

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2024

### Racial Targets

Atinuke O. Adediran

Fordham University School of Law, [aadediran@law.fordham.edu](mailto:aadediran@law.fordham.edu)

Follow this and additional works at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship](https://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Law and Race Commons](#)

---

#### Recommended Citation

Atinuke O. Adediran, *Racial Targets*, 118 Nw. U. L. Rev. 1455 (2024)

Available at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship/1329](https://ir.lawnet.fordham.edu/faculty_scholarship/1329)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# Articles

## RACIAL TARGETS

*Atinuke O. Adediran*

**ABSTRACT**—It is common scholarly and popular wisdom that racial quotas are illegal. However, the reality is that since 2020’s racial reckoning, many of the largest companies have been touting specific, albeit voluntary, goals to hire or promote people of color, which this Article refers to as “racial targets.” The Article addresses this phenomenon and shows that companies can defend racial targets as distinct from racial quotas, which involve a rigid number or proportion of opportunities reserved exclusively for minority groups. The political implications of the legal defensibility of racial targets are significant in this moment in American history, where race relations have become polarized and the conservative, pro-business U.S. Supreme Court may weigh in on the legality of voluntary goals set by some of the largest companies in the country. Large companies have historically been granted discretion to choose their strategies for paving the way toward equal employment opportunity for people of color. The Article grapples with whether this corporate-discretion ideal would inform the legal posture of racial targets.

**AUTHOR**—J.D., Ph.D., Fordham University School of Law. For comments and feedback, I’m grateful to Kerry Abrams, Emilie Aguirre, Pamela Bookman, Maureen Brady, Guy-Uriel Charles, Courtney Cox, Nestor Davidson, Ofer Eldar, Stavros Gadinis, Da Lin, Tom C.W. Lin, Veronica Root Martinez, James Park, Sepehr Shahshahani, Gregory Shill, Eric Talley, Julian Velasco, and Maggie Wittlin. I received feedback from participants at the 2023 Culp Colloquium at Duke Law School and the 2023 Corporate and Securities Roundtable at Tulane University Law School. I am grateful to my research assistants: Morgan Band, Emily Chambers, Jade Crichlow, Simran Kashyap, Yumiko Shime, and Evan Tart. Many thanks to the entire editorial staff of the *Northwestern University Law Review*.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION ..... 1456

I. RACIAL TARGETS AFTER 2020’S RACIAL RECKONING..... 1462

    A. *Closed-Ended Racial Targets* ..... 1467

    B. *Open-Ended Racial Targets*..... 1469

II. THE LAW AND HISTORY OF RACIAL QUOTAS IN COMPANIES ..... 1470

    A. *History of Racial Quotas in Employment*..... 1470

    B. *The Law of Racial Quotas*..... 1478

III. ANALYZING TARGETS ..... 1484

    A. *Connecting History with Contemporary Racial Targets* ..... 1485

    B. *Analyzing Racial Targets Independently* ..... 1485

    C. *Analyzing Targets as Quotas* ..... 1486

    D. *The Conservative Backlash*..... 1491

    E. *Corporate Discretion and the Business Judgment Rule* ..... 1494

CONCLUSION ..... 1496

APPENDIX..... 1498

INTRODUCTION

Since 2020, hundreds of large companies have voluntarily disclosed racial hiring and promotion goals with specific numerical targets. In 2022, for instance, Meta publicly declared its goal of increasing representation of people of color, including Black leadership, by 30% between 2020 and 2025.<sup>1</sup> In 2021, Sonoco—a global packaging company—announced its goal to have 15% of its senior leadership be people of color by 2023.<sup>2</sup> In 2020, Starbucks stated its goal to have 40% of its retail roles and 30% of its enterprise roles filled by people of color by 2025.<sup>3</sup> These are not isolated instances. Hundreds of large companies have made similar statements.<sup>4</sup>

---

<sup>1</sup> META, EMBRACING CHANGE THROUGH INCLUSION: META’S 2022 DIVERSITY REPORT 7 (2022), [https://about.fb.com/wp-content/uploads/2022/07/Meta\\_Embracing-Change-Through-Inclusion\\_2022-Diversity-Report.pdf](https://about.fb.com/wp-content/uploads/2022/07/Meta_Embracing-Change-Through-Inclusion_2022-Diversity-Report.pdf) [<https://perma.cc/9M7D-GNF6>].

<sup>2</sup> SONOCO, 2020-2021 CORPORATE RESPONSIBILITY REPORT 16 (2021), [https://www.sonoco.com/sites/default/files/technical-files/SON%2020-21%20Corp%20Resp%20Report\\_072821.pdf](https://www.sonoco.com/sites/default/files/technical-files/SON%2020-21%20Corp%20Resp%20Report_072821.pdf) [<https://perma.cc/3JPJ-T3M8>].

<sup>3</sup> STARBUCKS, 2019 GLOBAL SOCIAL IMPACT REPORT 9 (2020), <https://stories.starbucks.com/uploads/2020/06/2019-Starbucks-Global-Social-Impact-Report.pdf> [<https://perma.cc/DXR6-LVU4>].

<sup>4</sup> See *infra* Table 1. In fact, shareholders have begun using racial targets as the basis for antidiscrimination lawsuits. See David Hood, *Lawsuits Challenge Corporate Diversity Pledges After Floyd*, BLOOMBERG L. (Apr. 7, 2023), <https://news.bloomberglaw.com/esg/host-of-companies-sued-alleging-unmet-diversity-equity-pledges> [<https://perma.cc/JW9U-FVX3>]. For example, in a lawsuit brought by the Asbestos Workers Philadelphia Welfare and Pension Fund against Wells Fargo, the fund claimed that Wells Fargo stated in its environmental, social, and governance (ESG) reports that it would

This Article refers to these public statements as “racial targets.” Racial targets are nonbinding, voluntary goals or aspirations made by companies to hire or promote people of color by a future point in time. Typically, these goals are for hiring racial and ethnic minorities on a general institutional level, such as among employees, boards of directors, managers, and other leaders. This contrasts with racial quotas, which federal courts have found to be illegal.<sup>5</sup>

Racial quotas involve a fixed number or proportion of opportunities reserved exclusively for certain minority groups in particular jobs or occupations, often imposed on employers through collective bargaining with unions and by courts. Racial quotas are examined under different legal regimes depending on context. In the context of private employers, racial quotas have been analyzed under Title VII of the Civil Rights Act of 1964.<sup>6</sup> The seminal Supreme Court case on the legality of racial quotas in companies is *United Steelworkers v. Weber*.<sup>7</sup> To determine whether a racial quota is legal in the employment context, an employer must show that (1) the program is designed to open employment opportunities for minorities in occupations that were traditionally closed to them, (2) the preference does not unnecessarily trammel the interests of white employees, and (3) the plan is not meant to maintain racial balance.<sup>8</sup> Lower federal courts have struck down racial quotas not meeting the *Weber* standard, particularly those used “during the remedial phase of a desegregation” plan.<sup>9</sup>

The bottom line is that with few exceptions, regardless of the setting or the legal provision on which they are based, courts have generally found, and the public has generally accepted, that racial quotas are illegal or unconstitutional.

In contrast, courts and scholars have yet to grapple with the legality of the use of racial targets. Unlike quotas, racial targets provide institutional goals to promote workforce racial and ethnic diversity at some point in the future. Racial targets have historical antecedents in civil rights affirmative action plans established and debated between 1961 and 1985 during the administrations of Presidents John F. Kennedy, Lyndon B. Johnson, Richard

---

have 50% of its interview pool be diverse candidates when it did not. *See* Complaint & Demand for Jury Trial at 4–5, *Asbestos Workers Phila. Welfare & Pension Fund v. Scharf*, No. 3:23-cv-01168 (N.D. Cal. Mar. 15, 2023).

<sup>5</sup> *See, e.g., Patterson v. Newspaper & Mail Deliverers’ Union*, 514 F.2d 767, 776 (2d Cir. 1975) (Feinberg, J., concurring).

<sup>6</sup> *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 195 (1979).

<sup>7</sup> *Id.*

<sup>8</sup> *See id.* at 208–09.

<sup>9</sup> *See, e.g., Morgan v. McDonough*, 689 F.2d 265, 274 (1st Cir. 1982).

M. Nixon, and Ronald Reagan.<sup>10</sup> At the time, the federal government instituted executive orders,<sup>11</sup> public-private partnerships with large companies in what was known as the “Plans for Progress Program,”<sup>12</sup> and the National Alliance of Businessmen (NAB).<sup>13</sup> The government also mandated affirmative action programs in the construction business through the “Philadelphia Plan.”<sup>14</sup> Compounding government pressure to hire and promote Black people and other people of color, the Civil Rights Movement of the 1960s also made demands of corporations through demonstrations, protests, sit-ins, and boycotts to hire more Black people in nonmenial positions and train them for promotion.<sup>15</sup> The Civil Rights Movement had a major role in pressuring companies to open up job opportunities for racial minorities at that time.<sup>16</sup> Thus, an amalgam of private, governmental, and social movement efforts led companies to support hiring “goals and timetables” which they and the government believed differed from racial quotas.<sup>17</sup>

---

<sup>10</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961); Exec. Order No. 11,246, 3 Fed. Reg. 12,319 (Sept. 28, 1965); Richard Nixon, Statement on the Merger of the National Alliance of Businessmen and Plans for Progress (June 13, 1969), *reprinted by* THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-the-merger-the-national-alliance-businessmen-and-plans-for-progress> [<https://perma.cc/V9PG-GYV6>].

<sup>11</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977; Exec. Order No. 11,197, 30 Fed. Reg. 1721 (Feb. 5, 1965).

<sup>12</sup> The President’s Comm. on Equal Emp. Opportunity & Lockheed Aircraft Corp., Joint Statement on “Plan for Progress” [hereinafter Lockheed Joint Statement], [https://www.jfklibrary.org/asset-viewer/archives/jfkwhsfhw-008-004#?image\\_identifier=JFKWHSFHW-008-004-p0036](https://www.jfklibrary.org/asset-viewer/archives/jfkwhsfhw-008-004#?image_identifier=JFKWHSFHW-008-004-p0036) [<https://perma.cc/MDL3-YHSU>].

<sup>13</sup> JENNIFER DELTON, RACIAL INTEGRATION IN CORPORATE AMERICA, 1940–1990, at 229 (2009).

<sup>14</sup> David Hamilton Golland, *The Philadelphia Plan (1967-1970)*, BLACKPAST (May 26, 2014), <https://www.blackpast.org/african-american-history/philadelphia-plan-1967/> [<https://perma.cc/D9ZP-KVGG>].

<sup>15</sup> *See, e.g.*, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 70, 105, 190 (1990).

<sup>16</sup> *See* Charles E. Silberman, *The Businessman and the Negro*, 52 MGMT. REV. 17, 17–18 (1963) (discussing how protests shifted to center around jobs and the effect it could have on corporations).

<sup>17</sup> *See, e.g.*, Anne B. Fisher, *Businessmen Like to Hire by the Numbers*, FORTUNE, Sept. 16, 1985, at 26, 27–28.

Intense scholarly debates around corporate purpose,<sup>18</sup> corporate diversity,<sup>19</sup> and environmental, social, and governance (ESG) activities<sup>20</sup> have touched on race as one area of focus for large companies as they attempt to respond to societal and shareholder pressure—specifically, the pressure to

---

<sup>18</sup> See, e.g., Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1185–86 (2022); Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1261 (2022); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1342 (2021); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2633 (2021); Emilie Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077, 2092 (2021); Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 249 (2021); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1537 n.90 (2018); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249–51 (1999); David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1001–03 (2000); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1409–14 (1993); Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1197–1200 (1984).

<sup>19</sup> See, e.g., Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023); Jeffrey Meli & James C. Spindler, *The Promise of Diversity, Inclusion, and Punishment in Corporate Governance*, 99 TEX. L. REV. 1387, 1387 (2021); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story*, 89 N.C. L. REV. 855, 855–59 (2011) (criticizing the overreliance on business justifications for diversifying corporate boards); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 796–99; Veronica Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869, 875 (2021) (addressing the role of diversity disclosures in the context of shareholder transparency and decision-making).

<sup>20</sup> See, e.g., Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 940 (2020) (“Without a mechanism for ensuring that corporate social responsibility (CSR) actually benefits the stakeholders, companies can easily use it as a means of ‘greenwashing.’”); Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 846 (2008); Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies’ CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 742 (2021) (citing briefly a law firm memorandum stating that “social responsibilities and good corporate governance [includes] elimination of toxic corporate culture and enhancement of diversity, inclusion, and equity”); Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. ON REG. 625, 630 (2019) (advocating for a shift from purely environmental information regulation to a broader form of information regulation to include workplace diversity); Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 71–72 (2020) (addressing ESG disclosure reforms focused on environmental and climate risk disclosures); Edwin M. Epstein, *The Corporate Social Policy Process and the Process of Corporate Governance*, 25 AM. BUS. L.J. 361, 374 (1987) (noting that CSR broadly encompasses affirmative action policies for women and minorities); John C. Coffee Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 620 (noting that skeptics may doubt that racial diversity and inclusion relate to CSR); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 IOWA J. CORP. L. 41, 53 (1999) (noting that in the 1970s, scholars shifted the CSR debate to include affirmative action policies); Elizabeth Pollman, *The Origins and Consequences of the ESG Moniker* 23–27 (Inst. for L. & Econ., Rsch. Paper No. 22-23, 2022), <https://www.ecgi.global/sites/default/files/Paper:%20Elizabeth%20Pollman.pdf> [<https://perma.cc/AFY4-Z6XU>] (discussing the ambiguity and breadth of the ESG moniker); Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258, 271 (2022).

address racial and other social inequalities after the murder of George Floyd, which led to protests in at least 140 cities across the United States.<sup>21</sup> There were also protests in Africa, Asia, Europe, and the Middle East.<sup>22</sup> These protests and their aftermath have been called a racial reckoning.<sup>23</sup> But absent are thorough evaluations of the specific ways in which companies are attempting to address racial inequality.

This Article joins Professor Lisa Fairfax and a growing number of scholars engaged in the challenging task of ferreting out the 2020 racial reckoning's impact on corporate behavior.<sup>24</sup> After examining corporate commitments made after the racial reckoning, Fairfax found that Fortune 500 companies that made public statements about race were two times more likely to appoint a Black director as compared to companies that did not make public statements. She also found that the majority of new director appointments for companies that made these statements were people of color, while the majority of new appointments for companies that did not make these statements were white.<sup>25</sup>

This Article centers the doctrinal and political implications of how companies are attempting to racially diversify their workforces with racial targets. It addresses the history, law, and empirical analysis of this corporate move. The Article examines 1,000-plus public and privately held companies

<sup>21</sup> Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/G2SB-FH32>]; Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/8CMA-LLKM>].

<sup>22</sup> Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/> [<https://perma.cc/U923-2FH6>]; Javier C. Hernández & Benjamin Mueller, *Global Anger Grows over George Floyd Death, and Becomes an Anti-Trump Cudgel*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2020/06/01/world/asia/george-floyd-protest-global.html> [<https://perma.cc/9RF6-BBMJ>].

<sup>23</sup> Alisa Chang, Rachel Martin & Eric Mapparodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020), <https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit.html> [<https://perma.cc/KAV6-PKJ3>].

<sup>24</sup> See Atinuke O. Adediran, *Disclosures for Equity*, 122 COLUM. L. REV. 865 (2022); Lisa M. Fairfax, *Radical Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 COLUM. BUS. L. REV. 118; see also Andrew C. Baker, David F. Larcker, Charles McClure, Durgesh Saraph & Edward M. Watts, *Diversity Washing* (Eur. Corp. Governance Inst., Fin. Working Paper No. 868/2023, 2023), <https://www.ecgi.global/sites/default/files/Paper%3A%20Diversity%20Washing.pdf> [<https://perma.cc/4VJC-J3DL>] (focusing on diversity broadly, which includes race); PATRICIA A. BANKS, BLACK CULTURE, INC.: HOW ETHNIC COMMUNITY SUPPORT PAYS FOR CORPORATE AMERICA (2022) (focusing on the nexus between race and philanthropy).

<sup>25</sup> Fairfax, *supra* note 24, at 170–71. While not premised on the racial reckoning, another recent study has shown that companies with more people of color are more likely to make diversity statements in corporate financial disclosures. Baker et al., *supra* note 24, at 11.

to reveal the unstudied phenomenon of racial targets and provide insight into their shape, prevalence, and characteristics. It shows that there are two kinds of targets: closed-ended and open-ended. Closed-ended targets often include a stated year by which a company intends to meet a goal. Open-ended targets are goals and aspirations that do not include a stated year by which the goal would be met.

The Article analyzes both types of targets under the standard set forth by the Court in *Weber*. It concludes that under the *Weber* standard, companies can argue that targets are legal if they can show that (1) these public commitments are designed to open employment opportunities for people of color in areas that were traditionally unavailable to them, (2) the commitments do not bar white people from advancement, and (3) the plans are temporary and not meant to maintain racial balance. Companies can also argue that racial targets are legal because of distinctions between quotas and targets. The legal defensibility of racial targets remains largely unchanged by the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* because private employment decisions are distinct from admissions decisions made by federally funded universities. The historical discretion given to companies to define and carve out how they intend to comply with federal antidiscrimination law may also provide a shield.

But despite their defensibility, the conservative backlash against racial targets has already begun. The reputational costs of retracting a racial target should incentivize companies to keep them within the boundaries of the law. Legal defensibility aside, however, this corporate approach of addressing racial inequality warrants some normative concerns. While this Article does not make a normative claim about racial targets or defend them as a corporate strategy for racially diversifying large companies, it notes the need for further analysis to examine whether, from a policy perspective, racial targets benefit people of color.

The Article makes four contributions. First, it describes the history of quotas dating back to the 1960s, highlighting how companies have been drawn to numerical goals in the context of race. Second, it empirically shows that racial targets are a post-2020 racial-reckoning phenomenon with connections to the history of racial quotas. Third, it shows that while the doctrine is ambiguous, companies can defend the legality of racial targets. Fourth, it highlights the conservative backlash against racial targets, which is likely to intensify. Because there is already a strong conservative movement to fight race consciousness, an understanding of the empirical, historical, and legal landscape of racial targets is crucial.



This Article proceeds in three Parts. Part I empirically examines racial targets after 2020's racial reckoning, highlighting the difference between closed- and open-ended targets. Part II reviews the law and history of racial quotas, examining the Civil Rights Movement through the 1980s, the *Weber* standard, and the distinction between private and public actions to address racial inequality. Part III focuses on the doctrinal defensibility of racial targets. It also addresses the ideal of corporate discretion, which may be useful to companies if they confront legal attacks in the pro-business Supreme Court.

### I. RACIAL TARGETS AFTER 2020'S RACIAL RECKONING

To understand the substance and structure of racial targets, I conducted two levels of analysis. The first level was quantitative: I counted the prevalence of racial targets over time using Python,<sup>26</sup> a programming software. The second was qualitative: I observed how companies make racial targets and distinguish between closed- and open-ended targets using manual coding and Atlas.ti, a qualitative text management software.

My data comprise 1,000-plus public and privately held companies, of which 421 had targets between 2018 and 2023.<sup>27</sup> I selected these companies through a random sample of the 2,385 companies examined in my forthcoming book, *Disclosureland*.<sup>28</sup> To create the larger dataset, I obtained all available ESG and diversity reports disclosed by all U.S.-based public and private companies from the Corporate Register, an online directory with a comprehensive repository of nonfinancial reports.<sup>29</sup> Prior research on corporate disclosures has focused on Standard and Poor's 500 Index (S&P 500) companies, which are the 500 largest corporations in the United States by market capitalization.<sup>30</sup> Because it is conceivable that the 500 largest companies face more external pressures to make public statements about race, including racial targets, my larger dataset includes all S&P 500

---

<sup>26</sup> PYTHON, <https://www.python.org/> [<https://perma.cc/UJ5R-ALJP>].

<sup>27</sup> ESG reports are also called corporate social responsibility, sustainability, or community engagement reports.

<sup>28</sup> ATINUKE O. ADEDIRAN, *DISCLOSURELAND: HOW COMPANIES CONSTRUCT THEIR PUBLIC IMAGE AND DISCOUNT PEOPLE OF COLOR* (forthcoming 2025) (on file with author).

<sup>29</sup> For further discussion about the reports in this dataset, see Adediran, *supra* note 19, at 338–47. Since the 1990s, the Corporate Register has been collecting nonfinancial reports that companies publicly disclose. The Corporate Register harvests the reports from company websites; in many cases, companies send their reports directly to the Corporate Register for inclusion in the database. *About*, CORP. REG., <https://www.corporateregister.com/about/> [<https://perma.cc/DNJ6-C7L4>].

<sup>30</sup> Will Kenton, *S&P 500 Index: What It's for and Why It's Important in Investing*, INVESTOPEDIA (Sept. 22, 2023), <https://www.investopedia.com/terms/s/sp500.asp> [<https://perma.cc/QJ53-TKHJ>]; see, e.g., AARON A. DHIR, *CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY* 175 (2015).

companies as well as medium and smaller companies to provide a fuller picture of the empirical landscape. All public companies in the larger dataset are Russell 3000 Index companies. The Russell 3000 Index comprises 96% of the U.S. equity market, covering a substantial portion of the economy.<sup>31</sup>

I draw on work by Professors Aaron Dhir and Lauren Edelman, and my prior research, for the use of text data to understand corporate behavior.<sup>32</sup> I first manually created a dictionary of racial terms using both inductive and deductive methods.<sup>33</sup> I then used the keyword-counting method to determine the prevalence of particular words and phrases in text.<sup>34</sup>

To determine whether a company declared a racial target, I created a list of verbs that signal future intent, such as “commit,” “grow,” or “increase,” as indicated in Appendix B. I used these verbs to define when a company’s statistics are about future intent versus current statistics. For a company to count as making a racial target, it must use a verb that signals future intent in conjunction with the words “percent,” “percentage,” or the “%” symbol.

Racial targets were rare prior to 2021—a year after the murder of George Floyd. Table 1 shows that 4 out of 30 companies in 2018 made racial targets. By 2021, it increased to 69 companies out of the 191 I examined. And by 2023, about 40% of the companies I examined made racial targets.<sup>35</sup>

---

<sup>31</sup> Adam Hayes, *Russell 3000 Index: Stocks and Limitations*, INVESTOPEDIA (July 3, 2023), [https://www.investopedia.com/terms/r/russell\\_3000.asp](https://www.investopedia.com/terms/r/russell_3000.asp) [<https://perma.cc/8ZBS-M8BE>].

<sup>32</sup> See Adediran, *supra* note 19, at 338–47. See generally DHIR, *supra* note 30; LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 142–45 (2016).

<sup>33</sup> For the dictionary of racial terms with forty-six distinct terms describing race and people of color, see *infra* Appendix A. I generated the dictionary from words companies use to describe race and people of color in ESG and diversity reports. I also relied on the literature and institutional diversity, equity, and inclusion (DEI) dictionaries. *DEI Glossary*, FOSTER SCH. OF BUS., WASH. UNIV., <https://foster.uw.edu/about-foster-school/fostering-diversity/dei-glossary/> [<https://perma.cc/5DC9-42X8>]; HARV. HUM. RES., GLOSSARY OF DIVERSITY, INCLUSION AND BELONGING (DIB) TERMS, [https://edib.harvard.edu/files/dib/files/dib\\_glossary.pdf](https://edib.harvard.edu/files/dib/files/dib_glossary.pdf) [<https://perma.cc/3Q26-V38A>]. The terms “URM” and “black empowerment” came from Baker et al., *supra* note 24, at 38 tbl. B-3.

<sup>34</sup> See generally Eric Abrahamson & Donald C. Hambrick, *Attentional Homogeneity in Industries: The Effect of Discretion*, 18 J. ORG. BEHAV. 513 (1997) (utilizing a similar method in analyzing managerial information processing); Theresa S. Cho & Donald C. Hambrick, *Attention as the Mediator Between Top Management Team Characteristics and Strategic Change: The Case of Airline Deregulation*, 17 ORG. SCI. 453 (2006) (conducting a similar analysis in the airline industry); MITCHELL DUNEIER, *GHETTO: THE INVENTION OF A PLACE, THE HISTORY OF AN IDEA* (2016); JUSTIN GRIMMER, MARGARET E. ROBERTS & BRANDON M. STEWART, *TEXT AS DATA: A NEW FRAMEWORK FOR MACHINE LEARNING AND THE SOCIAL SCIENCES* 180–81 (2022) (describing a method for analyzing large collections of text via machine learning tools).

<sup>35</sup> Since 2020’s racial reckoning, ESG disclosures have increased exponentially. See generally Adediran, *supra* note 19.

TABLE 1: RACIAL TARGETS IN PUBLIC COMPANIES BY YEAR

Year	Companies with Reports	Companies with Targets
2018	30	4
2019	55	15
2020	77	21
2021	191	69
2022	331	113
2023	423	167

FIGURE 1: RACIAL TARGETS IN PUBLIC COMPANIES BY YEAR

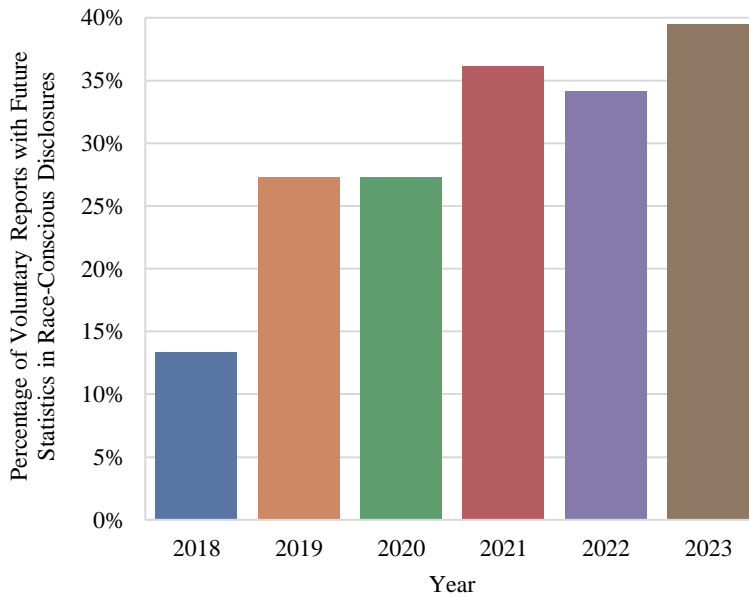
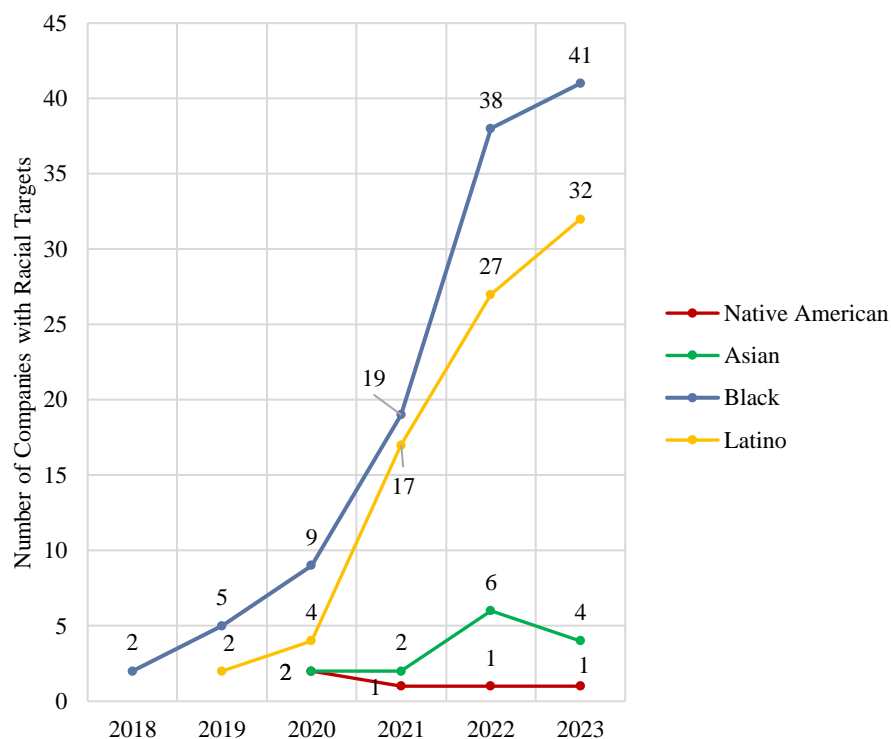


Figure 2 shows that companies are more likely to make racial targets regarding Black people in comparison to Asian, Latino, and Native American people. The racial reckoning of 2020 marks an increased focus of racial targets on Black people for future hiring and promotions. In 2023, for every ten racial targets focusing on particular racial and ethnic groups, approximately four to five are about Black people, three to four are about Latinos, one to two are about Asians, and zero to one are about Native Americans.<sup>36</sup>

<sup>36</sup> See *infra* Figure 2.

FIGURE 2: NUMBER OF VOLUNTARY REPORTS WITH RACIAL TARGETS IN PUBLIC COMPANIES



Appendices C and D show the frequency of terms in racial targets. For public companies, six out of the ten most frequently used terms in racial targets name a specific racial or ethnic group, such as Black, Hispanic, Asian, or Latino.<sup>37</sup> In contrast, only four of ten terms are general terms such as “people of color” and “ethnic.”

Private companies produce similar results, though there are few of them in this study. Private companies are not listed on any stock exchange and are not required to make public disclosures. Yet, private companies also make racial targets. In prior work, I have argued that large private companies should be regulated much like public companies, at least in the context of diversity disclosures.<sup>38</sup> In 2023, twelve of the twenty-nine private companies that made certain public disclosures also made racial targets in their ESG reports. For private companies, five out of the ten most frequently used terms in racial targets name a specific racial or ethnic group.<sup>39</sup>

<sup>37</sup> See *infra* Appendices C–D.

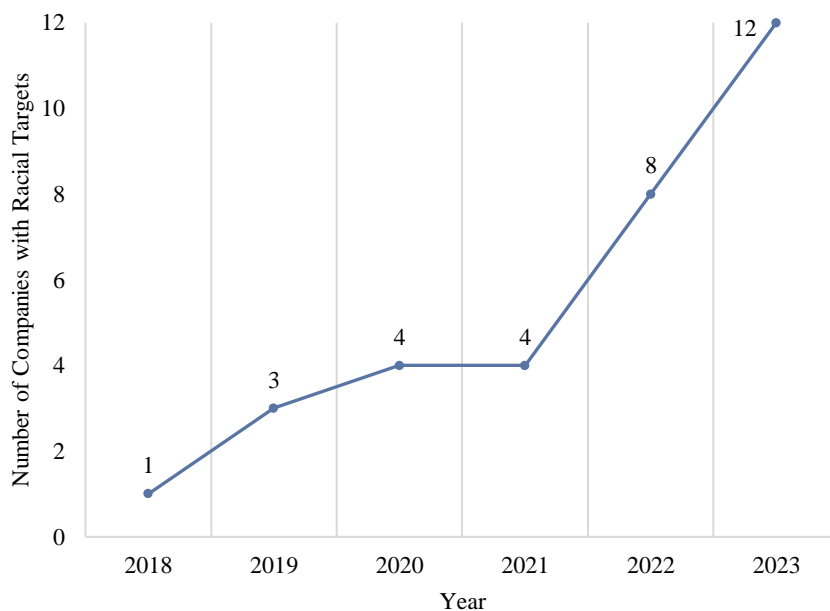
<sup>38</sup> See generally Adediran, *supra* note 19.

<sup>39</sup> See *infra* Table 2.

TABLE 2: RACIAL TARGETS IN PRIVATE COMPANIES BY YEAR

Year	Companies with Reports	Companies with Targets
2018	3	1
2019	5	3
2020	5	4
2021	8	4
2022	20	8
2023	29	12

FIGURE 3: RACIAL TARGETS IN PRIVATE COMPANIES BY YEAR



The second level of my analysis was qualitative, using content analysis to fully observe the words of racial targets. For the qualitative analysis, research assistants (RAs) read ESG reports to find racial targets and coded them using Atlas.ti software. To ensure accuracy and consistency, each RA used a code book as a guide. RAs coded racial targets as “any statement of future hiring, promotion, or retention of people of color with numbers, percentages, or years in which a goal or aspiration may be met.” After the RAs manually coded each company’s report by year, I personally read each manually coded statement for verification.

The qualitative analysis showed differences between closed- and open-ended racial targets. Closed-ended targets are the most common. The numerical goals in both the closed- and open-ended types are often specific. What distinguishes closed-ended from open-ended racial targets is whether there is a specific *year or period* by which the company plans to meet its hiring or promotion goal.

These data reveal that a few hundred public and private companies now set racial targets. Many probably set these targets because peer companies are doing the same.<sup>40</sup> Companies also use racial targets because it benefits them.<sup>41</sup>

### A. Closed-Ended Racial Targets

Closed-ended racial targets vary in language and levels of specificity, but all closed-ended racial targets have two common elements: (1) a specific goal or aspiration to hire or promote a specified percentage of people of color and (2) a year or period by which the goal will be achieved.

The racial targets disclosed by BNY Mellon, Hartford, Prudential Financial, Starbucks, Sysco, and Target are illustrative of closed-ended racial targets:

[B]y *year-end 2023*, [BNY Mellon] plan[s] to achieve these levels by improving diverse outcomes in hiring, advancement and retention[:]. Achieve a *15% increase* in Black representation *to 12%*[:]. Achieve a *30% increase* in Black representation of Senior Leaders (Levels M/S) *to over 4%*[:]. Achieve a *15% increase* in Latinx representation *to almost 8%*[:]. Achieve a *30% increase* in Latinx representation of Senior Leaders (Levels M/S) *to over 5.5%*[:].<sup>42</sup>

Hartford is on pace to reach our new representation goal of . . . *20% people of color* in senior leadership roles *by 2030* because the actions critical to our success are now fully integrated into our business, compensation and talent strategies.<sup>43</sup>

[I]n December 2020, [Prudential Financial] committed to the following set of diversity goals for our senior and mid-level leaders to be attained *by 2023*: Increase overall diversity of our most senior leader population *by 10%* and

---

<sup>40</sup> Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150 (1983).

<sup>41</sup> I take a closer look at larger motivating factors for the use of racial targets in a forthcoming book. See ADEDIRAN, *supra* note 28.

<sup>42</sup> BNY MELLON, 2020 ENTERPRISE ESG REPORT: PUTTING THE FUTURE FIRST 18 (2020) (emphases added), <http://www.bnymellon.com/content/dam/bnymellon/documents/pdf/2020-enterprise-esg-report.pdf.coredownload.pdf> [https://perma.cc/K5W5-CZEY].

<sup>43</sup> THE HARTFORD, 2020 SUSTAINABILITY HIGHLIGHT REPORT: PROGRESS WITH PURPOSE 5 (2020) (emphases added), [https://ewcstatic.thehartford.com/thehartford/the\\_hartford/files/Comm/2020-sustainability-highlight-report.pdf](https://ewcstatic.thehartford.com/thehartford/the_hartford/files/Comm/2020-sustainability-highlight-report.pdf) [https://perma.cc/P3ND-TV3U].

increase our percentage of Black and Latinx employees *by at least 25%*. For our mid-level leaders, increase the percentage of people of color *by 8%* and increase our percentage of Black and Latinx employees *by at least 25%*.<sup>44</sup>

[Starbucks has a goal of] [*at least 40% BIPOC*]<sup>45</sup> representation . . . in all retail roles, *by 2025* in the U.S. *At least 40% BIPOC* representation . . . in all manufacturing roles *by 2025* in the U.S. *At least 30% BIPOC* representation . . . for all enterprise roles, including senior leadership, *by 2025* in the U.S.<sup>46</sup>

[One of Sysco's] *2025 goals* [is to] increase total gender and ethnic diversity of U.S.-based associates *to 62%*.<sup>47</sup>

As a first step forward, [Target is] planning to increase representation of Black team members across the company *by 20% by 2023* by sharpening our focus on advancement, retention and hiring.<sup>48</sup>

These examples show that companies are often specific about the percentage increase they intend to reach and the year in which they intend to reach it. But there are some exceptions. Some companies use a range of years instead of a specific year within their closed-ended racial targets. But as with other closed-ended racial targets, these companies too have a time by which they seek to meet their goals. State Street and Truist are illustrative of closed-ended racial targets with a range of years:

[State Street aims to] *triple* our Black and Latinx leadership (Senior Vice Presidents and above) and *double* our percentage of Black and Latinx populations *over the next three years*.<sup>49</sup>

---

<sup>44</sup> PRUDENTIAL FIN., INC., 2021 PRUDENTIAL ENVIRONMENTAL, SOCIAL AND GOVERNANCE SUMMARY REPORT 5 (2021) (emphases added), [https://s1.q4cdn.com/379746662/files/doc\\_downloads/2021/Prudential-ESG-Summary-Report-Final.pdf](https://s1.q4cdn.com/379746662/files/doc_downloads/2021/Prudential-ESG-Summary-Report-Final.pdf) [<https://perma.cc/HAW4-3U5M>].

<sup>45</sup> “BIPOC” means Black, Indigenous, and People of Color. For a brief history of the origin of the term, see Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html> [<https://perma.cc/G4BZ-MJUU>].

<sup>46</sup> STARBUCKS, STARBUCKS 2020 GLOBAL ENVIRONMENTAL & SOCIAL IMPACT REPORT 8 (2020) (emphases added), <https://stories.starbucks.com/uploads/2021/04/Starbucks-2020-Global-Environmental-and-Social-Impact-Report.pdf> [<https://perma.cc/CJK4-QF9S>].

<sup>47</sup> SYSCO, 2021 CORPORATE SOCIAL RESPONSIBILITY REPORT 10 (2021) (emphases added), <https://investors.sysco.com/~media/Files/S/Sysco-IR/documents/sustainability-reports/Sysco%202021%20Corporate%20Social%20Responsibility%20Report.pdf> [<https://perma.cc/2F9R-9R8F>].

<sup>48</sup> TARGET, 2020 TARGET CORPORATE RESPONSIBILITY REPORT 38 (2020) (emphasis added), [https://corporate.target.com/getmedia/5703b228-030d-4f69-8a37-afc8225c57e3/2020\\_Target\\_Corporate-Responsibility-Report.pdf](https://corporate.target.com/getmedia/5703b228-030d-4f69-8a37-afc8225c57e3/2020_Target_Corporate-Responsibility-Report.pdf) [<https://perma.cc/G5JF-64CM>].

<sup>49</sup> STATE ST., 2020 ESG REPORT 58 (2021) (emphases added), <https://www.statestreet.com/web/global/documents/state-street-esg-report-04-2021.pdf> [<https://perma.cc/4W2G-9QUC>].

[Truist's] target is to increase ethnic diversity of senior leadership *from 11.9% to 15% in three years* and promote pay equity by conducting regular external, independent, and expert equity reviews.<sup>50</sup>

Among these examples of closed-ended racial targets, Starbucks's racial target is the closest to the specificity of most quotas. Recall that racial quotas involve a fixed number of opportunities for specific jobs or occupations. Starbucks's racial target is the most consistent with the typical structure of quotas because it states that the goal applies to "manufacturing roles" specifically, in addition to "enterprise roles."<sup>51</sup> Unlike quota language, however, Starbucks does not name a particular position or occupation within the manufacturing industry. This is an important distinction separating targets from quotas. My data shows that many companies' racial targets generally state an increase among employees and leadership positions rather than within jobs and occupations.

### B. Open-Ended Racial Targets

Open-ended racial targets—which provide a percentage target without a set timeframe—are relatively uncommon compared to closed-ended racial targets. P&G and Pactiv Evergreen's disclosures are illustrative of the open-ended approach:

[P&G has declared an aspiration] to achieve 40% representation of multicultural employees at every management level of the Company.<sup>52</sup>

In 2020, +50% of total U.S. [Pactiv Evergreen] employees were Black, Indigenous or People of Color. In 2021, we're working to revamp and accelerate our people strategy to make it more inclusive and representative.<sup>53</sup>

Like closed-ended racial targets, open-ended types tend to reference the hiring and promotion of broad categories like employees and management. They also include percentages but stop short of providing a year or timeframe by which the goals would be met. Despite this distinction, a similar analysis applies to both open- and closed-ended racial targets because both include goals and aspirations and are distinguishable from racial quotas.

---

<sup>50</sup> TRUIST, CORPORATE SOCIAL RESPONSIBILITY 2019 36 (2020) (emphasis added), [https://filecache.investorroom.com/mr5ir\\_truist/474/Truist%202020%20CSR%20and%20ESG%20Report%2009022021.pdf](https://filecache.investorroom.com/mr5ir_truist/474/Truist%202020%20CSR%20and%20ESG%20Report%2009022021.pdf) [<https://perma.cc/8ZR2-RKEW>].

<sup>51</sup> STARBUCKS, *supra* note 46, at 8.

<sup>52</sup> P&G, 2020 CITIZENSHIP REPORT 70 (2020), [https://downloads.ctfassets.net/oggad6svuzkv/6EZI43XPtL7w5kDKhMBZFS/c1d5eeaf260cb9335943b7ba4061537d/citizenship\\_report\\_2020\\_full\\_FINAL\\_updated.pdf](https://downloads.ctfassets.net/oggad6svuzkv/6EZI43XPtL7w5kDKhMBZFS/c1d5eeaf260cb9335943b7ba4061537d/citizenship_report_2020_full_FINAL_updated.pdf) [<https://perma.cc/Y7YX-ECNQ>].

<sup>53</sup> PACTIV EVERGREEN INC., ENVIRONMENTAL, SOCIAL & GOVERNANCE UPDATE 21 (2021), <https://investors.pactivevergreen.com/static-files/e0601a76-461b-4e4b-ad30-f7964324cb42> [<https://perma.cc/85DP-K7F3>].



## II. THE LAW AND HISTORY OF RACIAL QUOTAS IN COMPANIES

This Part frames companies' racial targets in the historical and legal context of corporate partnerships between companies and the federal government. Due to previous federal government involvement, historical forms of racial targets lack the purely voluntary nature of racial targets today. However, historical forms of racial targets still share the nonbinding characteristics of current racial targets.

A. *History of Racial Quotas in Employment*

On March 6, 1961, just two months into his presidency, President John F. Kennedy signed Executive Order 10,925, which mandated that companies doing business with the U.S. government take "affirmative action" to ensure that applicants and employees are treated "without regard to their race, creed, color, or national origin."<sup>54</sup> This affirmative action requirement included hiring, promoting, demoting, transferring, recruiting, laying off, terminating, training, and equalizing rates of pay.<sup>55</sup> President Kennedy also formed a Committee on Equal Employment Opportunity (Committee) to facilitate the implementation of the order.<sup>56</sup> The President's executive order "covered 35,000 companies and more than 15 million employees."<sup>57</sup> Failing to comply put companies at risk of losing their contracts with the federal government. But what it meant to "take affirmative action" was itself ambiguous.<sup>58</sup> Ultimately, the companies themselves defined the meaning of affirmative action.<sup>59</sup> That process began with Lockheed Aircraft Corporation's facility in Marietta, Georgia.

As part of the Plans for Progress Program, Lockheed's management drafted an affirmative action plan in consultation with the President's Committee.<sup>60</sup> The Plans for Progress Program constituted a series of company-created affirmative action plans made through the President's Committee to increase minority hiring, promotion, and retention in

---

<sup>54</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977, 1977 (Mar. 6, 1961). These requirements were reaffirmed in Executive Order 11,114. *See* Exec. Order No. 11,114, 28 Fed. Reg. 6485 (June 25, 1963).

<sup>55</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977; RANDALL L. PATTON, *LOCKHEED, ATLANTA, AND THE STRUGGLE FOR RACIAL INTEGRATION* 80 (2019).

<sup>56</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977.

<sup>57</sup> SUSAN E. REED, *THE DIVERSITY INDEX: THE ALARMING TRUTH ABOUT DIVERSITY IN CORPORATE AMERICA . . . AND WHAT CAN BE DONE ABOUT IT* 69–70 (2011).

<sup>58</sup> FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 4–5 (2009).

<sup>59</sup> *Id.* at 5.

<sup>60</sup> PATTON, *supra* note 55, at 83.

companies.<sup>61</sup> At the time, many felt that enforcement of the executive order necessitated buy-in from leading companies and government contractors.<sup>62</sup> Lockheed's plan was the very first set of corporate plans to improve equal employment opportunity for people of color.<sup>63</sup>

As part of the plan, Lockheed submitted "statistical data on its personnel and responded to questions with regard to its employment policies and practices . . . on a completely confidential basis and . . . only for the official use of the Committee."<sup>64</sup> Lockheed stated that it would conduct a periodic and likely yearly review of its plan with the Committee to measure its progress.<sup>65</sup> In five pages, the company then enumerated its specific plan in a number of categories, including recruitment, employment, placement, promotion, and training.<sup>66</sup> In the recruitment section, the plan stated that

Lockheed will in its employment recruitment *aggressively* seek out more qualified minority group candidates in order to increase the number of employees in many job categories, including but not limited to: Professional Engineering positions, such as design engineers, mathematicians, associate engineers and draftsmen; Technical positions, such as computer technicians and tabulating analysts; Administrative positions, such as accountants and buyers.<sup>67</sup>

In the employment section, the plan stated that

Lockheed will re-analyze its openings for salaried jobs *to be certain* that all eligible minority group employees have been considered for placement and upgrading. Its Industrial Relations staff, working with other members of management, will re-examine personnel records of minority group employees *to make certain* that employee skill and potential beyond current job requirements have been properly identified therein for use in filling job openings.<sup>68</sup>

---

<sup>61</sup> Lockheed Joint Statement, *supra* note 12; *Major American Firms Sign Plans for Progress*, ATLANTA DAILY WORLD, May 10, 1964, at A1. One example was American Motors, whose chief executive officer reported that the company joined to focus "the problem of equal employment opportunity for our people. . . . Plans for Progress has been good because it has made us concentrate on the problem of minority employment." NAT'L INDUS. CONF. BD., COMPANY EXPERIENCE WITH NEGRO EMPLOYMENT 58 (1966).

<sup>62</sup> *See, e.g.*, Lockheed Joint Statement, *supra* note 12.

<sup>63</sup> RICHARD P. NATHAN, JOBS & CIVIL RIGHTS: THE ROLE OF THE FEDERAL GOVERNMENT IN PROMOTING EQUAL OPPORTUNITY IN EMPLOYMENT AND TRAINING 102 (1969), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11016.pdf> [<https://perma.cc/6PYJ-8WHM>].

<sup>64</sup> *Id.* at 1.

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.* at 2–7.

<sup>67</sup> *Id.* (emphasis added).

<sup>68</sup> *Id.* (emphases added).

President Kennedy hailed Lockheed's plan as "a milestone in the history of civil rights in this country."<sup>69</sup> He further described it as a "long-range commitment by the Lockheed corporation and by the U.S. government to work together in improving and expanding the job opportunities available to members of the minority groups."<sup>70</sup> He also described the plan as "voluntary action" that would result in "real and measurable progress toward the goal of equal opportunity."<sup>71</sup> The President looked on with approval and smiled as Vice President Lyndon B. Johnson, Chairman of the Committee, and Lockheed President Courtland Gross signed the document in his office.<sup>72</sup>

After Lockheed created the first Plan for Progress, most of the country's then-largest companies joined the movement. By July 1961, 8 of the nation's largest defense contractors—a group employing 760,000 people—had joined the Plans for Progress Program.<sup>73</sup> A year later in July 1962, 85 companies followed suit.<sup>74</sup> And by November 1963, another 115 companies joined, including companies that did not hold government contracts.<sup>75</sup>

Plans for Progress varied from company to company in terms of detail, but with few exceptions, most followed Lockheed's basic template.<sup>76</sup> In addition to concrete plans for recruitment and employment, plans included condemning discrimination "in all phases of the company's personnel policies," particularly in training and education programs, and stating "the company's intention to take positive action to recruit minority group applicants for employment, training, and promotion." They further promised "thorough dissemination of the company's equal opportunity policies to company personnel, recruitment sources, and minority groups" and

---

<sup>69</sup> *Lockheed Pledges Job Equality at Plants: Pres. Kennedy Hails New Agreement as Milestone*, ATLANTA DAILY WORLD, May 26, 1961, at 1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Alvin Spivak, *Eight Defense Contractors Sign Non-Discrimination Government Job Agreements: President Kennedy Hails Ceremony as a Historic Step*, ATLANTA DAILY WORLD, July 13, 1961, at 1. The companies included Western Electric Company, General Electric Company, North American Aviation, Radio Corporation of America, and United Aircraft Corporation. *Id.*

<sup>74</sup> *33 More Firms Pledge Equal Employment Plan*, ATLANTA DAILY WORLD, July 1, 1962, at A5.

<sup>75</sup> PRESIDENT'S COMM. ON EQUAL EMP. OPPORTUNITY, REPORT TO THE PRESIDENT 2 (1963), [https://fraser.stlouisfed.org/files/docs/historical/presidents\\_committee/1963\\_committeeEEO.pdf?utm\\_source=direct\\_download](https://fraser.stlouisfed.org/files/docs/historical/presidents_committee/1963_committeeEEO.pdf?utm_source=direct_download) [https://perma.cc/YP6S-6U6Y].

<sup>76</sup> MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 117 (1966).

promised to provide details about implementation of these commitments—such as by filing progress reports with the government over time.<sup>77</sup>

The Plans for Progress Program came to an end because of its own failures and the establishment of other programs, policies, and changes in law under the Johnson and Nixon Administrations. In 1965, President Johnson, next in office after Kennedy’s assassination, issued Executive Order 11,246, which superseded Kennedy’s Executive Order 10,925.<sup>78</sup> While the previous executive order’s requirements for government contractors remained “essentially unchanged,” President Johnson’s order abolished the Committee and assigned its role to the Department of Labor.<sup>79</sup>

President Johnson’s political agenda and focus on the War on Poverty also deprioritized the Plans for Progress Program. The Economic Opportunity Act of 1964 was designed in large part to address the problems of poverty and unemployment in Black communities.<sup>80</sup>

In 1968, President Johnson created the NAB and appointed Henry Ford, the president of Ford Motor Company, to lead it.<sup>81</sup> The NAB’s purpose was to “encourage leading employers and businessmen to hire and train the most disadvantaged citizens, known as the hard-core unemployed,” through the Job Opportunities in Business Sector (JOBS) program.<sup>82</sup> The JOBS program focused on training and transportation from poor neighborhoods to industrial sites.<sup>83</sup> Within a year of creating the JOBS program, 12,000 companies

---

<sup>77</sup> *Id.* For examples, see Lockheed Joint Statement, *supra* note 12, and President’s Comm. on Equal Emp. Opportunity & The Martin Co., Joint Statement on “Plan for Progress” 1 (July 12, 1961), [https://www.jfklibrary.org/sites/default/files/styles/orange\\_dam/https://static.jfklibrary.org/f3abvol8c2kft05j2txwodo8762s6u8n.jpg?itok=mRvrRZNo](https://www.jfklibrary.org/sites/default/files/styles/orange_dam/https://static.jfklibrary.org/f3abvol8c2kft05j2txwodo8762s6u8n.jpg?itok=mRvrRZNo) [<https://perma.cc/LMB8-3DBB>]. For an example of a format that deviates from the Lockheed plan, see Advanced Copy of Statement to Be Presented by Mr. R. J. Cordiner, Gen. Electric Co. (July 12, 1961), [https://www.jfklibrary.org/asset-viewer/archives/jfkwhsfhw-008-004#?image\\_id=JFKWHSFHW-008-004-p0013](https://www.jfklibrary.org/asset-viewer/archives/jfkwhsfhw-008-004#?image_id=JFKWHSFHW-008-004-p0013) [<https://perma.cc/Z7KK-76DD>]. The *New York Times* described the Plan for Progress from General Electric as “unspecific and little more than a polite response to the panel’s invitation to cooperate.” Peter Braestrup, *U.S. Panel Split over Negro Jobs: Johnson Committee Tries to Reconcile ‘Voluntary’ and ‘Compulsory’ Programs*, N.Y. TIMES, June 18, 1962, at 1. Many companies had never examined their statistics until signing up for Plans for Progress. The newfound availability of statistics was surely an advantage of the Plans for Progress Program. For example, the Michigan Bell Telephone Company signed a Plan for Progress in June 1962. The company’s president recalled that “top management thought [it was] doing well . . . then the statistical reports prepared under the Plan for Progress began to come in. These shocked us.” NAT’L INDUS. CONF. BD., *supra* note 61, at 19.

<sup>78</sup> SOVERN, *supra* note 76, at 104.

<sup>79</sup> *Id.*

<sup>80</sup> ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S* 243–44 (1984); see generally Act of Aug. 20, 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964).

<sup>81</sup> DELTON, *supra* note 13, at 229.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

pledged to create 172,153 jobs for the hard-core unemployed.<sup>84</sup> Most of these jobs were low-level and, according to Black people, not the “kind of jobs everyone else [had].”<sup>85</sup> Companies were uninterested in employing Black people beyond the low-level positions that the JOBS program promised.<sup>86</sup>

When Nixon entered office in 1969, he merged the Plans for Progress Program with NAB.<sup>87</sup> By then, there were 441 Plans for Progress companies with over 9.7 million employees total, of which about 10% were Black and other minorities.<sup>88</sup> This merger probably created an out for companies that were not entirely interested in hiring people of color but would hire the poor.<sup>89</sup>

Despite the public–private partnerships forged by the Plans for Progress and NAB programs to create employment opportunities for racial minorities, companies still opposed the idea of racial quotas.<sup>90</sup> But racial quotas—not Plans for Progress or NAB—eventually paved the way for integrating a large number of Black people into traditionally white positions.<sup>91</sup> Part of the reason for this was the use of boycotts as a tool against employment discrimination, which gained prominence in the early 1960s.

Starting in Philadelphia, a group of approximately 400 Black ministers coordinated consumer boycotts against companies like Pepsi-Cola, Gulf Oil, and Sun Oil.<sup>92</sup> As a result of the Philadelphia boycotts of 1960–1962, twenty-four companies agreed to specific hiring goals for Black people.<sup>93</sup> This approach spread to other cities.<sup>94</sup> In the winter of 1962–1963, a boycott of Sealtest Milk in New York led to a negotiation in which the company pledged to “give [Black and Puerto Rican people] ‘exclusive exposure’ for

---

<sup>84</sup> Robert A. Wright, *From Overalls to the Attaché Case: A Symbol of Negro Goals in Business*, N.Y. TIMES, Jan. 6, 1969, at 71.

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* at 71–72 (noting that business cooperation beyond the JOBS program was fair at best and that most businessmen believed federally funded programs should bear the primary responsibility for solving urban social problems).

<sup>87</sup> Nixon, *supra* note 10.

<sup>88</sup> *Id.*; THEODORE L. CROSS, BLACK CAPITALISM: STRATEGY FOR BUSINESS IN THE GHETTO 250 (1969).

<sup>89</sup> *See, e.g.*, CROSS, *supra* note 88, at 244 (discussing the policies adopted by various companies that focused instead on the poor).

<sup>90</sup> DELTON, *supra* note 13, at 38–39.

<sup>91</sup> *Id.* at 40.

<sup>92</sup> GRAHAM, *supra* note 15, at 105.

<sup>93</sup> *Id.* This approach was spearheaded by the Congress of Racial Equality, or CORE, a group that played a major role in the Civil Rights Movement of the 1960s. Of the fifty original members, twenty-eight were men and twenty-two were women, and about one-third were Black and two-thirds white. *Id.*

<sup>94</sup> *Id.*

at least a week when hiring their next fifty employees.”<sup>95</sup> In 1963, Black protestors led to the shut-down of construction sites in Philadelphia because the mayor of Philadelphia, James Tate, feared further protests.<sup>96</sup>

As a precursor to what would be known as the Philadelphia Plan, in 1964 the Kennedy Administration began requiring prospective federal contractors to project the number of minority workers on a jobsite prior to being awarded a federal contract.<sup>97</sup> Contracting officers could then evaluate the projections along with all other factors in determining to whom the contract should be awarded.<sup>98</sup>

The Johnson Administration first established the Philadelphia Plan in 1967. The Philadelphia Plan was a federal affirmative action program to racially integrate the building-construction trade unions through mandatory goals for minority hiring on federal construction contracts.<sup>99</sup> It was therefore an effective racial quota. In November 1968, Elmer Staats, Comptroller General of the United States, ruled the Philadelphia Plan illegal under existing procurement law.<sup>100</sup> The Johnson Administration did not fight this ruling “for fear of clashes with unions, construction contractors, and conservative critics.”<sup>101</sup>

In September 1969, President Nixon revised and issued a new Philadelphia Plan.<sup>102</sup> The Nixon Administration “saw the plan as a political wedge issue which could divide two reliably Democratic constituencies: Black people and organized labor.”<sup>103</sup> The revised Philadelphia Plan sought to avoid inflexible quotas and embrace target employment ranges.<sup>104</sup> Much like today’s racial targets, “[i]t identified numerical ‘goals’ with timetables for achieving them” and included a good faith provision that allowed employers to show that they attempted to meet the modest targets.<sup>105</sup> The percentage of minority employees on Philadelphia Plan projects was to increase from 4% to 9% in 1970, and from 19% to 26% by the end of 1973.<sup>106</sup>

---

<sup>95</sup> *Id.*

<sup>96</sup> Golland, *supra* note 14; Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145, 161 (2004).

<sup>97</sup> Sugrue, *supra* note 96, at 146.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 170.

<sup>101</sup> NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 96 (2006); Sugrue, *supra* note 96, at 170.

<sup>102</sup> MACLEAN, *supra* note 101, at 95.

<sup>103</sup> Golland, *supra* note 14.

<sup>104</sup> MACLEAN, *supra* note 101, at 96.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

Minority employees were to be hired to fill new positions and no white worker was to be displaced.<sup>107</sup> As such, the Philadelphia Plan shared a concern for the interests of white employees like that in the Supreme Court's *Weber* decision.<sup>108</sup>

However, the Philadelphia Plan seemed to be in direct conflict with Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, sex, national origin, and religion.<sup>109</sup> Indeed, before Title VII became law, the wave of racial quotas brought on through boycotts and other nationwide debates found their way into congressional hearings on the bill.<sup>110</sup> Senate and House Judiciary Committee hearings revealed that civil rights leaders could not credibly defend racial quotas beyond equal opportunity because of how politically fraught they were.<sup>111</sup> Unsurprising, then, that there is explicit language in Section 703(j) of the bill stating that employers are not required to “grant preferential treatment to any individual or to any group because of the[ir] race, color, religion, sex, or national origin . . . on account of an imbalance which may exist with respect to [that group].”<sup>112</sup> This language helped appease construction unions, companies, and their congressional allies who vehemently opposed the Philadelphia Plan for instating “unlawful quotas” and “reverse discrimination.”<sup>113</sup>

While earlier efforts, including the Plans for Progress Program, NAB, and the Philadelphia Plan, failed to convince companies to hire people of color, litigation and mounting court-imposed back pay settlements did. And indeed, research shows that “numbers-oriented affirmative action plans put in place to mitigate litigation from Black workers, aided the advancement of Black workers in companies.”<sup>114</sup>

A conservative political turn occurred in the 1980s when President Ronald Reagan created a shift in the racial quota debate. In August 1985, Reagan's attorney general, Edwin Meese III, and the head of the Civil Rights Division of the Justice Department, William Bradford Reynolds, set out to rescind Johnson's Executive Order 11,246, denouncing its aims as quotas. Until Reagan, every president reaffirmed Johnson's executive order.<sup>115</sup> Americans at the time still supported affirmative action for minorities, but

---

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

<sup>110</sup> GRAHAM, *supra* note 15, at 106.

<sup>111</sup> *Id.* at 109–10.

<sup>112</sup> Civil Rights Act of 1964 § 703(j).

<sup>113</sup> MACLEAN, *supra* note 101, at 97.

<sup>114</sup> *Id.* at 110.

<sup>115</sup> *Id.* at 301.

typically without rigid quotas—policies involving quotas tended to provoke fierce hostility.<sup>116</sup> Conservatives argued that Johnson’s executive order catalyzed reverse discrimination against white men and failed to help poor Black people.<sup>117</sup> In response, the Reagan Administration wanted to make numerical goals and timetables for accomplishing particular racial compositions of workforce voluntary.<sup>118</sup> The Administration promised to “wipe out the effect of nearly twenty years of quota programs.”<sup>119</sup>

However, the Administration was shocked that corporate leaders were largely opposed to getting rid of the executive order.<sup>120</sup> John L. Huck, chairman of Merck, said that the company “will continue goals and timetables no matter what the government does” because “[t]hey are part of our culture and corporate procedures.”<sup>121</sup> John M. Stafford, the president and CEO of Pillsbury, said that “[i]t has become clear to us that an aggressive affirmative action program makes a lot of sense. So if [the president rescinds the executive order], it wouldn’t affect us.”<sup>122</sup> The Business Roundtable, a consortium of the nation’s leading companies,<sup>123</sup> responded similarly, asking the Reagan Administration to keep the Johnson executive order because the “Executive Order has served American society, workers, and [companies] well for the past 20 years.”<sup>124</sup> “Setting goals and using numerical measures ‘are a basic fact of how business operates.’”<sup>125</sup> However, companies still opposed racial quotas, but they did not view the setting of goals and timetables in their affirmative action plans to be the same as quotas.<sup>126</sup> So, while racial quotas were politically challenging and companies opposed them, most companies fully supported setting goals and numerical targets in hiring.<sup>127</sup>

Although the post-2020 racial reckoning’s increase in racial targets appears new, there is a historical background for the systematic development of these targets—particularly the setting of goals and timelines to increase

---

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Fisher, *supra* note 17, at 27.

<sup>119</sup> MACLEAN, *supra* note 101, at 301.

<sup>120</sup> *Id.* at 310.

<sup>121</sup> Fisher, *supra* note 17, at 28.

<sup>122</sup> *Id.*

<sup>123</sup> Atinuke O. Adediran, *Corporate Accountability and Worker Empowerment*, 69 UCLA L. REV. DISC. 178, 191 (2022); *About Us*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us> [<https://perma.cc/KC8N-HHQQ>].

<sup>124</sup> MACLEAN, *supra* note 101, at 310.

<sup>125</sup> *Id.* at 310.

<sup>126</sup> Fisher, *supra* note 17, at 28.

<sup>127</sup> *Id.*



the racial composition of the workforce—since at least the early 1960s. In the past, the government partnered with and mandated the setting of goals. Racial targets that existed before 2020 always had the hand of the state in them, no matter how trivial. Prior to 2020, companies made racial targets in the Plans for Progress Program, in NAB, and in response to the Reagan Administration’s opposition to Executive Order 11,246. Between then and the racial reckoning, companies established policies and programs served as indicia of compliance with civil rights laws.<sup>128</sup>

Companies have set their own racial hiring and promotion goals without government pressure, support, or the threat of litigation. The year 2020 brought on a new era of racial targets where companies themselves are systematically setting racial targets.

### *B. The Law of Racial Quotas*

Federal affirmative action doctrine has developed along two lines: state and private action. In situations involving state action—where a government entity establishes a quota system—courts analyze the legality of the quota under the Equal Protection Clause of the Fourteenth Amendment.<sup>129</sup> Under this analysis, the Court uses a colorblind approach, requiring strict scrutiny every time the government establishes a preference system or quota based on race.<sup>130</sup> A plurality of the Court adopted this Equal Protection analysis in *Regents of University of California v. Bakke*.<sup>131</sup>

In *Bakke*, the University of California Davis School of Medicine designed a special admissions program reserving sixteen seats for a specified number of minority groups. Bakke, a white applicant, challenged the program as racial discrimination.<sup>132</sup> U.C. Davis enumerated four reasons why it needed to use racial quotas in its admissions program: (1) to correct the effects of racial discrimination in public education, (2) because minority doctors can serve in minority communities to address the unequal medical care that Black and Latino people receive in California, (3) to increase the number and percentages of racial minorities in the medical profession, and (4) because medical school would be better if there were more people from diverse backgrounds.<sup>133</sup> Applying strict scrutiny, the Court reasoned that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus

---

<sup>128</sup> See EDELMAN, *supra* note 32, at 142–45.

<sup>129</sup> Sophia Z. Lee, *A Revolution at War with Itself - Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 2964, 2975–76 (2014).

<sup>130</sup> *Id.* at 2976, 2982.

<sup>131</sup> 438 U.S. 265, 291 (1976).

<sup>132</sup> *Id.* at 277–79.

<sup>133</sup> *Id.* at 305–06.

call for the most exacting judicial examination”—the state must have a compelling interest in using the quota, which must be narrowly tailored to achieve that interest.<sup>134</sup> The Court rejected the first three rationales as unconstitutional and held that the only compelling and constitutionally permissible goal is the attainment of a diverse student body.<sup>135</sup> This justification is now known as the diversity rationale for affirmative action.<sup>136</sup>

However, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, the Court held that Harvard’s and University of North Carolina’s admissions programs violate the Equal Protection Clause of the Fourteenth Amendment because “[e]liminating racial discrimination means eliminating all of it,” whereas the programs in question only focused on eliminating racial discrimination against certain groups.<sup>137</sup> The Court emphasized that the admissions systems at both universities use race as a negative against Asians, have no expiration date, and are not measurable; they must therefore be invalidated under the Equal Protection Clause.<sup>138</sup> The decision dismantled the consideration of race in university admissions except in military academies and in the narrow context of considering how race affected an applicant’s life through discrimination, inspiration, or other circumstances.<sup>139</sup> The Court in *SFFA* applied a similar analysis under Title VI of the Civil Rights Act to Harvard, a private entity which receives federal funds.<sup>140</sup>

If, however, a private entity without a government contract adopts a quota or another race-based system, the Court’s analysis would rest on Title VII of the Civil Rights Act of 1964, and this private action would not be given constitutional scrutiny.<sup>141</sup> Because racial targets involve purely private action, in that the government has not mandated that companies establish hiring and promotion goals for people of color,<sup>142</sup> the analysis of racial targets in this Article focuses mostly on Title VII and the implications of the private

---

<sup>134</sup> *Id.* at 291.

<sup>135</sup> *Id.* at 307–12.

<sup>136</sup> See EDELMAN, *supra* note 32, at 142–45; *infra* Section III.C.2.

<sup>137</sup> 143 S. Ct. 2141, 2150, 2161, 2175 (2023).

<sup>138</sup> *Id.* at 2175.

<sup>139</sup> *Id.* at 2166 n.4, 2176.

<sup>140</sup> See generally *SFFA*, 143 S. Ct. 2141 (applying a similar standard to Harvard, a private university); Title VI, 42 U.S.C. § 2000d.

<sup>141</sup> Lee, *supra* note 129, at 2977–78.

<sup>142</sup> To be sure, the SEC, through Nasdaq’s rule, has mandated the disclosure of board directors through rulemaking. This rule requires Nasdaq-listed companies to disclose having at least one board director who is a person of color or explain why they do not have a racially diverse director. Exchange Act Release No. 34–92590, 86 Fed. Reg. 44,424 (Aug. 6, 2021). However, the SEC made explicit that “[w]hile the [rule] may have the effect of encouraging some Nasdaq-listed companies to increase diversity on their boards, [it] do[es] not mandate any particular board composition.” *Id.* at 44,428.

action scenario. It also briefly discusses § 1981 of the Civil Rights Act of 1866, which conservatives have used in conjunction with Title VII to push back on diversity, equity, and inclusion programs.

*1. Title VII of the Civil Rights Act*

While Title VII of the Civil Rights Act of 1964 has been integral to preventing employers from discriminating against both current and potential employees on the basis of race, the Act does not explicitly require companies to take affirmative steps to provide employment opportunities to racial and ethnic minorities.<sup>143</sup> The Supreme Court previously relied on Title VII's legislative history to interpret the law to favor preferences for people of color in employment.<sup>144</sup> But the explicit language of the law prohibits racial preferences:

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.<sup>145</sup>

In 1965, four years after President Kennedy's Executive Order 10,925<sup>146</sup> and just one year after Congress passed Title VII, President Johnson issued another affirmative action directive in Executive Order 11,246.<sup>147</sup> Executive

---

<sup>143</sup> Civil Rights Act of 1964, Pub. L. No. 88-352 § 703(j), 78 Stat. 241 (1964).

<sup>144</sup> *United Steelworkers v. Weber*, 443 U.S. 193 (1979). For a thorough discussion of the legislative history of Title VII, see generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

<sup>145</sup> 42 U.S.C. § 2000e-2(j).

<sup>146</sup> Executive Order 10,925 states:

The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Exec. Order No. 10,925, 26 Fed. Reg. 1977, 1977 (Mar. 6, 1961); *see also* Exec. Order No. 11,114, 28 Fed. Reg. 6485 (June 25, 1963).

<sup>147</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

Order 11,246 required all government contractors and subcontractors to take affirmative action to expand job opportunities for minorities.<sup>148</sup> It also established the Office of Federal Contract Compliance (OFCC) in the Department of Labor to administer the order and ensure compliance.<sup>149</sup> OFCC's first opportunity to interpret Executive Order 11,246 came in 1968, when it issued a decision on whether the Allen-Bradley Company should lose its government contracts and be barred from doing business with the government for violating the order.<sup>150</sup> OFCC interpreted the order like Title VII, which merely prohibits nondiscrimination and does not require employers to give minorities any preferential treatment or to establish quotas. In its ruling, OFCC stated that the executive order merely required companies to ensure that all persons can apply for jobs and be hired, not to take active steps to help them do so.<sup>151</sup>

Eventually, the Supreme Court weighed in on the parameters of Title VII and the affirmative action in *McDonald v. Santa Fe Trail Transportation Co.* The Court held that Title VII prohibits "discriminatory preference for any [racial] group, minority or majority."<sup>152</sup> Yet, in *United Steelworkers v. Weber*, the Supreme Court held that Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans"<sup>153</sup> and set forth the standard for implementing such plans.<sup>154</sup> The Court affirmed that position eight years later in *Johnson v. Transportation Agency*, relying on Title VII's legislative history.<sup>155</sup> Title VII resulted from the nation's concern for centuries of racial injustice and was intended to improve the condition of people of color "who had 'been excluded from the American dream for so long.'"<sup>156</sup> The Court held that prohibiting private, race-conscious efforts to abolish racial injustices would be detrimental to this purpose.<sup>157</sup>

Companies can rely on *Weber* to make a strong argument that even if analyzed as quotas, targets are legal as "private, voluntary, race-conscious . . . plans" rather than federally mandated affirmative action.<sup>158</sup> They will have support from legal scholars such as Professor Peter H.

---

<sup>148</sup> *Id.* at 12,320.

<sup>149</sup> *Id.*

<sup>150</sup> RUTH G. SHAEFFER, NONDISCRIMINATION IN EMPLOYMENT: CHANGING PERSPECTIVES, 1963-1972, at 12 (1973).

<sup>151</sup> *Id.*

<sup>152</sup> 427 U.S. 273, 279 (1976).

<sup>153</sup> 443 U.S. 193, 208 (1979).

<sup>154</sup> *See infra* Section II.B.3.

<sup>155</sup> 480 U.S. 616, 645 (1987).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 628-29.

<sup>158</sup> 443 U.S. at 208.

Schuck, who has argued strongly in favor of private, voluntary plans and against federal affirmative action.<sup>159</sup>

## 2. *Section 1981*

Section 1981 originated as part of the Civil Rights Act of 1866, enacted during Reconstruction.<sup>160</sup> Section 1981 guarantees the rights of “[a]ll persons within the jurisdiction of the United States [to] have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”<sup>161</sup>

Since 1968, federal courts have recognized that § 1981’s language about the right to make and enforce contracts prohibits private acts of discrimination in employment, including employment discrimination by companies.<sup>162</sup>

However, litigants do not always invoke § 1981 in employment discrimination cases because Title VII tends to provide a more comprehensive coverage. Almost one-half of the time, litigants who bring Title VII cases also include § 1981 as a legal ground for their claims.<sup>163</sup>

## 3. *The Weber Standard*

In *Weber*, the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation (Kaiser) entered into a collective bargaining agreement covering fifteen Kaiser plants.<sup>164</sup> The agreement reserved 50% of the openings in craft-training programs for Black employees “until the percentage of black craftworkers in the plant was commensurate with the percentage of [Black individuals] in the local labor force.”<sup>165</sup> Kaiser was concerned that its craftworkers were almost exclusively white. In the Kaiser plant where the lawsuit arose, only 1.83% of the craftworkers were Black, even though the local work force was approximately 39% Black.<sup>166</sup> Weber, a white worker, claimed that because the affirmative action program had resulted in junior Black employees receiving training over senior white

---

<sup>159</sup> See generally PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 96 (2003).

<sup>160</sup> 42 U.S.C. § 1981; George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 307.

<sup>161</sup> 42 U.S.C. § 1981(a).

<sup>162</sup> E. Richard Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 57 (1972).

<sup>163</sup> Theodore Eisenberg & Stewart Schwab, *Importance of Section 1981*, 73 CORNELL L. REV. 596, 602–03 (1988).

<sup>164</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 198 (1979).

<sup>165</sup> *Id.* at 197.

<sup>166</sup> *Id.* at 198–99.

employees, he and other similarly situated white employees had been discriminated against in violation of Title VII.<sup>167</sup> The Supreme Court disagreed. It held that the 50% quota was permissible because Title VII allows the private sector to voluntarily adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.<sup>168</sup>

The *Weber* Court provided the standard by which lower courts have analyzed whether a private quota is legal: (1) the program is designed to open employment opportunities for minorities in occupations that were traditionally closed to them; (2) the preference does not unnecessarily trammel the interests of white employees—that is, the plan does not require the discharge of white employees and their replacement with minorities, nor does it bar white employees from advancement; and (3) the plan is a temporary measure to eliminate racial imbalance and is not meant to maintain racial balance.<sup>169</sup>

The Court also decided that despite the explicit language of Title VII to the contrary, the quota in *Weber* was lawful because it advanced the goal of Title VII.<sup>170</sup> The Court upheld the racial quota because the company had historically excluded Black people from craftwork.<sup>171</sup> The Court also found that the quota did not prevent white people from advancing as they still had 50% of craftwork positions.<sup>172</sup> Finally, it found that the plan was not designed to maintain racial balance because it would end as soon as the percentage of Black craftworkers in the plan became congruent with that of Black individuals in the local labor force.<sup>173</sup>

#### 4. State and Private Quota Distinction

In contrast to *Weber*, which involved a private employer, the Supreme Court invalidated a racial quota established by a government entity under the Equal Protection Clause of the Fourteenth Amendment. In *City of Richmond v. J.A. Croson Co.*, the City of Richmond, Virginia adopted a quota program requiring contractors on municipal projects to subcontract 30% of the dollar amount of each contract to minority business enterprises (MBEs).<sup>174</sup> 51% of the ownership of MBEs belonged to racial or ethnic minorities. The City established the program because, while its population was 50% Black, less

---

<sup>167</sup> *Id.* at 193.

<sup>168</sup> *Id.* at 204–09.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 201–02.

<sup>171</sup> *Id.* at 198.

<sup>172</sup> *Id.* at 208.

<sup>173</sup> *Id.*

<sup>174</sup> 488 U.S. 469, 477 (1989).

than 1% of its prime construction contracts had been awarded to minority businesses in recent years.<sup>175</sup> A construction company, the sole bidder on a municipal contract, lost its contract because it did not adhere to the quota and brought a lawsuit claiming that the quota was unconstitutional under the Fourteenth Amendment.<sup>176</sup> The Supreme Court sided with the construction company and invalidated the quota, reasoning that the City of Richmond did not show that the company had discriminated against minority businesses. The Court reasoned that none of the evidence presented by the City pointed to any identified discrimination in the Richmond construction industry. In other words, societal discrimination alone could not serve as the basis for the City's quota. Since the City could not show that it discriminated against Black people in the construction industry specifically, the Court held that the quota was not narrowly tailored to compensate Black contractors for past discrimination.<sup>177</sup>

*Croson* makes clear the distinction in how courts treat racial quotas established by state versus private entities. With the private employer in *Weber*, the Court relied on the legislative history of Title VII and its purpose of providing opportunities for racial minorities and chose to relax the requirement of showing of past discrimination to permit quotas. In other words, because the purpose of Title VII is to provide opportunities for minorities, the Court reasoned that an employer need not show past discrimination to provide opportunities for minorities, even in the form of quotas. But in *Croson*, under the Equal Protection Clause of the Fourteenth Amendment, the Court required a showing of past discrimination.

### III. ANALYZING TARGETS

In this Part, I connect the history of racial quotas with contemporary racial targets. While there is fear that *SFFA* rendered racial targets indefensible, I argue that there is a theory under which racial targets could still pass legal muster. Racial targets are still legally defensible because the Court in *SFFA* noted that both admissions programs at Harvard and University of North Carolina lack sufficiently focused and measurable objectives warranting the use of race.<sup>178</sup> Racial targets are by definition focused and measurable objectives, and they have historical and legal support too. But despite their seeming legality, conservative groups have already contested that assumption.

---

<sup>175</sup> *Id.* at 479–80.

<sup>176</sup> *Id.* at 482–83.

<sup>177</sup> *Id.* at 505.

<sup>178</sup> 143 S. Ct. 2141, 2166 (2023).

### C. *Connecting History with Contemporary Racial Targets*

During the Reagan Administration, the Business Roundtable stated that “[s]etting goals and using numerical measures ‘are a basic fact of how business operates.’”<sup>179</sup> Historically, hiring goals were crucial to increasing racial diversity in companies. A study from 1970 found that the primary reason why Black employment was not increasing in public utility companies was because company managers did not consider Black employment to be “important enough to warrant the same kind of goal setting, program planning, and performance evaluation applied in other areas of company operations.”<sup>180</sup> And when President Reagan threatened to rescind the Johnson executive order, companies vehemently opposed the move and promised to “continue goals and timetables no matter what the government does.”<sup>181</sup> In a 1985 survey of CEOs of Fortune 500 companies, more than 90%—116 out of 127 companies—said that the “numerical objectives” in their affirmative action programs were established partly to satisfy corporate objectives unrelated to government regulations.<sup>182</sup>

This history suggests that companies are inclined to establish racial targets, carefully orchestrating them to comply with Title VII and judicial precedents that made racial quotas illegal. Companies—large, medium, and small—have endorsed racial targets since 2020’s racial reckoning as a method for increasing racial diversity.

### D. *Analyzing Racial Targets Independently*

Companies have a strong basis for legality if they view racial targets as independent from racial quotas. There are three key distinctions between racial quotas and racial targets. First, racial targets are private and voluntary programs unrelated to federal affirmative action. They were invented by companies for companies and have no state or government entity overseeing them.

Second, while racial targets often include the specific numbers or percentages of people of color that a company aims to hire or promote, they tend to do so on a general institutional level and do not apply to a specific occupation or job, unlike racial quotas. Racial targets are almost always general aspirations to increase the percentage of people of color among employees, boards of directors, managers, and other leaders. So, if a company has a goal to have 20% of its leadership comprised of people of

---

<sup>179</sup> MACLEAN, *supra* note 101, at 310.

<sup>180</sup> BERNARD E. ANDERSON, THE NEGRO IN THE PUBLIC UTILITY INDUSTRIES 222 (1970).

<sup>181</sup> Fisher, *supra* note 17, at 28.

<sup>182</sup> *Id.*



color, “leadership” can be so broadly construed that the 20% can be applied to a range of occupations, professions, or roles.

Third, racial targets are aspirations or goals rather than strict requirements. This means that they are nonbinding. This concept of goals has historical precedence. In 1972, the U.S. Commission on Civil Rights distinguished goals from quotas by defining goals as “nothing more than a description of what the labor force would look like absent the effects of illegal racial or sexual discrimination, and the ‘timetable’ is the informed estimate of time needed to achieve the discrimination-free labor force without disrupting the industry or denying anyone the opportunity for employment.”<sup>183</sup> Per this definition, a goal is a desired result rather than a strict plan that must be achieved. In this way, companies can choose to use racial targets as metrics of assessment rather than strict end results.<sup>184</sup>

A company can ask a court not to evaluate racial targets under the stringent standards used for quotas, but to instead evaluate them under a separate standard that prioritizes corporate discretion, as discussed below. In other words, courts may give companies leeway to come up with plans for addressing workplace shortcomings. However, there is a possibility that courts may be impeded by what Professor Kenji Yoshino calls “pluralism anxiety” in carving out a new doctrine of racial targets, particularly when the issue of race has become extremely polarizing.<sup>185</sup>

### *E. Analyzing Targets as Quotas*

If, however, courts do not adopt a separate standard for analyzing racial targets, companies will likely defend racial targets as legal within the framework of racial quotas under the *Weber* standard, which applies to the employment context. Companies can argue that racial targets (1) open opportunities for minorities, (2) do not bar white advancement, and (3) do not maintain racial balance.

#### *1. Opening Opportunities for Minorities*

Under the *Weber* standard, there is no requirement of an admission of prior discrimination before an employer can take voluntary affirmative action measures.<sup>186</sup> This is good news for companies, as they do not need to

---

<sup>183</sup> MACLEAN, *supra* note 101, at 110.

<sup>184</sup> For a discussion focusing on diversity assessments in companies, see Martinez & Fletcher, *supra* note 19, at 869, 875.

<sup>185</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011). Broadly defined, pluralism anxiety is about not wanting to carve out new protections for certain groups.

<sup>186</sup> See Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1608.4 (2023) (setting out requirements for taking affirmative action measures, not including an admission of prior discrimination).

admit to past discrimination to disclose hiring and promotion goals. Not only would admitting discrimination be a violation of the law, but it is unimaginable that companies would admit to previously excluding people of color from certain positions for fear of backlash from customers, employees, potential employees, and shareholders.<sup>187</sup>

Because racial targets are pervasive, showing that opportunities are entirely closed to people of color would be difficult. Instead, companies can argue that racial targets are meant to eliminate the lack of racial and ethnic diversity in their companies. In ESG and diversity reports, companies discuss or allude to the problem of societal discrimination or bias against people of color before making disclosures about hiring and promotion. For instance, Devon Energy expressed that its decision to make racial targets was based on “acts of racial injustice against Black Americans [that] came to the forefront after the killings of George Floyd, Ahmaud Arbery, Breonna Taylor and others.”<sup>188</sup> Similarly, Penn National Gaming explained that it increased hiring efforts amid “one of the most challenging times in our nation’s history . . . as the world grappled with an outpouring of racial and social anguish.”<sup>189</sup>

Even if a court requires evidence of past discrimination, a company can seek to waive the provision, consistent with the reasoning in *Weber* that all a company need show is that a program is designed to open employment opportunities for minorities in occupations that were traditionally closed to them. Companies can show that positions, particularly in management, have remained largely white despite their best efforts not to exclude people of color from these positions.

## 2. *White Advancement*

The second *Weber* requirement is that a quota must not trammel the interests and advancement of white employees.<sup>190</sup> This is consistent with

---

<sup>187</sup> Recently, institutions of higher learning have begun admitting their role in slavery and discrimination against Black people since Emancipation. Brown, Harvard, Columbia, and other universities created presidential commissions and task forces to investigate and report on the wealth accrued by the schools “due to their direct or indirect participation in slavery and slave trading.” V.P. Franklin, *Georgetown Students Demonstrate How Reparations Can Be Made to African-American Students*, ACLU (May 22, 2020), <https://www.aclu.org/news/racial-justice/georgetown-students-demonstrate-how-reparations-can-be-made-to-african-american-students> [https://perma.cc/ANH4-5E2X]. However, these admissions have been challenging even for these universities.

<sup>188</sup> DEVON ENERGY, 2020 DEVON ENERGY SUSTAINABILITY REPORT 79 (2020), [https://www.responsibilityreports.com/HostedData/ResponsibilityReportArchive/d/NYSE\\_DVN\\_2020.pdf](https://www.responsibilityreports.com/HostedData/ResponsibilityReportArchive/d/NYSE_DVN_2020.pdf) [https://perma.cc/XUG5-4JQT].

<sup>189</sup> See PENN NAT’L GAMING, INC., 2021 CORPORATE SOCIAL RESPONSIBILITY REPORT 9–10 (2021), <https://www.pennentertainment.com/-/media/Project/PNG-Tenant/Corporate/PNG-Corp/2021esgreportdraftpages42322.pdf> [https://perma.cc/HSC3-H92B].

<sup>190</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

legal doctrine, which tends to ensure that efforts to protect people of color do not hinder the interests of white individuals and, in many cases, also benefit white interests. Numerous legal scholars have argued that the diversity rationale, accepted by the Court as the only constitutional basis for using race in college admissions in the *Bakke* case, favors white people more than people of color because diversity is meant to enrich white individuals and institutions.<sup>191</sup> Critical race scholars and others have also argued that diversity programs primarily benefit white women.<sup>192</sup>

A company can thus show that neither closed- nor open-ended racial targets prevent white individuals from obtaining positions in companies. Like the 50% in *Weber*, all the targets I examined leave room for white individuals to continue to be hired, sometimes as much as 80% in positions where companies seek to increase the percentage of people of color to 20% by a particular year.

### 3. *Lack of Permanence*

Lack of permanence, or the fact that a quota would not maintain racial balance, is probably the most important factor the Supreme Court has emphasized in its analysis of racial quotas.<sup>193</sup> This factor was also prominent in *SFFA* in the context of university admissions.<sup>194</sup> In other words, the Court wants to know that a program will expire. A company can achieve an impermanent program with either closed- or open-ended targets.

In *Johnson v. Transportation Agency*, the Court illustrates how either approach can satisfy the requirement that the plan not seek to maintain a racial balance. The *Johnson* case is largely about a gender preference and involved a state entity, but its holding provides an example of the interpretation of an open-ended quota. In that case, the Transportation Agency of Santa Clara County, California (the Agency), established a program that advanced the promotion of female and minority applicants to

---

<sup>191</sup> See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013) (noting that the diversity rationale as articulated in *Bakke* and *Grutter* reflects a belief that minority status has become something desirable and “a commodity to be pursued, captured, possessed, and used”); Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1446 (2020) (contending that Justice Lewis F. Powell Jr.’s commitment to the diversity rationale in *Bakke* stemmed from his belief that more diverse campuses would deradicalize white, male college students swayed by leftist ideas).

<sup>192</sup> See, e.g., Kimberlé W. Crenshaw, “*Framing Affirmative Action*,” 105 MICH. L. REV. FIRST IMPRESSIONS 123, 129 (2007); Sally Kohn, *Affirmative Action Has Helped White Women More Than Anyone*, TIME (June 17, 2013), <https://time.com/4884132/affirmative-action-civil-rights-white-women/> [<https://perma.cc/68RH-H2FN>].

<sup>193</sup> See, e.g., *Weber*, 443 U.S. at 208.

<sup>194</sup> See 143 S. Ct. 2141, 2170 (2023) (noting that universities’ affirmative action programs lack a logical endpoint).

the position of road dispatcher, a traditionally male job.<sup>195</sup> Under the plan, the Agency could consider the sex or race of a qualified applicant as one factor in hiring.<sup>196</sup>

A female employee, Diane Joyce, was promoted over a male employee, Paul Johnson.<sup>197</sup> Johnson filed a lawsuit claiming that the program violated Title VII.<sup>198</sup> The Agency noted that women were represented in numbers far less than their proportion of the county labor force in both the Agency as a whole and in five of seven job categories.<sup>199</sup> As the Court stated, “while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees.”<sup>200</sup> The Court analyzed the case using the factors in *Weber* and concluded that in comparison to the *Weber* plan, the Agency’s plan was not a quota in the strict sense of the word because it did not include a particular percentage of promotions set aside for women.<sup>201</sup>

The Court found that given the obvious imbalance in road dispatcher positions and the Agency’s commitment to eliminating these imbalances in a traditionally segregated job category, it was appropriate to consider sex as one factor in promoting Joyce.<sup>202</sup> The Court also found that because the sex of a candidate was only one factor to consider, the plan did not bar or exclude men from being promoted.<sup>203</sup> Finally, the Court found that the Agency’s moderate, gradual approach to eliminating the imbalance in its work force created minimal intrusion on the legitimate expectations of other employees.<sup>204</sup>

Relatedly, the Court also found that the Agency’s express commitment “to *attain* a balanced work force” rather than *maintain* racial balance tilted in favor of a finding that the program was not meant to be permanent and was therefore permissible.<sup>205</sup> The Court emphasized the flexibility of the plan, noting that “it anticipated only gradual increases in the representation of minorities and women,” contained no explicit end date, and was not expected to quickly yield success.<sup>206</sup> The Court found these facts reassuring “to ensure that the plan’s goals ‘[are] not being used simply to maintain . . .

---

<sup>195</sup> Johnson v. Transp. Agency, 480 U.S. 616, 620 (1987).

<sup>196</sup> *Id.* at 621.

<sup>197</sup> *Id.* at 625.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 621.

<sup>200</sup> *Id.* at 620.

<sup>201</sup> *Id.* at 624.

<sup>202</sup> *Id.* at 631–34.

<sup>203</sup> *Id.* at 637.

<sup>204</sup> *Id.* at 639.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

balance, but rather as a benchmark against which' the employer may measure its progress in eliminating the underrepresentation of minorities and women."<sup>207</sup>

Therefore, the Court favored the open-ended approach of the Agency's plan. Pactiv Evergreen's open-ended plan, which simply states that the company is working to revamp and accelerate its strategies to make its company more inclusive and representative, without saying whether it intends to do so by promoting a certain percentage of people of color into management, will likely be viewed as an impermanent plan not to maintain balance but to establish a benchmark by which to measure progress. P&G's open-ended racial target, which states that the company hopes to achieve 40% representation of multicultural employees at every management level of the company, can be viewed similarly because it lacks an explicit end date. The company can reach 40% in 2025 or 2045.

With closed-ended targets, an additional step is necessary. The *Johnson* case states that if a program sets aside positions according to specific numbers, "[e]xpress assurance that [the] program is only temporary may be necessary."<sup>208</sup> Closed-ended racial targets respond to this mandate by specifically stating when a company intends to meet a goal or aspiration and thus end the program. Therefore, closed-ended racial targets are by their very nature impermanent and not established to maintain racial balance because they have a specified period by which the goals would be met.

Critics may argue that specified periods in closed-ended racial targets are problematic. For example, since Hartford wants to have its senior leadership roles consist of 20% people of color by 2030, then it would need to hire more people of color between 2022 and 2030 to meet that goal, which may trammel or hinder white individuals from being hired in the next eight years.

The Court has rejected this type of argument. If we analyze Hartford's targets as a racial quota, then the company is free to keep hiring white leaders for 80% of its leadership positions. Having 80% of the positions could not trammel white advancement where the Court found that even 50% in *Weber* did not. The Court has also reasoned that the use of a quota system for a relatively short period of time, such as four years, is not unreasonable in light

---

<sup>207</sup> *Id.* at 640 (citing *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 477–78 (1986)).

<sup>208</sup> *Id.* at 639–40 (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 510 (1986)).

of a demonstrated history of racial discrimination.<sup>209</sup> Assuming that companies can use one of the three approaches discussed under *Weber*'s "opportunities for minorities" factor to either show or waive the requirement of previous discrimination, then two-to-six-year ranges for targets are likely legal.

#### F. *The Conservative Backlash*

Despite distinctions between racial quotas, which are illegal for state actors to impose,<sup>210</sup> and racial targets, which are legally ambiguous but defensible, conservative groups have already begun challenging racial targets as they have recently done with state and private rules requiring disclosure of a company's racial composition or an increase in corporate diversity.<sup>211</sup> Conservative groups have treated racial targets as indistinguishable from racial quotas because, in their view, both mechanisms can yield the hiring and promotion of people of color even if one option is binding and the other is nonbinding.

A conservative group, the Alliance for Fair Board Recruitment, is currently challenging a nonbinding, nonmandatory SEC-approved diversity disclosure rule, for example. In *Alliance for Fair Board Recruitment v. SEC*, the Alliance filed a petition in the U.S. Court of Appeals for the Fifth Circuit asking the court to review the SEC-approved Nasdaq rule requiring Nasdaq-listed companies to disclose two diverse board members—one person of color and one woman—or explain why a company lacks two diverse board members.<sup>212</sup> The Nasdaq disclose-or-explain rule is neither binding nor mandatory because it merely requires companies to explain why their boards

---

<sup>209</sup> In *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, the Supreme Court noted that the lower court's holding "is neither unreasonable nor unfair to require nonminority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy." 478 US at 512, 515.

<sup>210</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (rejecting set-asides of a particular number of seats for specific racial groups in favor of a more holistic review process).

<sup>211</sup> See, e.g., Adediran, *supra* note 19, at 351.

<sup>212</sup> Opening Brief for Petitioner, All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226 (5th Cir. 2023), 2021 WL 5702469, at \*1; see also Bre Bradham & Patricia Hurtado, *Nasdaq Board-Diversity Plan Challenged in Court as 'Unfair,'* BLOOMBERG L. (Aug. 18, 2021), <https://news.bloomberglaw.com/esg/nasdaqs-board-diversity-plan-challenged-in-court-as-unfair> [<https://perma.cc/B5JH-E2G3>]; Andrew Ramonas, *SEC's Board Diversity Drive Runs Risk of More Legal Challenges*, BLOOMBERG L. (Oct. 22, 2021), <https://news.bloomberglaw.com/securities-law/secs-board-diversity-drive-runs-risk-of-more-legal-challenges> [<https://perma.cc/G3PU-FM3V>]. For more on the Nasdaq rule, see Exchange Act Release No. 90,574, 2020 WL 7226158 (Dec. 4, 2020).

lack two diverse members.<sup>213</sup> Yet, some have referred to it as a quota.<sup>214</sup> Similarly, Judicial Watch, another conservative group, has challenged California's rule requiring California's public companies to have at least one board director from an underrepresented minority group or the LGBTQ+ community.<sup>215</sup> A California Superior Court judge recently struck down the rule as unconstitutional.<sup>216</sup>

And while *SFFA* was sweeping, the majority opinion written by Chief Justice John G. Roberts Jr. alluded to the compelling need for diversity in military academies and the national security implications at stake in that context.<sup>217</sup> This means that some of the conservative members of the Court recognize that there are settings where the use of race is still legally compelling. The employment setting must be one of those places. Companies are not universities and the need for racial diversity and inclusion in the employment context are significant and directly impact companies' bottom lines.<sup>218</sup>

---

<sup>213</sup> See Adediran, *supra* note 19, at 348.

<sup>214</sup> Letter from John A. Zecca, Exec. Vice President, Chief Legal & Regul. Officer, Nasdaq, to Vanessa A. Countryman, Sec'y, SEC 2 (Feb. 26, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf> [<https://perma.cc/X9JE-SH8K>].

<sup>215</sup> *Judicial Watch Victories: California Court of Appeal Upholds Court Injunctions Against Quotas for Corporate Boards*, JUD. WATCH (Dec. 20, 2022), <https://www.judicialwatch.org/judicial-watch-victories-2/> [<https://perma.cc/K5CR-CRDX>]; see also *Judicial Watch Victory: Court Declares Unconstitutional California's Racial, Ethnic, LGBT Quota for Corporate Boards*, JUD. WATCH (Apr. 1, 2022), <https://www.judicialwatch.org/quota-for-corporate-boards> [<https://perma.cc/TFL3-L4RC>]. “‘Director from an underrepresented community’ means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.” CAL. CORP. CODE § 301.4(e)(1) (West 2021); see also Adediran, *supra* note 19.

<sup>216</sup> See Lauren Weber, *Judge Tosses California Law Mandating Diversity on Boards*, WALL ST. J. (Apr. 4, 2022), <https://www.wsj.com/articles/judge-tosses-california-law-mandating-diversity-on-boards-11649078797> [<https://perma.cc/M8VF-X435>]; *Crest v. Padilla*, No. 19STCV27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022); Patrick Temple-West, *California's Gender Diversity Board Mandate Struck Down in Court*, FIN. TIMES (May 16, 2022), <https://www.ft.com/content/d89c0adc-52f5-4151-a344-fa25ab4b4178> [<https://perma.cc/6NFV-N5GV>]. Despite these decisions, institutional investors maintain that they will keep pressure on companies to diversify their boards by race and gender. See, e.g., Ellen Meyers, *Investors Keep Up Diversity Pressure After California Law Tossed*, ROLL CALL (Apr. 7, 2022), <https://rollcall.com/2022/04/07/investors-keep-up-diversity-pressure-after-california-law-tossed/> [<https://perma.cc/MRX8-YS8A>].

<sup>217</sup> 143 S. Ct. 2141, 2166 n.4.

<sup>218</sup> Dame Vivian Hunt, Dennis Layton & Sara Prince, *Why Diversity Matters*, MCKINSEY & CO. (Jan. 1, 2015), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters> [<https://perma.cc/LUF3-S3KM>]. One company explained in its voluntary diversity report that disclosures about race are “material to [its] business, helpful to [its] stakeholders, and increasingly expected by investors.” MOODY'S, DIVERSITY, EQUITY AND INCLUSION REPORT 2020, at 9 (2020), <https://www.moody's.com/sites/products/ProductAttachments/Sustainability/Diversity%20Equity%20and%20Inclusion%20Report%202020.pdf> [<https://perma.cc/JZ5Q-HWVV>].

There is also a more formalist approach to thinking about the Court's decision, but the companies may still be concerned about litigation. The private employment context is governed by Title VII. As such, numerical goals, including racial targets, pass the *Weber* standard discussed above. Starbucks faced a lawsuit specifically focused on racial targets—the same company that closed 8,000 stores nationwide to provide its 175,000 employees with four hours of racial bias training in 2018 when an employee called the police on two Black men holding a meeting in a coffee shop in downtown Philadelphia.<sup>219</sup>

In August 2022, the American Civil Rights Project, whose mission is “to assure that American law equally protects all Americans,” filed a lawsuit on behalf of the National Center for Public Policy Research, a conservative think tank, challenging seven of Starbucks's policies as racially discriminatory under § 1981, Title VII, and various state antidiscrimination laws.<sup>220</sup> The plaintiff alleged that the company's policies require it to discriminate on the basis of race in employment decisions, the compensation of its officers, and in contracting with suppliers. One of those policies involved a racial target where Starbucks stated its goals of achieving BIPOC (Black, indigenous, and people of color) representation of at least 30% at all enterprise levels and at least 40% in all retail and manufacturing roles by 2025.<sup>221</sup> Starbucks filed a motion to dismiss the case based on standing, arguing that the “[p]laintiff cannot proceed with [the] shareholder derivative lawsuit because it does not fairly and adequately represent the interests of

---

<sup>219</sup> Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz (*The Starbucks Case*), No. 2:22-cv-00267, 2023 WL 5945958 (E.D. Wash. Sept. 11, 2023); Bolduc v. Amazon, No. 4:22-cv-00615 (E.D. Tex. July 20, 2022); Do No Harm v. Pfizer, Inc., 646 F. Supp. 3d 490 (S.D.N.Y. 2022); Rachel Siegel & Alex Horton, *Starbucks to Close 8,000 Stores for Racial-Bias Education on May 29 After Arrest of Two Black Men*, WASH. POST (Apr. 17, 2018), <https://www.washingtonpost.com/news/business/wp/2018/04/17/starbucks-to-close-8000-stores-for-racial-bias-education-on-may-29-after-arrest-of-two-black-men/> [<https://perma.cc/654R-BF5P>]; Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html> [<https://perma.cc/2TCA-RGEG>].

<sup>220</sup> *Our Mission*, AM. C.R. PROJECT, <https://www.americancivilrightsproject.org/our-mission/> [<https://perma.cc/SQC8-34R4>]; *The Starbucks Case*, 2023 WL 5945958, at \*2. Based on the language of § 1981, it is surprising that racial targets are being challenged under the statute. The Civil Rights Act of 1866, and § 1981 therein, was aimed at the “Black Codes,” which were “passed in several southern states immediately after ratification of the Thirteenth Amendment.” According to scholar George Rutherglen, “[t]hese codes imposed severe legal disabilities on the newly freed slaves and sought to return them to a legal status practically equivalent to slavery, but formally in conformity with the Thirteenth Amendment.” Rutherglen, *supra* note 160, at 308. An article in the *Wall Street Journal* reports that conservatives have turned § 1981 on its head “by gathering several white, male business owners as plaintiffs.” Theo Francis, *The Legal Assault on Corporate Diversity Efforts Has Begun*, WALL ST. J. (Aug. 8, 2023) <https://www.wsj.com/articles/diversity-equity-dei-companies-blum-2040b173> [<https://perma.cc/D5F6-U66P>].

<sup>221</sup> STARBUCKS, *supra* note 46, at 8.



shareholders, as required by Rule 23.1(a).<sup>222</sup> A federal judge in Washington dismissed the case in September 2023 on those grounds, adding that the lawsuit centered on “political and public policy agendas” that are for “political branches” and “board[s] of directors of public corporations” to decide.<sup>223</sup> Similar motions to dismiss have also rested on the procedural aspects of bringing a lawsuit against a company.<sup>224</sup>

Considering this country’s political landscape of race-conscious objectives at this moment in history and despite racial target’s legal defensibility, it is conceivable that the court will strike down racial targets as illegal. As Professor Elizabeth Pollman has observed, the “Supreme Court’s approach may not capture the reality of modern business corporations [when it makes a decision that] might not be what many shareholders and corporate participants actually want.”<sup>225</sup> Indeed, she notes that the Court’s approach “may instead create new tensions in corporations . . . that undermine the conceptual foundation for the existing arrangements in corporate law and governance.”<sup>226</sup>

### G. Corporate Discretion and the Business Judgment Rule

It is important to assess whether the discretion and power that the government has historically afforded companies can save racial targets from legal scrutiny. One key distinction between racial quotas and racial targets is that racial targets are not imposed by the government or other entities, while racial quotas have been imposed on companies and other entities, municipalities, and states even when favorably received.<sup>227</sup> This distinction matters when considering the ideal of corporate discretion. For better or worse, corporate discretion has been the hallmark of all three federal branches’ dealings with companies since at least the 1960s.

---

<sup>222</sup> Defendant Starbucks Corp.’s Motion to Dismiss Complaint, *The Starbucks Case*, No. 2:22-cv-00267 (E.D. Wash. May 19, 2023), 2023 WL 6962044, at \*3.

<sup>223</sup> *The Starbucks Case*, 2023 WL 5945958, at \*3–5; Jody Godoy, *Conservative Starbucks Investor Loses Diversity Challenge*, REUTERS (Aug. 14, 2023), <https://www.reuters.com/legal/starbucks-board-wins-dismissal-shareholder-lawsuit-over-diversity-policies-2023-08-11/> [<https://perma.cc/9FYM-8G3G>].

<sup>224</sup> *See id.*

<sup>225</sup> Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 226 (2021).

<sup>226</sup> *Id.*

<sup>227</sup> *See, e.g.*, *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979) (involving a racial quota imposed on company through collective bargaining with union); *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 229 (4th Cir. 1975) (involving a district court-imposed racial quota); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977) (involving a district court-imposed racial quota, which the court of appeals rejected); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 421, 423 (1986) (involving a court-imposed racial quota on a union).

Corporate discretion played a significant role in the creation and diffusion of the Plans for Progress Program, which allowed companies to define their response to the government's push for affirmative action in employment.<sup>228</sup> At the same time, corporate discretion played a major role in preventing the Reagan Administration's attempt to rescind Johnson's Executive Order 11,246 and put an end to affirmative action. The executive order remained intact largely because, by the 1980s, companies were content with the changes the order had wrought.<sup>229</sup> When, in Reagan's second term, Attorney General Edwin Meese tried to mobilize the Cabinet to end racial preferences, Secretary of Labor Bill Brock intervened.<sup>230</sup> Brock understood business sentiment far better than Meese and knew that companies, accustomed to counting everything, had no serious problems with counting employees by race.<sup>231</sup>

Corporate discretion also plays a role in the Legislative Branch's dealings with companies. In *Weber*, the Court noted that when Congress enacted Title VII of the Civil Rights Act, it was particularly concerned with avoiding undue federal interference with corporate discretion.<sup>232</sup> Before Title VII became law, the liberal Republicans and Southern Democrats, whose support was crucial to obtaining passage of the bill, expressed misgivings about the potential for government intrusion into employer's managerial decisions beyond what was necessary to eradicate unlawful discrimination.<sup>233</sup> Support for the bill followed assurances that "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible."<sup>234</sup>

The judiciary has also granted companies extensive discretion in how to interpret federal affirmative action. This is why, after the passage of Title VII, it was corporate personnel who defined the boundaries of equal employment opportunity, reshaping it into diversity management; courts enabled companies' diversity programs as symbols of compliance with antidiscrimination laws.<sup>235</sup> Corporate discretion has also played a role in expanding corporate rights in the courts in areas as varied as political spending and religious liberty.<sup>236</sup> Even when the Supreme Court's opinions

---

<sup>228</sup> See *supra* Section II.A.

<sup>229</sup> Alan Wolfe, *Affirmative Action Inc.*, NEW YORKER, Nov. 25, 1996, at 107–08.

<sup>230</sup> *Id.* at 108.

<sup>231</sup> *Id.*

<sup>232</sup> *City of Cleveland*, 478 U.S. 501 at 519–20.

<sup>233</sup> *Id.*

<sup>234</sup> H.R. REP. NO. 914, at 29 (1963); see also 110 CONG. REC. 1518 (1964) (remarks of Rep. Emanuel Celler); *id.* at 11471 (remarks of Sen. Jacob Javits); *id.* at 14,314 (remarks of Sen. William E. Miller); *id.* at 15,893 (remarks of Rep. William Moore McCulloch).

<sup>235</sup> DOBBIN, *supra* note 58, at 4–5; EDELMAN, *supra* note 32, at 39.

<sup>236</sup> See Pollman, *supra* note 225, at 221.

in these cases suggest that the Court is distant from the realities of corporations, corporate discretion still comes into play.<sup>237</sup>

Beyond the ideal of corporate discretion, there is also the broad scope of the business judgment rule, which largely insulates corporate decision-making from legal attack unless there is a showing of a serious conflict of interest, fraud, waste, or illegality.<sup>238</sup> Outside of these exceptions, the business judgment rule shields corporate officers and directors from liability for their good faith decisions.<sup>239</sup> The federal judge who dismissed the Starbucks case alluded to that point in saying that the boards of directors and officers of companies make decisions about whether to have racial targets.<sup>240</sup>

Therefore, if lower federal courts or the Supreme Court, with its “pro-business” reputation,<sup>241</sup> reach the merits of racial targets, and are unpersuaded by the defensibility of these strategies as distinct from racial quotas, the ideal of corporate discretion and the business judgment rule may provide some defense to preserve racial targets.

#### CONCLUSION

This Article defines racial targets as voluntary goals or aspirations to hire or promote people of color by a future point in time on a general institutional level, such as among employees, boards of directors, managers, and other leaders. Racial targets are therefore distinct from racial quotas, which are mandatory requirements to hire or promote people of color in certain jobs or occupations by a future point in time. This Article makes four key contributions. First, it details the history of racial quotas and their relationship to companies’ accustomed use of numerical targets and goals to racially diversify their workforces, thus connecting the use of racial targets today to historical contexts. Second, it empirically shows that racial targets are a post-2020 racial reckoning phenomenon with connections to the history of racial quotas. Third, it shows that while the doctrine is ambiguous, companies can defend the legality of racial targets. Fourth, it highlights the conservative backlash against racial targets, which is likely to intensify. Because there is already a strong conservative movement to fight race

---

<sup>237</sup> *Id.*

<sup>238</sup> See, e.g., E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1421–22, 1469 (2005); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 96 (2004).

<sup>239</sup> See Veasey & Di Guglielmo, *supra* note 238, at 1421–22; Bainbridge, *supra* note 238, at 96.

<sup>240</sup> *The Starbucks Case*, No. 2:22-cv-00267, 2023 WL 5945958, \*4–5 (E.D. Wash. Sept. 11, 2023).

<sup>241</sup> See Pollman, *supra* note 225, at 223.

consciousness, an understanding of the empirical, historical, and legal landscape of racial targets is crucial. In making these contributions, the Article notes the historical discretion afforded companies to choose how to racially diversify their workforces.

While this Article does not make a normative claim about whether targets are a good or bad strategy, it notes here the need for further research and analysis to determine whether targets are beneficial to people and communities of color. This Article not only addresses but also raises the question of how companies are meeting or intend to meet their racial targets and the policy consequences of establishing hiring and promotion goals.

NORTHWESTERN UNIVERSITY LAW REVIEW

APPENDIX

APPENDIX A: DICTIONARY OF RACIAL TERMS

African American	Minorities
American Indian	Minority
Asian	Minority owned
BIPOC	Native American
Black	Pacific Islander
Black Empowerment	People of Color
Black led	POC
Black Lives Matter	Race
Black owned	Racial
black-led	Racial Diversity
black-owned	Racial Justice
Blacklatino	Racism
Board Ethnic Diversity	Systemic Racism
Board Racial Diversity	Tribal
Communities of Color	Tribe
Cultural appropriation	Under represented
Ethnic	Under-represented
Ethnic Diversity	Underrepresented
Hispanic	Underrepresented Communities
Indigenous	Underrepresented Minorities
Institutional Racism	urn
Latino	White Fragility
Latinx	White Privilege
Marginalized	

## APPENDIX B: VERBS DENOTING FUTURE INTENT

<b>Verb</b>	<b>Frequency</b>
increase	0.156
own	0.032
identify	0.027
grow	0.025
include	0.023
achieve	0.023
commit	0.022
continue	0.020
make	0.019
hire	0.019
represent	0.017
have	0.016
double	0.014
set	0.013
add	0.012
improve	0.012
promote	0.011
base	0.010
focus	0.010
develop	0.010

NORTHWESTERN UNIVERSITY LAW REVIEW

APPENDIX C: FREQUENCY OF RACIAL TARGET TERMS BY PUBLIC COMPANIES

<b>Term</b>	<b>Frequency</b>
Black	0.296
Hispanic	0.108
African American	0.077
POC	0.067
Asian	0.065
Latinx	0.058
BIPOC	0.047
Latino	0.044
Ethnic	0.035
People of Color	0.030
Minority	0.026
Indigenous	0.021
Racial	0.020
Race	0.019
Pacific Islander	0.016
Native American	0.016
Underrepresented	0.014
Minorities	0.012
American Indian	0.006
Ethnic Diversity	0.005

## APPENDIX D: FREQUENCY OF RACIAL TARGET TERMS BY PRIVATE COMPANIES

<b>Term</b>	<b>Frequency</b>
Racial	0.121
Black	0.112
Minority	0.109
Ethnic	0.109
African American	0.054
Hispanic	0.050
Asian	0.050
Indigenous	0.044
Underrepresented	0.043
Latinx	0.040
Latino	0.032
People of Color	0.030
Minorities	0.030
Pacific Islander	0.020
Racism	0.020
Race	0.016
Racial Justice	0.014
American Indian	0.012
Ethnic Diversity	0.012
Marginalized	0.010



