace equality benefits for

gender-conscious efforts designed to increase the presence of various underrepresented groups in the workplace, including specifically women and racial minorities, as well as ensure a more inclusive work culture as a means of leveraging this diversity and inclusion for instrumental benefit.⁴⁸ Notwithstanding their race- and gender-consciousness, properly administered WDE are careful to avoid explicit racial and gender preferences, or any efforts that may be exclusionary rather than inclusionary.⁴⁹ Creating both more diverse and more inclusive workplaces is, after all, the means by which employers realize the instrumental benefits of WDE.⁵⁰

3. A Common Origin in EEO Compliance

Despite these material differences, affirmative action and WDE do have a critical point of alignment.⁵¹ WDE, like remedial affirmative action plans, have origins in the management of EEO compliance.⁵² Although some scholars date the origins of WDE as far back as the

women and racial minorities specifically despite their broad scope. *See infra* Part II.B.

⁴⁸ *See supra* note 27. In fact, when WDE employ explicit racial and gender preferences they are most likely to go awry and create the kinds of unintended consequences that most concern progressive scholars. *See infra* Part III.A.2.

⁴⁹ *Compare Mlynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) (rejecting a reverse discrimination challenge to the employer's workplace diversity plan where the plan prohibited decision-makers from expressly considering race or gender in individual hiring or promotion decisions even though it encouraged and rewarded managers for their efforts to improve workplace diversity), *with Decorte v. Jordan*, 497 F.3d 433 (5th Cir. 2007) (affirming a jury verdict in favor of the white plaintiff challenging a diversity plan and finding it was not error for the trial court to treat the diversity plan as an invalid affirmative action plan where the employer used racial preferences in an attempt to achieve a desired racial balance within the workforce). For a fuller discussion of why racial and gender preferences ought not be employed as a part of WDE, *see* Hawkins, *supra* note 5, at 2478–79.

⁵⁰ *See generally* Michalle E. Mor Barak, *Inclusion Is the Key to Diversity Management, But What Is Inclusion?*, 39 HUM. SERV. ORGS.: MGMT., LEAD. & GOVERNANCE 83 (2015).

⁵¹ *See infra* note 52 and accompanying text.

⁵² For a general discussion of the history and origins of WDE, including their relation to the EEOC, *see* Kim et al., *supra* note 4; *see also* Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 80–81.

1960's,⁵³ the more common account locates the origins of WDE in the 1980's.⁵⁴ As administrative enforcement and attention to EEO compliance under Title VII waned during the Reagan Administration, human resources professionals "rebranded the programs they had built for EEO compliance as part of a new 'diversity management' initiative."⁵⁵ These nascent diversity efforts, initially designed to sustain EEO compliance, were soon bolstered in their importance when the "mega" discrimination cases of the 1990's demonstrated the huge liability corporations could face for failing to adequately prevent workplace discrimination,⁵⁶ and as the business management literature began to offer empirical proof that diverse, heterogeneous workforces were better for business than non-diverse, homogenous ones.⁵⁷

These factors, coupled with the growing demographic diversity of the labor force and the globalization of economic markets that made cultural competence an indispensable skill in the twenty-first century workforce,⁵⁸ caused WDE to transcend their origins in EEO

⁵³ See, e.g., Frymer & Skrentny, *supra* note 15, at 7 (arguing that WDE emerged as early as the late 1960's in response to the race riots).

⁵⁴ See Kim et al., *supra* note 4, at 173 (explaining that while companies began recruiting women and minorities in the 1960s, formal diversity programs did not emerge until the 1980s).

⁵⁵ *Id.* at 186. Coincidentally, due to the political appointment of federal judges, this shift in the political climate might also explain the judicial retrenchment on robust remedial enforcement of Title VII. See *infra* note 156 and accompanying text.

⁵⁶ See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 81–82 (describing the 1996 \$176.1 million Texaco settlement and the ensuing 1999 \$192 million Coca-Cola settlement of race discrimination charges as watershed events that precipitated the rapid rise of the diversity movement in corporate America); see also Nancy Levit, *Megacases, Diversity and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 367–68 (2008) (describing the proliferation of diversity initiatives after settlement through consent decree of "megacases" of employment discrimination).

⁵⁷ See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 86 (describing the emergence of the business and functional cases for diversity). For a fuller discussion of the functional benefit, see SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* (2008) (demonstrating empirical link between diversity, including social identity diversity such as race and gender, and work tasks such as problem-solving and prediction that allows diversity to be a value-added benefit in the workplace).

⁵⁸ In 1987, the Hudson Institute released its influential publication, *Workforce 2000*, predicting the rapid diversification of the American labor force. See Frymer & Skrentny, *supra* note 15, at 705–06. See also Brief for 65 Leading American

compliance and develop into the instrumentally-justified and widely-embraced management practices they have become today.⁵⁹ WDE are now largely justified in instrumental terms, rather than by the legal compliance justifications that characterized their EEO origins.⁶⁰ But this does not mean that instrumental WDE have become completely unmoored from these EEO origins.⁶¹ They continue to make workplaces more equitable and inclusive even as they have become increasingly justified in instrumental terms.⁶² In fact, it may be that the instrumental value for workplace diversity has become dominant, not in spite of, but because of its ability to remain allied with diversity's broader equality origins, making WDE consonant with rather than antagonistic to the equality goals underlying Title VII.⁶³

B. Diversity Fosters Workplace Equality

This fuller account of WDE's origins and operation, often unacknowledged in the progressive critique, demonstrates how WDE

Businesses as Amici Curiae Supporting Respondent at 4, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516) [hereinafter *Brief for 65 Leading American Businesses*] (arguing that the skills needed in the increasingly global economy included cultural competence).

⁵⁹ See Hawkins, *A Deliberative Defense of Diversity*, *supra* note 5, at 80–82; see also Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1590 (2001) [hereinafter Edelman et al., *Rhetoric and the Managerialization of Law*] (describing how WDEs both evolved out of and have helped influence EEO compliance). The proliferation of WDEs was also no doubt spurred by endorsement from the EEOC, the administrative agency charged with enforcement of Title VII. See EEOC DIRECTIVES TRANSMITTAL, *supra* note 46 (approving of “diversity efforts designed to open up opportunities to everyone”).

⁶⁰ See Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKLEY J. EMP. & LAB. L. 1, 6 (2005) [hereinafter Estlund, *Putting Grutter to Work*] (observing that “the public posture of [employers] has shifted over the last few decades away from [EEO] compliance and social justice and toward ‘diversity’” and achieving its “economic benefits.”).

⁶¹ See *infra* note 62 and accompanying text.

⁶² See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, at 2459 (discussing the debate between the “moral case” and the “business case” for diversity in the legal profession). Employers commonly reference these equal opportunity and inclusion goals alongside the instrumental goals. See *id.* Employers commonly reference these equal opportunity and inclusion goals alongside the instrumental goals. See *id.*

⁶³ See *infra* Part III.A.1.

and affirmative action efforts are aligned.⁶⁴ Moreover, there is ample evidence that WDE do promote workplace equality for women and racial minorities despite their express goal of improving business performance.⁶⁵ This should not be surprising considering the instrumental benefits sought by employers can often only be achieved if workplaces actually become both more diverse and also more inclusive.⁶⁶ Targeted recruitment efforts, for instance, increase the hiring and promotion of women and racial minorities while at the same time identifying new sources of talent that aid in business innovation.⁶⁷ Similarly, programmatic diversity initiatives designed to foster inclusion, such as mentoring and affinity groups, are credited with improving work cultures for women and racial minorities while also driving innovation and enhancing the employer's reputation for inclusion with key stakeholders.⁶⁸

Still critics claim that WDE generate little or no benefit for women and racial minorities, often pointing to mixed empirical reviews of diversity to support this claim.⁶⁹ While it is true there are

⁶⁴ See *infra* Part III.A.1.

⁶⁵ See Kim et al., *supra* note 4, at 206 (citing study showing that “‘identity-conscious’ human resource practices...are associated with greater gender and racial diversity in the ranks of management...by closely monitoring personnel decisions...and by ‘making special efforts to employ and promote the career progress’ of minorities.”); see also Lisa H. Nishii, *The Benefits of Climate for Inclusion for Gender-Diverse Groups*, 56 ACAD. MGMT. J. 1754, 1768 (2013) (demonstrating that inclusive work climates increase unit-level engagement and satisfaction by women and reduce turnover); E. H. Buttner et al., *Diversity Climate Impact on Employee of Color Outcomes: Does Justice Matter?*, 15 CAREER DEV. INT’L 239, 249 (2010) (finding that organizational practices facilitating workplace inclusion correlate with high levels of job satisfaction and low turnover for employees of color).

⁶⁶ See generally PAGE, *supra* note 57 (explaining that diverse workgroups only generate greater business innovation when the demographic differences among groups translate into differences of skill and experiences that can be leveraged in problem-solving); see also Barak, *supra* note 50, at 87.

⁶⁷ See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, 2479–81 (discussing the Rooney Rule, its impact on the diversity of the NFL, and how it has been recommended for adoption in the legal profession).

⁶⁸ See CARBADO & GULATI, *supra* note 3, at 314; see also Kim et al., *supra* note 4, at 207–08 (observing that mentoring programs have positive benefits for women and minorities in management).

⁶⁹ Lisa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 765–67 (2011) (describing empirical evidence on the

studies purporting to demonstrate negligible benefits accruing to women and racial minorities from WDE, these studies often have narrow findings and are contradicted by other data and studies demonstrating that WDE do generate significant workplace benefits for women and racial minorities.⁷⁰ Critics often cite a 2006 study by Alexandra Kalev, Frank Dobbin, and Erin Kelly as proof that WDE generally have no appreciable benefit for women and racial minorities.⁷¹ Instead the Kalev, Dobbin, and Kelly study concludes that diversity training specifically is not particularly helpful for improving advancement opportunities for women and minorities.⁷² However, the study also finds that other WDE, such as mentoring, fair better in this regard.⁷³ Most important, the study finds that employers who adopt diversity management structures with accountability for WDE significantly improve advancement opportunities for women and racial minorities in the workplace.⁷⁴ Not only are the beneficial

benefits of diversity as “mixed”); Edelman et al., *Rhetoric and the Managerialization of Law*, *supra* note 59, at 1632 (suggesting some diversity efforts are effective while others are not).

⁷⁰ See *infra* notes 71–73 and accompanying text.

⁷¹ Tessa L. Dover et al., *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, HARV. BUS. REV. (Jan. 4, 2016), <https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they-make-white-men-feel-threatened> (describing the Kalev, Dobbin and Kelly study as “[a] longitudinal study of over 700 U.S. companies [finding] that implementing diversity training programs has little positive effect and may even decrease representation of black women.”).

⁷² See Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 590, 594–95, 611 (2006). Importantly, this study was limited to evaluating only a handful of diversity practices, including diversity committees/task forces/managers, manager evaluations, diversity training, networking programs and mentoring programs. *Id.* at 590. The study was further limited by measuring the efficacy of these programs only in relation to the increased representation of women and minorities among management. *Id.* This finding of the limited utility of diversity training programs is not surprising considering these programs are not designed to improve advancement opportunities for women and racial minorities. See *id.* at 604. Rather, they are designed to improve work cultures by reducing bias. See *id.*

⁷³ *Id.* at 607 (showing mentoring programs have positive effects which are strengthened by robust accountability structures). Indeed, this study was later referenced by Kalev & Dobbin as showing only that some of the most popular corporate diversity programs . . . fail to produce tangible, on-the-ground results.” Kim et al., *supra* note 4, at 204.

⁷⁴ Kalev et al., *supra* note 72, at 607.

effects of WDE acknowledged in the Kalev, Dobbin, and Kelly study itself, they are also demonstrated in a number of other empirical studies.⁷⁵ This research on the beneficial effects of WDE offers strong proof of their value for improving equal opportunities for women and racial minorities even when, and perhaps precisely because, they are justified in instrumental rather than remedial terms.⁷⁶

II. THE PROGRESSIVE CRITIQUE OF DIVERSITY

Despite the demonstrated improvements in workplace equality they generate, and the enthusiastic embrace by employers, progressive legal scholars have frequently criticized WDE.⁷⁷ Often failing to acknowledge their EEO origins, or credit their equality-enhancing effects, progressive legal scholars have focused instead on the instrumental justifications for WDE and examples of their potential harms to assail them as both antithetical in principle and incompatible in practice with the goal of workplace equality underlying Title VII.⁷⁸

⁷⁵ See, e.g., Kim et al., *supra* note 4, at 607; Barak, *supra* note 50, at 87; Nishii, *supra* note 65, at 1763–64; Buttner et al., *supra* note 65, at 249.

⁷⁶ See Edelman et al., *Rhetoric and the Managerialization of Law*, *supra* note 59, at 1632 (suggesting that the instrumental bases for WDEs might actually make them more effective than equal opportunity efforts undertaken for legal compliance reasons).

⁷⁷ See Frymer & Skrentny, *supra* note 15, at 719 (noting despite widespread adoption of WDEs, they have “few supporters in the academic and legal community”); *but cf.* George H. Taylor, *The Object of Diversity*, 75 U. PITT. L. REV. 653, 657 (2014) (objecting to Leong’s critique of diversity specifically by positing, “she is mistaken that there is a disjunction between the basic sense of rightness...and the implementation of diversity.”). Taylor offers a cogent account of diversity’s potential to instantiate workplace equality stating, “diversity at its best serves not only the goal of institutional participation by people of color, but also a recasting, through this participation, of institutional norms.” *Id.* at 674.

⁷⁸ See, e.g. Estlund, *Taking Grutter to Work*, *supra* note 19, at 26 (expressing approval of the diversity rationale only insofar as it aspires to integrative ends, rather than merely instrumental ends, and further expressing concern that the instrumental ends might override these integrative ends and thwart the egalitarian purposes of Title VII); Norton, *supra* note 19, at 545–47 (acknowledging that despite the turn to instrumental rationales many questioned whether this “signaled a retreat from articulating the moral justification for affirmative action....to avoid addressing directly the barriers of race and class that adversely affect so many [in the workplace]” and only embracing these rationales to the extent they signal a rejection of a “racial caste system”); Tristin K. Green, *Race and Sex in Organizing Work: “Diversity,” Discrimination and Integration*, 59 EMORY L. J. 585, 598 (2010)

However, this critique ignores the material differences between WDE and affirmative action that make WDE less likely to be harmful in practice when properly administered, while at the same time disregarding the critical alignment between the two that makes them more compatible in principle than progressives acknowledge. By identifying these errors in the progressive critique, this Part reveals that WDE are neither incompatible with the workplace equality goals underlying Title VII in principle; nor are they necessarily harmful to the interests of women and racial minorities in practice.⁷⁹ This part demonstrates how WDE have the potential, if properly circumscribed, to aid in the progressive project of advancing workplace equality, particularly on behalf of women and racial minorities.⁸⁰

A. *An Overview of the Progressive Critique*

The progressive critique of WDE opposes them both in principle and in practice and can be summarized into the following objections: (1) WDE's instrumental rationale(s) are antithetical to the equality principle underlying Title VII;⁸¹ (2) WDE's instrumental rationale(s) are incompatible with the remedial scheme of Title VII;⁸²

(noting that because equality and integration are not dominant themes in the instrumentalist arguments in favor of WDEs, they are “likely to entrench rather than destabilize inequality in organizations” especially when used to organize work, rather than at the moment of entry into the workplace and should be permitted only if aligned with broader integrative efforts pursuant to Title VII.); Cheryl L. Wade, “*We Are An Equal Opportunity Employer*”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1548 (2004) (explaining that WDE discussions often fail to deal with “difficult problems of discrimination and racism”).

⁷⁹ See *infra* Part II.A.

⁸⁰ See *infra* Part II.B.

⁸¹ For instance, in describing the diversity rationale in the employment context, Cynthia Estlund described it as “decidedly *not* a remedial argument; it is instrumental and forward-looking. It is not about making up for the sins of the past, but about making a better future.” Estlund, *Taking Grutter to Work*, *supra* note 19, at 216.

⁸² See Rebecca H. White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 269 (2004) (arguing that instrumental diversity is in tension with Title VII's remedial scheme); see also Estlund, *Taking Grutter to Work*, *supra* note 19, at 218 (suggesting that WDE are only permitted if they incorporate integrative with instrumental aims); Green, *supra* note 78, at 621 (urging courts not to recognize instrumental justification for WDE without alignment with the remedial purpose of Title VII).

(3) WDE exploit, rather than benefit, women and racial minorities;⁸³ and (4) WDE essentialize and/or entrench, rather than destabilize or disrupt, harmful gender and racial stereotypes.⁸⁴ Following a general overview of each of these discrete objections, I highlight the ways progressive legal scholars articulated these objections to WDE in doctrinal terms in the wake of the Supreme Court's 2003 decision in *Grutter v. Bollinger*, in which the Court expressly approved of a university's interest in student body diversity based in part on the instrumental benefits that accrue to employers in the form of students who are "better prepare[d] for an increasingly diverse workforce."⁸⁵ Despite judicial endorsement of the instrumental value of diversity in the educational context, many progressive legal scholars expressed skepticism that the Court would (or should) similarly embrace this instrumental diversity interest in the employment context under Title VII.⁸⁶

1. Diversity as Antithetical to Equality

The first, and perhaps most fundamental, objection progressive scholars have raised in response to the rise of WDE is that these efforts are simply antithetical to the equality aims of Title VII.⁸⁷ This rejection of WDE in principle is based on a belief that the underlying

⁸³ See Estlund, *Taking Grutter to Work*, *supra* note 19, at 219 (suggesting that the "business case for diversity" is problematic in "echo[ing] employers' discredited efforts to cite discriminatory 'customer preferences' under Title VII."); see also Leong, *supra* note 1, at 2165.

⁸⁴ See CARBADO & GULATI, *supra* note 3, at 73 (framing the problem of working identity in terms of "essentialism").

⁸⁵ *Grutter*, 539 U.S. at 330. At issue in *Grutter* was whether the University of Michigan Law School's race-conscious admissions plan justified by instrumental concerns for student body diversity rather than remedial concerns for remedying past institutional discrimination could withstand challenge under the strict scrutiny standard applicable to race-based equal protection claims. *Id.* at 328. The Court found that achieving the educational benefits of student body diversity was sufficiently compelling to justify a university's race-conscious admissions plan. *Id.* at 328. This holding was subsequently affirmed in *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411 (2013); *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016).

⁸⁶ See *infra* Part II.B. This skepticism and hostility towards WDE can be contrasted with the general embrace of instrumental diversity in the context of higher education admissions. See e.g. Estlund, *Taking Grutter to Work*, *supra* note 19, at 220 (treating the *Grutter* diversity interest favorably even while critiquing WDE).

⁸⁷ See *supra* note 88–91 and accompanying text; see also Rich, *supra* note 33, at 2 (describing WDEs as "orthogonal, or even hostile to equality").

instrumental rationales make these efforts unsuited to the task of achieving the social justice goal of workplace equality underlying Title VII.⁸⁸ Illustrating this belief in the fundamental disjunction between diversity and equality, Skrentny argues that in the turn towards the instrumental management of WDE, “significant opportunities and values [have been] lost.”⁸⁹ In particular, Skrentny laments that this shift in emphasis away from a more remedial, non-discrimination approach and toward instrumental diversity “sacrifice[s] the consensus goal of equal opportunity” that underlies the enforcement of Title VII.⁹⁰ Stephen Rich similarly argues that “[p]hilosophically, diversity contradicts basic principles of antidiscrimination law” because it rejects the remedial rationale for pursuing equality in favor of an instrumental one.⁹¹

This view that WDE are incompatible with, or even antagonistic to, workplace equality for women and racial minorities fails to acknowledge WDE’s EEO origins, or the fact that in many ways WDE have continued to enhance workplace equality and promote greater workplace inclusion even as they have transcended these EEO origins.⁹² Consequently, WDE and equality are neither inherently nor necessarily incompatible.⁹³ Rather the equality-enhancing effects of WDE can be reconciled with the equality principles underlying Title VII.⁹⁴

⁸⁸ Rich, *supra* note 33, at 2.

⁸⁹ SKRENTNY, *supra* note 2, at 2.

⁹⁰ *Id.* at 3; *see also* Frymer & Skrentny, *supra* note 15, at 721–23 (describing the “seeming matter-of-fact acceptance of instrumental forms of race” and lamenting that “the Court has forgotten why race matters, and should matter in certain contexts and why it does not and should not in others” separating it from historical context). Frymer and Skrentny do acknowledge that this shift might be a pragmatic response to the judicial turn away from traditional remedial enforcement of civil rights laws, but still question the adequacy of instrumental diversity as a substitute for, or even supplement to, the pursuit of purely egalitarian aims for workplace equality. *Id.* at 678–79; *see also infra* Part II.B.

⁹¹ Rich, *supra* note 33, at 2.

⁹² *See infra* Part II.B.

⁹³ *Id.*

⁹⁴ *Id.*

2. Diversity as Incompatible with Title VII

The second objection is a more nuanced version of the first. Specifically, some progressive scholars point to the expressly remedial purpose of Title VII to argue that WDE are not only incompatible with Title VII in principle, but expressly prohibited by it.⁹⁵ Skrentny explains this objection by emphasizing that non-discrimination and equal opportunity are the only permissible goals justifying race- or gender-motivated conduct under Title VII.⁹⁶ He concludes that the absence of egalitarian goals as a motivation for engaging in WDE would prove fatal to their defense under Title VII.⁹⁷

The problem with this objection is that it conflates the race- and gender-consciousness of WDE with the racial and gender preferences of remedial affirmative action; but, as explained above, the two are quite distinct.⁹⁸ WDE are race- and gender-conscious in

⁹⁵ See White, *supra* note 82, at 268 (observing that because Title VII has only been held to support a remedial interest, the non-remedial diversity interest could not be sustained under Title VII); Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451, 462 (2004) (observing “[u]nder Title VII, an employer may only act to redress past discrimination or a manifest imbalance in its workforce...Neither of *Grutter*’s categories of interest...fit within the Title VII analysis,” notwithstanding a prediction that Title VII might ultimately be modified to accommodate the diversity interest); Ciocchetti & Holcomb, *supra* note 19, at 347 (arguing that the diversity rationale “butt[s] heads with the express language and anti-discriminatory thrust of Title VII”); *but see* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1048–49 (2004); Green, *supra* note 78, at 617 (arguing that non-remedial justifications in support of racial/gender preferences were not expressly ruled out by the Court in *Weber*); Norton, *supra* note 19, at 547, 617 (discussing instrumental diversity efforts and application to an “employment context.”).

⁹⁶ SKRENTNY, *supra* note 2, at 80. (“In private employment, where Title VII and Section 1981 are the relevant statutes, only classical liberalism and affirmative action liberalism have court backing,” noting there is “no [bona fide occupational qualification (BFOQ)] defense for race” under either statute.)

⁹⁷ *Id.* at 88; *see also* Eang L. Ngoy, *War and Peace Between Title VII’s Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L. J. 74, 76–78 (2010) (comparing the instrumental justifications for race-consciousness under WDE to prohibited customer preferences under the BFOQ defense).

⁹⁸ See *supra* Part II.A.2. It is important to make a distinction between principle and practice as it relates to WDE. See Edelman et al., *Rhetoric and the*

that they acknowledge the instrumental importance of a demographically diverse workforce and adopt systematic approaches for achieving workplace diversity, but they need not and ought not involve racial and gender preferences.⁹⁹ Nor do WDE rely on the explicit consideration of race or gender when making individual employment decisions.¹⁰⁰ This distinction is critical for understanding why WDE do not necessarily contravene either the purpose or express language of Title VII notwithstanding their race- or gender-consciousness.¹⁰¹ Moreover, this distinction is also necessary for understanding why Title VII law and doctrine can be, and has generally been, amenable to WDE in spite of their instrumental aims.¹⁰²

Managerialization of Law, *supra* note 59, at 1592 (discussing the difference between WDE in principle and in practice and similarly focusing only on how WDE are conceived in principle rather than how they operate in practice). WDE do not always operate in practice the way they are conceived in principle. *Id.* Despite this discrepancy, the focus here is on how WDE are conceived in principle. *Id.*

⁹⁹ See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, at 2476–81 (cautioning that WDE ought not involve explicit consideration of race or gender in decision making, but may involve other race- and gender-conscious efforts designed to expand opportunities and create a more inclusive workplace, such as targeted recruitment or affinity groups).

¹⁰⁰ *Id.* at 2476 (discussing the impropriety of expressly considering race or gender even as a “tie-breaker” when making employment decisions pursuant to WDE).

¹⁰¹ To understand this difference between the inexplicit race and gender-consciousness of WDE and the explicit racial and gender preferences of affirmative action plans, it is instructive to review Justice Kennedy’s equal protection jurisprudence on race distinguishing between permissible race-consciousness and impermissible racial classifications. Compare *Grutter*, 539 U.S. at 387–95 (Kennedy, J., dissenting) (observing that classifying students on the basis of race must withstand strict scrutiny), with *Parents Involved in Cmty. Sch. vs. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (Kennedy, J., concurring) (observing that race-conscious efforts to integrate schools might be permissible if they are race-neutral). For an analysis of Kennedy’s jurisprudence on these and similar cases, see Ciocchetti & Holcomb, *supra* note 19, at 342–43. But see *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016) (suggesting that even race-conscious efforts may be problematic under equal protection even when they do not involve racial classifications).

¹⁰² See *infra* Part II.B; see generally Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5 (surveying decided Title VII diversity cases to demonstrate the difference in treatment of WDE that are merely race- and gender-consciousness and affirmative action plans involving racial and gender preferences).

3. Diversity as Exploitive of Women & Racial Minorities

The third objection levied against WDE by progressive scholars raises a more practical concern. The complaint is that WDE have the potential to operate in ways that are exploitive of women and racial minorities who ought instead to be the object of solicitude under Title VII.¹⁰³ Nancy Leong explains this objection in an article provocatively titled *Racial Capitalism*.¹⁰⁴ Leong claims that the instrumental value assigned to racial (and gender) identity by employers pursuant to WDE results in a commodification of minority racial (and female gender) identity by predominantly white (male) institutions.¹⁰⁵ Discussing why WDE are exploitive of (women and) racial minorities and should be viewed warily, Leong describes them as “merely a useful means . . . to acquire social and economic benefits” for predominantly white institutions while “avoiding [the] more difficult questions of racial [and gender] equality.”¹⁰⁶ Exploitation, however, is neither the necessary nor is it an inevitable consequence of WDE.¹⁰⁷ Rather than only generating benefit for the employer, WDE often generate tangible benefits for employees as well, including specifically women and racial minorities.¹⁰⁸ These

¹⁰³ See Leong, *supra* note 1, at 2155–56, 2194–96 (discussing how diversity and inclusion efforts commodify nonwhite individuals, and examines racial capitalism in the workplace); see also Green, *supra* note 78, at 599 (suggesting that some WDE “may generate or exacerbate feelings of exploitation and isolation reported by women and people of color”); Wade, *supra* note 78, at 1545 (noting that work place dynamics can lead to situations where “diversity discussions make people of color supplicants, and whites become their benefactors”); Rich, *supra* note 33, at 2, 28, 29 (describing WDE as “exploitive”); see also Rebecca K. Lee, *Core Diversity*, 19 TEMP. POL. & CIV. RTS. L. REV. 477, 492 (2009) (describing the ways in which some employers implement workplace diversity practices using a “marginal diversity approach [that] can leave female and minority workers feeling exploited...[and] further contributes to the stereotyping of women and racial minorities”).

¹⁰⁴ Leong, *supra* note 1, at 2153. Leong’s claim is broader than WDE. *Id.* at 2153–56. She assails diversity efforts generally, but she relies heavily on workplace examples to signify her claims. *Id.* at 2194–96.

¹⁰⁵ *Id.* at 2155. Leong focuses her critique of WDE on their racial harms, but acknowledges that these same harms can accrue to other groups targeted by WDE as well. *Id.* at 2184, n. 174 (acknowledging the performative harms that similarly accrue to women and LGBT persons); see also *id.* at 2217 (discussing how work cultures can impose burdens on the basis of both race and gender).

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* notes 64–67 and accompanying text.

¹⁰⁸ *Id.*

benefits include, among other things, expanded employment opportunities and improved work cultures.¹⁰⁹ So this critique skews the benefit/harm calculus unjustifiably against WDE.¹¹⁰

4. Diversity Essentializes Racial & Gender Identity

A related fourth objection is that WDE tend to essentialize and/or entrench gender and racial identities, rather than to disrupt stereotypic notions of gender and race and allow for more authentic and inclusive expressions of identity to be valued and flourish in the workplace.¹¹¹ Devon Carbado and Mitu Gulati unpack this claim as it relates to race specifically.¹¹² Carbado and Gulati acknowledge that all employees “feel pressured to signal to their employers that they belong and possess the right institutional stuff to succeed.”¹¹³ The problem with WDE, in their estimation, is that racial minorities and women face greater pressures to work their identities in ways that signal their belonging to employers than do their white, male peers.¹¹⁴ The

¹⁰⁹ *Id.*

¹¹⁰ For an extended discussion of this miscalculation, see Stacy L. Hawkins, *Selling Diversity Short: An Essay Responding to Nancy Leong’s “Racial Capitalism,”* 126 *HARV. L. REV.* ___ (2013), 40 *RUTGERS L. REC.* 68 (2013).

¹¹¹ See Norton, *supra* note 19, at 562 (assailing instrumental rationales relating to businesses “race-matching” employees with customers as “a return to long-discredited ‘customer preference[s]’ . . . [that] indulges the sort of stereotypes that antidiscrimination principles seek to counter). For example, Tristin Green discusses the distinction between race- and sex-based decisions made pursuant to the diversity rationale at moments of entry, promotion, and exit, which she suggests may improve overall diversity and equal opportunity for women and racial minorities, and those made at the level of organizing work (or in assignment of work), which she suggests are “likely to entrench rather than destabilize inequality in organizations” by “perpetuat[ing] stereotypes about group difference . . . lead[ing] to stratification within workforces as women and minorities become pigeonholed in certain jobs or job functions and those jobs or functions labeled ‘female’ or ‘minority’ are devalued.” Green, *supra* note 78, at 598.

¹¹² Accord CARBADO & GULATI, *supra* note 3, at 23. See also Green, *supra* note 78, at 598.

¹¹³ See CARBADO & GULATI, *supra* note 3, at 23. The concern that WDE essentialize gender and racial identity is most likely to arise when diversity is pursued as a means of racial signaling, rather than when women and racial minorities are pursued for their “racial abilities.” See *supra* note 29 and accompanying text.

¹¹⁴ See CARBADO & GULATI, *supra* note 3, at 24–35 (explaining that marginalized groups are may feel the need to do more “identity work” to counteract negative stereotypes).

concern is that when employers assign value to racial and gender identity as a part of WDE women and racial minorities are forced to perform their identities in ways that might be inauthentic and that can be harmful.¹¹⁵

However, an important distinction identified by Carbado and Gulati, and one that helps distinguish when WDE may be harmful to women and racial minorities, and when they may instead actually be beneficial, is whether the racial signal the institution sends about its value for workplace diversity requires individuals to “act white” or to “act [] diverse.”¹¹⁶ Carbado and Gulati explain that some institutions might value individuals who are “diverse in terms of how they look, but not diverse in terms of how they act.”¹¹⁷ Rebecca Lee calls this “surface diversity.”¹¹⁸ Carbado and Gulati also concede that institutions might instead value individuals who both look and act “diverse”¹¹⁹ or what Lee would call “core diversity.”¹²⁰ If employers value those who both look and act diverse, then applicants and employees might feel empowered to be more rather than less authentic

¹¹⁵ *Id.* at 42 (describing identity work as “shadow work . . . unacknowledged as a formal matter [and] largely unregulated as a legal matter” with wide reaching implications). Carbado and Gulati acknowledge that performance can occur along a number of axes, such as dress, speech, and personal or professional affiliation. *See id.* at 1–3. This identify work has many potentially negative implications. *See id.* at 42.

¹¹⁶ *Id.* at 21, 116.

¹¹⁷ *Id.* at 125. Carbado and Gulati further elucidate this desire by explaining that an institution might very well value diverse individuals for their ability to signal the openness of the institution, but believe that persons who look different, but act the same as other institutional “insiders” are likely to generate the most benefit at the lowest cost to institutional harmony. *Id.* at 123 (discussing the need for diversity agents to be likeable outsiders by expressing ideological commitments and social behaviors that conform to institutional norms). Not all progressive scholars believe that selecting for intra-racial diversity is harmful to racial minorities, or undesirable generally. *See* Vinay Harpilani, *Narrowly Tailored But Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 817–24 (2015) (discussing the value of universities selecting for intra-racial diversity as a part of race-conscious admissions).

¹¹⁸ *See* Lee, *Core Diversity*, *supra* note 103, at 489 (describing an expectation that diverse employees act in identical ways by disregarding difference).

¹¹⁹ CARBADO & GULATI, *supra* note 3, at 136–38.

¹²⁰ *See* Lee, *Core Diversity*, *supra* note 103, at 494 (describing the “core diversity” model as leveraging individual differences to improve organizational practices).

when expressing their identity in the workplace.¹²¹ WDE that allow for these more authentic identity performances are not likely to incur the kinds of harms that concern progressives.¹²² Rather, this value for “core diversity” would seem to further, not hinder, the workplace equality goals of Title VII by creating more inclusive work cultures.¹²³ What each of these scholars, including Carbado and Gulati, implicitly acknowledge is that WDE are not always bad, nor do they necessarily

¹²¹ See CARBADO & GULATI, *supra* note 3, at 37–38. The reason these demands might be ameliorated is because the instrumental concern for leveraging workplace diversity to improve business performance (functional diversity) actually relies on individual differences associated with persons of different gender, race or ethnicity without concern for or attention to the ways in which these differences conform to or conflict with perceptions (stereotypical or otherwise) of group identity. See PAGE *supra* note 57, at 305–09; see also Barak, *supra* note 50, at 87. To the extent that these instrumental diversity values ameliorate identity performance demands, they are an advantage over the status quo in which racial and ethnic minorities are required to do identity performance work as a matter of course. See also Leong, *supra* note 1, at 2204–05 (describing the continuous acknowledgement and negotiation of racial identity by nonwhites irrespective of context). For a discussion of identity performance demands more generally, see KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

¹²² See CARBADO & GULATI, *supra* note 3, at 23–25 (acknowledging that all individuals perform identity work across a range of different contexts). Accordingly, the mere fact of performing identity work does not incur harm to women and racial minorities. *Id.* Instead, only particular types of identity work that are least true to an individual’s sense of authentic self are the subject of concern. *Id.* at 35. Nancy Leong also distinguishes between qualitatively different types of diversity, referring to its “thin” and “thick” conceptions in the same way that Lee distinguishes between “surface diversity” and “core diversity.” Leong, *supra* note 1, at 2169. In diversity management terms, this is the difference between diversity and inclusion. See generally Barak, *supra* note 50.

¹²³ Carbado and Gulati offer Justice Sonia Sotomayor’s nomination for the Supreme Court by President Obama as an example of this potentially beneficial form of diversity. CARBADO & GULATI, *supra* note 3, at 116–18. They suggest “something more was at stake vis-à-vis her nomination than to simply have the Court ‘look’ more diverse in its official photographs.” *Id.* at 117. Without attributing any particular motive to the nomination, they consider the possibilities that perhaps it was Justice Sotomayor’s ability to “speak explicitly from her experiences as a Latina”, or her willingness to “be racially salient when the moment called for it” that contributed to her nomination. *Id.* at 117–18. Either of these motivations are manifestations of WDE that would seem to be beneficial both for individuals, by alleviating identity performance demands, and for institutions, by both signaling openness and promoting cultural competence. See *supra* note 27 and accompanying text (describing instrumental interests).

incur the kinds of harms to women and racial minorities for which we should seek legal redress.¹²⁴

Accordingly, whether identity performance demands are harmful or beneficial to racial minorities and women follows from the way in which diversity is valued and practiced by individual institutions, not by the adoption of WDE *per se*.¹²⁵ If individuals are valued for their distinctive characteristics, rather than just for their membership in a particular group, *i.e.*, “core diversity,” this is likely to inure both to the benefit of the institution and to the individual.¹²⁶ Conversely, when institutions value only “surface diversity,” notwithstanding any institutional value that may accrue from these efforts, concerns rightly arise about the exploitation of, and harm to, women and racial minorities from these practices.¹²⁷

The thrust of both these latter arguments is an objection to the way WDE operate in practice, rather than an objection to the instrumental justifications underlying WDE in principle.¹²⁸ Accordingly, these objections suggest we might be able to restrain WDE in practice to accommodate this concern for their potential harms while also promoting their demonstrated equality-enhancing

¹²⁴ Cf. CARBADO & GULATI, *supra* note 3, at 148 (acknowledging the difficulties of sorting out the legal claims associated with working identity).

¹²⁵ *Id.*

¹²⁶ See Lee, *supra* note 118 and accompanying text. The value of promoting workplace inclusion may even exceed the EEO goals of Title VII because the emphasis is not merely on improving diversity as measured by the numeric representation of women and racial minorities in the workplace, but on ensuring the qualitative experiences of women and racial minorities are improved by fostering higher levels of engagement from these employees. See Nishii, *supra* note 65, at 1768; Buttner et al., *supra* note 65, at 249 (discussing how WDE improve the work climate for women and racial minorities and foster greater engagement).

¹²⁷ See Lee, *supra* note 103, at 490 (noting surface diversity operates to exclude rather than include difference).

¹²⁸ See *supra* notes 85–86 and accompanying text. There is, however, a sense in which critics of WDE believe that they are equal-opportunity suppressing in practice precisely because they are believed to be anti-egalitarian in principle. See, e.g., Green, *supra* note 78, at 598 (arguing that WDE are likely to entrench inequality because they are justified in instrumental rather than egalitarian terms). This conclusion does not follow if we understand WDE in the context of their equal opportunity origins, see *supra* Part II.A.3., and acknowledge their equality enhancing effects, see *supra* Part II.B.

effects.¹²⁹ Before turning to these prescriptive claims, it is first helpful to understand how this general critique of WDE translated into a specific doctrinal critique under Title VII in the wake of *Grutter*.

B. *The Post-Grutter Doctrinal Critique of Workplace Diversity*

The body of scholarship produced by progressive employment law scholars in the wake of the Supreme Court's 2003 decision in *Grutter v. Bollinger* also reflected skepticism towards WDE.¹³⁰ More than sixty-five corporate amici argued in *Grutter* that student body diversity was necessary to succeed in the twenty-first century global economy, and the Court placed heavy emphasis on this business rationale when approving of the interest in student body diversity on behalf of colleges and universities.¹³¹ Not surprisingly then, in the wake of that decision, legal scholars rushed to predict the likely impact of the Supreme Court's embrace of this diversity interest in *Grutter* on corporate employers' ability to justify race- and gender-conscious action in employment by asserting a comparable diversity interest under Title VII.¹³² Despite the fairly strong endorsement of the diversity interest to the workplace in *Grutter*,¹³³ many of these scholars seemed to reject the possibility that the Court would fully embrace the diversity interest when adjudicating it under prevailing

¹²⁹ See *infra* Part IV.B.

¹³⁰ *Grutter*, 539 U.S. at 330; see *Brief for 65 Leading American Businesses*, *supra* note 58, at 4. *Grutter* involved a challenge by a white female applicant denied admission to the University of Michigan Law School. *Id.* She alleged that the School's race-conscious admissions plan violated the equal protection clause. *Id.* However, in upholding the School's race-conscious admissions plan against challenge, the Supreme Court acknowledged that the School's interest in achieving a diverse student body was sufficiently compelling to justify the use of race in admissions; and moreover that the flexible, holistic review process employed by the School was appropriately narrowly tailored as required by the prevailing strict scrutiny standard applicable to race-based equal protection challenges. *Id.*

¹³¹ *Grutter*, 539 U.S. 330; see *Brief for 65 Leading American Businesses*, *supra* note 58, at 10.

¹³² See *infra* note 138 (discussing these predictions).

¹³³ *Grutter*, 539 U.S. at 330. Writing for the majority, Justice O'Connor emphasized that the instrumental benefits of diversity were "not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and viewpoints." *Id.*

Title VII doctrine, which they interpreted as permitting only remedial race-consciousness.¹³⁴

Cynthia Estlund's post-*Grutter* analysis is illustrative of this critique.¹³⁵ Much like Skrentny's principled objection to WDE, Estlund's doctrinal critique expressed deep concern for the tension between the instrumental rationales articulated in support of WDE and the remedial, anti-discrimination goals of Title VII.¹³⁶ She expressed particular concern that rather than promoting the remedial and integrative goals of Title VII, WDE instead were a modern echo of employers' formerly discredited attempts to cite white customer preferences as a means of avoiding compliance with the non-discrimination mandate of Title VII.¹³⁷ However, perhaps recognizing the growing embrace of WDE by employers, Estlund suggested that rather than simply reject these WDE outright, courts should instead require employers to frame their WDE in both instrumental and integrative terms to prevent the instrumental aims from overriding the integrative goals of Title VII.¹³⁸ To illustrate her prescriptive claim,

¹³⁴ *Id. See, e.g.,* Green, *supra* note 78, at 621; White, *supra* note 82, at 263–64; Rich, *supra* note 33, at 1–2; Estlund, *Taking Grutter to Work*, *supra* note 19, at 215–16; Lillard, *supra* note 18, at 146; *but see* Tilles, *supra* note 95, at 463 (although acknowledging the discontinuity between the instrumental rationales for diversity in *Grutter* and the remedial goals of Title VII, suggest “some basis to believe the conflict will be resolved by modifying the Title VII analysis to conform to *Grutter*.”); Richard N. Appel et al., *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L. J. 549 (2005) (suggesting that non-remedial diversity rationales may be extended in Title VII context).

¹³⁵ *See* Estlund, *Taking Grutter to Work*, *supra* note 19; *see also* Estlund, *Putting Grutter to Work*, *supra* note 60.

¹³⁶ *See* Estlund, *Taking Grutter to Work*, *supra* note 19, at 217–18. Estlund offered a more charitable reading of *Grutter* and its effects on Title VII in a later article in which she suggested that employers might be able to justify their WDE by demonstrating that prospective measures of diversity were as suitable as remedial measures of racial imbalance in deciding whether to permit voluntary affirmative action. Estlund, *Putting Grutter to Work*, *supra* note 60, at 6. This suggestion that employers ought to be permitted to engage in racial or gender preferences as a part of WDE is problematic, however, because allowing racial or gender preferences for instrumental reasons raises precisely the concerns for exploitation of women and racial minorities that Estlund seeks to avoid. *See infra* Part IV.B.2.

¹³⁷ Estlund, *Taking Grutter to Work*, *supra* note 19, at 219. These concerns are reflected in the legislative history of Title VII and gave rise to the exclusion of race as a “bona fide occupational qualification” under the statute.

¹³⁸ *See* Estlund, *Taking Grutter to Work*, *supra* note 19, at 220. Estlund suggested that these limits must accommodate claims for individual rights. *Id.* For a discussion

Estlund cited the Court's reasoning in *Grutter*, recognizing the instrumental reasons for valuing student body diversity but also acknowledging the need for special attention to enrolling underrepresented minority students.¹³⁹ By expressly wedding the diversity interest to remedial concerns in this way, Estlund argued that *Grutter* "cured the historical amnesia of the conventional [instrumental] argument," and she encouraged the same approach for WDE.¹⁴⁰

Tristin Green similarly argued that courts could not sanction WDE without undermining the force and effect of Title VII's solicitude for protecting women and racial minorities from workplace discrimination.¹⁴¹ Green suggested that because integration and equality are not "dominant themes" of the instrumental rationales for WDE, these efforts are more likely to "entrench rather than destabilize [workplace] inequality."¹⁴² But Green too attempted to blunt this presumptively negative impact by suggesting, similar to Estlund, that courts require employers who pursue WDE to also serve the goal of "reducing present and future workplace discrimination" thereby "further[ing] Title VII's broader statutory goals" in addition to whatever instrumental goals might be furthered by these efforts.¹⁴³

On the whole this body of literature largely predicted very limited, if any, application of the instrumental rationales recognized in *Grutter* to private employers defending WDE under Title VII unless the result was expressly to further the remedial, anti-discrimination goals of Title VII.¹⁴⁴ This principled opposition to WDE, however,

of how Title VII might accommodate the concern for individual claims of discrimination. *See infra* Part IV.B.

¹³⁹ *See Grutter*, 539 U.S. at 333 (acknowledging that a "'critical mass' of underrepresented minorities is necessary to further [the Law School's] compelling interest in securing the educational benefits of a diverse student body.")

¹⁴⁰ Estlund, *Taking Grutter to Work*, *supra* note 19, at 218, 220. Notably, WDE already target underrepresented groups. *See supra* note 14 and accompanying text.

¹⁴¹ *See Green*, *supra* note 78, at 598.

¹⁴² *Id.*

¹⁴³ *Id.* at 620–21. Green concluded that employers should only be permitted to pursue race- and gender-conscious goals if they are "intended to reduce workplace discrimination." *Id.* at 614.

¹⁴⁴ *See supra* note 138. These predictions did exhibit nuance, despite their caution. For example, Eric Tilles suggested that courts might try to resolve the inherent

was tempered by some pragmatism that these efforts might be tolerable if there could be some forced alignment with the egalitarian objectives of Title VII.¹⁴⁵ This proposed prescription, like the related critique, fails to recognize the existing alignment between WDE and the egalitarian objectives of Title VII.¹⁴⁶ Despite their instrumental goals, WDE remain allied with their EEO origins insofar as they continue to have equality-enhancing effects by improving equal opportunities for women and racial minorities and fostering inclusive work cultures.¹⁴⁷ The challenge for progressives is not to create alignment between WDE and workplace equality, or force this alignment to be more explicit.¹⁴⁸ The challenge instead ought to be for Title VII law and doctrine to be developed and interpreted in ways that

conflict between the remedial scheme of Title VII and the instrumental diversity interest by “modifying the Title VII analysis to conform to *Grutter*.” Tilles, *supra* note 95, at 463. Cynthia Estlund, on the other hand, argued that the impact of *Grutter* would be more limited in the employment context, amounting to no more than a different means of demonstrating a manifest imbalance in the workforce by importing the “critical mass” concept from *Grutter* into the Title VII proof scheme for voluntary affirmative action under *Weber* and *Johnson*. See generally Estlund, *Taking Grutter to Work*, *supra* note 19 (treating *Grutter* diversity interest favorably even while critiquing WDE). Notably, this skepticism and hostility towards WDE can be contrasted with progressives’ general approval of the Court’s embrace of instrumental diversity in the context of higher education admissions. *Id.* (citing to *Grutter* approvingly).

¹⁴⁵ See, e.g., SKRENTNY, *supra* note 2, at 268–69. Skrentny, for instance, goes to great lengths to reconcile what he believes is the irreversible trend towards WDE with what he believes to be the fundamental goal of Title VII—achieving workplace equality on behalf of women and racial minorities. *Id.* at 268–69. Skrentny dedicates an entire chapter of his book to sorting out the possible legal consequences of the turn towards WDE, and attempts to reconcile them to the egalitarian purposes underlying Title VII. *Id.* at 265–90. See also Turner, *supra* note 18, at 233–34 (suggesting the diversity rationale might be available, if at all, to public employers, but suggesting that the instrumentalist goals that accompany the diversity rationale necessitate “higher scrutiny” to ensure they do not offend the “fundamental antidiscrimination and integrationist” ideals that Title VII embodies.); Green, *supra* note 78 (advocating for acceptance of diversity only if properly aligned with the integrative goals of Title VII); Wade, *supra* note 78 (suggesting that in order for diversity to promote the interests of women and minorities it workplace equality, it must be coupled with a compliance-oriented perspective that seeks to reduce discrimination); Rich, *supra* note 33 (suggesting that diversity efforts be combined with institutional practices designed to support the advancement of underrepresented persons as envisioned by Title VII).

¹⁴⁶ See *supra* Part II.A.3.

¹⁴⁷ See *supra* notes 65–67.

¹⁴⁸ See *infra* Part III.B.

promote the existing equality-enhancing effects of WDE and limit their possibility for engendering the kinds of harms identified by progressive scholars.¹⁴⁹

Notably, pragmatism may have prevailed over principle in shaping the doctrinal prescriptions proposed by progressive scholars in part because the more favored remedial and integrative approaches to Title VII enforcement have become increasingly ineffective in preventing and correcting workplace discrimination against women and racial minorities, let alone in promoting workplace equality.¹⁵⁰ Although progressive scholars have decried this judicial turn away from more robust remedial enforcement of Title VII,¹⁵¹ it likely

¹⁴⁹ See *infra* Part III.B. This prescription is not the same as the progressive prescription that employers be forced to justify WDE in remedial or integrationist terms or to structure these efforts with an eye towards remedial or integrationist aims. Rather, the suggestion here is that Title VII law and doctrine be developed in ways that acknowledge and approve of WDE insofar as they demonstrate continued compatibility with the workplace equality goals of Title VII and otherwise restrict or proscribe their operation when their effects serve to undermine the goal of workplace equality. For a fuller discussion of this prescription, see *infra* Part IV.B and cites therein.

¹⁵⁰ See Sullivan, *supra* note 95, at 1085–87 (recognizing a “retrenchment” by the Supreme Court in Title VII cases that reflects a view of discrimination as “rare” rather than commonplace and observing “[r]acial discrimination, and to a lesser extent sex discrimination, has become so anathematized in our society that it is increasingly hard for juries (even judges) to believe it occurs.”); Natasha Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 318 (2010) (discussing the many ways that Title VII standards have been ratcheted up to make it more difficult for discrimination plaintiffs to succeed); Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening or Killing It?*, 74 LA. L. REV. 1160, 1163 (2014) (arguing that the Supreme Court’s narrowing construction of Title VII has limited its ability to accomplish the original goal of securing workplace equality on behalf of women and minorities); Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. No. 3, 888–954 (2011) [hereinafter Edelman et al., *When Organizations Rule*] (applying sociological neoinstitutional theory to demonstrate that prevailing Title VII legal standards do not adequately police institutional actors for discriminatory conduct, but simply defer to employers who demonstrate structural compliance with EEO laws).

¹⁵¹ See Martin, *supra* note 150, at 318 (discussing how pretext standard has operated to foreclose relief for Title VII plaintiffs); Chambers, *supra* note 150, at 1162 (discussing how expanded deference to employers has operated to limit remedies for Title VII plaintiffs); see also Sullivan, *supra* note 95, at 1085–87 (observing “retrenchment by the Supreme Court in Title VII cases reflects a change in the ‘basic

explains why, despite some misgivings, many progressive scholars have often not rejected WDE outright but instead have offered qualified support for these efforts.¹⁵²

C. *Diversity & Equality: An Unlikely Alliance*

This turn away from robust enforcement of traditional civil rights remedies is not unique to Title VII, but indicative of a broader judicial trend.¹⁵³ The receding tide of civil rights enforcement, while lamentable, actually offers progressive scholars the chance to re-envision equal opportunity law and doctrine by finding unlikely allies (employers) and deploying unlikely tools (WDE) in the fight for workplace equality.¹⁵⁴ From this perspective, WDE might be viewed as beneficial, rather than detrimental, to the cause of workplace equality.¹⁵⁵ As traditional civil rights remedies have narrowed, WDE

assumption' underlying *McDonnell Douglas*: discrimination...is now viewed as rare ...courts [are] more likely to believe cronyism...[or] personal animus explains disadvantages for minorities. These alternate explanations are increasingly replacing a presumption of discrimination in the courts.”)

¹⁵² See *supra* note 151 and accompanying text.

¹⁵³ The most recent evidence of this trend in the employment context is *Ricci v. DeStefano*, 557 U.S. 557 (2009) (rejecting an employer’s race-conscious efforts to avoid a disparate impact in the promotion of firefighters by holding that an employer must demonstrate a “strong basis in evidence” that the disparate impact will result in legal liability before engaging in a race-conscious remedy to cure the disparity). This trend can be seen in other legal domains as well, including education. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 551 U.S. 701 (2007) (striking down race-conscious student assignments in primary and secondary schools) and voting rights, see also *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking down Section 5 of the Voting Rights Act).

¹⁵⁴ This opportunity, and the unlikely alliance with corporate employers, has been acknowledged by at least some progressive scholars. See, e.g., Lee, *supra* note 103; Edelman et al., *When Organizations Rule*, *supra* note 150; Wade, *supra* note 78; see also Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5 (arguing that WDEs may, ironically, redeem Title VII as a bulwark for the protection of women and racial minorities).

¹⁵⁵ Even the EEOC has acknowledged this potential. See Press Release, EEOC, Race and National Origin Discrimination Persist 50 Years After EEOC’s Founding (April 15, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/4-15-15.cfm> (experts recommend focus on diversity and inclusion efforts as a way to reduce workplace discrimination and continuing inequalities).

have opened up space for alternate practices and accompanying doctrines of anti-discrimination law to emerge.¹⁵⁶

In some ways WDE have created a dilemma for progressive scholars who tend to view them as antithetical to the principles they believe best effectuate workplace equality, such as the remedial principle underlying Title VII.¹⁵⁷ At the same time, these scholars also recognize that narrowing judicial redress for traditional workplace discrimination under Title VII leaves much of the inequality experienced by women and racial minorities in the modern workplace unredressed.¹⁵⁸ This is a false dilemma.¹⁵⁹

Progressive scholars need not betray the commitment to equality, or even abandon the remedial principles underlying Title VII, to embrace WDE and their potential for creating more inclusive and equitable workplaces for women and racial minorities.¹⁶⁰ WDE are neither inherently nor inevitably antithetical to the principles of equality underlying Title VII.¹⁶¹ Rather, they have the potential to be equality-enhancing, despite their expressly instrumental aims.¹⁶² Notwithstanding the progressive scholarly critiques that followed in

¹⁵⁶ *Cf. id.* By comparison, the literature exploring these alternate theories of equality under equal protection doctrine is wide-ranging; see Reva Siegel, *From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1282 (2011) (positing that one way to understand the Supreme Court's equality jurisprudence is as a mechanism for avoiding racial balkanization among groups and simultaneously, facilitating social cohesion among groups); see generally William Eskridge, *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239 (2009) (envisioning the protection of minority rights as a function of a pluralist political system of governance that safeguards fully participating social minority groups from class legislation harmful to their collective interests). See generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (suggesting that a liberty-based theory of substantive due process rights supplant equality-based theories of rights on behalf of minority groups).

¹⁵⁷ See *supra* notes 81–84 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ See *infra* note 163 and accompanying text.

¹⁶⁰ See SKRENTNY, *supra* note 2, 268–269 (discussing the diversity rationale as complementary to the traditional, remedial rationales).

¹⁶¹ See *supra* Part II.B.

¹⁶² *Id.*

the wake of *Grutter*, WDE deserve renewed and refocused consideration to assess their potential for advancing workplace equality on behalf of women and racial minorities.¹⁶³

In deciding whether to embrace or reject WDE, progressive legal scholars ought to weigh several considerations. First, progressives must decide whether, on balance, WDE serve or disserve the goal of workplace equality in practice, rather than focusing only on how they are justified in principle. In adjudging the efficacy of school districts' efforts to desegregate elementary schools in the wake of *Brown v. Bd. of Education*, the Supreme Court famously remarked that the best plan was one that "promises realistically to work, and promises realistically to work now."¹⁶⁴ Similarly, WDE should not be judged solely by their instrumental rationales, but by whether they "promise realistically to work" in advancing workplace equality on behalf of those women and racial minorities who continue to suffer

¹⁶³ This is not to say that support for WDEs should supplant diligent enforcement of Title VII through the prosecution of traditional claims of discrimination on behalf of women and racial minorities or voluntary affirmative action by employers, where such actions can be justified and defended under prevailing legal standards. See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* n. 5 at 2465. Increasingly, however, these efforts are difficult to defend and employers should be mindful of the ratcheting up of the legal standards applicable to voluntary affirmative action efforts. See *Ricci v. DeStefano*, 557 U.S. 557 (2009) (requiring that employers demonstrate not only a manifest imbalance in the workplace as a predicate for voluntary affirmative action, but also a strong basis in evidence that the employer would be subject to liability for disparate impact discrimination). Nor is the claim that support for WDE should be uncritical. The suggestion is instead that WDE might offer some incremental benefit in achieving the goal of workplace equality on behalf of women and racial minorities, beyond that accomplished by remedial enforcement of Title VII alone, particularly as these remedial efforts decline in scope and significance. This is not the same argument made by Estlund and others that courts should sanction WDE only when they are aligned with remedial and integrationist goals. See *supra* notes 65–67. Rather, the claim here is that in addition to pursuing remedial enforcement of Title VII through traditional discrimination claims prosecuted by and on behalf of women and racial minorities, or even the adoption of voluntary affirmative action plans, we ought to consider how employer-adopted WDE might complement these Title VII enforcement efforts given the collateral benefits that often accrue to women and racial minorities from these programs. See *supra* Part II.A.3.

¹⁶⁴ *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

from discrimination and exclusion in the workplace.¹⁶⁵ The evidence suggests WDE have the potential to be equality-enhancing not just in spite of but perhaps because of their expressly instrumental aims.¹⁶⁶

Second, consideration must be given to the shifting trajectory of anti-discrimination law, and Title VII doctrine in particular.¹⁶⁷ If there are ways to leverage this doctrinal shift, those strategies ought to be fully deployed in service of the equality goals underlying Title VII.¹⁶⁸ Derrick Bell's often-cited interest convergence theory posits that equality for underrepresented minority groups may be possible only when the interests of these groups are aligned with the interests of the majority.¹⁶⁹ In many ways interest convergence theory explains why embracing WDE might offer the best hope for advancing workplace equality for women and racial minorities.¹⁷⁰

III. DIVERSITY & EQUALITY: POSSIBILITIES AND NEW PREDICTIONS

In order to understand how best to leverage Title VII law and doctrine to ensure that WDE continue to advance workplace equality consistent with their EEO origins, even as they also realize instrumental goals, it is necessary to first understand how Title VII law has responded to WDE to date. Although the Supreme Court has yet to

¹⁶⁵ See *supra* notes 81–84 and accompanying text; see *infra* note 211 (discussing the ways Title VII fails to prevent/correct many forms of discrimination).

¹⁶⁶ See *supra* notes 65 and 76 and accompanying text.

¹⁶⁷ See *supra* note 163 and accompanying text.

¹⁶⁸ The EEOC took a similarly pragmatic approach in its recently released report on harassment in the workplace, in which the authors note that while harassment is both legally and morally wrong, and ought to be redressed by employers for those reasons alone, “employers should also care about stopping harassment because it makes good business sense.” CHAI FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 17 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

¹⁶⁹ See Derrick A. Bell, *Brown v. Board of Education and The Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

¹⁷⁰ See, e.g., Taylor, *supra* note 77, at 659 (describing diversity efforts generally as “a prototypical example of Bell’s theory of ‘interest convergence’” and even noting that Bell himself acknowledged that diversity efforts “fit his interest convergence theory.”); see also Lee, *supra* note 103, at 506 (acknowledging that employers may be more motivated to pursue practices that align with their business interests).

decide a case involving WDE, many lower federal courts have.¹⁷¹ Overwhelmingly, these courts have approved of WDE when they are merely race- and gender-conscious; in contrast they have increasingly disapproved of the types of racial and gender preferences, characteristic of remedial affirmative action.¹⁷²

Noted legal scholar Lauren Edelman has written extensively about how managerial practices, such as WDE, have influenced the development of Title VII law and doctrine.¹⁷³ Edelman, writing with several colleagues, has identified two theories that explain the influence of management's embrace of WDE on the development of Title VII law and doctrine.

A. A Theory of Law & Workplace Diversity

Edelman developed the first theory – “managerialization of law” – by studying WDE specifically.¹⁷⁴ This theory posits that when business managers translate legal rules into business practice, they get filtered in a way that reorients them away from an emphasis on legal compliance and towards an emphasis on managerial concerns such as maximizing productivity and profitability.¹⁷⁵ This theory describes the evolutionary account of WDE precisely, having begun as rebranded EEO compliance efforts, then expanded and ultimately transcended

¹⁷¹ For a quantitative and qualitative analysis of these cases, *see generally* Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, 2467–73.

¹⁷² *See id.* at 2468–69. In a survey of post-*Grutter* cases, employers defending workplaces diversity programs involving race- and gender- conscious efforts that did not involve explicit racial or gender preferences experienced an eighty-six percent success rate. *Id.* at 2468. By contrast, employers defending voluntary affirmative action plans involving explicit racial and/or gender preferences succeeded only fifteen percent of the time. *Id.* at 2468–69.

¹⁷³ *See generally* Edelman et al., *Rhetoric and the Managerialization of Law*, *supra* note 59; Edelman et al., *When Organizations Rule*, *supra* note 150.

¹⁷⁴ Edelman et al., *Rhetoric and the Managerialization of Law*, *supra* note 59, at 1597–99.

¹⁷⁵ *Id.* at 1599. These motivations are consistent with the instrumental justifications offered in support of WDEs. *See id.* at 1619. Coding references to WDEs that appeared in the management literature beginning in the late 1980's, Edelman et al. found that “profit” was the most frequently cited reason in support of WDE, and also found references to managerial concerns for demographic diversity, legal compliance, fairness and responsiveness to customers. *Id.*

these origins to become the instrumental efforts we see today focused largely, if not exclusively, on business performance goals.¹⁷⁶ What Edelman's theory suggests is that, through the process of "normative isomorphism," this managerial conception of EEO law got conveyed back into the legal domain where it has been incorporated into the law.¹⁷⁷ Consequently, EEO law has become "managerialized" or "infused" with the managerial value for instrumental diversity as an acceptable means of achieving EEO compliance.¹⁷⁸ Importantly, at the same time that law becomes managerialized, businesses also become more "legalized" by these new legal norms shaped by and responsive to their managerial concerns.¹⁷⁹ Although Edelman, like many other progressive legal scholars, cautions about the dangers of this shift that WDE have occasioned away from a more remedial EEO compliance orientation, she nevertheless acknowledges the transformative potential of WDE for both Title VII law and employment practice, particularly in light of the waning remedial enforcement of Title VII.¹⁸⁰

¹⁷⁶ See *supra* note 46 and accompanying text.

¹⁷⁷ Edelman et al., *Rhetoric and the Managerialization of Law*, *supra* note 59, at 1595–96. The authors explain this process of "normative isomorphism" as consistent with "institutional theory," which "posits that the professions are key carriers of ideas among and across organizational fields and that the personnel, managerial, and legal professions are particularly important carriers of ideas about law" making them a "source of normative isomorphism within and across [each of these] organizational fields." *Id.* Specifically, they found that the management rhetoric accompanying and justifying the adoption of WDE had a particularly strong influence on the construction of Title VII law because the management rhetoric emphasizing the "novelty" of these practices allowed the logic of instrumental diversity to challenge the increasingly contested meaning of EEO law. *Id.* at 1610–11, 1631 (describing the decline in EEO enforcement during the Reagan Administration and the ensuing public/political backlash against affirmative action). The result was the development of legal standards that gradually embraced instrumental diversity's expanded conception of who ought to be protected against workplace discrimination under Title VII, as well as a shift in emphasis away from remediation and towards organizational effectiveness. *Id.* at 1602.

¹⁷⁸ *Id.* This can be seen in the Court's embrace of this managerial value for instrumental diversity in *Grutter*, 539 U.S. at 220, as well as in the EEOC's embrace of WDEs. EEOC, *supra* note 22, at 150, 162.

¹⁷⁹ See Edelman et al., *Rhetoric and the Managerialization of Law*, *supra* note 59, at 1602.

¹⁸⁰ *Id.* at 1632. According to Edelman et al., the cost of this shift is that it "divests law of its moral component." *Id.* The benefit, however, is that because "civil rights

Applying this managerialization of law theory to judicial decision-making in Title VII cases, Edelman and her colleagues identified a related phenomenon at the intersection of law and management practice – the “legal endogeneity” of organizations – that builds on managerialization of law.¹⁸¹ Edelman and her colleagues demonstrated that whatever resulting compliance practices employers adopt in response to the new managerialized version of EEO law, “legal actors and legal institutions become increasingly likely to associate those practices with legal compliance.”¹⁸² Legal endogeneity can be broken down into three, progressive stages: reference, relevance, and deference.¹⁸³ Reference indicates that “organizational structures have entered the judicial lexicon”.¹⁸⁴ Relevance occurs when judges consider these managerial practices in the determination of legal compliance.¹⁸⁵ Finally, at the deference stage, judges are more likely than not to presume the legal adequacy of these managerial practices to accomplish the intended compliance goal without scrutinizing their actual effects.¹⁸⁶

Edelman, *et al.* tested this theory of legal endogeneity by studying judicial review of employers’ discrimination and harassment policies and procedures in cases alleging workplace discrimination and harassment.¹⁸⁷ They found that, despite the lack of empirical proof of the beneficial effects of these policies and procedures for preventing or correcting discrimination and/or harassment as intended (and in some

law...never provided a panacea for women, minorities and other disenfranchised groups, ...[diversity] may overcome much of the managerial resistance to nontraditional workers by transforming the notion of ‘difference’ from one of legal imposition to one of business advantage.” *Id.* at 1632–33.

¹⁸¹ Edelman et al., *When Organizations Rule*, *supra* note 150, at 890.

¹⁸² *Id.* Similar to the managerialization of law, Edelman et al. found the context is ripened for legal endogeneity when there is ambiguity or political contest surrounding the law, as there was concerning EEO enforcement during the rise of WDE. *Id.* at 891.

¹⁸³ *Id.* at 893–94.

¹⁸⁴ *Id.* at 894.

¹⁸⁵ *Id.*

¹⁸⁶ Edelman et al., *When Organizations Rule*, *supra* note 150, at 894.

¹⁸⁷ *Id.* at 898–900. The policies and procedures studied by Edelman and her colleagues included anti-discrimination and anti-harassment policies, as well as the attendant training and complaint procedures. *Id.*

cases proof of their harm), the more commonplace these policies and procedures became the more likely judges were to cite to them as a material consideration in adjudging Title VII liability (*i.e.*, the greater their reference and relevance), and also the more likely these policies and procedures were to “acquire an aura of legitimacy irrespective of their impact,” (*i.e.*, the greater their deference).¹⁸⁸ Once presumptively legitimate, Edelman and her colleagues found that judges were less likely to scrutinize these policies and procedures for their practical effect in achieving Title VII compliance, and were instead more likely to simply reference their very existence as evidence of an employer’s Title VII compliance, or as evidence rebutting an employee’s claim of discrimination or harassment.¹⁸⁹ Again, Edelman, *et al.* caution that legal endogeneity undermines robust Title VII enforcement, but they also acknowledge that this effect is not inevitable if legal actors closely scrutinize managerial practices for their efficacy in promoting the workplace equality goals underlying Title VII.¹⁹⁰

Based on these findings, it is not surprising that as WDE have proliferated, they have become managerialized in law.¹⁹¹ More important, as they have expanded both their reference¹⁹² and relevance,¹⁹³ they have become increasingly likely to receive judicial deference.¹⁹⁴ This insight is helpful for understanding why, contrary to

¹⁸⁸ *Id.* at 898–900.

¹⁸⁹ *Id.* at 902.

¹⁹⁰ *Id.* at 933, 935.

¹⁹¹ See *supra* note 181 and accompanying text.

¹⁹² See *Grutter*, 539 U.S. at 308. Reference to diversity in legal opinions was relatively limited prior to its proliferation in corporate America and its judicial embrace in *Grutter*. See *id.*

¹⁹³ *Id.* at 330. The judicial embrace of the diversity interest in *Grutter*, as well as the Court’s citation in *Grutter* to the corporate amicus briefs in support of the claimed benefits of diversity as “not theoretical, but real,” demonstrate the increasing relevance of these diversity efforts. *Id.*

¹⁹⁴ See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, at 2477 (discussing cases adjudicating WDE in which courts have taken judicial notice of the beneficial value of diversity and its relevance to the modern workplace as well as presumed that an employer’s commitment to diversity could not be proof of discriminatory intent); see, e.g., *Brown v. Delaware River Port Auth.*, 10 F. Supp. 3d 556, 566 (D. N.J. 2014) (rejecting a memorandum instructing a hiring manager to change a position description after the initial posting failed to yield a diverse applicant pool as evidence of pretext for discrimination, reasoning “if

the post-*Grutter* predictions of many progressive scholars, courts have already demonstrated a willingness to embrace WDE as consonant with rather than antagonistic to Title VII.¹⁹⁵

This presumption of legitimacy accorded to WDE by judges is not problematic *per se*. Yet Edelman, *et al.* caution courts and other legal actors against abdicating their responsibility to ensure adequate enforcement of Title VII in the face of these increasing managerial pressures.¹⁹⁶ The theories of managerialization of law and legal endogeneity reveal the potential for Title VII law and doctrine to police the boundaries between those WDE that are equality-enhancing and those that are, or have the potential to be, equality-suppressing.¹⁹⁷ By permitting the former and proscribing or otherwise signaling disapproval of the latter, Title VII law can help maximize the equality-enhancing potential of WDE while minimizing their potential harm.¹⁹⁸ Notably, the managerialization of WDE into EEO law demonstrates that attempts to reject WDE in principle are unlikely to succeed.¹⁹⁹ Instead, progressive ought to focus on how best to structure Title VII law and doctrine to prevent WDE from realizing any potential harms to the greatest extent possible.²⁰⁰

it is literally true then it proves the opposite of discriminatory intent since the stated reason for the change was to increase diversity in the applicant pool..."); *Bissett v. Beau Rivage Resorts*, 442 F. App'x 148, 152 (5th Cir. 2011) (finding that a diversity policy did not support an inference of discrimination where the policy stated that the employer "values diversity and considers it an important and necessary tool that will enable [the employer] to maintain a competitive edge," and that the employer "is committed to maintaining a workforce that reflects the diversity of the community").

¹⁹⁵ See *supra* note 193 and accompanying text.

¹⁹⁶ See *supra* note 190 and accompanying text.

¹⁹⁷ See *infra* Parts III.A.1–2.

¹⁹⁸ Title VII has not only enforcement value, but also expressive value. Cf. Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 569 (2014) (discussing the expressive value of civil rights laws targeting anti-gay discrimination). As EEO compliance enforcement legalizes employers, they should internalize both the enforcement and expressive values embodied in these legal rules. For an example of how employers have already internalized EEO compliance in the area of sexual harassment enforcement, see *infra* note 280.

¹⁹⁹ See *supra* n. 194 (discussing cases in which courts have taken judicial notice of the beneficial value of WDE).

²⁰⁰ Several other progressive scholars have similarly urged the adoption of appropriate limits under Title VII to cabin the harmful effects that can accrue to

B. Leveraging Diversity to Advance Workplace Equality

The first equality-suppressing concern reflected in the literature critiquing WDE is that these efforts can sometimes operate to exploit women and racial minorities.²⁰¹ The second concern is that “surface” WDE might have the effect of essentializing racial and gender identity and therefore reinforcing instead of disrupting harmful stereotypes.²⁰² There are two interventions in Title VII law and doctrine that would allow courts to better scrutinize WDE for the harms that may accrue to women and racial/ethnic minorities when WDE go awry in practice.²⁰³ The first intervention is directed towards the harm of essentializing racial and gender identity, and the second is directed toward the harm of exploitation.²⁰⁴

1. Disparate Impact Liability for “Surface Diversity”

When employers value women and racial minorities for the signal they send to internal or external audiences about the organizational commitment to diversity, the employer may essentialize race and gender in ways that can be harmful to these employees.²⁰⁵ Notably, these harms are most likely to occur if the employer expresses a value only for “surface diversity,” rather than a value for “core diversity.”²⁰⁶ For instance, where employers value “surface diversity” employees may feel compelled (or worse yet be obligated) to perform “identity work” for the benefit of their employer and to

women and racial minorities from WDE. *See, e.g.*, Rich, *supra* note 33, at 47; Wade, *supra* note 78, at 1575. Whereas these scholars largely focus on redirecting the underlying rationale of WDE towards remediation and integration, and away from instrumental business concerns, the prescriptions offered here focus instead on policing the effects of WDE regardless of their underlying rationale. Additionally, some of these scholars have suggested that racial and gender preferences might be permissible in the interest of instrumental diversity. *See supra* notes 65–67. For the reasons discussed, *see infra* Part IV.B.2., the prescriptions offered here would proscribe the use of racial and gender preferences as a part of WDE.

²⁰¹ *See supra* note 106 and accompanying text.

²⁰² *See supra* note 115 and accompanying text.

²⁰³ *See infra* Part III.A.1–2.

²⁰⁴ *Id.*

²⁰⁵ *See SKRENTNY supra* note 2, at 11, for an in-depth discussion of racial signaling.

²⁰⁶ *See supra* notes 120 and 122 and accompanying text (describing “surface” and “core” diversity).

their own detriment.²⁰⁷ The harms that can accrue to women and racial minorities from these identity performance demands are largely expressive and dignitary, but they can also be more tangible and in some instances may even be pecuniary.²⁰⁸ The question is how to interpret Title VII law and develop Title VII doctrine in these cases to promote WDE when they are beneficial (or at least not harmful) to women and racial minorities, *i.e.*, core diversity, and to proscribe (or otherwise discourage) those WDE that are harmful regardless of any instrumental benefit that might accrue to the employer, *i.e.*, surface diversity?²⁰⁹

Scholars have observed that even when WDE incur harm by imposing identity performance demands on women and racial minorities, individually these harms may be difficult to remedy under Title VII's prevailing *McDonnell Douglas* standard applicable to

²⁰⁷ See CARBADO & GULATI, *supra* note 3, at 24. Common forms of this "identity work" include but are not necessarily limited to: appearing in marketing materials, attending diversity events, and race- and gender- matched mentoring. See Leong, *supra* note 1, at 2153 (describing a particularly egregious incident where a person of color was photo-shopped into a marketing brochure). Carbado and Gulati define this identity work more expansively as anything that a woman and/or racial minority employee might feel compelled to do to either negate perceptions (often stereotypical) of her as an outsider or to promote perceptions of her as an insider. See CARBADO & GULATI, *supra* note 3, at 24.

²⁰⁸ Title VII's requirement that plaintiffs prove a tangible adverse employment action forecloses the possibility of redress for harms that are only dignitary or expressive in nature. See 42 U.S.C. § 2000e-2; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing plaintiff's burden of proof at the *prima facie* case stage of the analysis to demonstrate some tangible, adverse employment action suffered because of that person's race, ethnicity, gender, or another protected basis). Carbado and Gulati quantify the pecuniary harms that can accrue to women and racial minorities from working their identities for the benefit of their employer to include both lost or diminished career opportunities and lost or reduced compensation. See CARBADO & GULATI, *supra* note 3. For a discussion of the burdens placed on racial minorities from both voluntary and involuntary mentoring, see Audrey Williams June, *The Invisible Labor of Minority Professors*, THE CHRON. OF HIGHER EDUC. (Nov. 8, 2015).

²⁰⁹ See *infra* notes 210–220 and accompanying text. There are two ways that Title VII law and doctrine can prevent employers from adopting harmful WDE: First, the expressive value of Title VII signals opprobrium of this conduct, thus discouraging it in the first instance; and Second, as Edelman and her colleagues demonstrated, legal endogeneity operates by influencing the widespread adoption of certain management structures rather than others. See *supra* notes 196 and 190 and accompanying text.

claims of disparate treatment discrimination.²¹⁰ Problems of proof might arise at various stages of the *McDonnell Douglas* burden-shifting framework,²¹¹ including when the plaintiff is called upon to offer evidence at the *prima facie case* stage that an adverse action is suffered or that such action is based on the plaintiff's race or gender.²¹² Similarly, at the final stage of proof it may be difficult to convince a trier-of-fact that unlawful discrimination, rather than other concerns, motivated the employer's actions.²¹³ These challenges would not be easy to overcome.²¹⁴ However, women and racial minorities forced to perform this kind of "identity work" to their

²¹⁰ See CARBADO & GULATI, *supra* note 3, at 66 (acknowledging that the harms of WDE generally may not be "a problem anti-discrimination law can fix."). Scholars have offered other, novel ways to compensate for these burdens, such as by adjusting salary accordingly, reducing other work obligations proportionately, *see* June, *supra* note 208, or providing additional value to women and racial minorities in exchange for this work. *See* Eli Wald, *BigLaw Identity Capital: Pink & Blue, Black & White*, 83 FORDHAM L. REV. 2509, 2514 (2015).

²¹¹ The *McDonnell Douglas* burden-shifting framework requires the plaintiff to first establish a *prima facie* case of discrimination by offering proof that: (1) he/she is in a protected class, (2) he/she was qualified for the position sought (in the case of hire or promotion) or met the employer's legitimate expectations (in the case of termination), and (3) similarly situated employees were treated differently or the adverse action was taken under circumstances giving rise to an inference of discrimination. 411 U.S. 792, 802. Assuming the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to demonstrate some legitimate, non-discriminatory reason for the challenged action. *Id.* This is a burden of production, not one of proof. *See id.* If the defendant satisfies the burden of production at the second stage, the burden shifts back to the plaintiff, who at the third stage must prove by a preponderance of the evidence that the reason articulated by the defendant is pretextual and/or that the real reason for the adverse action was unlawful discrimination. *Id.* at 804–05.

²¹² *See supra* note 211 (detailing the *McDonnell Douglas* burden-shifting framework generally and the *prima facie* case burden specifically).

²¹³ For instance, Carbado and Gulati concede that identity performance is a routine fact of life, and often individuals choose to perform their identities in certain ways without any explicit institutional prompting. CARBADO & GULATI, *supra* note 3, at 15. The absence of any act on the part of the employer to demand identity performance, or to demand specific types of identity performance, by racial minorities or women might prove fatal to a Title VII plaintiff's burden under the *McDonnell Douglas* proof scheme. *See supra* note 211 and accompanying text (discussing the *McDonnell Douglas* burden-shifting framework).

²¹⁴ *See* CARBADO & GULATI, *supra* note 3, at 65 (noting that the problems of diversity are not about "animus" and therefore are unlikely to be subject to legal sanction under existing standards).

detriment may not be without remedy if they are able to effectively assert a claim for relief under a disparate impact theory of liability.²¹⁵ Rather than proving individual harm and intentional discrimination pursuant to a disparate treatment theory of liability under the *McDonnell Douglas* standard, under a disparate impact theory of liability, aggrieved employees need only establish that: (1) the employer's WDE incur the burdens of identity performance; (2) these burdens are born disparately by women and/or racial minorities;²¹⁶ and (3) such efforts are not "job related" and "consistent with business necessity."²¹⁷ Pursuing a disparate impact theory of liability might be preferable for two reasons.²¹⁸ First, it avoids the problems of proof associated with a disparate treatment theory of liability.²¹⁹ Second, and perhaps more important, it allows courts to make individualized decisions about the effects of WDE in the context of particular institutional practices, rather than suggesting that WDE are *presumptively* discriminatory.²²⁰ An example loosely extrapolated from the literature is instructive.

²¹⁵ In addition to proscribing individual acts of discrimination, under certain circumstances, Title VII also prohibits employers from engaging in any conduct that has an adverse impact on a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

²¹⁶ Carbado and Gulati assert as a relatively indisputable proposition that Black employees, for example, could establish that they perform more identity work than others due to the negative stereotypes attributed to them in the workplace, such as laziness and the lack of qualifications, and the need to negate these stereotypes in order to enjoy professional success and/or career advancement. *See* CARBADO & GULATI, *supra* note 3, at 35–36. If this assumption is true, minority plaintiffs are likely to be able to meet the burden of proof on a disparate impact claim; *see also* Leong, *supra* note 1, at 2207–08 (offering the kind of evidence that might be available to demonstrate the disparate burdens placed on racial minority employees to work their identity in contexts where their employer instrumentally values workplace diversity); *see also id.* at 2202 (positing that historic racial inequities necessarily render a disparate impact in the identity performance demands imposed on racial and ethnic minorities versus white employees and suggests this is a matter about which anti-discrimination law should be concerned and which it "plausibly proscribe[s]").

²¹⁷ *See* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²¹⁸ *See* CARBADO & GULATI, *supra* note 3, at 74–76 (discussing these claims under a disparate treatment theory of discrimination).

²¹⁹ *Id.* at 65 (observing proof problems under a disparate impact theory).

²²⁰ Disparate impact liability tends to have less of a chilling effect on employment practices than does disparate treatment liability. Compare, for example, the difference between the chilling effect that *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), had in proscribing diversity considerations in teacher layoffs and the

Imagine that an elite corporate law firm is hiring entry-level associates from among a diverse pool of applicants.²²¹ This firm has expressed a commitment to the instrumental benefits of diversity and has avowed to increase their hiring of diverse entry-level associates.²²² The hiring committee decides that in addition to evaluating the candidates' academic credentials, the firm will also consider the extent to which each candidate would be a good "fit"²²³ and/or contribute to the firm's diversity.²²⁴ Assume that on the basis of the information available to the hiring committee from the resumes and interviews of the candidates, the selection decisions are as follows: [see table on following page].

negligible effect on pre-employment testing generally of the finding of discriminatory impact in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²²¹ This example manipulates the hypothetical offered in the original text to highlight the potential Title VII claims relating to identity performance. CARBADO & GULATI, *supra* note 3, at 72–76. Carbado and Gulati actually offer two different hypotheticals, one involving the non-selection of a Black woman among a group of racially and gender-diverse candidates and another involving the non-selection of a single Black woman among a group of Black women. *Id.*

²²² See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5 (discussing law firms' avowed commitment to diversity, including specifically hiring diverse associates).

²²³ "Fit" is the subject of much scholarly debate insofar as it may serve as a barrier to employment and/or advancement for women and minorities or even as a proxy for discrimination. See, e.g., CARBADO & GULATI, *supra* note 3, at 137–39.

²²⁴ *Id.* If the candidates were not equally well-qualified based on their credentials, it might be more difficult to justify the consideration of diversity in selecting among these applicants. See Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5 (discussing the legal risks associated with various law firm diversity efforts and in particular noting the low risk of liability under the *McDonnell Douglas* standard associated with subjective diversity hiring when candidates have equivalent credentials). According to Carbado and Gulati these are the precise circumstances in which institutions make intra-racial and intra-gender decisions that implicate individual's working identity and that are likely to impose identity performance demands on individuals. CARBADO & GULATI, *supra* note 3.

| Name ²²⁵ | Demographic | Resume Information ²²⁶ | Interviewer's Notes ²²⁷ | Selected for Hire |
|---------------------|-----------------|---|--|-------------------|
| Elizabeth Peters | White Female | Women's Law Caucus (<i>law school</i>) | Personable, team-player, ambitious | Yes |
| Rebecca Simon | White Female | President's Diversity Cabinet (<i>undergraduate</i>) | Third-generation lawyer | Yes |
| William Reynolds | White Male | SBA President (<i>law school</i>) | First-generation lawyer | Yes |
| Lydia Cruz | Hispanic Female | Young Republicans (<i>undergraduate</i>) Part-time student (<i>law school</i>) | "Well-spoken" | Yes |
| Martin Chandler | Black Male | Student Body President (<i>undergraduate</i>) Phi Gamma Delta Fraternity ²²⁸ (<i>undergraduate</i>) | "well-groomed" | Yes |
| Tyisha Davis | Black Female | Black Student Union President (<i>undergraduate</i>) Black Lives Matter organizer (<i>law school</i>) | "Dreadlocks?" | No |
| Nho Trong Nguyen | Asian Male | Asian Pacific American Law Students Association (<i>law school</i>) | "Heavy accent - difficult to understand" | No |

²²⁵ See Marianne Bertrand & Sendhil Mullainathan, *Are Emily & Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1008–09 (2004) (demonstrating employment bias based on applicant names).

²²⁶ Background information gleaned from resumes can form the basis of mental impressions about a candidate's diversity that lends itself to both inter- and intra-racial distinctions. *See id.* at 1007 (discussing a study of resumes that demonstrated employment discrimination based on names).

²²⁷ Numerous cues from an in-person interview can be used to create mental impressions about a candidate's diversity that lends itself to discriminatory attitudes. *See* CARBADO & GULATI, *supra* note 3 (discussing the way that individuals "whiten" their names to conform to an institutional value for whiteness).

²²⁸ This is not one of the five historically black fraternities. *See* <http://www.blackgreek.com/divinenine/>. Its founders were all white, and its membership appears to remain predominantly white. *See* PHIGAM.ORG, <http://www.phigam.org/2016/about/history> (last visited Dec. 29, 2016).

In this hypothetical, both the Black female and the Asian male not selected would have difficulty establishing a claim for disparate treatment discrimination on the basis of their race or national origin under the *McDonnell Douglas* standard.²²⁹ In the first instance, they would have difficulty demonstrating a *prima facie* case of discrimination where the persons selected included both Black and other ethnic minority candidates, rebutting any presumption that their non-selection was due to race or national origin.²³⁰ Additionally, these individuals would face an equally difficult burden at the third stage of the *McDonnell Douglas* burden-shifting framework to establish that unlawful discrimination on the basis of their race, ethnicity or national origin was the reason for their non-selection, rather than their name, appearance, accent, or other presumptively lawful considerations.²³¹

²²⁹ See *supra* note 211.

²³⁰ *Id.* (outlining the *McDonnell Douglas* burden-shifting framework and the proof required to establish a *prima facie* case of discrimination in the failure to hire context).

²³¹ See CARBADO & GULATI, *supra* note 3, at 143. Names, appearance, or accents may reasonably be considered performative aspects of race or national origin, but they are distinguishable from the phenotypical aspects of race or national origin that are generally subject to protection under Title VII. See *id.* (discussing the court's rejection of accent and appearance discrimination as actionable race or national origin discrimination under Title VII). For a general discussion of the ways in which Title VII fails to offer protection against discrimination based on these performative aspects of race, see Camille G. Rich, *Performing Racial and Ethnic Identity: Discrimination By Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (critiquing courts' failure to recognize performative aspects of race, such as appearance or accent/language, as subject to protection under Title VII); D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FLA. INT'L L. REV. 331 (2013) (arguing for legal recognition under Title VII of the discrimination suffered by Black and Muslim women from workplace dress codes that regulate appearance); see also Janet Ainsworth, *Language, Power and Identity in the Workplace*, 9 SEATTLE J. SOC. JUST. 233 (2010) (arguing that Title VII inadequately protects racial minorities from workplace discrimination based on facile distinctions between voluntary and involuntary aspects of identity). For a discussion of Carbado and Gulati's estimation of how these claims might fair under Title VII, see generally CARBADO & GULATI, *supra* note 3, 142–44 (discussing the possibility of asserting a “race-plus” claim of discrimination, but concluding such a claim is “normatively and theoretically problematic”).

However, if these candidates' names, appearance, or accents made them less desirable to the employer, this would seem to raise a concern that the employer values only "surface diversity," a practice that Title VII ought to proscribe, or at least condemn.²³² The outlook might be different if, rather than trying to remedy individual instances of harm arising from these identity performance demands under a disparate treatment theory of liability,²³³ we target employers who adopt only a "surface diversity" commitment using a disparate impact theory of liability.²³⁴

Under a disparate impact theory of liability, WDE that reflect only a commitment to surface diversity ought to be actionable.²³⁵ A disparate impact theory of liability would allow the treatment of working identity to be considered actionable discrimination because aggrieved employees need not demonstrate that the employer's consideration of working identity amounted to intentional discrimination.²³⁶ Nor do they need to establish that the dispositive aspects of working identity are themselves subject to protection under

²³² See Lee, *supra* note 103, at 490.

²³³ Disparate treatment liability is difficult to establish for any Title VII plaintiff, not just those challenging WDE. See generally Martin, *supra* note 150 (discussing Title VII's failure to address "disparate treatment").

²³⁴ See Lee, *supra* note 103, at 490. Notably, in a search of federal cases adjudicating WDE, see Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5, at 2467, the only case identified challenging WDE under a disparate impact theory of liability was brought by a group of Black employees alleging that the employers' effort to ensure proportionate representation at all levels of the company under a balanced workforce plan had a disparate impact on Black employees who, under the plan, were considered "overrepresented" in some job categories. Frank v. Xerox Corp., 347 F.3d 130, 135 (5th Cir. 2003). In reversing summary judgment for the employer, the Fifth Circuit ruled that the plaintiffs were entitled to a trial on the question of whether the employer's diversity initiative had a disparate impact on the Black plaintiffs. *Id.* While this case does not demonstrate the viability of a disparate impact theory of liability specifically for disapproving of "surface diversity," it does suggest the viability of a disparate impact theory of liability generally to redress the harms arising from WDE. See *id.*

²³⁵ See Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (establishing the standard for proof of disparate impact liability under Title VII).

²³⁶ See *id.* at 432. Under a disparate impact theory of liability, the plaintiff need not demonstrate that the discrimination was intentional, but may establish liability by offering proof that a neutral policy was administered or enforced in a manner that caused women and/or minorities to be adversely and disproportionately affected. *Id.*

Title VII.²³⁷ Rather, potential plaintiffs would only need to demonstrate that the employer's practice of valuing "surface diversity," caused an adverse impact on women and racial minorities.²³⁸ This proof of adverse impact would then shift the burden to the employer to demonstrate that the policy is both job-related and consistent with business necessity.²³⁹ Even if some instrumental justification for WDE would suffice to establish their job-relatedness, it is unlikely that most employers could demonstrate that the particular practice of valuing only "surface diversity" is necessary to achieve the instrumental benefits of workplace diversity.²⁴⁰ To the contrary, if diversity is valued instrumentally for its ability to signal the openness of the workplace, or to realize functional or market benefits on behalf of the employer,²⁴¹ it necessarily requires employers to embrace not just those who look different and act the same, but those who are truly different.²⁴² In other words, it requires employers to embrace "core diversity."²⁴³ Importantly, unlike pursuing a disparate treatment theory, where liability might signal normative disapproval of WDE by declaring them *presumptively* discriminatory,²⁴⁴ a disparate impact

²³⁷ See *id.* at 436 ("Nothing in the act precludes testing or measuring procedures; they are obviously useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are a demonstrably reasonable measure of job performance.").

²³⁸ *Id.* at 431. Adverse impact is often demonstrated through statistical proof. See *id.* Plaintiffs are presumptively able to meet their burden of proving adverse impact if they are able to demonstrate that the rate of selection among the protected group is less than four-fifths the rate of selection among the non-protected group. See *id.* In the present example, the data set is so small that it might not lend itself to reliable statistical proof of adverse impact. However, it is clear from the data that the rate of selection among minority applicants (50%) as compared to the rate of selection among non-minority applicants (100%) demonstrates the required adverse impact where the rate of minority selection is less than four-fifths the rate of non-minority selection.

²³⁹ See *Griggs*, 401 U.S. at 436.

²⁴⁰ See *infra* notes 241–245 and accompanying text.

²⁴¹ See *supra* note 27 and accompanying text (discussing the various instrumental benefits of WDE).

²⁴² See Lee, *supra* note 103, at 513

²⁴³ *Id.*; see also CARBADO & GULATI, *supra* note 3.

²⁴⁴ See *supra* note 220 and accompanying text. This chilling effect would be undesirable because of the potential for WDE, when properly administered, to improve employment opportunities for and inclusion of women and racial minorities in the workplace. See *supra* Part II.B. Legal sanction under these circumstances

theory of liability simply cautions employers to take care not to pursue WDE in ways that unduly harm the interests of women and racial minorities.²⁴⁵

2. NO Racial & Gender Diversity Preferences

The second concern raised by progressive scholars is that WDE may limit opportunities for women and racial minorities by exploiting gender or racial identity for the benefit of the employer, and to the detriment of employees.²⁴⁶ It is worth noting that the opportunities that may be opened up for women and racial minorities in the workplace as a result of WDE are not insignificant and may very well enhance equal opportunities for some, even as they may have the potential to limit opportunities for others.²⁴⁷ However, even if these efforts might be equally likely to expand opportunities, Title VII ought to effectively police those WDE that are equality-suppressing.²⁴⁸

would send a strong signal to employers about the impropriety of these efforts, even if well-intentioned. *See supra* note 177 and accompanying text (discussing how the law influences management practice and vice versa through the process of normative isomorphism).

²⁴⁵ *See supra* notes 219–220 and accompanying text. Ultimately, because it is really errant WDE that cause harm, not instrumental diversity in principle, many progressive scholars have tried to offer prescriptions directed to the narrower project of restraining WDE rather than the broader project of proscribing them. *See, e.g.*, Lee, *supra* note 103, at 513 (advocating that businesses adopt “core diversity” rather than “surface diversity” in WDE); Rich, *supra* note 33, at 47 (conceding that it is “ineffective diversity management” rather than WDE per se that warrant objection); Wade, *supra* note 78, at 1575 (suggesting courts impose a duty of care on employers adopting WDE); Green, *supra* note 73, at 613 (suggesting Title VII “harness the business interests” in diversity to advance antidiscrimination goals). Many of these prescriptions, however, erroneously assume that the justifications for WDE have to be modified, rather than simply restricting how they may operate in practice.

²⁴⁶ *See supra* note 95 and accompanying text.

²⁴⁷ *See* SKRENTNY, *supra* note 2, at 39 (acknowledging that WDE might both expand and limit employment opportunities for women and racial minorities).

²⁴⁸ For example, Skrentny notes that “[i]n occupations as diverse as advertising/marketing, medicine, teaching, journalism, and policing, employers see value in matching the race of the employee to the race of the clients or citizens he or she serves.” *Id.* at 11. However, as observed by a number of progressive scholars in their critiques of WDE, an employer would not likely be able to justify the explicit consideration of race in hiring and assignments under prevailing Title VII standards, which do not recognize any “bona fide occupational qualification” (BFOQ) for race. *See supra* note 96. *See generally* Green, *supra* note 78.

In particular, the concern from progressive scholars is that women or racial minorities, if seen as uniquely qualified to perform certain jobs by virtue of their gender or race, may be funneled into career-limiting jobs that are segregated by gender and/or race.²⁴⁹ Unlike the harms that arise from “racial signaling”,²⁵⁰ WDE that attempt to leverage “racial abilities”²⁵¹ seem highly amenable to challenge under a disparate treatment theory, as well as amenable to proof under the *McDonnell Douglas* burden-shifting framework.²⁵² In contrast to the largely expressive or dignitary harms that may be suffered by women and racial minorities from racial signaling, WDE that attempt to leverage racial abilities and that result in the exclusion of women and/or racial minorities from career-enhancing opportunities or conversely that restrict them to career-limiting opportunities, are highly amenable to the kinds of proof necessary to establish an adverse employment action under the first prong of *McDonnell Douglas*, as well as to proof of unlawful race- and gender-based discrimination under the third prong of *McDonnell Douglas*.²⁵³

Again, an example from the literature is instructive. Skrentny, in his book *After Civil Rights: Racial Realism in the New American Workplace*, offers Walgreens as a cautionary tale of the harms that can arise from WDE that go awry when attempting to leverage “racial abilities.”²⁵⁴ Walgreens had a practice of matching Black managers with stores in Black communities.²⁵⁵ This was not an attempt to invidiously discriminate against Black managers.²⁵⁶ Rather, like many other businesses that recognize the instrumental value of workplace diversity, Walgreens believed that it could better respond to its

²⁴⁹ See SKRENTNY, *supra* note 2, at 39. There is also a concern that this type of job assignment stereotypes employees. See also *id.* at 12–13 (describing the stereotypes on which racially segregated jobs are based). See also Green, *supra* note 78, at 599. However, this expressive harm is not amenable to redress under Title VII. *But see Griggs*, 401 U.S. at 424.

²⁵⁰ See SKRENTNY *supra* note 2, at 11.

²⁵¹ *Id.*

²⁵² See *McDonnell Douglas Corp.*, 411 U.S. at 802.

²⁵³ *Id.*

²⁵⁴ See SKRENTNY, *supra* note 2, at 87.

²⁵⁵ *Id.*

²⁵⁶ *Id.* (noting that the company’s record of hiring and promoting Black managers was well above the industry average).

customers if its store managers reflected the diversity of the communities they served.²⁵⁷ Even when well-intentioned, however, WDE raise the possibility that the particular practices adopted by individual employers may result in suppressing rather than enhancing opportunities for women and racial/ethnic minorities or reinforcing rather than disrupting harmful racial and gender stereotypes in the workplace.²⁵⁸ As progressive scholars have noted, this is a serious concern.²⁵⁹

In this instance, problems arose because Walgreens promoted and compensated managers on the basis of store performance, which on average was lower in Black communities than in other neighborhoods.²⁶⁰ The effect was to limit both the compensation and promotional opportunities of the Black managers assigned to these Black stores. The EEOC sued Walgreens on behalf of these Black managers alleging that the practice of assigning store managers based on race amounted to unlawful race discrimination.²⁶¹ Walgreens settled the EEOC suit for \$24 million.²⁶² This case demonstrates that when WDE go awry in practice, even when well-intentioned in principle, there is redress available under Title VII.²⁶³ It is not difficult

²⁵⁷ *Id.* In fact, Walgreens alleged that it made these race-based assignments because community groups had themselves requested that Black managers supervise these stores. *Id.* As some progressive scholars have observed, this makes these practices reminiscent of the “long-discredited customer preferences” that resulted in the exclusion of race as a BFOQ under Title VII. *See* Norton, *supra* note 19, at 562.

²⁵⁸ *See* CARBADO & GULATI, *supra* note 3, at 42.

²⁵⁹ *See id.*; *see generally* Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5 (discussing the risk of liability under Title VII of various workplace diversity practices, including race- and gender-based selection).

²⁶⁰ *See* SKRENTNY, *supra* note 2, at 87. These practices were even more objectionable because Walgreens also assigned Black managers to these stores even when they objected to these assignments. *Id.* One Black manager, for instance, complained that although he lived in an affluent, predominantly white neighborhood, he was assigned to manage a store in a poor Black neighborhood. *Id.*

²⁶¹ *Id.* at 88.

²⁶² *Id.* *See generally* Levit, *supra* note 56 (discussing the considerations that influence employers to settle class action discrimination suits, including public pressures).

²⁶³ *See* SKRENTNY, *supra* note 2, at 88.

to understand why these employees would likely have prevailed under the *McDonnell Douglas* burden-shifting framework.²⁶⁴

Although the involuntary assignments themselves are not likely to be actionable as an adverse employment action under Title VII,²⁶⁵ the negative implications of these assignments for managers' pay and promotion opportunities certainly would satisfy the *McDonnell Douglas prima facie* case standard.²⁶⁶ Similarly, the fact that these assignments were explicitly race-based, even if not motivated by intentional discrimination or racial animus, would suffice to satisfy the third prong of the *McDonnell Douglas* test.²⁶⁷ On these facts, Walgreens may not even satisfy its burden at the second stage of the *McDonnell Douglas* test to proffer a legitimate, non-discriminatory reason for the assignments.²⁶⁸ Instead, the explicit use of race to assign managers to stores would likely require Walgreens to demonstrate a remedial predicate for its actions as required under the *Weber/Johnson* cases.²⁶⁹ Because Walgreens' purpose in making these explicitly race-based assignments was instrumental (*i.e.*, to better serve customers), rather than remedial (*i.e.*, to cure a manifest imbalance in its workforce), it would likely be unable to defend these assignments under the prevailing *Weber/Johnson* standard.²⁷⁰ And that is as it should be.²⁷¹ Employing explicit racial and gender preferences

²⁶⁴ See *Lomack v. Newark*, 463 F.3d 303, 309, 311 (3d Cir. 2006) (finding that fire department that involuntarily transferred firefighters or otherwise denied transfer requests based on race without proof of a remedial interest engaged in impermissible racial discrimination).

²⁶⁵ *McDonnell Douglas Corp.*, 411 U.S. at 802.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *Weber*, 443 U.S. at 208; see also *Johnson*, 480 U.S. at 641–42.

²⁷⁰ *Weber*, 443 U.S. at 208. The Court in *Weber* required a remedial predicate to justify racial preferences. *Id.* But cf. *Green*, *supra* note 73, at 617 (noting that *Weber* did not foreclose non-remedial goals as a basis for justifying racial preferences under Title VII).

²⁷¹ See *Norton*, *supra* note 19, at 563. On this point, *Norton* is correct in suggesting that racial equality requires employers to screen directly for the skills they seek rather than to use race as a proxy for these skills. *Id.* This includes skills that further an employer's instrumental diversity interest, including cultural competence or diversity of experience. *Id.* After all, the empirical research supporting the functional benefits of workplace diversity clearly demonstrate that it is not race or gender *per*

make WDE more likely to incur the kinds of harms that most concern progressives.²⁷²

Perhaps Walgreen's seems to be a particularly egregious case. Perhaps there might be concern that other cases will present a more challenging set of facts and more difficult prospects for redress of the legitimate harm women and racial minorities might suffer from WDE gone awry. A look at the trends from decided diversity cases suggests such a concern is unwarranted.²⁷³ Those cases involving minority and female plaintiffs challenging WDE under the *McDonnell Douglas* burden-shifting framework have generally been more successful than those by white or male plaintiffs challenging these same efforts.²⁷⁴ In particular where employers use explicit racial and/or gender preferences in ways that are equality-suppressing, rather than equality-enhancing, courts have not displayed the same willingness to presume the legitimacy of these WDE, but have instead subjected them to more rigorous scrutiny.²⁷⁵ These cases suggest that Title VII law and

se that generate these benefits, but the different skills and experiences that inevitably accompany these different social identities. *See* Page, *supra* note 54, at 306–07. Accordingly, employers should be required to select directly for the skills and experience they desire, rather than allowing race or gender to serve as a proxy for them. *See id.* In this regard, employment decisions are different than college admissions decisions in which decision-makers often have to rely on limited information about large numbers of applicants to determine which students to admit. *See* Brief for Respondents in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516), 4-5 (describing grades and test scores as “imperfect predictors” of prospective academic success that are combined with other factors to make admissions decisions), Brief for Respondents in *Fisher v. Texas*, 136 S. Ct. 2198 (2016) (No. 11-345), 12-14 (describing the university’s admissions decisions made on the basis of “a matrix where you don’t know who’s who. Because once they’ve made a score, you become a number.”)

²⁷² *See supra* Part III.A.3–4.

²⁷³ *See infra* notes 274–75 and accompanying text.

²⁷⁴ *Id.* *See generally* Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard*, *supra* note 5.

²⁷⁵ *See* *Hagan v. City of N.Y.*, 39 F. Supp.3d 481 (S.D.N.Y. 2014) (denying employer’s motion to dismiss finding plaintiff had presented sufficient evidence that defendant hired minorities only to quiet complaints of discrimination and not to promote diversity or to resolve the underlying issues of workplace discrimination); *Epps –Milton v. Genesee Intermed. Sch. Dist.*, 2014 WL 5817015 (No. 14-11861 (E.D. Mich.) (allowing plaintiff to proceed on race discrimination claim where alleged hired because African American and solely “for appearance of diversity” but then subjected to differential treatment than white peers); *Blakely v. Big Lots Stores, Inc.*,

doctrine can distinguish between WDE that are equality-enhancing, and those that are instead equality-suppressing by harming them.²⁷⁶

Managerialization of law theory suggests that the process of normative isomorphism is bi-directional, and just as EEO law has become managerialized by WDE so too WDE can become more legalized as Title VII law is interpreted and applied to proscribe those WDE that incur harms to women and racial/ethnic minorities.²⁷⁷ Title VII law and doctrine have already proven capable of identifying and signaling to employers the boundaries between WDE that are equality-enhancing and those that are instead equality-suppressing.²⁷⁸ By adopting standards that reflect a proscription on the use of explicit racial or gender preferences as a part of WDE, and through continued targeted enforcement against employers who express a commitment only to “surface diversity,” while generally continuing to approve of WDE that embody a commitment to “core diversity,” Title VII law and doctrine can ensure that it has the same normative influence on the managerial practice of diversity that managerial practice has had on EEO law.²⁷⁹

2014 WL 4261239 (No. 2:10 CV 342 (N.D. Ind.) (denying summary judgment to employer on white female plaintiff’s claim that she was fired for refusing to refrain from hiring black employees and instead increase hiring of white employees to “diversify” the store).

²⁷⁶ Several cases involving minorities who were harmed by explicitly race-based employment decisions have resulted in favorable decisions for plaintiffs. *See, e.g.*, *Frank v. Xerox*, 347 F.3d 130 (5th Cir. 2003) (reversing grant of summary judgment for employer finding that employees raised triable issue of fact regarding whether the employer’s diversity plan limiting promotional opportunities because Blacks were “overrepresented” in certain job categories was unlawful); *Lomack v. Newark*, 463 F.3d 303 (3d Cir. 2006) (reversing judgment for employer and entering judgment for employees who were involuntarily transferred in order eliminate segregation in fire houses); *Sinio v. McDonalds Corp.*, 2007 WL 869553 (N.D. Ill. 2007) (denying summary judgment for employer and finding triable issue of fact on whether diversity efforts that helped African American employees but not Asian female plaintiff was lawful).

²⁷⁷ Edelman, *When Organizations Rule*, *supra* note 150, at 902–03.

²⁷⁸ *See supra* notes 275-276 and accompanying text.

²⁷⁹ This normative isomorphic force has already been demonstrated, for instance, in the area of sexual harassment law where cases like *Burling Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), have established a standard of vicarious liability for supervisor harassment where employers fail to prevent and promptly correct workplace harassment. These cases

IV. CONCLUSION

Progressive scholars have often been the fiercest critics of WDE, believing them to be fundamentally in tension with the egalitarian goals that underlie Title VII. This critique may be misguided, not only normatively when WDE are viewed in the context of their EEO origins, but also descriptively in view of the benefits that often accrue to women and racial minorities from WDE, which include expanded employment opportunities and more inclusive workplaces. Rather than viewing WDE as antagonistic to the project of workplace equality, therefore, progressives ought to recognize WDE for their potential, if appropriately circumscribed by Title VII law and doctrine, to aid in securing the long sought ideal of workplace equality. In this regard, the focus of Title VII law and doctrine should not be on proscribing the instrumental justifications for WDE, but on policing the boundaries between those WDE that are equality-enhancing and those that are, or have the potential to be, equality-suppressing. By approving of the former and signaling disapproval of the latter, Title VII can prevent WDE from incurring the kinds of harms that most concern progressive scholars and operate not only in service to businesses' legitimate instrumental concerns but also aid in the advancement of workplace equality.

have given rise to the near universal adoption by employers of anti-harassment policies (and in many cases training) that seek to ensure compliance with this standard. Whether or not these policies are effective in preventing and correcting workplace harassment, *see* Edelman, *When Organizations Rule*, *supra* note 150, at 934 (questioning the efficacy of these policies in practice), the legal standards developed in these cases have certainly influenced managerial practice in this regard.