

7-1-2018

## Whose Diversity? The Contest for Control over the Law and Culture of Work

Stephen M. Rich

Follow this and additional works at: <https://scholarship.law.berkeley.edu/bjell>



Part of the [Law Commons](#)

---

### Recommended Citation

Stephen M. Rich, *Whose Diversity? The Contest for Control over the Law and Culture of Work*, 39 BERKELEY J. EMP. & LAB. L. 177 (2018).

### Link to publisher version (DOI)

<https://doi.org/10.15779/Z389C6S14N>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Whose Diversity? The Contest for Control over the Law and Culture of Work

Stephen M. Rich<sup>†</sup>

INTRODUCTION.....	177
I. DEFINING DIVERSITY MANAGEMENT.....	185
A. Theory.....	185
B. Practice.....	188
II. DEFINING DISCRIMINATION.....	195
A. Disparate Treatment Doctrine.....	196
B. Disparate Treatment Doctrine’s Current Application to Diversity Management.....	204
III. REDEFINING DISCRIMINATION TO ALIGN DIVERSITY AND EQUAL OPPORTUNITY.....	217
A. Diversity’s Contribution to Equal Opportunity.....	218
B. Reforming Title VII Doctrine.....	223
CONCLUSION.....	228

## INTRODUCTION

A contest is being waged in the American workplace over the meaning of “diversity,” a contest with important implications for the law and culture of work. The story begins with the passage of the 1964 Civil Rights Act.<sup>1</sup> Title VII of the Act prohibits employment practices that discriminate “because of [an] individual’s race, color, religion, sex, or national origin.”<sup>2</sup>

---

DOI: <https://doi.org/10.15779/Z389C6S14N>

†. Professor of Law at the University of Southern California Gould School of Law.

1. Civil Rights Act, 42 U.S.C. §§ 2000(e)–(n) (1964).

2. 42 U.S.C. § 2000e(2)(a)(1) (2012) (prohibiting an employer from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin[;]” 42 U.S.C. § 2000e(2)(a)(2) (prohibiting an employer from “limit[ing], segregat[ing], or classify[ing] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

Soon after its passage, the Supreme Court recognized the statute's purpose "to achieve equality of employment opportunities" through "the removal of artificial, arbitrary, and unnecessary barriers to employment" that result in discrimination because of a person's protected status.<sup>3</sup> Title VII thus came to embody a principle of equal employment opportunity that forever altered the practice of personnel management. In response, firms hired affirmative action officers and developed new methods for screening job applicants, evaluating employee performance, and allocating work.<sup>4</sup>

Less than two decades later, however, the tables turned. A backlash against civil rights enforcement eroded the legal mandate for private employers to embrace affirmative action programs and other strategies for the rapid integration of their workforces.<sup>5</sup> Firms came to denounce the "artificiality" of legal rules intended to promote equal opportunity and to uproot discriminatory practices.<sup>6</sup> Managerial experts and corporate leaders proposed to recapture an organic relationship between personnel management and business objectives by replacing affirmative action with "diversity management": a style of personnel management predicated on a "business case for diversity."<sup>7</sup>

---

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin").

3. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 431 (1971).

4. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 83–88 (2009) (discussing the rise of equal opportunity officers and departments); *id.* at 104–29 (discussing the bureaucratization of work as an instrument of equal opportunity).

5. *Id.* at 133–43; *see also* Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960 (1998).

6. *See, e.g.*, R. Roosevelt Thomas, *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV. Mar.–Apr. 1990, at 108 (describing affirmative action as "an artificial, transitional intervention intended to give managers a chance to correct an imbalance, an injustice, a mistake"); *id.* at 112 (acknowledging that "[w]hat managers fear from diversity is a lowering of standards" but reassuring that "[t]he goal is to manage diversity in such a way as to get from a diverse work force the same productivity we once got from a homogeneous work force, and to do it *without artificial programs, standards—or barriers*" (emphasis added)). Thomas's language reprises the language of *Griggs* and *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). In *Weber*, the Court found permissible under Title VII voluntary workplace affirmative action programs designed to correct a "manifest racial imbalance" in the employer's labor force, even as Thomas's early diversity management manifesto prophesied the death of affirmative action. 443 U.S. at 208; *see also* Thomas, *supra*, at 107 ("Sooner or later, affirmative action will die a natural death. . . . [I]f we look at the premises that underlie it, we find assumptions and priorities that look increasingly shopworn."). *See also* Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. SOC. 1589, 1620 (2001) (observing within managerial diversity rhetoric assumptions regarding "the artificial (imposed) nature of legal mandates in comparison to the natural character of the new diversity").

7. *See* Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 4 (2005) (defining the "business case for diversity" as "the proposition that a diverse workforce is essential to serve a diverse customer base, to gain legitimacy in the eyes of a diverse public, and to generate workable solutions within a global economy"); *see also* Martin N. Davidson, *How Hard Should You Push Diversity?*, HARV. BUS. REV., Nov. 2012, at 139, 142 (quoting retired PepsiCo CEO Steve Reinemund: "The big picture is that a company needs to represent

The legal status of diversity management is ambiguous. Viewed from one perspective, diversity management simply rebrands and updates the compliance strategies forged by firms in the wake of Title VII's passage. Adding to its appearance of legitimacy, the concept of diversity received the Supreme Court's endorsement in *Grutter v. Bollinger*<sup>8</sup> and again in more recent rulings upholding the constitutionality of affirmative action in public university admissions.<sup>9</sup> Universities now paint their admissions programs within the lines of well-wrought legal doctrine, and some legal scholars have argued that employment discrimination doctrine could be improved by adapting the Court's constitutional diversity rationale.<sup>10</sup> However, the Supreme Court has yet to recognize diversity as a justification for status-based preferences at work. Lower courts reviewing statutory challenges to diversity management practices have generally declined to view diversity as a defense to a claim of discrimination and, in many cases, have held that an employer's pursuit of diversity may provide evidence of discrimination.<sup>11</sup> For now, employers continue to practice diversity management for their own instrumental reasons, undeterred by the uncertainty of the legal landscape. Indeed, the difficult questions raised by the application of diversity to employment have given "regulators . . . an incentive to allow the regulated to devise and implement the legal regimes under which the regulated will operate their businesses."<sup>12</sup> Diversity management thus remains a world over which "organizations rule"<sup>13</sup> and in which business objectives often prevail over equal opportunity.

---

the marketplace from the boardroom to the front line. That is the only way it can make decisions that reflect its customers' needs and be worthy of their loyalty.").

8. 539 U.S. 306 (2003) (holding that the pursuit of student body diversity may justify race-based affirmative action, because the educational mission of the university benefits from diverse student viewpoints and experiences).

9. See *Fisher v. Univ. of Tex. at Austin* ("Fisher I"), 570 U.S. 297 (2013) (instructing that the application of strict scrutiny to public university admissions requires that the reviewing court must verify a university's need to implement racial preferences in lieu of race neutral means); *Fisher v. Univ. of Tex. at Austin* ("Fisher II"), 136 S. Ct. 2198 (2016) (applying the holdings of *Grutter* and *Fisher I* to uphold the use of racial preferences by the University of Texas at Austin).

10. See, e.g., Estlund, *supra* note 7; Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter*, 92 KY. L.J. 263 (2003).

11. See *infra* Part II.B.2.

12. Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 89 (2008). Professor Carbado and his coauthors borrow from the work of legal sociologist Lauren B. Edelman, whose theory of "legal endogeneity" has depicted the process through which the targets of regulation come to define the very legal norms by which they are regulated, *id.* (discussing Edelman's work). See generally Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in HANDBOOK ON EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 337 (Laura Beth Nielsen & Robert L. Nelson eds., 2005). Within this process, human resources and compliance professionals function as "legal agents" whose policy choices "negotiate [the firm's] relationship to antidiscrimination law." Carbado et al., *supra*, at 89.

13. See Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 Am. J. Soc. 888 (2011).

This essay addresses the question of whose conception of diversity ought to govern the workplace. The answer is complicated. Neither *Grutter*'s conception of diversity as a justification for affirmative action nor the prevailing managerial conception of diversity as a business resource is sufficiently concerned with the goal of equal employment opportunity for which Title VII was enacted. This essay argues that legal doctrine has an important role to play in shaping diversity management practices to ensure that these practices provide equal opportunity, whatever other business goals they may serve. To succeed in this effort, employment discrimination law must reject the business community's self-interested diversity rationale. Instead, the law must enforce a principle of equal opportunity against employment practices using an individual's protected statuses to deny her substantively equal investments in her potential for professional growth and performance regardless whether those practices are undertaken in the name of diversity.

This argument builds upon prior work, in which I have demonstrated that both *Grutter*'s diversity rationale and managerial diversity underserve the objective of equal opportunity. Neither rationale is capable of distinguishing between egalitarian and exploitative uses of diversity. Instead, each depends upon an instrumental logic that justifies the pursuit of diversity according to certain institutional benefits that diversity is expected to deliver.<sup>14</sup> Both rationales have also displaced remedial rationales for affirmative action and integration, which, during the Civil Rights Era, had reflected a will to correct historical patterns of discrimination and social subordination. I have found in managerial diversity, however, adumbrations of a new principle of equal opportunity that exceeds the present scope of civil rights law.<sup>15</sup>

In its effort to convert diversity into a business resource, managerial discourse has theorized diversity management as a means to cultivate human potential, positing that a firm will not achieve the "up-side of diversity" until it enables "every member of [its] work force to perform to his or her potential."<sup>16</sup> Thus, I have argued, managerial discourse reminds us that equal opportunity is not exhausted by the standard of formal equal treatment that is required by the theory of disparate treatment,<sup>17</sup> or the disparate impact theory of *Griggs v. Duke Power Co.*,<sup>18</sup> according to which facially neutral policies

---

14. Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. Cal. L. Rev. 1111 (2016).

15. *Id.* at 1121.

16. Thomas, *supra* note 6, at 12.

17. Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1116–18 (distinguishing diversity from three well-known theories of equal opportunity).

18. 401 U.S. 424 (1971) (holding that Title VII prohibits employers from implementing facially neutral employment practices that produce racially disparate impacts, unless they can justify those practices by a showing of job-relatedness and business necessity), codified at 42 U.S.C. § 2000e-2(k).

must also avoid status-based disparate impacts, or the “statistical integration” pursued by traditional affirmative action programs.<sup>19</sup> Instead, “[e]qual opportunity requires that the opportunities themselves be substantively equal in that they sustain the professional growth and achievement of all persons.”<sup>20</sup> Organizational practices that take social status into account to provide equal opportunity to every individual should, on that basis, withstand legal scrutiny. Diversity management should not be presumed to be lawful, however, merely by virtue of its name; rather, any status-based practice that results in employment adversity should be subject to legal scrutiny to determine whether or not it has in fact denied equal opportunity.

In this essay, I propose to tailor my prior thesis to the particular circumstances of work by emphasizing the employer’s duty to invest equally in all persons, regardless of their social status. The term “investment” has a distinct and familiar meaning in business. Not so in civil rights discourse. I mean to change that. Employers invest in their personnel just as they invest in building infrastructure, channels of distribution, the invention of intellectual property, and other consequential business assets.

In pioneering work, economist Gary Becker depicted human capital investment as the use of education and training, each of which imposes initial costs, to realize long-term individual and organizational benefits.<sup>21</sup> This classic neoliberal perspective assumed that, while a firm might have strong incentive to provide specific training in knowledge and skills particular to the firm, the cost of general training in knowledge and skills valued outside the firm would typically be passed on to individual workers.<sup>22</sup> Today, social scientists—including Becker—recognize that human capital investment may

---

19. See, e.g., *United Steelworkers of Am., v. Weber*, 443 U.S. 193, 197 (1979) (holding that Title VII permits employers to use voluntary affirmative action programs to eliminate “manifest racial imbalance[s]” in their workforces); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (same for sex-based affirmative action).

20. Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1121.

21. See Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. Pol. Econ. 9 (1962); see also GARY S. BECKER, *HUMAN CAPITAL* (2d ed. 1975). As some economists have surmised: The concept of human capital arose from a recognition that an individual’s or a firm’s decision to invest in human capital (i.e., undertake or finance more education or training) is similar to decisions about other types of investments undertaken by individuals or firms. . . . In the standard economic model, the accumulation of human capital is seen as an investment decision, where the individual gives up some proportion of income during the period of education and training in return for increased future earnings. Richard Blundell et al., *Human Capital Investment: The Returns from Education and Training to the Individual, the Firm, and the Economy*, 20 FISCAL STUDIES 1, 2 (1999).

22. See Rita L. Dobbs et al., *Human Capital and Screening Theories: Implications for Human Resource Development*, 10 ADV. IN DEV. HUM. RES. 788, 789 (2008); see also Seong-O Bae et al., *Comparison and Implications of Human Capital Theory at the Individual, Organizational, and Country Levels*, 18 J. ORG. CULTURE, COMMUNICATIONS & CONFLICT 11, 13 (2014) (explaining that “[g]eneral training increases the marginal productivity of trainees by exactly the same amount in the firms providing the training as in other firms,” whereas “[s]pecific training has no effect on the productivity of trainees that would be useful to other firms” (emphasis in original)).

take on forms other than education and training.<sup>23</sup> It may, for example, include mentoring, networking, and feedback because these too impose initial costs in exchange for human capital gains that are expected to translate into long term benefits.<sup>24</sup> Today's social scientists also recognize that the line between general and specific training is porous; employers do invest in their employees' acquisition of portable knowledge and skills because these are often inextricable from firm specific assets.<sup>25</sup>

Successful human capital investment promises to firms have increased efficiency and profitability. Thus, firms rarely construe such investment choices as equal opportunity choices. For an individual, human capital investment produces both tangible and intangible benefits such as increased earnings, positive changes in employment status, and greater work satisfaction.<sup>26</sup> But the causal connection between such investment and its benefits may be indirect, and at times even elusive. Employment discrimination law targets discriminatory practices that culminate in tangible employment actions or otherwise alter the terms or conditions of work. This bias in the law's account of an employment-related injury can make it difficult for the law to address the equal opportunity implications of diversity management, which is itself a form of human capital investment.

The theory of human capital has long influenced the practices of human resources professionals.<sup>27</sup> Like on-the-job training, diversity management practices such as status-based work assignments, task forces, and mentoring and networking policies control access to work-related knowledge and skills without directly impacting tangible employment outcomes.<sup>28</sup> In a very real sense, a firm's investment in diversity is often an investment in its future, one

---

23. See, e.g., Gary S. Becker, *Human Capital Revisited*, collected in HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION, 15, 16 (Gary Becker ed., 1994) (“[I]t is fully in keeping with the capital concept as traditionally defined to say that expenditures education, training, medical care, etc., are investments in capital”); see also Dobbs et al., *supra* note 22, at 789 (explaining that, although “human capital investment was [initially] defined to comprise expenditures on schooling and income forgone during the schooling period,” it was subsequently “extended to encompass even relatively costless knowledge and experience acquired on the job”).

24. Indeed, any decision that affects a person's access to valuable work-related knowledge and skills may be labelled a human capital investment decision, regardless whether these benefits are imparted programmatically (e.g., through training or education) or experientially (e.g., through job allocation, work assignments, or performance evaluation).

25. See, e.g., Dobbs et al., *supra* note 22, at 789–90 (“In organization practice . . . most skills contain both general and specific components. . . . In organizational reality, it is impossible to decompose specific skills from general skills embedded in individual employees.”).

26. Blundell et al., *supra* note 21, at 8–9.

27. Dobbs et al., *supra* note 22, at 788 (reporting that “[h]uman capital theory has been regarded as an important theoretical foundation of human resource development” even though “H[uman] R[esource] D[e]partment professionals' understanding of human capital theory are [sic] largely intuition based”).

28. See *infra* Part I.B. (discussing different types of diversity management practices).

that may demand uncomfortable sacrifices in the present.<sup>29</sup> Diversity management thus represents a particular strategy of human capital investment—one in which a firm will take status differences into account to shape its resource investments into the productive potential of individual employees. It also affects equal opportunity because practices that control employees' access to important work-related resources will position some employees for success and others for failure.

The theory of equal opportunity propounded here endorses diversity management programs designed to produce substantively equal investment in the growth and advancement of all workers. It also recognizes that, when measuring investment, formal equality is not the relevant standard; to provide equal opportunity, the investments in any two employees need not be identical. Rather the question is whether investments in individual employees are substantively equal in the sense that the investments equally prepare and equip employees for future success.

Thus, I argue that an employer should not be permitted to take an individual's protected social status<sup>30</sup> into account unless the employer invests equally in the growth and advancement of all workers. An employer may conclude that its consideration of status helps it make effective and equal investments. Successfully including an employee within the firm's strategic business efforts may require different measures based on the needs and experiences of the individual, and some of those needs may reflect differences in social status. A firm commits unlawful disparate treatment when its consideration of employee status results in an adverse employment action. This fact leaves little room for an employer's experiments with diversity management. This essay proposes to permit an employer to escape liability in such a circumstance only if it can show that the difference in treatment did not breach its duty to provide equal opportunity by investing equally in all workers. This proposal protects the individual's interest in equal opportunity while, at the same time, allowing employers to innovate ways to organize work around a concern for diversity that do not subject all persons to identical treatment provided that they deny no one equal opportunity.

Some may counsel against disturbing these waters. After all, the business community has accepted the business case for diversity.<sup>31</sup> As support for traditional affirmative action has waned, private sector employers

---

29. See, e.g., Susan Athey et al., *Mentoring and Diversity*, 90 AM. ECON. REV. 765, 781 (2000) (“Even if full diversity is the most profitable steady state for a firm, it may not be optimal for a historically homogenous firm to sacrifice profits to achieve full diversity without outside pressure.”).

30. Title VII, for example, protects against discrimination “because of [an] individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(3).

31. See, e.g., Lisa Burrell, *We Just Can’t Handle Diversity*, July–Aug. 2016 HARV. BUS. REV. at 71, 71 (“It’s hard to argue with the benefits of diversity, given the decades’ worth of studies showing that a diverse workforce measurably improves decision making, problem solving, creativity, innovation, and flexibility.”).

have poured billions of dollars into the pursuit and management of diversity. Too much legal scrutiny of those diversity management practices may spoil employers' appetites to continue to incur this cost and thus undermine the goal of equal employment opportunity.<sup>32</sup>

I have a different view. First, consistent application of employment discrimination law to diversity management practices will not necessarily undercut those practices. Whether and to what degree a firm will prioritize diversity today turns almost primarily on the characteristics and ambitions of the firm.<sup>33</sup> Because market forces have driven the pursuit of diversity, legal guidance designed to align diversity management and equal opportunity is unlikely to drive the former out of existence.<sup>34</sup> Second, firms have shown an unfortunate but predictable tendency to implement diversity practices that, although they may symbolize legal compliance or a superficial commitment to egalitarian values, nevertheless are ineffective at materially advancing equal employment opportunity.<sup>35</sup> Such practices are not without social cost; in fact, psychological research has shown that they tend to legitimate discriminatory behaviors and slow institutional responses to complaints of discrimination.<sup>36</sup> Flawed or sham diversity management practices can even result in "discrimination as compliance," or the repetition and entrenchment of discrimination through practices advertised as compliance efforts.<sup>37</sup> Third, without adequate support from the scholarly community, courts will fail to develop an approach to the review of diversity management that appropriately balances equal opportunity values and the legitimate pursuit of business goals. All too frequently, in fact, courts have issued rulings that undermine workplace diversity efforts by equating an employer's pro-diversity statements and policies with evidence of discriminatory motivation

---

32. See, e.g., Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 61, 74 (2017) (arguing that "there is ample evidence that [workplace diversity efforts] do promote equality for women and racial minorities despite their express goal of improving business performance").

33. See, e.g., Frank Dobbin et al., *You Can't Always Get What You Need: Organizational Determinants of Diversity*, 76 AM. SOC. REV. 386, 386 (2011) ("The prevalence of most diversity practices remains low. Even things that can be done on the cheap are not broadly popular.").

34. I do not deny that placing additional legal scrutiny on diversity management practices may depress the prevalence of those practices. Nevertheless, I agree with Professor Tristin Green that even if realigning diversity management practices with equal opportunity values comes at such a cost, that cost is justified. Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585, 643 (2010).

35. See *infra* notes 66–82 and accompanying text. See also, e.g., Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006); Alexandra Kalev & Frank Dobbin, *Why Diversity Programs Fail and What Works Better*, July–Aug. 2016 HARV. BUS. REV., at 52.

36. See *infra* notes 76–78 and accompanying text.

37. See Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 80–81 (2011).

in reverse discrimination cases.<sup>38</sup> Thus, the call to leave well enough alone is mistaken about the current state of affairs regarding diversity management. Workers and the public pay a price for the undertheorization of diversity at work, one that cannot be addressed without asking whose understanding of diversity should organize the workplace.

This essay will proceed as follows. In Part I, I will introduce diversity management as a matter of theory and practice. When considering how the law might respond to diversity management, it is important to observe just how varied examples of diversity management are. This is also important for understanding how diversity management might relate to equal employment opportunity. Part II will discuss disparate treatment theory, the impact of *Ricci v. DeStefano* on affirmative action and diversity, and lower courts' reactions to claims challenging diversity management practices. Part III will propose an alternative approach to such cases, propounding a theory of equal opportunity as a duty to invest equally in the growth and advancement of all persons regardless of their social status. This part will also outline ways in which existing doctrine could be amended to advance this theory.

## I.

### DEFINING DIVERSITY MANAGEMENT

The rise of diversity management has been widely discussed in law and sociology.<sup>39</sup> This introduction will therefore be brief. It will divide diversity management into theory and practice. As used in this essay, the term “managerial diversity” will refer to the theoretical conception of diversity found in managerial literature. “Diversity management” will then refer to the organizational, or practical, iterations of this theory. This Part will show that the universe of policies and practices that may be associated with diversity is vast with profound implications for equal employment opportunity. It will also show that within the theoretical construct of managerial diversity rests the possibility for business interests and civil rights interests to coalesce around an ideal of equal opportunity as substantively equal investment.

#### A. Theory

The theory of managerial diversity seems fairly straightforward. Workforce diversity presents potential pitfalls and benefits. Diversity may generate new obstacles to efficient business administration not previously faced when firm personnel were more homogeneous. But diversity also provides opportunities for innovation, expansion, customer satisfaction, and

---

38. See *infra* notes 174–184 and accompanying text.

39. See, e.g., DOBBIN, *supra* note 4; Kelly & Dobbin, *supra* note 5; Edelman et al., *Diversity Rhetoric*, *supra* note 6. See also, e.g., Green, *supra* note 34; Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14.

talent recruitment. The key to husbanding workforce diversity as a positive business resource is effective diversity management.

That is the pitch, and it is a good one. Diversity management is now a billion-dollar industry, one for which the popular support of diversity as a public ideal provides a tremendous amount of free marketing. When it comes to promoting diversity management, it may not be far from the truth to say that “we are all complicit.”<sup>40</sup>

Popular accounts of diversity management, however, tend to oversimplify its underlying theory. From its inception, the managerial literature on diversity has articulated aspirations that include but also transcend business profitability. Proponents of diversity management have long argued that “the benefits of a diverse workforce . . . go beyond financial measures to encompass learning, creativity, flexibility, organizational and *individual growth*, and the ability of a company to adjust rapidly and successfully to market changes.”<sup>41</sup> The theory thus conceives of “individual growth” as an important component of organizational success. This connection has led some proponents to connect diversity management to “equal opportunity for all individuals” because it seeks to transform organizational culture to “stimulate personal development,” to “make workers feel valued,” and to erect an “egalitarian, nonbureaucratic structure.”<sup>42</sup>

How was this message lost in translation from the business to legal literature? There are two answers. First, managerial discourse too often prioritizes profit. Second, managerial experts made the case early on for diversity management by distinguishing it from affirmative action and civil rights enforcement.<sup>43</sup> Take, for example, the title of a seminal work in diversity management, “From Affirmative Action to Affirming Diversity,” which was published first in the *Harvard Business Review* in 1990. In that article, the late R. Roosevelt Thomas, Jr., one of the founders of diversity management, prophesied the end of affirmative action because its “assumptions and priorities [were] increasingly shopworn.” He also predicted the end of prejudice, because businesses were already “filled with progressive people—many of them minorities and women themselves—whose prejudices, where they exist, are much too deeply suppressed to interfere with recruitment.”<sup>44</sup> Thomas went on to argue that “affirmative

---

40. John Fitzgerald Gates, *Pimping Diversity*, HUFFINGTON POST: THE BLOG (July 24, 2014), [http://www.huffingtonpost.com/john-fitzgerald-gates-phd/pimping-diversity\\_b\\_5617661.html](http://www.huffingtonpost.com/john-fitzgerald-gates-phd/pimping-diversity_b_5617661.html).

41. David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, Sept.–Oct. 1996 HARV. BUS. REV. at 79, 79–80 (emphasis added).

42. Thomas & Ely, *supra* note 41, at 86–87.

43. See Edelman et al., *Diversity Rhetoric*, *supra* note 6, at 1620–21; Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1149–50, 1153–56.

44. Thomas, *supra* note 6, at 107.

action means an unnatural focus on one group,” which in turn leads people to doubt a firm’s commitment to individual merit.<sup>45</sup>

This message rings hollow in an era when, despite advances, women still do not have pay parity with men, and women and minorities are still underrepresented in the executive suites of major U.S. firms. It also has a tendency to overshadow aspects of the theory that are congenial to the goal of equal employment opportunity. For example, Thomas’s critique of affirmative action included the observation that it systematically “overlooked or undervalued” the “competence and character” of the very workers whom it was intended to benefit.<sup>46</sup> This dynamic contradicted the competitive ethos of private firms, but it also stunted the professional growth and advancement of women and minority workers. His theory thus attempted to align diversity management and a radical form of equal opportunity: he sets out “the remaining long-term task of creating a work setting geared to the upward mobility of all kinds of people”<sup>47</sup> by enabling women and minorities in particular “to perform to their potential.”<sup>48</sup> Today, corporate leaders sometimes refer to this effort as “position[ing] for success,” or “sponsorship.”<sup>49</sup>

Managerial diversity also eschews integration as its primary end, often expressly assuming that changing labor demographics alone either have integrated or will integrate firms. This assumption has caused the managerial literature to focus on diversity primarily not in terms of the acquisition or selection of a diverse workforce, but on the *management* of that workforce. Managerial diversity imagines a connection between firm and employee that is not exhausted by the process by which an individual comes to be hired or promoted. It is not exhausted, in other words, by concerns over affirmative action, merit, and fair consideration in hiring and promotion procedures. It imagines a connection between firm and worker that extends over the life of the individual’s retention by the firm, and it imagines the individual and the firm as sharing, in a sense, a parallel path. Employees are not merely predictions—not guesses about future performance—but investments to which one must commit for the long haul if one is going to realize the full benefit of their performance potential.

---

45. *Id.* at 109.

46. *Id.*

47. *Id.* at 108.

48. *Id.* at 109.

49. Davidson, *supra* note 7, at 143 (quoting George Borst, President and CEO of Toyota Financial Services, who advocated that managers should be evaluated in terms of whether minority candidates have been “positioned for success” through practices that “recruit, identify, coach, and mentor minority talent”); *id.* (quoting John Veihmeyer, Chairman and CEO of KPMG International, as advocating that company leaders should cultivate a “sponsorship culture” by “pull[ing] high-potential individuals up through the organization over a period of time by finding and creating career-defining growth opportunities, providing coaching and counseling, and assigning the individuals to the most important clients”).

This aspect of the theory of diversity management conflicts with the very doctrinal frameworks governing employment discrimination law. First, it encourages firms to take status differences into account to enhance equal opportunity, but the law balks at status considerations, calling them “disparate treatment.”<sup>50</sup> Second, it measures equal opportunity over time, using the time horizon of the individual’s tenure with the firm to measure the aggregate impact of the employer’s decisions on the individual’s chances for advancement.<sup>51</sup> Diversity management’s aspirations for the individual— inclusion, growth, and success—do not happen all at once. They require support and cultivation over time. Disparate treatment doctrine, however, conceives of discrimination in terms of discrete transactions—an adverse employment decision such as a termination, demotion, or refusal to promote or to hire—abstracted from other events that may have contributed to that outcome.<sup>52</sup> Thus, to describe discrimination as a consequence of unequal investment in an individual’s potential over time is to describe a workplace phenomenon for which there is no satisfactory doctrinal fit.

### B. Practice

Two questions haunt the practice of diversity management. First, what is a diversity management practice? That is, why label one personnel practice “*diversity* management,” but not another? Second, how does one know when a particular practice has been successful? Diversity management practices come in a wide variety. They are, in the most general sense, personnel management practices or policies intended to fulfill a purpose associated with the cultivation or management of workforce diversity. Sometimes they invoke the term “diversity” (e.g., diversity training, diversity committees), but often they do not (e.g., formalized mentoring and assessment practices). Sometimes they refer expressly to the social status of employees (e.g., women’s working group), but often they do not—even when they are meant to target particular groups (e.g., paid maternity leave or egg-freezing policies). One could propose to measure the success of such policies according to their ability to fulfill organizational objectives—that is, to husband workforce diversity as a business resource to fulfill goals such as employee retention, increased profitability, or innovation. Conversely, one could measure the

---

50. See *infra* Part II.A.

51. In contrast, Title VII’s disparate impact and voluntary affirmative action doctrines measure equal opportunity in terms of the aggregate effect of an employer’s policies upon a particular status group. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing disparate impact liability when an employer’s facially neutral policy produces a racially disparate impact that the employer fails to justify with a showing of job relatedness and business necessity), codified at 42 U.S.C. § 2000e-2(k); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (establishing that an employer may implement a voluntary affirmative action program to correct a manifest racial imbalance in a traditionally segregated job category).

52. See *infra* notes 88–92 and accompanying text.

success of diversity management practices based on their ability to fulfill equal opportunity goals. No one should assume, however, that one necessarily includes the other.

One might also categorize diversity management practices in terms familiar to students of employment discrimination law. First, even in today's workplace, diversity management continues to include practices indistinguishable from traditional *affirmative action* in that they involve consideration of a person's social status in connection with a decision to employ or to promote that person to a particular position. The difference, however, is that, when such programs are not justified on remedial grounds (i.e., when the employer is not acting to correct a manifest imbalance in its workforce), the impetus for considering social status is often purely opportunistic. For example, a retail chain might hire black managers to run outlets in predominantly black neighborhoods on the assumption that racial affinity will help those managers to serve the stores' clientele; an information technology firm might hire women to serve in its small business department because it has found that, among its clientele, most of the businesses owned by women fall within this category.<sup>53</sup> In such cases, although the employer may be using status preferences to assign positions, it is not likely to do so under the banner of affirmative action but instead will rely upon the language of diversity to render its opportunistic motivation more palatable.

Second, diversity management may also include *facially neutral practices* intended either to avoid disparate impacts that tend to exclude minorities and women or to improve their representation, or the representation of other underrepresented groups, within the firm. The Equal Employment Opportunity Commission has expressly advised that an employer operates within the bounds of Title VII when, in the course of "changing its hiring practices," it "take[s] steps to ensure that the practice it selects minimizes the disparate impact on any racial group."<sup>54</sup> *Facially neutral* diversity practices might also include benefits offered to employees regardless of their status, which are especially attractive to members of a particular group. For example, policies to subsidize employee childcare, provide flextime options for employees with caregiving responsibilities, or subsidize reproductive assistance may benefit women more than men to the

---

53. See JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* 87–88 (2014) (discussing private and EEOC enforcement suits brought against Walgreens); *See, e.g.*, David A. Thomas, *Diversity As Strategy*, Sept. 2004 HARV. BUS. REV. at 1 (discussing IBM). In both situations, the firm has matched the employee to the job in an effort to exploit some advantage that it associates with their status. This does not mean, however, that doing so cannot be part of a broader strategy to foster the inclusion and advancement of underrepresented workers. *Id.* at 1–2 (describing substantial increases in the managerial representation of women and minorities at IBM under diversity management).

54. Office of Legal Counsel, Title VII/ADEA/EPA Division, EEOC, EEOC COMPLIANCE MANUAL 15–31 (2006), <https://www.eeoc.gov/policy/docs/race-color.pdf>.

extent that issues of caregiving and reproductive assistance impact women more acutely than men. These are diversity policies in that, for many women, they operate to decrease career interruptions and, for many employers, to keep valuable female employees at work.

Alongside affirmative action and facially neutral policies, the third and broadest category of diversity management practices do not include tangible employment actions. They fall under the category that Professor Tristin Green has labelled *organizing work*.<sup>55</sup> Under this category, an employer takes employee status into account in the course of making an employment decision that does not rise to the level of a tangible change in employment status. Therefore, unlike affirmative action programs, decisions organizing work will not include the allocation of job positions. Nevertheless, they may later result in adverse employment actions (e.g., refusals to hire or to promote, or diminished compensation) when they withhold critical opportunities for supervision, experience, or organizationally valuable contributions. For example, the allocation of work assignments may be crucial in shaping an employee's experience and preparing her for future advancement; policies formally assigning mentors may either accelerate an employee's pathway to success by providing useful feedback, supervision, and networking opportunities or hinder that success if the mentoring relationship fails to provide such benefits. Decisions organizing work thus strongly implicate the issue of equal investment in employee potential, because they constitute many of the very acts through which the employer's investment in that potential is made.

The organization of work may benefit or may harm the goal of providing all workers equal employment opportunity. For example, effective mentoring programs may be critical in developing talent within a firm, so much so that they may constitute the critical difference between career success and stagnation. A firm might institute a formal mentoring policy aimed precisely to equalize mentoring opportunities for women and people of color who have historically had difficulty finding senior officials to sponsor their success. However, race- and sex-based mentoring policies can have the perverse consequence of disadvantaging minorities and women in firms by constraining the opportunities for training, work experience, and positive exposure within the organization, particularly if the firm has few minority and female mentors relative to the number of minority and female protégés or if the organizational status of minority and female mentors tends to lag behind that of their white male counterparts.<sup>56</sup> Similarly, in the professional

---

55. See Green, *supra* note 34, at 587. I adopt here Professor Green's definition of the phrase: "decisions about how and by whom work is accomplished . . . rather than about who gains entry into a firm in the first place or where someone is placed within a clearly defined job hierarchy." *Id.*

56. See Carol T. Kulik & Loriann Roberson, *Diversity Initiative Effectiveness: What Organizations Can (and Cannot) Expect from Diversity Recruitment, Diversity Training, and Formal Mentoring*

services, minority workers assigned to work primarily for minority-owned client firms may be denied promotions or experience and may receive reduced compensation relative to their white counterparts based on the size or significance of such clients to the employer. In these ways, decisions organizing work sometimes intersect with other firm practices or with demographic and structural characteristics of the firm to disadvantage the very workers who were otherwise presumed to have benefited from the firm's attention to diversity.

As a counterexample, some sociological research has found that certain types of team-based work structures enhance equal opportunity by raising the visibility of contributions made by women and minorities.<sup>57</sup> An employer may not think of such practices as diversity management, or may think of them primarily as a means to diversify viewpoints within a team. Nevertheless, they can hold civil rights implications. An employee will experience such collaborative assignments as positive investments provided that they receive fair attribution for their contributions to the work of the team; a collaborative assignment that obscures such contributions or does not permit them in the first place, however, may derail the employee's progress toward advancement.

Decisions organizing work also sometimes include assignments to work within the structure of the firm's diversity management efforts. These bias-reduction and strategic practices are intended to transform workplace culture or to develop policies that will make the firm more congenial to a diverse workforce. For example, firms commonly assign supervisory personnel to participate in diversity training programs.<sup>58</sup> Other bias-reduction strategies include bureaucratic procedures governing employment decisions and the investigation of employee grievances. Rather than investing in the individual by including her more deeply within the business of the firm, these practices seek to shield her from possible discrimination or the firm from liability. Strategic practices are epitomized by attempts to erect within the firm new machinery for setting and enforcing diversity-related policies. Common strategic practices include the creation of diversity officer positions, diversity committees, and diversity task forces. Several high-profile discrimination lawsuits have ended with consent decrees mandating the creation of task

---

*Programs*, in DIVERSITY AT WORK 265, 283–93 (Arthur P. Brief ed., 2008). See generally Belle Rose Ragins, *Diversified Mentoring Relationships in Organizations: A Power Perspective*, 22 ACAD. MGMT. REV. 482 (1997); Gail M. McGuire, *Do Race and Sex Affect Employees' Access to and Help from Mentors?: Insights from the Study of a Large Corporation*, in MENTORING DILEMMAS: DEVELOPMENTAL RELATIONSHIPS WITHIN MULTICULTURAL ORGANIZATIONS 105 (Audrey J. Murrell et al. eds., 1999).

57. See Alexandra Kalev, *Cracking the Glass Cages? Restructuring and Ascriptive Inequality at Work*, 114 AM. J. SOC. 1591 (2009).

58. Soohan Kim et al., *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171, 197–99 (2012); Kalev et al., *Best Practices*, *supra* note 35, at 604–05.

forces as a remedy for systemic discrimination.<sup>59</sup> Of course, even when such practices succeed in returning benefits to the firm, individual employees may still experience unfair differences in treatment. For example, an employee might be assigned to a diversity task force or committee within the firm, because of her status as a woman or racial minority. When this occurs, the employee may experience a denial of equal opportunity to the extent that she is not fairly compensated for this work or is forced to miss other assignment opportunities that might have brought her valuable experience or recognition for her contribution to the firm's core business endeavors.

The fourth and final category of diversity management practices covers predominantly *expressive* or *symbolic* practices. These include diversity mission statements, client brochures, and recruiting efforts that express to potential employees the firm's commitment to diversity.<sup>60</sup> Such efforts may positively impact the experiences of underrepresented employees, who may be less inclined to experience stereotype threat or who may otherwise experience a greater sense of engagement with their work because they view their working environment as socially tolerant and inclusive.<sup>61</sup> Conversely, those who feel that the term "diversity" excludes them (e.g., white men) may perceive decision making within the firm to be rigged against them and may even feel in some sense threatened by talk of diversity.<sup>62</sup>

These four categories provide a general overview of organizational practices commonly associated with diversity management. They tell us little, however, about the effectiveness of specific practices. Presumably, whether the law should tolerate—much less endorse—a diversity practice should turn at least in part on the relationship between that practice and the law's objective of equal employment opportunity. Sociologists Frank Dobbin, Alexandra Kalev, Erin Kelly, and Soohan Kim have closely examined this issue, using as their metric for success an integrative measurement: whether a particular practice correlates with an increase in the number of women and minorities occupying a firm's managerial positions.<sup>63</sup> Their research shows that diversity management is most effective when it includes accountability structures, such as affirmative action programs, task forces, committees, or delegation of organizational authority to specific

---

59. See *infra* note 167 and accompanying text.

60. See DOBBIN, *supra* note 4, at 143–44.

61. On the topic of stereotype threat and possible strategies for its mitigation, see generally CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2014).

62. See *infra* note 79 and accompanying text.

63. See Kalev et al., *Best Practices*, *supra* note 35, at 590; see also Kim et al., *Progressive Corporations at Work*, *supra* note 58; Frank Dobbin & Alexandra Kalev, *Why Firms Need Diversity Managers and Task Forces*, in HOW GLOBAL MIGRATION CHANGES THE WORKFORCE DIVERSITY EQUATION 170 (M. Pilati et al. eds., 2014); Frank Dobbin et al., *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOC. REV. 1 (2015); Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 35.

individuals charged with monitoring and upholding diversity initiatives.<sup>64</sup> Such practices correlate with substantial increases in the percentages of minorities and women occupying managerial positions. Indeed, even programs that otherwise show low to moderate gains are more effective in firms that implement such “responsibility structures.”<sup>65</sup>

The authors do observe, however, that, just as the forms of accountability structures vary, so do their rates of success. For example, “affirmative action plans and diversity staff both centralize authority over and accountability for workforce composition,” whereas “diversity committees locate authority and accountability in an interdepartmental task force” thereby potentially democratizing responsibility “for pursuing the goal of integration.”<sup>66</sup> In a recent study, Dobbin and Kalev found that, in fact, diversity managers and taskforces produced far more managerial diversity than affirmative action plans.<sup>67</sup> Manager and taskforces offer avenues for continuing organizational accountability and investment-achieving positive outcomes, thus making it less likely that diversity goals will “fall by the wayside.”<sup>68</sup> Managerial experts might offer a different explanation: taskforces in particular fold the pursuit of diversity into the strategic goals and operations of the firm. In the managerial literature, these structural reforms are associated not just with diversity but with inclusion—the structural integration of women’s and minorities’ perspectives and insights by folding them into the operational design and strategic outlook of the firm.<sup>69</sup>

Ironically, even though they are among the most popular diversity management practices, bias-reduction measures, such as diversity training, produce no appreciable positive effect on workforce integration.<sup>70</sup> Similarly, bureaucratic reforms, such as performance evaluations and grievance procedures, widely believed to curb discrimination, often produce rebellion by decision makers seeking to assert their autonomy.<sup>71</sup> Although Dobbin and

---

64. See Kalev et al., *Best Practices*, *supra* note 35, at 611 (“Structures that embed accountability, authority, and expertise (affirmative action plans, diversity committees and taskforces, diversity managers and departments) are the most effective means of increasing the proportions of white women, black women, and black men in private sector management.”).

65. See *id.* at 611.

66. *Id.*

67. Dobbin & Kalev, *Why Firms Need Diversity Managers*, *supra* note 63, at 173.

68. *Id.* at 172.

69. See, e.g., Thomas, *supra* note 6, at 107.

70. See Kalev et al., *Best Practices*, *supra* note 35, at 611 (“Practices that target managerial bias through feedback (diversity evaluations) and education (diversity training) show virtually no effect in the aggregate.”); see also Dobbin & Kalev, *Why Firms Need Diversity Managers*, *supra* note 63, at 170 (“[A]nti-bias educational efforts produce negligible change in attitudes, and have never been shown to diminish workplace discrimination.”).

71. See Dobbin et al., *Rage Against the Iron Cage*, *supra* note 63, at 1026 (concluding that “[p]erformance evaluations show negative effects for white women” and grievance procedures “show

his colleagues' initial research showed modest effects for associational practices aimed at ameliorating social isolation, such as mentoring and networking,<sup>72</sup> subsequent research showed that mentoring can be an effective means of integrating managerial ranks with the caveat that, to be effective, mentoring relationships must endure and mentors must be equipped to provide real experience and opportunity to their protégés.<sup>73</sup> Their recent work has also shown, however, that bias-reduction strategies such as diversity training and formal testing actually hurt racial minorities and in some cases also hurt white women.<sup>74</sup> Overall, these sociologists found that, not only did different diversity management practices vary in their success, but the effect of diversity management also was not uniform across social groups. For example, white women benefited more from diversity management (including affirmative action programs) than black men or black women.<sup>75</sup> Finally, in addition to the positive impact of internal accountability structures, Dobbin and his colleagues also found that employment discrimination law enforcement and discrimination lawsuits positively impact workforce diversity.<sup>76</sup>

Research in social psychology has corroborated the sociological findings that diversity management practices have the potential to undermine equal employment opportunity. For example, mere presence of such practices can “create an *illusion of fairness*” that dulls organizational responses to evidence of discrimination.<sup>77</sup> Social psychologists Tessa Dover, Cheryl Kaiser, and Brenda Major have found that “the presence of diversity initiatives acts as a legitimizing cue,” confounding the ability of “high-status

---

negative effects for all underrepresented groups but Hispanic men”); see also Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

72. Kalev et al., *Best Practices*, *supra* note 35, at 604. In fact, these sociologists found that the effects of such programs varied based on the program and the race and sex of the intended beneficiary. For example, diversity networking programs increased the odds that white women would join a firm's managerial ranks, but decreased the chances of both white men and black men. *Id.*

73. Kim et al., *supra* note 58, at 207–08; see also Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 35, at 57 (stating that mentoring programs “[o]n average . . . boost the representation of black, Hispanic and Asian-American women, and Hispanic and Asian-American men, by 9% to 24%”). But see Kalev, *Cracking the Glass Cages?*, *supra* note 57, at 1631 (discussing research showing that “special networking and mentoring programs for women and minorities” often have “weak, and often negative, effects on diversity outcomes”); Rich, *supra* note 14, at 1067–68 (cautioning that race- and sex-matched mentoring may harm protégés if mentors lack institutional standing or professional clout necessary to propel protégés' careers).

74. Dobbin & Kalev, *Why Diversity Programs Fail*, *supra* note 35, at 59 (finding, for example, that mandatory diversity training led to significant decreases in managerial ranks for black women and for Asian Americans and finding that testing and grievance systems significantly and negatively affected those groups and white women, black men, and Latinos).

75. Kalev et al., *Best Practices*, *supra* note 35, at 604.

76. *Id.* at 607–08.

77. Cheryl R. Kaiser et al., *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. OF PERSONALITY & SOC. PSYCHOL. 504, 504 (2013).

group members” to recognize discrimination and causing them instead to respond defensively to claims of discrimination.<sup>78</sup> Recently, these authors have found that whites express fears of discrimination and cardiovascular threat during simulated job interviews when prospective employers indicate that they are pro-diversity.<sup>79</sup> Employment discrimination law scholar Professor Tristin Green has neatly captured this problem in the gloss of legal theory, arguing that diversity management contributes to an assumption of “organizational innocence” that tends to undermine the law’s pursuit of equal opportunity.<sup>80</sup> Thus, the cost of failed diversity initiatives is not simply “lost opportunity to foster greater inclusion.”<sup>81</sup> That cost also includes a kind of managerial blindness to discrimination as managers perceive problems of discrimination and inclusion to have already been resolved or to be attributable to rogue individuals, and view complaints of discrimination as products of poor interpersonal relations between workers, individual oversensitivity, or worse, self-dealing.<sup>82</sup>

These findings in sociology and social psychology contradict the common assumption that to facilitate civil rights goals, employers must be given broad discretion to wield the tools of diversity management in a self-interested manner, free from legal intrusion. To the contrary, it appears that if legal policy directed firms to adopt appropriate accountability structures as part of their diversity strategy, they would achieve superior results and perhaps also avoid the pitfalls associated with measures that have largely become hollow symbols of legal compliance.

## II. DEFINING DISCRIMINATION

The practitioners and promoters of diversity management no doubt presume that its practices are lawful. This presumption is not wholly without reason. After all, many of diversity management’s practices have their origins in equal employment opportunity compliance policies,<sup>83</sup> and those that do not

---

78. Tessa L. Dover et al., *Diversity Initiatives, Status, and System-Justifying Beliefs: When and How Diversity Efforts De-Legitimize Discrimination Claims*, 17 *GROUP PROCESSES & INTERGROUP REL.* 485, 491 (2013).

79. Tessa L. Dover et al., *Members of High-Status Groups Are Threatened by Pro-Diversity Organizational Messages*, 62 *J. EXPERIMENTAL SOC. PSYCH.* 58 (2016).

80. TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 36–38 (2017).

81. Rich, *supra* note 14, at 1065.

82. See GREEN, *DISCRIMINATION LAUNDERING*, *supra* note 80, at 38 (explaining that diversity management promotes organizational innocence by “framing organizational action in terms of proactive, business efforts to manage diversity and by sweeping individual bias into the business realm of the personal and relational for managers and workers”).

83. See DOBBIN, *supra* note 4, at 153–56 (discussing the rise of diversity management as an exercise in rebranding equal opportunity compliance policies). See generally Erin Kelly & Frank Dobbin,

are nevertheless commonly associated with improving workforce diversity. Even the EEOC has advised that “diversity efforts designed to open up opportunities to everyone” are lawful under Title VII.<sup>84</sup> However, practices that allocate employment opportunities based even in part on an employee’s protected status would appear to violate the statute’s fundamental prohibition against disparate treatment. This Part will discuss disparate treatment doctrine in relationship to diversity management, first setting forth its analytical frameworks and then describing several ways in which those frameworks are currently applied to contemporary diversity practices by lower federal courts. The decisions of lower courts show a startling trend: affirmative action programs, although rarely used, have a clear doctrinal pathway to establish their legal validity, whereas diversity management practices risk exposing employers to liability even when their status consciousness does not directly award tangible employment opportunities.

### A. Disparate Treatment Doctrine

Disparate treatment doctrine prohibits an employer from subjecting an individual to an adverse employment practice—a change in the terms or conditions of her employment—because of her protected status.<sup>85</sup> To succeed on a claim of disparate treatment, a plaintiff must prove that any legitimate, nondiscriminatory reason proffered by her employer is in fact a pretext for discrimination.<sup>86</sup> The plaintiff must also exhaust administrative remedies by filing a timely charge of discrimination.<sup>87</sup> The Supreme Court has held that common acts of individual disparate treatment (e.g., refusals to hire or promote, demotions, terminations, etc.) are “discrete acts” each of which

---

*How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCI. 960 (1998).

84. Office of Legal Counsel, Title VII/ADEA/EPA Division, EEOC, EEOC COMPLIANCE MANUAL 15–31 (2006), <https://www.eeoc.gov/policy/docs/race-color.pdf>.

85. 42 U.S.C. § 2000e-2(a)(1).

86. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–805 (1973). According to the burden shifting approach set forth in *McDonnell Douglas*, a plaintiff first bears the initial burden of demonstrating a prima facie case of discrimination. *Id.* at 802. This is a “minimal” showing. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *see also Texas Dep’t of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (“The burden of establishing a prima facie case of disparate treatment is not onerous.”). The burden then shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the challenged employment decision. *McDonnell Douglas*, 411 U.S. at 802–03. Once the defendant has met this burden, the presumption of discrimination raised by the prima facie case has been rebutted, and the plaintiff bears the burden of proving that the proffered reason was a pretext and that the real reason was discrimination. *Id.* at 804–05. In 1991, Congress amended Title VII to permit a plaintiff to establish an employer’s liability for discrimination if the plaintiff showed that her status was a “motivating factor” in the challenged decision, 42 U.S.C. § 2000e-2(m), but the employer may avoid certain damages and certain injunctive relief if it can show that it would have made the “same decision” even absent the illicit motivation, 42 U.S.C. § 2000e-5(g)(2)(B).

87. 42 U.S.C. § 2000e-5(e)(1) (requiring a plaintiff to file a charge of discrimination with the EEOC within 180 days, or to file a charge with an appropriate state or local authority within 300 days, of the date on which “the alleged unlawful employment practice occurred”).

“occurred”—for statutory purposes—on “the day that it ‘happened.’”<sup>88</sup> Legislative and judicial exceptions to this rule have been made for plaintiffs challenging workplace harassment,<sup>89</sup> pay discrimination,<sup>90</sup> and employer policies which, each time they are used, produce a disparate impact.<sup>91</sup> The Court’s adoption of the “discrete act” rule means, however, that even a series of related actions (e.g., a punitive disciplinary action and demotion followed by termination) must be considered separate discriminatory acts.<sup>92</sup> The “discrete act” rule thus focuses attention on the employer’s motivation for each employment action rather than leaving open the possibility that disparate treatment discrimination may unfold over time through a series of actions culminating in a particularly adverse outcome. Together disparate treatment doctrine’s attention to motive and the “discrete act” rule make it difficult for the law to recognize a right of equal employment opportunity as equal investment—and therefore difficult for the law to police diversity management practices that undermine an individual’s access to equal opportunity.

This is a problem that threatens the legacy and present vitality of employment discrimination law. The burden shifting structure of disparate treatment doctrine reflects the Supreme Court’s conclusion, first articulated in *Griggs*, that Title VII was enacted to realize the goal of equal opportunity in employment.<sup>93</sup> The Court returned to the same understanding of the

---

88. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002).

89. *Id.* at 115–17 (concluding that hostile work environment harassment claims are timely if an act of harassment occurred within the limitations period, because “[s]uch claims are based on the cumulative effect of individual acts”).

90. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending several federal employment discrimination statutes, including Title VII, to establish that the limitations period begins to run for claims of pay discrimination when a “discriminatory compensation decision or other practice is adopted, when an individual becomes subject to” such a practice, or “when an individual is affected by” the application of such a practice). The statute was enacted to override the Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which applied *Morgan*’s “discrete acts” rule to pay decisions.

91. *Lewis v. City of Chicago*, 560 U.S. 205 (2010) (holding that an act of disparate impact discrimination occurs each time the challenged practice that produces a disparate impact is used).

92. This is so because *Morgan* prevents the aggregation of serial discriminatory acts for the purposes of establishing liability. However, it does not preclude evidence of events occurring outside the limitations period from being used to prove discrimination within the limitations period. *Id.* at 113. This so-called “background evidence” may be useful to establish that an action occurring within the limitations period issued from a discriminatory motive, but *Morgan* does not permit it to be used to challenge a continuing pattern of discriminatory behavior (such as underinvestment in an employee’s performance potential relative to her peers) that culminates in some adverse action.

93. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”). Disparate impact doctrine provides that an employer commits an unlawful employment practice by using a facially neutral practice that produces a status-based disparate impact and may escape liability only by showing that the challenged practice was job-related and

statute's equality commitment when, two years later, it established individual disparate treatment doctrine in *McDonnell Douglas v. Green*.<sup>94</sup> The Court understood disparate treatment and disparate impact to be complementary expressions of the same equal opportunity commitment—one that would serve not just the “personal” interest of the plaintiff seeking a remedy for discrimination but also a “societal” interest, shared by “employer, employee, and consumer,” in “efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”<sup>95</sup> Equal opportunity, in other words, was originally meant to fulfill the employer's and employee's interests by embracing a structural understanding of the operation and effect of discriminatory practices, which operate both to maintain social subordination and to disrupt business objectives.

Five years later, however, in *Teamsters v. United States*,<sup>96</sup> the Court sharply distinguished disparate treatment from disparate impact:

Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .

Claims of disparate treatment may be distinguished from claims of “disparate impact.” . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory.<sup>97</sup>

Commentators have long puzzled over this passage. It seems to describe not one theory of disparate treatment, but two: one that ascribes liability to an employer who subjects members of different groups to different treatment, and another that ascribes liability to an employer who acts upon a discriminatory motive. The two accounts appear to command very different results when applied to diversity management. On the first account, disparate treatment doctrine will apply to any diversity practice that treats individuals differently because of their status, resulting in an adverse employment action. But, under the second, the doctrine might excuse most diversity practices because they do not issue from a discriminatory motive. *Teamsters* went on to describe disparate treatment as “the most obvious evil Congress had in

---

consistent with business necessity. *Id.* at 431. Congress codified the doctrine as an amendment to Title VII in the 1991 Civil Rights Act. 42 U.S.C. § 2000e-2(k).

94. 411 U.S. 792, 800 (1973) (“The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.” (citing *Griggs*, 401 U.S. at 429)).

95. *McDonnell Douglas*, 411 U.S. at 801. *Griggs* expresses a similar ambition, when it states that Congress did not intend to guarantee employment to the unqualified but instead an employee's qualifications to guide his employer's decisions “so that race, religion, nationality, and sex become irrelevant.” *Griggs*, 401 U.S. at 436.

96. 431 U.S. 324 (1977).

97. *Id.* at 335 n.15 (citations omitted).

mind when it enacted Title VII,”<sup>98</sup> and such language appears inapplicable to policies and practices implemented because an employer wishes to improve or to manage workforce diversity. Indeed, some of the Court’s rhetoric in later cases could be interpreted to support this conclusion. Statements equating disparate treatment with “intentional discrimination” and requiring proof of a subjective intent to discriminate counsel against applying this doctrine to workplace diversity measures.<sup>99</sup>

For better or worse, the issue is far more complicated. As early as *City of Los Angeles v. Manhart*<sup>100</sup> and again as recently as *Ricci v. DeStefano*,<sup>101</sup> the Court has maintained that an employer will not escape disparate treatment liability simply because its motive was rational or benevolent or because it did not *intend* to discriminate.<sup>102</sup> The statute provides that it shall be an “unlawful employment practice” for an employer to discriminate “because of [an] individual’s race, color, religion, sex, or national origin”<sup>103</sup> or to “limit, segregate, or classify” employers on the same basis.<sup>104</sup> Many diversity practices would seem to run afoul of these prohibitions, and the Supreme Court’s interpretations underscore this dilemma. For example, the Court held in *Manhart* that an employer who requires women to pay more than men into a pension fund based on the rational conclusion that women, on average, live longer than men has committed sex discrimination in violation of Title VII.<sup>105</sup> Similarly, a union that refuses to pursue complaints of race discrimination on behalf of African Americans but prosecutes other grievances violates employment discrimination law even if its motivation was not animus but self-interest.<sup>106</sup> And an employer seeking to avoid committing disparate impact discrimination—by refusing to certify the results of a promotion test because the test produced a disparate impact against African American workers—violates Title VII “however well intentioned or benevolent [its action] may have seemed.”<sup>107</sup> The Court explained its rationale in *Manhart*: “[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply” because Title VII promises each *individual* equal opportunity.<sup>108</sup> In other

---

98. *Id.*

99. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Texas Dept. of Cmt’y Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

100. 435 U.S. 702 (1978).

101. 557 U.S. 557 (2009).

102. *Manhart*, 435 U.S. at 707–08; *Ricci*, 557 U.S. at 585.

103. 42 U.S.C. § 2000e-2(a)(1).

104. 42 U.S.C. § 2000e-2(a)(2).

105. *Manhart*, 435 U.S. at 708.

106. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

107. *Ricci*, 557 U.S. at 585.

108. *Manhart*, 435 U.S. at 708.

words, every individual has a right to work free from disparate treatment based on her status regardless of what the defendant's motive was for the difference in treatment. It is therefore both undeniable and supremely consequential that an employer's benevolent motivation may form the basis for unlawful disparate treatment.

Title VII entertains only two exceptions to the rule that an employment practice is unlawful if it uses preferences based on an individual's protected status to render a tangible employment decision. First, Congress enacted Title VII with an affirmative defense available to employers who successfully demonstrate that "religion, sex, or national origin is a bona fide occupational qualification [(“BFOQ”)] reasonably necessary to the normal operation of that particular business or enterprise.”<sup>109</sup> By its terms, the defense excludes race and color as potential BFOQs, and therefore it cannot justify diversity management practices structured upon race. Even when the defense is technically available, the Supreme Court has held that it must be strictly construed. An employee's status can serve as a legitimate employment qualification *only* if it “relate[s] to the ‘essence’ or to the ‘central mission of the employer’s business.’”<sup>110</sup> Thus, an employer claiming that sex, for example, is a necessary qualification for a position need not invoke diversity as its rationale. By the same token, however, an employer's motivation to pursue diversity—whether to improve the representation of certain groups within its workforce or to realize some incremental improvement in its performance—will not render an employee's status necessary to fulfill the essence of the business.

Second, in *United Steelworkers of America v. Weber*,<sup>111</sup> the Supreme Court recognized that an employer may implement a voluntary affirmative action plan without violating Title VII when “[t]he purposes of the plan mirror those of the statute” because the plan is “designed to break down old patterns of . . . segregation and hierarchy.”<sup>112</sup> In *Johnson v. Transportation Agency*,<sup>113</sup> the Court extended this rationale from race- to sex-based affirmative action.<sup>114</sup> Both decisions recognize a congressional purpose to encourage voluntary compliance efforts by employers.<sup>115</sup> However, both decisions also strictly circumscribe an employer's use of affirmative action.

---

109. 42 U.S.C. § 2000e-2(e).

110. *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991).

111. 443 U.S. 193 (1979).

112. *Id.* at 208.

113. 480 U.S. 616 (1987).

114. *See id.* at 619.

115. *Weber*, 443 U.S. at 204 (arguing that Title VII was intended “as a spur or catalyst to cause ‘employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges’ of the country’s history of discrimination”); *id.* at 207 (identifying a congressional purpose to preserve “traditional management prerogatives”); *Johnson*, 480 U.S. at 640 (“In evaluating the compliance of an affirmative action plan with Title VII’s prohibition on

To be considered a “valid” plan under the statute, a plan (1) must be designed to eliminate a “manifest imbalance” in the employer’s workforce in a “traditionally segregated job category,”<sup>116</sup> (2) must be a “temporary measure,”<sup>117</sup> and (3) must not “unnecessarily trammel the interests” of whites or men and must not otherwise erect an “absolute bar to [their] advancement.”<sup>118</sup> Although *Weber* and *Johnson* do not require an employer to demonstrate that its affirmative action plan is necessary to remedy an employer’s violation of law,<sup>119</sup> they do not authorize an employer to engage in affirmative action absent a present imbalance, and they do not permit an employer to implement the plan indefinitely even after correcting the imbalance. This remedial logic is at odds with diversity management. The strategic business value of workforce diversity does not permit affirmative action; the employer’s business interest in diversity does not come into play under *Weber-Johnson*.

Finally, it is important to note that *Weber-Johnson* may be read to impose other limitations on the design of affirmative action plans. For example, although the plan upheld in *Weber* relied upon a racial quota,<sup>120</sup> the plan upheld in *Johnson* resembled the “Harvard Plan” for university admissions<sup>121</sup> since sex was merely one factor among many considered by employers. The Court has praised this holistic approach to affirmative action as a model of “individualized consideration.”<sup>122</sup> Ultimately, however, the

---

discrimination, we must be mindful of this Court’s and Congress’ consistent emphasis on the value of voluntary efforts to further the objectives of the law.”) (internal quotation marks omitted).

116. *Weber*, 443 U.S. at 208; see also *Johnson*, 480 U.S. at 631–32 (clarifying that a “manifest imbalance” sufficient to justify race- or sex-based affirmative action may be demonstrated by “a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or [the] general population” if the plan applies to “jobs that require no special expertise . . . or training programs designed to provide expertise”).

117. *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 630.

118. *Id.*

119. In fact, the Court in *Weber* considered and rejected Justice Blackmun’s proposed compromise: the employer, to justify its affirmative action plan, must be able to identify an “arguable violation” of law. 443 U.S. at 211 (Blackmun, J., concurring). In *Johnson*, the Court rejected the application of a “prima facie case” standard to support the voluntary use of affirmative action, reasoning that such a requirement “could inappropriately create a significant disincentive for employers to adopt an affirmative action plan.” 480 U.S. at 632–33. Thus, it was sufficient that the employer reasonably concluded that “women were concentrated in traditionally female jobs” due to a pattern of “traditional segregation.” *Id.* at 634.

120. *Weber*, 443 U.S. at 199 (stating that the challenged plan allocated craft trainee positions on the basis of seniority, “with the proviso that at least 50% of the new trainees were to be black until the [company’s] percentage of black skilled craftworkers . . . approximated the percentage of blacks in the local labor force” (emphasis added)).

121. *Johnson*, 480 U.S. at 638. As Justice Powell originally discussed in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the Harvard admissions plan provides that a student’s race “may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.” *Id.* at 317 (opinion of Powell, J.).

122. See *Grutter v. Bollinger*, 539 U.S. 306, 336–39 (2003) (describing the process of “individualized consideration” necessary for a race-based affirmative action program to satisfy the constitutional requirement of narrow tailoring).

*Johnson* Court did not uphold the affirmative action plan in question because it deemed the plan to be an ideal approach to merit review that required no statutory justification. Instead, the Court upheld the plan because, as *Weber* prescribed, it was designed as a temporary measure to remedy a manifest gender imbalance without unnecessarily trammeling upon the interests of male workers.<sup>123</sup> Therefore, a diversity program awarding a tangible employment opportunity might run afoul of *Johnson* if the employer acted purely on the basis of status. Even if its decision rests on individualized review in which status is merely a factor, the program's legal justification would still turn on its remedial purpose. Notably, in her *Johnson* concurrence, Justice O'Connor made clear that, despite Title VII's respect for traditional management prerogatives, *Weber* "did not approve preferences for minorities 'for any reason that might seem sensible from a business or a social point of view.'" <sup>124</sup>

As is evident from the foregoing analysis, Title VII's affirmative action doctrine offers no easy pathway to legitimacy for diversity management practices that rely upon race- or sex-based preferences but are not designed to respond to a manifest imbalance in an employer's workforce. As discussed in Part I, however, most diversity management practices do not award employment positions outright but rather organize work in a more inchoate manner. They can distribute employment opportunities, and yet those opportunities often do not constitute tangible employment positions or benefits. An adverse employment action occurs when the employer's decision negatively alters the terms and conditions of the plaintiff's employment.<sup>125</sup> Thus, even diversity management practices that negatively impact a particular employee's chances of promotion or selection for some future benefit will not be actionable if they do not result in an adverse employment action. Unless such a practice actually results in a tangible employment action, the plaintiff will have no legally cognizable injury. For example, lower courts have held that practices such as disciplinary actions, unfavorable work assignments, lateral transfers, and negative performance evaluations are typically not considered to be adverse employment actions

---

123. *Johnson*, 480 U.S. at 640–42.

124. *Johnson*, 480 U.S. at 649 (O'Connor, J., concurring); see also *id.* ("As I read *Weber* . . . the Court also determined that Congress had balanced these two competing concerns by permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.").

125. See, e.g., *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009) (defining an adverse employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits"); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands.").

under this definition.<sup>126</sup> Yet even diversity management practices that do not directly confer tangible employment opportunities may cause adverse employment actions to be taken at a later time. This means that, while one class of diversity management measures is presumptively unlawful and requires special remedial justification, another class that also affects equal employment opportunity sits outside the ambit of employment discrimination law.

The latter class creates a dilemma for Title VII and diversity management. On the one hand, effective diversity management may advance Title VII's equal opportunity goals. It may result in greater workforce integration, for example, or it may assist underrepresented employees to achieve high status positions within the firm. On the other hand, when an employer uses status-based preferences to award tangible job opportunities, it must satisfy the remedial rationale of *Weber* and *Johnson* and cannot stand on the instrumental rationale of diversity, except under the tight strictures of the BFOQ defense. The statute's liability rules direct employers away from using status preferences to award tangible opportunities and instead toward less direct forms of personnel investment.

The Court's "discrete act" rule, however, makes it difficult for a plaintiff to challenge practices that culminate in adverse actions but otherwise unfold over time. If, for example status-based work assignments and mentoring practices underinvest in an employee's performance potential relative to the employer's investments in her peers, she may be passed over for promotion and plagued by unimpeachable evidence at trial that the employer's decision resulted from her poor performance and not from personnel practices that undermined her potential. In short, the "discrete act" rule does not afford the plaintiff a cause of action for the cumulative effect of a series of practices. Thus, to the extent that statutory guidance shapes diversity management practices, it does so by directing employers away from affirmative-action type policies and toward more indirect equal employment strategies such as diversity training, mentoring, networking, work assignments, and team-based work organization.<sup>127</sup> These are the kinds of practices that constitute investments in employee potential and may affect employees' chances for future success. Because, however, they do not directly result in tangible employment losses, current doctrine will frequently obscure the role that they play in setting an employee up for success or failure.

---

126. See, e.g., *Higgins v. Gonzales*, 481 F.3d 578 (8th Cir. 2007) (work assignments and transfer); *Zhuang v. Datacard Corp.*, 414 F.3d 849 (8th Cir. 2005) (negative performance evaluation); *Burger v. Central Apartment Mgmt., Inc.*, 168 F.3d 875 (5th Cir. 1999) (lateral transfer).

127. See *supra* notes 55–76 and accompanying texts (discussing the prevalence of these diversity management practices).

*B. Disparate Treatment Doctrine's Current Application to Diversity Management*

The Supreme Court has never decided whether the constitutional diversity rationale of its public university affirmative action cases can be applied in a private employment discrimination case. Instead, the *Weber* and *Johnson* doctrines continue to govern Title VII challenges to workplace affirmative action. However, lower federal courts have developed ways of circumscribing those doctrines. At the same time, courts have faced a serious question concerning whether evidence of an employer's motivation to pursue diversity proves legal compliance or discrimination, and increasingly they have decided in favor of the latter.

1. Affirmative action and diversity. Title VII endorses but underspecifies voluntary compliance measures. Current doctrine gives employers incentives, in the form of defenses to damages or liability, to take some prophylactic measure against discrimination. It does not require that an employer's measures be proved effective to satisfy the defense.<sup>128</sup> In addition, the Court has long held that ascribing a discriminatory motive to the employer requires the factfinder to consider the totality of the circumstances surrounding the challenged action. Factors weighing against a finding of unlawful discrimination include the composition of the employer's workforce, assuming that it is diverse, and the employer's implementation of affirmative action programs.<sup>129</sup> The totality of the circumstances test suggests that employers will benefit in disparate treatment cases from their use of diversity management practices regardless of whether those practices are effective from a civil rights point of view. When and how much they may benefit, however, depends on whether courts interpret the presence of diversity initiatives consistently, irrespective of the social status of the plaintiff, and whether courts interpret "diversity" to be a synonym for compliance and equal opportunity or for preference and discrimination.

---

128. For example, in disparate treatment cases involving hostile work environment harassment liability or punitive damages, the Court has established affirmative defenses, which incentivize employers to adopt and disseminate anti-harassment and anti-discrimination policies and to structure those policies so as to facilitate prompt internal investigation and resolution of complaints. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that an employer may avoid sexual harassment liability involving a supervisor and subordinate if the employer institutes reasonable complaint procedures, the plaintiff fails to use those procedures, and no tangible employment action is taken); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (same); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (holding that an employer may avoid punitive damages for malicious or recklessly indifferent discriminatory behavior if it adopts anti-discrimination policies and institutes supervisor training); *see also, e.g.*, *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536 (4th Cir. 2003) (employer could not be held liable for punitive damages where it implemented anti-discrimination and grievances policies in addition to providing diversity training). *See generally* Edelman et al., *When Organizations Rule*, *supra* note 13.

129. *See, e.g.*, *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

Sociologists Dobbin, Kalev, and Kelly observe that, as recently as 2002, sixty-three percent of workplaces used affirmative action plans.<sup>130</sup> The authors do not define “affirmative action” precisely, and it is evident that affirmative action plans may take many different forms.<sup>131</sup> They have also noted that most firms separate “the affirmative action function” from their diversity management apparatus.<sup>132</sup> The rising position of diversity management has therefore coincided with a decrease in traditional affirmative action programs that use status preferences in awarding tangible job opportunities. For example, a plan preferring women for a traditionally male-dominated position will resemble the affirmative action plans challenged in *Weber* and *Johnson*, and it will comply with the *Weber-Johnson* doctrine only if it is designed to correct a manifest sex-based imbalance without unnecessarily trammeling the interests of male workers. A critical question remains, however, regarding whether status preferences can be sustained in any employment context when no remedial purpose is shown.

Two decades ago, the Court granted certiorari on a case raising this question, but the writ was ultimately withdrawn before the petition was heard. In *Taxman v. Board of Education of Piscataway*,<sup>133</sup> the Third Circuit held that the defendant school board violated Title VII when, during a reduction in its teaching staff, the board invoked its affirmative action policy to break a tie between two otherwise equally qualified teachers, one black and one white, and selected the black teacher for retention. *Taxman*’s invalidation of the board’s affirmative action decision has two important components that are relevant here. First, the court determined that *Weber* and *Johnson* governed the validity of voluntary affirmative action programs under Title VII, and neither ruling “open[ed] the door to additional non-remedial deviations” from the statute’s “antidiscrimination mandate.”<sup>134</sup> Second, although decided before *Grutter*, *Taxman* addressed the diversity rationale. It stated that employers could not lawfully pursue diversity by using race as a tiebreaker that resulted in the loss of the plaintiff’s job, even if Title VII were to accept diversity as a non-remedial rationale. The court concluded that the school board’s policy “unnecessary[il]y trammel[ed]” the interests of the white employee by imposing upon her the “severe” cost of

---

130. See Kalev et al., *Best Practices*, *supra* note 35, at 598.

131. See generally David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L. Q. 921 (1996).

132. Dobbin & Kalev, *Why Firms Need Diversity Managers and Task Forces*, *supra* note 63, at 191–92; see also *id.* at 193 (“Many more companies have affirmative action plans than diversity managers or committees. But affirmative action plans have, in effect, been gutted since the 1980s and replaced with more ambiguous diversity mission statements in many companies. They no longer play the driving role in equal opportunity efforts that they were reputed to play in the 1970s.”).

133. 91 F.3d 1547, 1549–50 (3d Cir. 1996).

134. *Id.* at 1557–58.

termination.<sup>135</sup> In her dissent, Judge Sloviter criticized the majority for deciding, in effect, that Title VII did not permit the board to break a tie between two equally qualified candidates by considering how each might contribute to the school district's faculty diversity; this position seemed to require that such decisions be resolved "through a coin toss or lottery."<sup>136</sup>

*Taxman* foretold the dominant trend regarding the treatment of affirmative action in Title VII cases. Lower courts continue in the present day to uphold affirmative action programs under the *Weber-Johnson* doctrine.<sup>137</sup> However, some courts have held that an employee's status may not provide the sole basis for the employer's assignment and may not serve as a dispositive "tiebreaker."<sup>138</sup> Courts generally require proof of the remedial purpose for which the plan was implemented.<sup>139</sup> Finally, decisions barring the use of so-called "ad hoc" plans have required the employer to respond to a finding of statistical imbalance with a formal plan.<sup>140</sup> These cases show a trend to continue to apply *Weber* and *Johnson*, but to do so in a more restrictive form—one that tightens rather than relaxes the requirement that a plan serve a remedial function and one that polices the design of plans as if they were required to conform to the constitutional standard of narrow tailoring.

*Ricci* has played an important role in furthering this trend. First, *Ricci* indirectly undermines the diversity rationale in employment cases. Before the district court, the *Ricci* plaintiffs had argued that a desire to promote racial diversity in violation of Title VII and the Equal Protection Clause motivated the City of New Haven's refusal to certify the results of its promotion exam.<sup>141</sup> The district court in fact referred to this contention as the "real crux of [the] plaintiffs' argument."<sup>142</sup> The district court had rejected that argument because, under circuit precedent, a motivation to comply with the statute

---

135. *Id.* at 1564.

136. *Id.* at 1567 (Sloviter, J., dissenting).

137. *See, e.g.,* *Shea v. Kerry*, 961 F. Supp. 2d 17 (D.D.C. 2013) (granting defendant's motion for summary judgment based on the validity of the challenged affirmative action plan under *Weber-Johnson*); *see also, e.g.,* *Sharkey v. Dixie Elec. Membership Corp.*, 262 Fed. Appx. 598 (5th Cir. 2008).

138. *Hill v. Ross*, 183 F.3d 586, 588–89 (7th Cir. 1999) (interpreting the facts of *Johnson* as, in effect, abrogating the holding of *Weber* by requiring that status be considered as one factor among many); *Oerman v. G4S Gov't Solutions, Inc.*, 2012 WL 3138174, at \*8–9 (D.S.C. July 17, 2012) (citing *Hill* for this proposition and invalidating the defendant's affirmative action plan because it used race as a decisive "tiebreaker"); *see also Shea*, 961 F. Supp. 2d at 40 (noting courts' preferences for "flexible, case-by-case approaches over rigid quota systems").

139. *See, e.g.,* *Hammon v. Berry*, 826 F.2d 73, 74–75 (D.C. Cir. 1987) (concluding that *Johnson* did not eliminate the requirement that a valid affirmative action plan must be based upon a "predicate of discrimination"); *Shea*, 961 F. Supp. 2d at 28 (same).

140. *See, e.g.,* *Lilly v. City of Beckley*, 797 F.2d 191, 195 (4th Cir. 1996); *see also Oerman*, 2012 WL 3138174, at \*8.

141. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 150 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 557 U.S. 557 (2009).

142. *Id.* at 156–57.

could not be a discriminatory purpose.<sup>143</sup> The Supreme Court did not take up the diversity rationale. Instead it held that the city's motivation to withhold certification because of the test's racially disproportionate impact rendered its decision disparate treatment, because it simply did not matter whether the city's motivation was "well intentioned or benevolent."<sup>144</sup> After *Ricci*, race-based decisions clearly require justification to satisfy Title VII regardless whether they were motivated by a desire to achieve legal compliance or to promote diversity.

Second, *Ricci* has had a more direct impact on Title VII's affirmative action doctrine. *Ricci* imposed its strong-basis-in-evidence test on acts of disparate treatment implemented to avoid unlawful disparate impact.<sup>145</sup> The irony of *Ricci* is that, even though the city implemented no facial racial preference, the strong-basis-in-evidence test establishes a higher standard than the one *Weber* and *Johnson* established for voluntary affirmative action. In other words, if an employer awards a position using an explicit racial preference, it will be judged under a more "lenient standard that preserves its discretion and does not require proof of past discrimination";<sup>146</sup> but, if an employer refuses to honor the results of an employment examination that produced a racially disparate impact, it must justify that decision by providing such proof.<sup>147</sup>

In *United States v. Brennan*,<sup>148</sup> the Second Circuit attempted to draw a new line of demarcation between *Ricci* and *Weber-Johnson*, holding that affirmative action doctrine does not apply to awards of retroactive seniority to minority and female workers used to settle disparate impact claims. The court concluded, contrary to prior circuit law, that *Weber* and *Johnson* apply exclusively "to circumstances in which an employer has undertaken a race- or gender-conscious affirmative action plan designed to benefit *all* members of a racial or gender class in a forward-looking manner."<sup>149</sup> *Ricci* applies, according to *Brennan*, whenever "the employer provides individualized race-

---

143. *Id.* at 157–60 (discussing cases, and concluding that the city's "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent"); see also *Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999) ("[T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.").

144. *Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009).

145. *Id.* at 583.

146. Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 240 (2014).

147. Rich, *Against Prejudice*, *supra* note 37, at 50–51; Rich, *One Law of Race?*, *supra* note 146, at 240–42.

148. 650 F.3d 65 (2d Cir. 2011).

149. *Brennan*, 650 F.3d at 72; see also *id.* at 102 (clarifying that *Ricci* applies when the employer "throws out the results" of a previously established procedure or practice to make an individualized grant of employment benefits).

or gender-conscious benefits as a remedy for previous disparate impact.”<sup>150</sup> In other words, *Ricci* carves away from *Weber* and *Johnson* cases in which the employer responds with race- or sex-based assignments to systemic defects in its own practices in order to shield particular employees from the adverse effects of those practices.

*Brennan* advances a rule that may be of great consequence to the legality of diversity management under Title VII: employment practices that are intended to equalize employment opportunity by correcting employers’ class-disadvantaging mistakes must meet the more onerous strong-basis-in-evidence test. This rule leaves preemptive practices (e.g., implementation of a flawed test) untouched if they proceed through race neutral means.<sup>151</sup> An employer who wishes to correct past denials of opportunity to an individual employee by granting that employee new opportunities risks tripping the *Brennan* rule. Not once, however, does *Brennan* utter the word “diversity.”

The diversity rationale has gained some traction in constitutional employment cases, as courts have recognized that law enforcement in particular may have special operational needs for racial diversity. For example, in *Petit v. City of Chicago*,<sup>152</sup> the Seventh Circuit held that the city’s police department “had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.”<sup>153</sup> *Petit* relied largely on *Reynolds v. City of Chicago*,<sup>154</sup> in which the same circuit court concluded that the department’s “operational needs” justified the promotion of a Latino officer to the rank of lieutenant because such supervisory personnel “set the tone for the department” and act as “ambassadors” to the city’s residents.<sup>155</sup> *Petit* also analogized the city’s police department to the University of Michigan Law School, the defendant in *Grutter*, stating that “there is an even more compelling need for diversity

---

150. *Id.* at 72; *see also id.* at 104 (“It would be strange to make an employer be subject to *Ricci* when it promises a set of employment benefits to test-passers but then unilaterally decides not to give the benefits out, while at the same time allowing that employer to avail itself of the more easily satisfied *Johnson/Weber* standard when it gives out another set of benefits, such as seniority rights that will lead to the aforementioned benefits.”).

151. The Second Circuit later clarified that *Ricci* does not preclude an employer from redesigning a facially neutral test to avoid future disparate impact. *See Maraschiello v. City of Buffalo Police Dep’t*, 709 F.3d 87 (2d Cir. 2013) (holding that *Ricci* did not preclude the department from redesigning its promotion test to minimize racially disparate impacts, even if the plaintiff had established his promotion eligibility under a prior test, because no positions were in fact open until after the redesigned test was implemented and plaintiff refused to take that test); *see also Rich, Against Prejudice, supra* note 37, at 77 (discussing the importance of the timing of the defendant’s decision to the result in *Ricci*).

152. 352 F.3d 1111 (7th Cir. 2003).

153. *Id.* at 1115.

154. 296 F.3d 524 (7th Cir. 2002).

155. *Id.* at 529–30.

in a large metropolitan police force charged with protecting a racially and ethnically divided major American city.”<sup>156</sup>

The rationale has been limited in its application, however. For example, the Third Circuit declined to apply the operational needs rationale to race-based lateral transfers made by the City of Newark’s fire department because the department offered no evidence to support the conclusion that it had a diversity need.<sup>157</sup> Similarly, in *Patrolmen’s Benevolent Association v. New York*,<sup>158</sup> the Second Circuit held that New York City’s police department could not justify the assignment of black police officers to a police precinct shortly after formerly assigned officers violently sexually assaulted a black criminal suspect. The city’s reliance on “common knowledge” regarding race relations in policing failed to establish a factual basis for its need that rose above the level of mere stereotyping.<sup>159</sup> Thus, even if “operational needs” has become synonymous with “diversity” in a limited number of cases, it is a rationale heavily circumscribed in the law enforcement context, where public safety concerns have justified the government’s need.

2. Diversity and discrimination. Under Title VII, the fundamental stumbling block for the diversity rationale is its instrumental nature. A firm seeking to justify status-based decisions by expressing its motivation to exploit the value of workforce diversity for financial gain has not stated a purpose that aligns with the equal opportunity commitments of the statute. True, *Grutter*’s diversity rationale embraces a similarly instrumental structure, but *Grutter* applied that rationale to public university admission—an individual good with recognized public benefit. Private employers serve the interests of their shareholders, and their employment decisions generally

156. *Petit*, 352 F.3d at 1114–15. See also *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (upholding racial preferences in hiring of correctional officers for penal bootcamp, because black inmates were believed to be willing “to play the correctional game of brutal drill sergeant and brutalized recruit” only if there were “some blacks in authority in the camp”); *Talbert v. City of Richmond*, 648 F.2d 925, 930 (4th Cir. 1981) (recognizing that “the operational needs of an urban police department serving a multi-racial population” may require consideration of race in the hiring of police officers). See also *Lomack v. City of Newark*, 463 F.3d 303, 310 n.8 (3d Cir. 2006) (“In a sense, *Grutter* could itself be characterized as an ‘operational needs’ opinion. The Supreme Court essentially found that law schools have an operational need for a diverse student body in order to effectively achieve their educational mission.”); *Dietz v. Baker*, 523 F. Supp. 2d 407, 418–19 (D. Del. 2007).

157. *Lomack*, 463 F.3d at 310. The circuit court also sharply distinguished a university’s educational need for diversity from the fire department’s “mission,” which was “the control, fighting and extinguishment of any conflagration which occurs within the city limits.” *Id.* (quoting the city’s ordinances) (internal quotation marks omitted). Interpreting *Grutter* narrowly, *Lomack* concluded that “*Grutter* does not stand for the proposition that the educational benefits of diversity are *always* a compelling interest, regardless of context” but “for the premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.” *Id.*

158. 310 F.3d 43 (2d. Cir. 2002).

159. *Id.* at 52–53; see also *Reynolds*, 296 F.3d at 526 (concluding that reliance on the operational needs defense requires substantiating evidence of need because “[a]rgument in so sensitive an area of human relations must not . . . be allowed to draw on ‘common sense,’ which might be inflected by stereotypes”).

do not require the allocation of a similarly unimpeachable good. Rather, they range across the spectrum of employment related matters, and decisions to allocate positions within a firm do not necessarily promise the award of equal positions to all recipients.

An employer may believe that it will avert legal scrutiny by avoiding traditional affirmative action. However, employers' efforts to justify status-based hiring considerations for diversity-related reasons that reflect the value of an employee's status to the firm's bottom line have failed under employment discrimination law.<sup>160</sup> For example, in *Ferrill v. Parker Group, Inc.*,<sup>161</sup> the Eleventh Circuit held that a marketing firm's practice of "race-matching" its employees to the recipients of "get-out-the-vote" calls violated Title VII and Section 1981.<sup>162</sup> An African American plaintiff brought the case—not a white worker seeking access to those jobs. The plaintiff successfully argued that the practice constituted discrimination because it resulted in her termination when, following the end of the election season, the employer no longer had a need to make race-matched calls. The circuit court agreed that a showing of animus was not required.<sup>163</sup> The plaintiff had shown that the employer's discrimination was "because of" her race by revealing the employer's instrumental, business-related assumption "that black voters will more readily identify with and be sympathetic to 'black voices'" and that white voters will respond similarly to "'white voices.'"<sup>164</sup> Likewise, in *Hall v. Lowder Realty Co.*,<sup>165</sup> a federal district court held that an employer's practice of assigning a black real estate agent to black buyers and properties located in predominantly black neighborhoods was illegal under Section 1981 and the Fair Housing Act of 1968.<sup>166</sup>

---

160. As discussed above, the diversity rationale has achieved some traction in constitutional equal protection challenges to race-based hiring decisions in the area of law enforcement, where some courts have recognized race as fulfilling an "operational need" of law enforcement to hire officers in policing and corrections who share an affinity with either citizens or prisoners in their working sphere. *See supra* notes 152–159 and accompanying text.

161. 168 F.3d 468 (11th Cir. 1999).

162. *Id.* at 474–75.

163. *Id.* at 473. The employer admitted that its "assignments of 'get-out-the-vote' calls and scripts were made on the basis of race and that [its] employees were segregated on the basis of race." *Id.* at 472.

164. *Ferrill v. Parker Grp., Inc.*, 967 F. Supp. 472, 474 (N.D. Ala. 1997).

165. *Hall v. Lowder Realty Co.*, 160 F. Supp. 2d 1299 (M.D. Ala. 2001).

166. *Id.* at 1318. One can only wonder how many unreported cases have followed this pattern. For example, in a highly publicized enforcement action, the EEOC has successfully challenged Walgreens's practice of assigning black managers to oversee stores located in predominantly black neighborhoods. *See Tucker v. Walgreens*, No. 05-cv-440-GPM (S.D. Ill. Mar. 24, 2008); Ann Brown, *Class-Action Lawsuit Against Walgreen Co. Finalized*, BLACK ENTERPRISE (Apr. 8, 2008), <http://www.blackenterprise.com/uncategorized/class-action-lawsuit-against-walgreen-co-finalized/>. The practice precluded black employees from competing fairly for positions managing more potentially lucrative stores in nonminority neighborhoods. The EEOC obtained a consent decree in the case that enjoined the practice and subjected the company to continued monitoring and mandatory revision of its promotion and training policies. *See Consent Decree, Tucker v. Walgreens*, No. 05-cv-440-GPM (S.D. Ill. Mar. 24, 2008).

The aforementioned cases go to the heart of the business case for diversity. In each, the employer attempted to extract commercial value from the social statuses of individual employees, each time seeking to serve its customer base through a strategy of race matching. The results should not come as a surprise. Title VII forbids even rational status-based discrimination. Attaching a business value to race makes these decisions no less discriminatory.

The outcome of these cases poses no serious loss to the advancement of equal employment opportunity. The sociology illustrating how diversity management best contributes to equal opportunity has concluded that structural reforms that include accountability measures outperform even affirmative action plans. In keeping with this insight, over the last few decades, consent decrees resolving large-scale employment discrimination litigations have frequently included measures such as diversity task forces and diversity officers as essential means of effectuating and tracking the inclusion of groups who have been the victims of discrimination.<sup>167</sup> As discussed above, most diversity management practices do not operate like traditional affirmative action programs in that they typically do not involve the allocation of positions based on status preferences. The question remains: *How do courts respond to diversity management practices that are at most indirect or uncertain with regard to their impact on hiring and promotion decisions?*

Here, the answer is surprising. Again, following the tenets of diversity management, a firm may believe that it implements a policy that does not apply status preferences in employment decisions but does establish diversity benchmarks and methods for enforcing accountability. In limited circumstances, courts have accepted this view.<sup>168</sup> All too frequently,

---

167. See, e.g., *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 687–88 (N.D. Ga. 2001) (entering settlement agreement that included forming a four-year independent task force to oversee reform of the company’s personnel practices); Stipulation and Settlement Agreement at ¶¶ 6, 9, *Roberts v. Texaco, Inc.*, No. 94-CIV-2015 (CLB), (S.D.N.Y. Jan. 3, 1997) ECF No. 76 (entering settlement agreement that established a five-year Equality and Tolerance Task Force); *United States v. City of New York*, 308 F.R.D. 53, 61 (E.D.N.Y. 2015) (the city agreed to create positions of Chief Diversity and Inclusion Officer and Diversity Advocate to promote diversity within its fire department); see also Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1324 (2003) (agreeing that “[d]iversity task forces have become one of the primary means of implementing and enforcing settlement agreements” but questioning whether these task forces have provided effective oversight).

168. See *supra* note 156 (discussing cases in which courts have recognized an “operational need” for diversity among police officers); see also *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 186–87 (D. Del. 2001) (refusing to interpret as evidence of discrimination, absent evidence of causation, the employer’s “diversity awareness programs,” which the court praised as “necessary to remedy past discrimination against minorities and women” and as “ensur[ing] that companies such as [the defendant] have the ability to hire a workforce that will enable it to effectively service an increasingly diverse customer base”).

however, courts have interpreted evidence of an employer's pro-diversity efforts as probative of *reverse* discrimination.

One method of doing so is simply to collapse the distinction between diversity plans and traditional affirmative action plans. For example, in *Decorte v. Jordan*, the Fifth Circuit held that a "cultural-diversity report" that recommended the racial diversity of the New Orleans district attorney's office "should be more reflective of the Parish's population" constituted an affirmative action plan, even though the report provided for no express quotas or preferences.<sup>169</sup> In *Humphries v. Pulaski*, the Eighth Circuit held that a school district's policy of "pairing assistant principals with principals of different races," if true, would require justification as a valid affirmative action plan.<sup>170</sup> Similarly, the Eleventh Circuit has held that a white male plaintiff had survived summary judgment of his Title VII, § 1981, and state law civil rights claims because the employer's "Diversification Plan" constituted direct evidence of discrimination.<sup>171</sup> The circuit court labeled the plan an "affirmative action plan" notwithstanding the absence of any evidence that the plan included status preferences or that government had relied on the plan when it denied the plaintiff's employment application for a position with its Fire and Rescue Division.<sup>172</sup> As if to explain why the mere articulation of benchmarks should be treated as affirmative action, the court recounted testimony from the division's chief that, by including benchmarks and requiring the division to provide diversity reports, the board of commissioners had "pressured" the division "to hire more minorities."<sup>173</sup>

Even when diversity management practices could not be labeled as affirmative action, courts have still found them probative of discrimination. This has been true even when the plaintiff has failed to establish a causal nexus between any specific diversity practice and the challenged employment decision. For example, in *Iadimarco v. Runyon*,<sup>174</sup> the Third

---

169. See *Decorte v. Jordan*, 497 F.3d 433, 440–41 (5th Cir. 2007).

170. *Humphries v. Pulaski* Cty. Special Sch. Dist., 580 F.3d 688, 696 (8th Cir. 2009). The school district's case was weakened by evidence that it "use[d] biracial committees to conduct interviews . . . and to select candidates for the assistant principal positions" and that its job postings notified applicants that it would make "SPECIAL EFFORTS TO EMPLOY AND ADVANCE WOMEN, BLACKS, AND DISABLED PERSONS." *Id.* at 693. See also *Ritchie v. Napolitano*, 196 F. Supp. 3d 54 (D.C.D.C. 2016) (holding that the defendant's admission that the decisionmaker had "considered the racial and gender diversity of applicants" for a position that was denied to the white male plaintiff was itself direct evidence of race discrimination).

171. *Bass v. Bd. of Cty. Comm'rs*, 256 F.3d 1095, 1112–13 (11th Cir. 2001). That plan had been designed to eliminate discrimination and to ensure that the workplace would be "generally reflective of the county's diverse population." *Id.* at 1112.

172. *Id.* at 1113. See also *id.* at 1112 (explaining that the plan set hiring benchmarks and required that the county's various divisions "suspend the hiring process when no qualified minority or female applicant was available and 'provide written justification to the EEO/Professional Standards Department stating job related reasons why diversity cannot be obtained via the particular hiring process.'").

173. *Id.* at 1106–07.

174. 190 F.3d 151 (3d Cir. 1999).

Circuit held that a white male plaintiff survived summary judgment of his Title VII claim when he succeeded in raising a reasonable inference that he was denied a promotion, in favor of a black female applicant, because a supervisor presiding over the decision “wanted to hire a minority applicant . . . to diversify the workforce.”<sup>175</sup> In reaching this conclusion, the court explained that it must weigh the totality of the evidence “in light of [a supervisor’s] diversity memo.”<sup>176</sup> The memo prevailed upon the firm’s employees “to ensure that very serious consideration is given to the issue of diversity,” and it argued that “[t]he management teams in our plants should reflect the composition of our workforce and communities if we are to benefit from the contributions that minorities, women, and ethnic groups can bring to our decision making processes and the social harmony that this will instill in our work environment.”<sup>177</sup> The case is significant for present purposes because, like so many other cases, the court might have relied only on evidence regarding the applicant’s superior qualifications or irregularities in the employer’s decision-making process. Instead, it chose to highlight the employer’s diversity efforts as a means to explain why this other evidence might point to discrimination.<sup>178</sup>

Although some courts have required a causal nexus between diversity practices and the challenged employment action,<sup>179</sup> others—including

175. *Id.* at 154–55.

176. *Id.* at 164.

177. *Id.* at 155.

178. *See, e.g.,* *Bass v. Bd. of Cty. Comm’rs*, 256 F.3d 1095, 1113 (11th Cir. 2001) (“While the mere existence of an affirmative action plan does not constitute direct evidence of discrimination, the existence of a plan combined with other circumstances of the type present in this case make available to a jury the reasonable inference that the employer was acting pursuant to the plan despite statements to the contrary from the decisionmakers involved.”); In *Iadimarco*, the Third Circuit reached a similar conclusion, even though it also concluded that a reverse discrimination plaintiff need not satisfy the requirement of establishing so-called “background circumstances” suggesting that the defendant is that “unusual” sort of employer that might discriminate against non-minorities. 190 F.3d at 162–163. Courts recognizing the “background circumstances” requirement have rather easily concluded that evidence of diversity efforts satisfies the requirement. *See, e.g.,* *Sutherland v. Michigan Dep’t of Treasury*, 344 F.3d 603, 615–16 (6th Cir. 2003) (interpreting evidence that the percentage of blacks among the employer’s personnel substantially exceeded their percentage in the labor pool as “background circumstances”); *Harel v. Rutgers*, 5 F. Supp. 2d 246, 265 (D.N.J. 1998) (internal and external pressure to promote diversity may constitute “background circumstances”).

179. *See e.g.,* *Jones v. Bernanke*, 493 F. Supp. 2d 18 (D.D.C. 2007) *aff’d on other grounds*, 557 F.3d 670 (D.C. Cir. 2009) (holding that the employer’s implementation of a diversity awareness policy and diversity training did not establish a prima facie case of discrimination due to the lack of a causal nexus to the challenged adverse promotion decision); *see also* *Mlynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) (holding that the employer’s use of a competitive recruiting policy intended to generate a diverse pool of qualified applicants did not establish that it denied the position to the white male plaintiff due to discrimination); *see also* *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 185–86 (D. Del. 2001) (“Merely producing anecdotal evidence regarding the aspirational purpose of an employer’s diversity policy, and its intent to ameliorate any underutilization of certain groups, is not sufficient [because the plaintiff must show] . . . that such policies were ‘actually relied upon’ in deciding to terminate his employment.”).

*Iadimarco*—have not. For example, the Tenth Circuit has held that an investigator’s notation in a form questionnaire describing applicants as “minorities” may be probative of discrimination, despite the investigator’s having had no hiring authority.<sup>180</sup> In *Rudin v. Lincoln Land Community College*,<sup>181</sup> the Seventh Circuit extended this approach one step further. The college had argued before the district court that it should be permitted, according to *Grutter*, to use race-conscious means to increase the diversity of its faculty.<sup>182</sup> On appeal, the college abandoned that argument. Instead, it defended its decision to add an African American male applicant late into the applicant pool for a tenure-track position by arguing that this action was not evidence of racial bias in the actual hiring decision.<sup>183</sup> The circuit court, however, did not accept this distinction. Instead, the court read the hiring decision in light of other evidence, including the college’s policy of seeking to ensure that it hired faculty from a diverse pool, the statements by certain college officials indicating their awareness that the college sought more faculty diversity, and the college’s prior invocation of *Grutter* before the district court.<sup>184</sup> Decisions like *Iadimarco* and *Rudin* question the serviceability of any clear distinction between diversity management and discrimination because they read efforts to diversify the workplace and even, in cases like *Rudin*, to diversify an applicant pool as evidence of a discriminatory hiring decision. What is more, they threaten the possibility of an existential crisis for diversity management by demonstrating that, once talk of diversity enters the workplace, diversity provides the very language in which claims of discrimination are now articulated.

These cases also place firms and their minority and female workers in a peculiar bind. The Supreme Court has long recognized that evidence that an employer implemented policies to increase the percentage of women and minorities or to minimize harassment or discrimination against women and minorities tends to defeat a showing of pretext in race- and sex-based discrimination cases. Lower courts continue to follow this rule.<sup>185</sup> The cases discussed above, however, show that identical policies and practices may be

---

180. *McGarry v. Board of Cty. Comm’rs*, 175 F.3d 1193, 1199–1200 (10th Cir. 1999).

181. 420 F.3d 712 (7th Cir. 2005).

182. *Id.* at 721.

183. *Id.*

184. *Id.* at 721–24.

185. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (holding that, at the pretext stage, “the employer must be allowed some latitude to introduce evidence which bears on his motive,” including evidence that the employer’s “work force was racially balanced or that it contained a disproportionately high percentage of minority employees). Lower courts continue to adhere to this instruction. *See, e.g., Whethers v. Nassau Health Care Corp.*, 956 F. Supp. 2d 364 (E.D.N.Y. 2013) (concluding that the addition of a new diversity office and director and the dissemination of diversity training weighed against an inference of discrimination for a black plaintiff); *see, e.g., Hawkins v. Cty. of Oneida*, 497 F. Supp. 2d 362 (N.D.N.Y. 2007) (concluding that dissemination of diversity training weighed against black plaintiff’s claim of statutory and constitutional violations).

used as evidence of discrimination in reverse discrimination cases brought by men or whites. In those cases, courts have interpreted such evidence to neutralize the very proof problem that often destroys the claims of female and minority plaintiffs. A disparate treatment plaintiff must establish that her status was the cause of her injury—the adverse employment action that was taken against her. Because many diversity management practices do not directly involve the taking of a tangible employment action, the causal connection between the practice and a cognizable injury may be difficult to establish, even if the plaintiff does suffer an adverse action at a later time.<sup>186</sup> Again, cases such as *Rudin* and *Iadimarco* neutralize this problem for white male plaintiffs by interpreting the employer’s diversity management workplace reforms—which the employer might otherwise reasonably have relied upon as compliance efforts in cases brought by women or racial minorities—as evidence of discriminatory motivation, regardless whether those efforts possess any causal relationship to the challenged employment action.

Direct comparison with non-reverse discrimination cases is instructive. The Fifth Circuit has held that evidence that a supervisor told an African American plaintiff to “find a black mentor” was no more than a stray remark and not evidence that an adverse promotion decision was discriminatory.<sup>187</sup> The Eighth Circuit has held that even systematic denials of effective mentoring, supervision, and training to a junior attorney because of her race did not give rise to a Title VII violation because the denials themselves were not adverse employment actions.<sup>188</sup> In one case, the plaintiff, a Native American woman, alleged several instances of disparate treatment involving not only mentoring and training but also oppressive monitoring, unfavorable work assignments, and undesirable transfers. The court found that, even though much of the treatment was “harsh and unprofessional,” it could not be aggregated to show an adverse employment action.<sup>189</sup> These cases diverge sharply from cases like *Iadimarco* and *Rudin*, in which circuit courts found evidence of diversity policies and recruitment practices to be probative of discrimination even without a direct causal connection to the challenged employment action.

These cases suggest that, if either employer had provided mentoring or supervision based on a minority plaintiff’s race, and that mentoring or supervision had proven professionally damaging or otherwise unequal to the standard provided to white employees, Title VII would not have been violated. To provide bad mentoring—like providing no mentoring—because of race would not constitute an adverse employment action and would prove

---

186. See *supra* notes 55–57 and accompanying text.

187. See *Scales v. Slater*, 181 F.3d 703, 712 (5th Cir. 1999).

188. *Higgins v. Gonzales*, 481 F.3d 578, 585–86 (8th Cir. 2007).

189. *Id.* at 588.

difficult to connect to downstream employment outcomes. A white plaintiff, however, would quite likely be able to use evidence of mentoring decisions that reflected considerations of race—or even that the employer was especially interested in providing mentoring to minority employees—to show an employer’s discriminatory motivation. This would appear to be so even if the plaintiff could show neither that the employer’s mentoring practices materially advantaged minority employees nor that they disadvantaged him directly.

In cases brought by minority plaintiffs, employment discrimination law has been held to reach decisions organizing work by race when materially adverse outcomes were tied directly to those decisions. For example, in *Ferrill and Hall*, the employers’ assignment of black workers to service black clientele materially harmed the plaintiffs’ compensation and advancement opportunities. But *Ferrill and Hall* do not address situations where the impact of decisions organizing work may be more indirect or may evolve over a longer time horizon. Once again, law enforcement cases offer an interesting alternative approach.

Repeatedly, in cases in which minority officers were transferred or assigned work because of their race, courts have found that increased risk and lost opportunity associated with such assignments satisfied the requirement of an adverse employment action. For example, in *Perez v. FBI*,<sup>190</sup> a federal district court found that federal agents selected for undercover work because of their race were due adequate compensation and proper credit toward future promotion as recompense for lost opportunities. In *Bridgeport Guardians, Inc. v. Delmonte*,<sup>191</sup> another district court held that the city’s police department had discriminated against black officers by denying them assignments to specialized divisions that offered “greater opportunities to gain experience and skills that contribute to job satisfaction and to the possibility of advancement.”<sup>192</sup> The department disproportionately assigned blacks to “high-crime, high-risk areas,” where their duties were “more demanding” and working conditions “more onerous than white officers[’],” based on stereotypical assumptions about their racial affinity with residents in those areas.<sup>193</sup> It also paired patrol officers based on race to accommodate the “preferences” of other (i.e., white) officers.<sup>194</sup> Finally, and most recently, the Second Circuit held that lateral transfers of black officers to fill vacated positions in a troubled police precinct, where prior officers had recently physically and sexually assaulted a black detainee, violated Title VII. The court, in *Patrolmen’s Benevolent Association v. City of New York*, ruled that

---

190. 707 F. Supp. 891 (W.D. Tex. 1988).

191. 553 F. Supp. 601 (D. Conn. 1982).

192. *Id.* at 607.

193. *Id.* at 610–11.

194. *Id.* at 612.

the operational needs defense “does not . . . give a police department carte blanche to dole out work assignments based on race if no such justification is established.”<sup>195</sup> As in the prior cases, the court found that proof of a police department’s operational needs required more than mere reliance on racial stereotyping.<sup>196</sup>

Together these cases stand for this principle: if the employer organizes work on the basis of race to the detriment of employees directly subject to its policies, then the employer must be held liable for denials of equal employment opportunity that flow from those discriminatory assignments. They express a logic that is adaptable beyond the law enforcement and civil service contexts. But, as evidenced by *Ferrill* and *Hall*, courts have adopted this logic in only private employment cases involving the most obvious forms of material harm to plaintiffs and have overlooked opportunities to apply the same logic to cases in which decisions organizing work produce discriminatory effects downstream. If workers are to be able to use employment discrimination law to force employers to invest equally in their individual capacities for growth and advancement, the doctrine must be reformed to highlight the relationship between the organization of work and the distribution of tangible employment opportunities.

### III.

#### REDEFINING DISCRIMINATION TO ALIGN DIVERSITY AND EQUAL OPPORTUNITY

The preceding discussion illustrates that current disparate treatment doctrine has failed to address the several challenges raised by diversity management practices. When an employer classifies its employees by race or sex, that employer commits disparate treatment and will bear liability if that disparate treatment resulted in an adverse employment action. Title VII’s affirmative action doctrine offers one approach to this problem. It imposes a remedial requirement upon status-based allocations of title or position. Conversely, if the employer acts in furtherance of its business objectives, the statute strictly limits those situations in which status may be considered a proper employment qualification. Diversity management, however, is most often characterized by intermediate practices that fall within no existing doctrinal category. These practices frequently classify employees by status for avowedly nondiscriminatory reasons, either egalitarian or profit-seeking, yet they may operate to constrain opportunity and impose new employment

---

195. *Patrolmen’s Benevolent Ass’n v. City of New York*, 310 F.3d 43, 52 (2d Cir. 2002).

196. *Id.* at 53. *See also Knight v. Cty. of Nassau*, 649 F.2d 157, 162 (2d Cir. 1981) (holding that the civil service commission violated Title VII by involuntarily transferring a black employee to its Recruitment Division, because its decision was based “on a racial stereotype that blacks work better with blacks and on the premise that [the plaintiff’s] race was directly related to his ability to do the job”).

adversities upon certain individuals. For this very reason, an employer's use of status in the organization of work should be held to the standard of equal opportunity. At the same time, the concept of equal opportunity must be adapted to meet the unique challenges of diversity management and its particular egalitarian aspiration: that employers may, in certain circumstances, treat individual workers differently based on their status in order to provide each worker with the opportunities that will best support her performance potential and her professional success.

#### A. Diversity's Contribution to Equal Opportunity

*Grutter* provides no useful model for the governance of diversity management practices. By defining diversity as a compelling interest, *Grutter* positions diversity conceptually as an *exception* to equal protection, not a *fulfillment* of equal protection. It is the mechanism of affirmative action, for which diversity is merely a justification, that aligns *Grutter's* diversity rationale with integration and equal opportunity.<sup>197</sup> By contrast, the managerial concept of diversity eschews affirmative action and separates the organizational benefits of diversity from modes of employee selection.<sup>198</sup> To be fully realized at work, diversity management's potential "upside" requires management and investment over time. It thus reflects the managerial perspective that a worker is an investment, held over a period, which one hopes will appreciate in value.

In prior work, I proposed to improve upon *Grutter's* diversity rationale by arguing that "the law's reasons for endorsing diversity measures" should be decoupled from "organizational objectives."<sup>199</sup> Instead, the pursuit of diversity should serve as a defense to claims of discrimination only when an organization's practices "provide equal opportunity for individual growth and achievement, regardless of a person's status."<sup>200</sup> In the particular context of the workplace, an employer's responsibility to provide equal opportunity to its workers includes an obligation to invest equally in each worker's professional growth and development. Thus, I propose to develop further this principle in relation to work in the following way: an employer may avoid liability for disparate treatment even when a status-based diversity practice produces an adverse employment action provided that the employer can demonstrate that the practice was part of the employer's effort to invest

---

197. I have previously acknowledged that one may read *Grutter* to imply either that integration or a selection mechanism capable of producing an integrated student body is necessary to confer legitimacy onto elite public universities. See Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1129. However, *Grutter* does not require that a program *successfully* integrate or address what degree of integration might be necessary to be deserving of constitutional endorsement.

198. See Part I.A.

199. Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1121.

200. *Id.*

equally in the growth and advancement of all of its workers. In other words, an employee who claimed that a diversity management practice resulted in an adverse employment action could not prove her claim if the practice granted her equal investment in the development of skills or qualities germane to the challenged employment action. Conversely, an employer will be liable for disparate treatment discrimination if the consequence of diversity management practices is that they produce adverse employment actions by underinvesting in the growth and advancement of particular workers because of their status.

Because so many diversity management practices tend to organize work around employee status without necessarily allocating job titles or positions, the concept of investment is necessary to address the connection between such practices and downstream adverse effects. Diversity management practices often concern intermediate matters, such as work assignments, skill development, and networking opportunities that may have either positive or negative effects on workers subjected to those practices. The effects of diversity management—its successes and its failures, for business performance and for equal opportunity—must be measured over time. The concept of investment reflects this concern that ultimate employment actions and the availability of future opportunities derive from multiple employment decisions aimed at a particular worker. Without the concept of investment, an employer might be free to use employee status to allocate opportunities that do not themselves rise to the level of adverse employment decisions. Nevertheless, these opportunities stack the deck for or against particular workers, penalizing some workers with adverse decisions that followed predictably from the inferior cards they were dealt.

“Investment,” as used here, encompasses the full range of employment decisions that might contribute to an employee’s professional development, achievement of performance potential, or career trajectory.<sup>201</sup> Such decisions may include, for example, work assignments that confer experience, exposure to clients, and professional connections within the firm. They may also include training, feedback, mentoring, networking, and business development opportunities.

Human capital investment decisions are sometimes seen as particularly risky, because the investment period is often long and a rate of return is difficult to predict.<sup>202</sup> To manage the risk associated with human capital investment decisions, a firm has an incentive to ration its resources by allocating resources that it believes are career advancing to individuals “who stand out relative to their peers.”<sup>203</sup> Diversity management strategies may

---

201. See *supra* notes 21–29 and accompanying text (discussing diversity management as a strategy of human capital investment).

202. See Bae et al., *supra* note 22, at 18.

203. Blundell, *supra* note 21, at 10.

reformulate calculations of risk and reward, but they will not necessarily eliminate inequities in the allocation of resources and opportunities. For example, when—as is too often the case—minority workers “receive little mentoring, even a minority with a very high initial ability may be passed over in favor of a less initially able, but better mentored majority type.”<sup>204</sup> When initial ability is scarce across groups, regardless of type, an employer will “shift the bias toward the minority type,” in order to “exploit the talents” of all worker types within a diverse workforce.<sup>205</sup> Under those conditions, diversity management may emerge as an attractive strategy to promote future organizational success. When, however, a firm perceives investment in majority type workers to be its “best bet,” it is likely to continue to favor such workers by providing them with its best resources.<sup>206</sup> This can occur even alongside diversity management practices, to the extent that those practices do not seriously disrupt the allocation of superior resources to workers who would traditionally be identified as superior investments.

One must not forget, in addition, that diversity management decisions are business decisions, and so—even though they intersect with the goal of equal opportunity by influencing the distribution of human capital—they may nevertheless be undertaken with virtually no consideration of their practical effect upon an individual’s professional development. For example, a firm might construct cross-functional work teams to bring together diverse skill sets and perspectives to resolve particular commercial problems, with the consequence that women and minorities on these teams benefit from the opportunity to make important contributions in a collaborative environment. Or a firm might assign minority workers to service minority clients, with the consequence that these workers may be excluded from other productive opportunities within the firm and may experience a hard ceiling within the firm that reflects the firm’s failure to integrate them into its core business ventures. Employment discrimination law should provide a means to examine these investments and to hold employers accountable when unequal investments result in unequal opportunity.

Diversity serves the objectives of employment discrimination law when an employer’s consideration of an individual’s social status aids the employer to provide that person with equal opportunity. The concept of diversity incorporates the recognition of individual difference, including differences that correspond in some way to a person’s social status. Social status may function within the organization as an advantage or a detriment; a diversity-based approach to equal opportunity would permit an employer to take status

---

204. Athey et al., *supra* note 29, at 767.

205. *Id.*

206. *See id.* (“Because majority employees are better mentored, their promotion rates can be higher than those of minorities, leading the firm to care more about the *effective* mentoring of majority than minority employees.” (emphasis added)).

differences into account to provide equal opportunity to every individual. Diversity aligns with equal opportunity when an employer takes the “posture and condition” of an employee “into account”—not by identifying those “true” job qualifications that impact all job seekers equally as *Griggs* contemplated,<sup>207</sup> but by adjusting practices so that status does not in itself become predictive of individual opportunity. On their face, such practices conflict with Title VII’s prohibition of disparate treatment, but disparate treatment doctrine is intended to promote equal opportunity and not to freeze in place privileges which, over time, have accrued to status differences.

The theory proposed here agrees with traditional disparate treatment theory that status-based practices run afoul of the statute when they deny equal opportunity, but it also adds that such practices should be permissible when they provide equal opportunity. They should not be presumed to be unlawful due to their form without actually examining their effect. Because equal employment opportunity is an individual right, such scrutiny should occur on a case-by-case basis that takes into account the full complement of an individual’s interactions with her employer with an eye to assessing the impact of the employer’s policies on her opportunities.

My approach offers new advantages but also new challenges. First, my approach pushes legal discourse on diversity beyond whether and how diversity may justify affirmative action. In the workplace, unlike in education, firms tend to reject traditional affirmative action and favor instead diversity management practices that consider employee status in a manner removed from direct allocations of title or position. All too often, courts have responded to this change by attempting to bootstrap diversity management practices into the category of affirmative action, regardless whether they involve an explicit status preference or have a direct causal connection to the challenged employment action. The law will remain unable to review these practices in a manner that is fair to firms and provides equal opportunity to individuals, so long as it assumes that the legal significance of diversity is exhausted in its use as a rationale for affirmative action.

Second, my approach decouples diversity as a legal rationale for status-based action from organizational self-interest. But it is not indifferent to organizational interests. Rather, I take seriously the statements of managerial experts and corporate leaders that they intend, through the practice of diversity management, to realize “individual growth” and “upward mobility” for all workers as a means of realizing the business aspirations of the firm. Far from attacking diversity management, this essay mounts a defense of diversity management against the challenge that it is irreconcilable with civil rights law. Firms already view investment in their employees as a critical strategy for success. Managerial experts have already claimed individually

---

207. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

and institutionally effective investment as an element of successful diversity management.<sup>208</sup> Using legal liability rules to hold diversity management to the standard of substantively equal investment simply redirects the cost of failed policies that firms impose upon their workers back to the firm in the form of employment discrimination remedies.

To be successful, however, doctrinal reform built on my approach must not only enable plaintiffs to claim discrimination through unequal investments that produced adverse employment actions; it must also enable employers to defend against such claims by providing evidence that, over an appropriate time horizon and in the aggregate, the firm provided equal opportunity by investing as much in the plaintiff as in appropriate comparators. A guarantee of equal investment in growth and advancement is not like a guarantee of formally equal treatment. No two workers will receive identical opportunities, nor should employers be expected to equalize opportunities by making them identical. Therefore, my approach requires that, when an employer uses diversity management practices that take employee status into account, the employer should be held to the standard of positioning all employees equally for success; it would not be required to ensure that all employees succeed. In this sense, my approach channels the spirit of *Griggs*, which required employers to make business decisions on the basis of appropriate job qualifications, not that employers guarantee positions to minority workers regardless of their qualifications.

Third, by focusing on equality of investments, my approach makes visible the potential of diversity management practices to position women and minorities for professional success or failure and seeks to make employers accountable for the adverse effects of unequal investments. Thus, although my approach is in some sense analogous to *Griggs*, it is also quite different. My approach is not aimed at the reform of employment selection and evaluation devices. It is aimed at those recurrent intermediate transactions that shape the employment relationship over time—those transactions that both organize work and structure employment opportunity. Diversity contributes to equal opportunity by recognizing that it may be necessary to take individual differences into account to provide each individual equal consideration and to invest equally in each individual. The *Griggs* equal opportunity model focuses on providing each worker equal access to an employment position by perfecting a discrete selection device that would apply to all workers. My diversity principle instructs the employer to invest equally in the success of every worker holding a particular position, but it also grants the employer latitude to do so by taking relevant status differences into account if doing so is part of a successful strategy to achieve equal investment. By raising concerns of professional development and

---

208. See *supra* notes 41–42 and accompanying text.

advancement, managerial experts have exposed the extent to which the disparate impact model—like the affirmative action model—may be too superficial in its focus on statistical representation without also looking at issues of retention, trajectory, and influence within the firm. My approach seeks to reshape disparate treatment doctrine to address these critical concerns in relation to the practice of diversity management.

Fourth, my approach disrupts the facile equation of diversity with discrimination that has plagued so many lower court decisions. As discussed above, rather than reflexively endorsing practices undertaken in the name of diversity, several courts have interpreted evidence that an employer had a diversity policy or even talked of diversity in informal terms as evidence of discrimination.<sup>209</sup> I have argued elsewhere that “an organization’s expression of its motivation to promote diversity is not evidence of discrimination absent proof that ‘diversity’ is a pretext or proof of a causal connection between a specific diversity practice and some legally cognizable adversity.”<sup>210</sup> Here, I add that, even if a plaintiff proves a causal connection between a specific diversity practice and an adverse employment action, the employer must be permitted to defend itself by demonstrating that the diversity practice did not deny the plaintiff substantively equal investment in her growth and advancement.<sup>211</sup> Talk of diversity and the mere existence of a particular diversity practice would not be considered probative of discrimination under this approach, which is instead concerned with the practical effect of diversity practices on human capital investment.

### *B. Reforming Title VII Doctrine*

As discussed in Part I, diversity management practices may take a wide variety of forms, from traditional affirmative action programs that assign position or title using status preferences to purely symbolic actions, like the publication of diversity mission statements or equal opportunity job postings. Designing particularized doctrines for each would be cumbersome and unnecessary. Some changes, however, are both important and overdue. My proposals for doctrinal reform concentrate on two types of employment situations: (1) those in which an employer’s diversity policies are not directly responsible for the plaintiff’s adverse employment action but could arguably

---

209. See *supra* Part II.B.2.

210. Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1199.

211. For example, a plaintiff might succeed in showing that a sex-based mentoring policy that matched proteges with mentors of the same sex disadvantaged her by denying her equal access to favorable assignments and productive client relationships. Conversely, a plaintiff might prove that she was subjected to such a policy and later denied promotion due to her lack of experience and marketability. But the employer may avoid liability if the mentoring policy did not produce these deficiencies or if the policy were offset by an assignment and client outreach system that ensured subordinates equal access to meaningful work and productive client relationships rather than requiring them to obtain these opportunities through the mentoring relationship.

be taken as evidence of discrimination, and (2) those in which an employer's diversity policies, though they do not directly produce any legally cognizable adverse employment action, may constitute unequal investments in employee potential that ultimately result in cognizable adverse actions. First, however, it is important to explain why these types of practices should not be subject to the *Weber-Johnson* voluntary affirmative action doctrine.

As discussed in Part II, *Ricci* has left the contours of affirmative action doctrine unclear. What sort of affirmative action policy must be evaluated according to the remedial logic of *Weber* and *Johnson*? What sort of policy sits beyond their reach and beyond their remedial basis for justification? I propose the following clarification. To constitute direct evidence of discrimination and to be subject to *Weber-Johnson*, an affirmative action plan must use status preferences to provide a title, position, or other tangible employment benefit (e.g., including admission to a training program, as was the benefit at issue in *Weber*) and must apply those preferences in a class-wide manner (i.e., a preference given to all class members, not only to those class members who suffered prior harms). This clarification ensures that diversity policies expressing an interest in minority recruitment and hiring—or articulating a benchmark against which a supervisory employee's hiring or retention record might be measured—would not be considered affirmative action and would not be measured against the standard of *Weber-Johnson*. This clarification is also consistent with the line drawn by the Second Circuit in *Brennan* between affirmative action plans that provide class-wide preferences and individualized relief provided to particular workers in response to past or imminent discrimination. In my view, an employer need not justify its attempts to equalize investments in the growth and advancement of its employees with a finding of past discrimination; and when it engages in such efforts, they should not be construed as affirmative action. Moreover, an employer who sets benchmarks or makes other attempts to organize work in an equitable manner but who has not done so by taking any adverse tangible action against an employee should not be required to justify that action according to *Ricci*. The strong-basis-in-evidence-test was intended to balance tangible harms to innocent employees against the employer's wish to avoid discrimination against other employees. Decisions organizing work that avoid tangible employment actions also avoid this conflict.

By drawing clear lines around affirmative action and refraining from overly expansive interpretations of *Ricci*, we can maintain the flexibility necessary to evaluate the positive and negative contributions of any particular diversity practice to the goal of equal opportunity. The most significant threat to this approach is found in those cases where lower federal courts have treated as affirmative action diversity practices that articulate benchmarks or express a desire to integrate the workplace but do not rely on the use of status preferences. These decisions are particularly threatening to diversity

management practices because they derive direct evidence of discrimination from practices not designed to award positions based on status preferences. They are also particularly threatening because diversity practices often lack the specific remedial purpose required for their validation under *Weber-Johnson*. This class of cases could be easily eliminated by clarifying that affirmative action requires the use of status preferences to award a title, position, or other tangible employment benefit.

Second, a diversity management practice should not expose an employer to Title VII liability unless it can be causally connected to an adverse employment action. So, cases involving the mere talk of diversity or the mere existence of diversity practices or officials should not constitute evidence of discrimination. Cases such as *Iadimarco* and *Rudin* consider an employer's diversity policies and statements as evidence of reverse discrimination even without a causal nexus between a particular policy and the challenged employment action. If this trend continues, it may poison business organizations against implementing, or even openly considering, organizational reforms to enhance equal opportunity. Because "diversity" has become synonymous with "equal opportunity" in corporate and public discourse,<sup>212</sup> this form of silencing might have profound consequences.

Similarly, if a firm cannot identify job candidates as "minorities" or seek to recruit from a diverse pool of applicants, then it cannot work consciously toward the development and maintenance of an inclusive workplace.<sup>213</sup> Neither expressing an interest in diversity nor seeking to identify a diverse group of candidates indicates that an employee's status motivated the employer's ultimate decision; such actions might indicate merely the sincerity of the employer's interest in administering a fair selection process or in achieving a more inclusive workplace environment.<sup>214</sup>

Therefore, talk of diversity and diversity measures not causally connected to a challenged adverse employment action should contribute to a finding of liability only where they are otherwise exposed as a sham or a pretext for discrimination. Moreover, an employer's commitment to diversity should be presumed to have the same meaning in reverse and non-reverse discrimination cases; that is, it should be interpreted as evidence of an employer's intention to comply with the law and to obtain an inclusive working environment in which status is no barrier to opportunity. Otherwise, employers will be left in the impossible position of adopting policies and positions that are met with praise in one litigation context and suspicion in

---

212. See Rich, *What Diversity Contributes to Equal Opportunity*, *supra* note 14, at 1113; see also ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* 26 (2015) (describing "diversity" as a "keyword"—an "influential, binding term").

213. See *supra* notes 180, 184 and accompanying text.

214. See *supra* notes 179–184 and accompanying text.

another, depending solely on the social status of the plaintiff making the accusation of discrimination.

Individual disparate treatment cases generally turn on the central question: did the employer favor one candidate for a position over another because of status rather than because of a legitimate, nondiscriminatory reason such as superior qualifications or a superior employment record? Cases challenging an employer's diversity management practices divide this question into two: does employee status explain the difference in treatment? And, if so, did the difference in treatment cause a cognizable employment injury? Decisions like *Iadimarco* and *Rudin* muddle the first question by requiring the employer to prove the negative—that the existence of diversity management policies within the firm or the firm's avowed interest in diversity did not somehow lead the employer to discriminate in a particular case.

An example of a court taking the right approach can be found in *Mlynczak v. Bodman*,<sup>215</sup> where the Seventh Circuit refused to interpret the employer's "active recruitment of women and minority candidates" or its use of a "competitive process" that considered outside candidates as evidence of discrimination.<sup>216</sup> A contrary ruling would have stifled the employer's efforts to foster equal opportunity through inclusive recruitment. Without addressing that policy concern directly, the court remained unconvinced that such measures showed evidence of discrimination. Instead, the circuit court focused on the comparative qualifications of the plaintiffs and the persons who ultimately received the contested positions, finding no basis to infer discrimination in the absence of a significant disparity favoring the plaintiffs.<sup>217</sup> The *Mlynczak* court relied on comparative qualifications to resolve the fundamental status causation issue, rather than giving the white male plaintiffs an easy "pass" on the causation question by treating the employer's interest in diversity as evidence of discrimination. *Mlynczak* thereby reaffirms the obvious but all too often elusive point that white male plaintiffs are not denied equal opportunity in a competitive process when the employer undertakes the goal of providing a fair process to *all* workers.

Third, and finally, cases involving diversity management raise difficulties regarding the second question—whether differential treatment caused an employment injury. As discussed in Part I, employers often practice diversity management by using employee status to make decisions about the organization of work but without awarding any position, title, or tangible benefit on that basis. Therefore, a plaintiff alleging that she suffered discrimination due to an employer's diversity management strategies may have little difficulty proving that she was denied particular opportunities or

---

215. 442 F.3d 1050 (7th Cir. 2006).

216. *Id.* at 1054.

217. *Id.*

allocated particular work assignments because of her status, but may have considerable difficulty proving that those status-based decisions caused the employer to take an adverse employment action against her. To make that showing, she may need to compare her own career trajectory while working for the defendant employer to the career trajectories of other employees outside of her class in order to illustrate how the allocation of intermediate employment opportunities, such as mentoring, favorable work assignments, and the like, contributed to an actionable difference in employment outcomes. The need to review the employer's actions over time is obvious from the standpoint of evaluating the substantive equality of an employer's investments in particular employees. If it were not so, courts would be limited to the review of discrete transactions abstracted from their particular context.<sup>218</sup> Cases falling into this category, however, require something more—that the concept of investment be used to determine the relevant scope of employment policies and practices that must be subjected to a court's review.

Consider the following example as an illustration of how these various doctrinal adjustments might affect the decision of a particular case. Hypothetical employer *X* operates a formal mentoring program as part of its diversity management strategy. That strategy is memorialized in a written diversity policy that expresses the company's aspiration to increase the representation of "underrepresented" workers at senior levels. Intended to benefit women and minorities who had historically had difficulty finding mentors at the company, the mentoring program is also coordinated with a number of diversity-related outings intended to expand networking opportunities for program participants. A white male employee is passed over for promotion in favor of a black woman who was an active participant in the program. Senior executives are heard on several occasions to offer congratulations to the Chief Diversity Officer and other organizers of the program on the program's success in fostering the advancement of the black female employee. The white male employee sues, claiming disparate treatment.

Under *Iadimarco* and *Rudin*, this Title VII claim would survive summary judgment because the employer's diversity efforts would be construed as evidence of discrimination. If, however, a court follows the approach advocated here, the company's diversity policy will not constitute direct evidence of discrimination or be considered an affirmative action plan. By expressly seeking to increase diversity and considering its promotion decision a "success," *X* has not converted its mentoring policy into

---

218. Even the Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), does not require such abstraction, for it recognizes that evidence of events occurring outside the limitations period *may* help to prove discrimination within the limitations period by providing important evidence of discriminatory motive. *Id.* at 113.

affirmative action. The policy lacks express status preferences and makes no direct allocation of any tangible employment opportunity. The plaintiff also would have no claim that he suffered from unequal investment in his professional growth and advancement, if the company could show that, despite his lack of participation, he received comparable opportunities to obtain valuable experience and supervision. It would defeat his allegation of unequal investment. Also, if the plaintiff had voluntarily declined participation in the program, this fact would also be relevant to the question of unequal investment, for it shows that the employer made the opportunity available to him as it did to other workers.

Alternatively, if *X*'s mentoring program were compulsory and if it included a preference for race- and sex-matching of junior and senior employees, this would present a very different case. A black plaintiff who could show that these policies restricted his opportunities to obtain valuable work assignments, supervision, and experience would have a claim for denial of promotion, if he were able also to show unequal investment in his growth and advancement over time and that the decisions leading to such unequal investment were due to his race. In either case, it would also be relevant whether the employer had a mechanism in place—such as a diversity officer or task force—to review the effects of its diversity practices with an eye to promoting the success of all workers. If the employer could demonstrate that its mentoring program was meant to ensure adequate supervision and that it balanced that effort with work assignment policies and training opportunities that took each individual employee's experience at the firm into account, it would be able to defend the charge of discrimination. The employer could point to evidence that the plaintiff received substantively equal investment in his potential for growth and advancement relative to the investments received by similarly situated coworkers.

The concept of investment here provides a defense against liability by permitting the employer to show that it invested meaningfully in the plaintiff's potential for success and that unequal investment was not the cause of the adverse outcome. An employer who is being mindful of its investments in employees' potentials and who is using diversity management as a means to improve those investments should welcome the opportunity to make such a showing. An employer who is using diversity management only to treat workforce diversity as a business resource will be exposed as having important work to do to align its diversity management efforts with the goal of equal opportunity.

#### CONCLUSION

Equal employment opportunity requires that employers make substantively equal investments in the potential growth and advancement of all employees, regardless of their social status. Diversity management tools

may be important to fulfill this goal, because they provide a means to tailor investments to the needs of individual employees. However, when firms construe workforce diversity as a business resource to be exploited by making status-based assignments that connect employees to particular clients, markets, or tasks based on assumptions of status affinity, diversity management becomes a source of inequality that employment discrimination law should not tolerate. By holding these practices to the standard of equal investment, the law would restore their connection to core civil rights goals of equal employment opportunity and workplace integration.

Some readers may judge that my approach does not go far enough. Under my approach, the law's intervention remains limited to address those employment actions that affect the terms or conditions of a plaintiff's employment and would not reach the employee who is set up for failure, but who has not yet failed. My intention is to strike a balance that will allow employers to continue to experiment with diversity management practices so that they can, eventually, get diversity management right by finding effective ways to promote the growth and success of all workers. Future work by others, or indeed by myself, might experiment with a different balancing approach. I have chosen one here that reflects an incremental but important change that will incentivize more equitable employment practices.

Other readers may judge that my recommendations go too far. Whether one generally supports diversity management or not, an employer cannot be expected to guarantee the success of its employees. Indeed, this is true. Title VII already commands, however, that an employer provide equal opportunity. The approach advocated here simply imposes Title VII's requirements on diversity management practices with the understanding that an employer that engineers either a more inclusive or a more profitable workplace by taking employee status into account must do so without sacrificing equal employment opportunity. Some employers may argue that this approach provides them with only a narrow space in which to practice organizational reform. Perhaps this will be so. But an employer should not be permitted to purchase more breathing room for its reform efforts by making its employees foot the bill for failed reforms.

