THE FUTURE OF EMPLOYMENT DISCRIMINATION AND DIVERSE WORKPLACES: LESSONS FROM TITLE VII JURISPRUDENCE AND *SFFA*

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ABSTRACT

The Supreme Court has conceptualized equality in different ways. This is especially prominent in the employment discrimination context. This Note explores Title VII jurisprudence and argues that the most pragmatic approach for diverse workplaces accepts a historical view, but ultimately focuses on a forward-looking view of equality. However, Title VII jurisprudence and the Court's recent SFFA decision severely limit this forward-looking approach.

This Note is divided into three parts. Part I provides a basic overview of Title VII jurisprudence and theories of discrimination. Part II explores the history of affirmative action cases and discusses SFFA's implications. Part III advocates for a view that centers the forward-looking view of equality. This part emphasizes the importance of diverse workplaces and ultimately argues that the Court's endorsement of the color-blind view drastically limits employers' ability to implement meaningful equality in the workplace.

INTRODUCTION

The workplace brings people together. For many people, work plays a central role in their sense of self and community identity. It is a social nexus between those from different cultural, ethnic, religious, and racial backgrounds who would otherwise lack consistent, direct contact. To date, the Supreme Court has considered relatively few cases involving private employers' affirmative efforts to consider race in their hiring and employment processes. The Supreme Court has endorsed different, sometimes conflicting, views of equality, particularly in the context of affirmative action in public universities. On one hand, the Court has endorsed a formal view of equality, which posits that the "sole object" of equality "is to ensure that everyone is treated equally without regard to race."[1] But the Court has also embraced a substantive approach that favors "legal and policy approaches that move beyond formally equal legal solutions in favor of affirmative interventions genuinely intended to level the playing field."[2] In 2003, the Court in *Grutter v. Bollinger* upheld a law school's admission policy that considered race "as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race."[3] However, in the recent case *Students for Fair Admissions v. President and Fellows of Harvard College* ("*SFFA*"), the Court reversed *Grutter*, finding Harvard's and the University of North Carolina's ("UNC") consideration of race in admissions decisions unconstitutional.[4] Though *SFFA* deals with affirmative action in the university context, it could have potentially significant implications for private employers' Diversity, Equity and Inclusion ("DEI") efforts. This decision has concerning implications for equality in the workplace, education, and other social institutions.

This Note analyzes Title VII jurisprudence and discusses how the Court's *SFFA* decision will shape private employers' DEI efforts moving forward. I also discuss the benefits of a forward-looking view but conclude that Title VII jurisprudence limits this view. Ultimately, I argue that this limitation, coupled with the Court's abandonment of the substantive view in *SFFA*, prevents employers from implementing meaningful equality in the workplace. Moreover, the *SFFA* Court's narrow exception allowing the

1. J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 213 (1980).

2. Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1645 (2017) (internal citations omitted).

3. Grutter v. Bollinger, 539 U.S. 306, 340 (2003).

4. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

consideration of race if an applicant self-justifies it has worrisome moral implications.

I. OVERVIEW OF TITLE VII JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[5] Because Title VII does not provide a statutory definition for discrimination, federal courts have been tasked with defining it.[6] Title VII has two basic theories of discrimination: disparate treatment and disparate impact.[7] In *Teamsters v. United States*,[8] the Supreme Court described disparate treatment as the "most easily understood type of discrimination. With disparate treatment, the employer treats some people less favorably than others *because of* their race, color, sex, religion, or national origin."[9] Given that this definition contemplates the employer's motive for an adverse action, discriminatory intent is an essential element in a disparate treatment claim.[10] The Court distinguished disparate impact claims as those concerning employer policies, practices, or tests that are "facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[11] Importantly, unlike disparate treatment claims, disparate impact claims do not require discriminatory motive.[12] Disparate impact claims focus on consequences that flow from the discrimination, not the intent behind the

5. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 261 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)(1)). The Act provides, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

6. *See* MARIA L. ONTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW 87 (10th ed. 2021).

7. *Id.*

8. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

9. *Id.* at 335 n.15 (emphasis added). While the Supreme Court never explicitly tied its doctrine to specific statutory language, it is now widely accepted that the disparate treatment theory is based on judicial construction of § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). The disparate impact theory is based on judicial construction of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2). *See* ONTIVEROS, ET AL., *supra* note 6, at 88.

10. The Court in *Teamsters* went on to explain that for disparate treatment, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Teamsters*, 341 U.S. at 335 n.15. *See* ONTIVEROS ET AL., *supra* note 6, at 94 ("Although it is now widely accepted that the disparate treatment theory of discrimination is based on a construction of § 703(a)(1), the Supreme Court has never clearly tied either its prima facie case doctrine or the order and allocation of proof to specific statutory language.").

11. *Id.*

12. ONTIVEROS ET AL., *supra* note 6, at 88 ("Proof of discriminatory motive * * * is not required under a disparate impact theory.").

employer's actions.[13] Because disparate impact claims do not require discriminatory intent, these claims are focused on "*limitations* and *classifications* that would deprive any individual of employment *opportunities*."[14]

A. Disparate Treatment Theory

The Court's early Title VII jurisprudence focused on intentional discrimination in disparate treatment cases.[15] Disparate treatment cases fall into three camps: (1) single-motive cases, (2) mixed-motive cases, or (3) pattern or practice cases.[16] The Court established the analytical framework for single-motive disparate treatment claims in *McDonnell Douglas Corporation v. Green*,[17] and later clarified it in *Texas Department of Community Affairs v. Burdine*.[18] Under the *McDonnell Douglas* burden-shifting framework, an employee has the initial burden of establishing a prima facie case of discrimination by showing:

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13. *See id.*

14. Connecticut v. Teal, 457 U.S. 440, 448 (1982) (original emphasis). "A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: '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.'" *Id.* (internal citation omitted).

15. ONTIVEROS ET AL., *supra* note 6, at 89-90.

16. *Id.* at 90. Note that pattern or practice cases can also serve as a basis for disparate impact claims. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (statute superseded overall holding but did not invalidate pattern or practice cases).

17. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

18. Texas Dept. of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 n.6 (1981) (noting that the *McDonnell Douglas* standard "is not inflexible, as 'the facts necessarily will vary in Title VII cases and the specification above the prima facie proof required from respondent is not necessarily applicable in every respect in different factual situations.'").

> (i) that he belongs to a racial minority;[19] (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[20]

The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the [adverse employment action]."[21] If the employer meets this burden, the plaintiff must then "be afforded a fair opportunity to show that [the employer's] stated reason for [the adverse employment action] was in fact pretext."[22] This allows the employee-plaintiff to demonstrate that the employer's stated reason was merely a "coverup for a racially discriminatory decision."[23]

Beyond the more straightforward discrimination cases, there were also challenges with ambiguous cases where an employer had both discriminatory and non-discriminatory motives. The Court identified a framework to resolve these "mixed-motive" cases in *Price Waterhouse v. Hopkins*.[24] The plaintiff there provided substantial and convincing evidence that she was denied a promotion because she was a woman.[25] The

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19. Though the *McDonnell Douglas* prima facie case requires membership to a minority group, the Supreme Court has consistently ruled that white plaintiffs may also recover under Title VII. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 593 (2009) (holding that white plaintiffs made a valid Title VII disparate treatment claim because of the employer's refusal to certify test results for promotions due to racial disparities in test scores).

20. *McDonnell Douglas*, 411 U.S. at 802. The Court noted that "the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at n.13. Many disparate treatment claims do not fit squarely under the *McDonnell Douglas* framework. The Supreme Court cautioned five years after *McDonnell Douglas* that the framework "was never intended to be rigid, mechanized, or ritualistic," but is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

21. *McDonnell Douglas*, 411 U.S. at 802. In *McDonnell Douglas*, plaintiff Percy Green, a black civil rights activist, was laid off and later reapplied for a job with the defendant-employer. The adverse employment action in *McDonnell Douglas* was refusal to hire. The *McDonnell Douglas* framework applies to many different adverse employment actions including lack of promotions, demotions, discharges, and constructive discharges.

22. *Id.* at 804.

23. *Id.* at 805. The Supreme Court held in *St. Mary's Honor Center v. Hicks* that what a plaintiff needs to demonstrate pre-text was a prima facie case combined with sufficient evidence demonstrating that a reasonable factfinder can, but not need to, reject the employer's evidence of a legitimate nondiscriminatory reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516 (1993). This is sometimes referred to as the pretext-maybe theory. *See* Ontiveros et al., *supra* note 6, at 108.

24. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1071.

25. *Id.* at 234-38.

defendant-employer countered, providing evidence that the reason the plaintiff here was not promoted was due to her "interpersonal problems."[26] Therefore, the employer argued, even if the decision was partly motivated by discrimination, there was also a legitimate reason for not granting the plaintiff a promotion.[27] The employer further argued that Congress's inclusion of the words "because of" in § 703(a)(1) in Title VII means that an employer only violates Title VII when the employer fires an employee for discriminatory reasons alone.[28] The Court rejected this argument.[29] The plurality understood that if an employer fires an employee "because of" her gender, this only means that gender played some part in the decision.[30] Therefore, the discrimination need not be the exclusive reason in order to be actionable under Title VII.[31] However, after rejecting the employer's but-for causation argument, the Court held that the employer may escape liability if it can show that it would have still denied the plaintiff a promotion had it not taken her gender into account.[32] In response to *Price Waterhouse*, Congress changed the mixed-motive proof structure in the Civil Rights Act of 1991.[33] Under the Act, a plaintiff becomes automatically entitled to judgment if she can prove that an impermissible discriminatory motive "was a motivating factor."[34] This means that an employer cannot escape liability altogether by meeting the *Price Waterhouse* standard; instead, the employer can only limit its damages if it proves that it would have made the same decision absent the impermissible factor.[35] *Price Waterhouse* marked a significant expansion in the Court's understanding of equality by acknowledging that a discriminatory motive, even if not the sole motive, violates Title VII.

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26. *Id.* at 234.

27. *Id.* at 236. The Court emphasized here that Title VII also contemplates an employer's "freedom of choice," meaning "that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision." *Id.* at 242.

28. *Id.* at 237-38.

29. *Id.* at 242.

30. *Id.*

31. The Court explained, "since we know that the words 'because of' do not mean 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241.

32. *Id.* at 244-45.

33. Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2 to 2000e-17).

34. *Id*. at 2000e-2(m). Though the Court came to an opposite conclusion in *Price Waterhouse*, it explained a motivating factor means that "if we asked the employer at the moment of the decision what its reasons were and if we were to receive a truthful response, one of those reasons would be that the applicant or employee was a woman." *Price Waterhouse,* 490 U.S. at 250.

35. Title VII, § 703(m), 42 U.S.C. § 2000e-5(g)(2)(B).

Courts have also recognized statistics can help identify discriminatory practices.[36] Under a "pattern or practice" theory, a plaintiff uses an employer's hiring, promotion, or termination figures to argue that an employer has engaged in a pattern or practice of discrimination.[37] In these cases, the plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[38] The Court considered this type of case in *Teamsters v. United States*. In *Teamsters*, statistical evidence showed that employees with Black and Spanish surnames were limited almost exclusively to lower-paying, less desirable jobs, while their white counterparts were hired in the more desirable jobs.[39] Here, the Court acknowledged the important role statistics can play in a prima facie case of discrimination, explaining in a footnote that "[s]tatistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination."[40] Additionally, the plaintiff may strengthen their case with individual testimony, as the government plaintiff did in *Teamsters*.[41] The Court explained that, "[t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."[42] In these cases, employers rebut the evidence by offering an alternative, non-discriminatory explanation for the statical disparity.[43] Courts typically compare the racial composition of the at-issue jobs with the racial composition of the qualified population in the relevant labor market and use statistical algorithms to determine the likelihood that the discrepancy is simply due to chance.[44] Identifying the correct labor market comparison is crucial in these pattern or practice cases.[45] If statistical

36. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
37. Title VII, § 707(a), 42 U.S.C. §2000e-6(a).
38. *Teamsters*, 431 U.S. at 336.
39. *Id.* at 337-39.
40. *Id.* at 339 n.20; *see* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977) (explaining "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute a prima facie proof of a pattern or practice of discrimination.").
41. *Teamsters*, 431 U.S. at 338.
42. *Id.* at 339.
43. *Id.* at 309.
44. *Id*. The Court also explained in a footnote, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Id.* n.20.
45. *See, e.g., Hazelwood*, 433 U.S. at 313 (holding "that the Court of Appeals erred in disregarding the post-Act hiring statistics in the record, and that it should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination.").

disparities are a product of "pre-Act hiring rather than unlawful post-Act discrimination," then the employer is not liable.[46]

These theories help courts analyze evidence, but they are not without limitations. The single-motive theory set forth in *McDonnell Douglas* assumes a single underlying reason motivates the employer at the moment of the adverse action.[47] Moreover, it assumes that the employer, if acting with discriminatory motive, does so consciously.[48] The mixed-motive framework accounts for situations where an employer has many motives, but it still assumes that the employer is conscious of their motives and that the discriminatory motive motivates the employer at the moment of the adverse action.[49] Finally, pattern or practice discrimination claims are difficult to prove in cases with small sample sizes because statistical disparities are often not probative with limited data. Courts also may struggle in determining the relevant labor market.[50] These theories all assume conscious bias on the part of the employer, which is intuitive given that disparate treatment theories target *intentional* discrimination. Therefore, plaintiffs face many challenges under Title VII absent evidence of overt discrimination.

These three theories of discrimination require conscious bias on the employer's part. However, a wealth of literature has developed in recent decades on the role unconscious bias plays in our everyday cognitive processes, including in the workplace.[51] Many scholars have criticized Title VII jurisprudence for its inability to account for unconscious discrimination,

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46. *Id.* at 310.

47. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

48. *See id.* at 798. The Court's emphasis on pretext implies that there is one true reason for the adverse employment action—either an unlawful discriminatory reason or a lawful nondiscriminatory reason.

49. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (plurality opinion) (noting that the words "because of" in § 703(a)(1) requires evaluating *all* the reasons, both legitimate and illegitimate, *at the time the employer makes the decision*) (emphasis added); *see* Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1183 (1995) (explaining that "Price Waterhouse in essence directs the trier of fact to take a snapshot of the decisionmaker's mental state at the moment the allegedly discriminatory decision was made.").

50. *See Hazelwood*, 433 U.S. at 308 (introducing the notion that identifying the relevant labor market is critical to the statistical significance inquiry); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 (1989) (finding that plaintiffs could not recover in a pattern or practice disparate impact claim if the statistical disparity was "due to a dearth of qualified nonwhite applicants").

51. *See* Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83 (2008); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

particularly in disparate treatment cases.[52] Linda Krieger applies insights from cognitive psychology to highlight challenges that disparate treatment struggles to reconcile.[53] The social cognition theory posits that "cognitive structures and processes in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment."[54] Based on this theory, stereotyping involves cognitive mechanisms that *all* people use.[55] Krieger describes these processes as "central, and indeed essential to normal cognitive functioning."[56] This challenges the *McDonnell Douglas* framework's underlying presumption that the employer is hiding his or her true and discriminatory motives for an adverse employment action. Krieger explains that because biases can be cognitive rather than motivational, the Title VII frameworks that require conscious discrimination by the employer are inadequate to deal with the problems that unconscious bias poses.[57]

In sum, proof problems and the assumption that discrimination is motivational limit disparate treatment claims. The Supreme Court later recognized that employer policies and procedures may unintentionally cause inequality. We now turn to the Court's disparate impact jurisprudence and assess whether these theories are better suited to address issues that unconscious biases pose.

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52. *See generally* Krieger, *supra* note 49; Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 355 (2001); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005) (highlighting specific strategies to apply to the theory of unconscious bias to employment discrimination litigation); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006).

53. Krieger, *supra* note 49, at 1186-1211. Linda Krieger, now a retired professor of law, practiced as a civil rights lawyer representing plaintiffs in race, sex, national origin, and disability discrimination cases. UNIV. OF HAWAI'I AT MÁNOA, WILLIAM S. RICHARDSON SCH. OF L., https://law.hawaii.edu/people/linda-hamilton-krieger/#:~:text=Biography,which%20she%20served%20until%202017.

54. Krieger, *supra* note 49 at 1187. *See* ALBERT BANDURA, SOCIAL LEARNING THEORY (1st ed. 1976) (elaborating on his social cognition theory he first introduced in the 1980s); ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION (1st ed.1985) (further developing the social cognition theory).

55. *Id.* at 1188.

56. *Id.*

57. *Id.* at 1164.

B. Disparate Impact Theory

Disparate impact, unlike disparate treatment, does not require intentional discrimination.[58] Discrimination under the disparate impact theory exists when an employer's facially neutral practice or policy unequally burdens a protected class and cannot be justified by business necessity.[59] The Court first recognized the theory of disparate impact in *Griggs v. Duke Power Co.*[60] In *Griggs*, the issue was whether Title VII prohibits an employer from requiring applicants to pass a standardized general intelligence test or to graduate from high school as a condition of employment.[61] The Court, expanding its previous narrow interpretation of Title VII, found that regardless of the employer's intent, these requirements still violated Title VII.[62] The Court reasoned that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[63] It further explained that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.[64] The Court elaborated further on congressional intent:

> 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 the other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[65]

If business necessity cannot justify the employer's practice, or the practice is not reasonably related to the job, then the practice is prohibited.[66] *Griggs* marked a dramatic expansion of the Court's Title VII jurisprudence.

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58. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
59. *Id.*
60. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
61. *Id.* at 425-26.
62. *Id.* at 432.
63. *Id.* at 431.
64. *Id.* at 432 (emphasis added).
65. *Id.* at 429-30.
66. *Id.* at 431.

The Court broadened its understanding of discrimination by accepting a substantive approach, viewing discrimination in a historical context.[67]

After *Griggs*, the Court considered the disparate impact theory's limits in *Wards Cove Packing Company v. Atonio*.[68] There, Filipino and Alaskan Natives advanced their claims under both disparate treatment and disparate impact theories.[69] The employees alleged that their employer's informal promotional and hiring practices disproportionately led to white employees getting the higher-paying jobs, while the minority workers were limited to lower-paying jobs.[70] The Court found that because there was a lack of qualified minorities in the relevant labor market, the employer was not liable.[71] It reasoned that if "the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have a disparate impact on nonwhites."[72] The Court also rejected the plaintiffs' argument that the cumulative impact of multiple employment practices constituted discrimination.[73] Instead, the plaintiffs had to "specifically [show] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[74]

In response to *Wards Cove Packing*, Congress codified the disparate impact theory and provided a framework in the Civil Rights Act of 1991.[75] The statute modified the Court's requirement for identifying a specific employment practice, allowing for the decision-making process to be "analyzed as one employment practice" if the plaintiff can demonstrate the decision-making process cannot be separated.[76] The statute also placed the

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67. *See* Tristin K. Green, *Discrimination in the Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 136-37 (2003) (explaining that "the *Griggs* Court opened the door for a structural approach to combatting discrimination more broadly" and noting that "disparate impact theory conceptualizes discrimination in terms of institutional barriers to equal opportunity for women and minorities.").

68. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

69. *Id.* at 650-51, 657.

70. *Id.* at 647-48.

71. *Id.* at 651-52.

72. *Id.*

73. *Id.* at 657.

74. *Id.*

75. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(m)).

76. Title VII, § 703(k), 42 U.S.C. § 2000e-2(k)(B)(i).

burden of proving business necessity on the employer rather than the employee.[77]

Since *Griggs*, the Court has been tasked with defining the boundaries of disparate impact claims. Though disparate impact claims helped address weaknesses with disparate treatment claims, there are other underlying challenges plaintiffs face. Title VII operates against a backdrop of at-will employment, the long-standing and prevailing rule that employers may hire and fire people for good reasons, bad reasons, or no reason at all.[78] Though there are exceptions to the doctrine, employers remain largely free to control the terms and conditions of employment.[79]

Some scholars have criticized courts for being overly deferential to employer discretion by prioritizing the at-will doctrine in Title VII cases.[80] Among these scholars are Chad Derum and Karen Engle, who argue that there has been a gradual but significant shift in presumptions underlying disparate treatment cases.[81] They propose that the "personal animosity" presumption has replaced the presumption of unlawfulness.[82] The consequence is that courts use personal animosity synonymously with "non-discriminatory."[83] Thus, Derum and Engle argue, invoking personal animus has allowed employers to avoid liability and "a close examination" of their motives.[84] This is evident in *St. Mary's Honor Center v. Hicks*, where an employee alleged that he was demoted and discharged because of

77. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The employer may rebut a prima facie case of disparate impact if it can show that a "challenged practice is job related for the position in question and consistent with business necessity." *Id.*

78. Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to No Cause Employment*, 81 TEX. L. REV. 1177, 1182 (2003). Chad Derum is a partner at Manning Curtis Bradshaw & Bednar whose practice focuses on commercial disputes and employment-related matters. MANNING CURTIS BRADSHAW & BEDNAR, https://www.mc2b.com/chad-derum. Karen Engle is a professor at the University of Texas School of Law. She is also the Minerva Drysdale Regents Chair in Law and Founder of the Bernard and Audre Rapoport Center for Human Rights and Justice. *Faculty*, THE UNIV. OF TEX. AT AUSTIN SCH. OF L., https://law.utexas.edu/faculty/karen-engle/.

79. Some exceptions to the employment-at-will doctrine include public policy exceptions, implied covenants of good faith and fair dealing, the creation of contractual rights in employment manuals, and more. *See generally* Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719 (1991).

80. *Id.*; *see also* William R. Corbett, *The Fall of Summers, the Rise of Pretext Plus, and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305 (1996); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 355 (2001); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Julie C. Suk, *Discrimination At Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007).

81. *See* Derum & Engle, *supra* note 78.

82. The personal animosity presumption assumes that an employer's adverse employment action was motivated by personal animosity rather than racial animus. *Id.* at 1186.

83. *Id.* at 1179.

84. *Id.*

his race, violating Title VII.[85] Though the Court accepted that the employer's proffered business reason was false, it ultimately found that the plaintiff failed to show that race was the motivating factor for the adverse employment action.[86] The Court credited the district court which reasoned that "although [the employee] has proven the existence of a crusade to terminate him, he has not proven that the crusade was *racially* rather than *personally* motivated."[87] Derum and Engle discuss the Court's decision in *Hicks* as a "significant turning point" for the personal animosity presumption because it "both heightened the burden of proof for plaintiffs and suggested that racial and personal animosity were distinct concepts."[88]

Some critics have proposed abandoning employment-at-will because of its inadequacy in addressing discrimination, among other issues. Ann McGinley argues that we should instead adopt "for cause employment," which would require an employer to provide legitimate, not just nondiscriminatory, reasons for taking an adverse employment action.[89] Donna Young, through the lens of racial discrimination, argues employers should be required to give a certain amount of notice or pay before they can terminate employees.[90] Young argues that "the employment-at-will doctrine works in tandem with ineffectual antidiscrimination laws to facilitate . . . dismissals [of people of color] by shielding employers from having to justify the terminations."[91] These scholars argue that the broad discretion that employers are given to control the conditions of employment allows racial discrimination to go unaddressed or minimized. However, defenders of at-will employment point out that any discharged employee may allege

85. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). In *Hicks*, the plaintiff employee provided comparator evidence showing similarly situated employees, and even employees who committed more serious violations, did not face adverse employment actions. *Id*. at 508.

86. *Id.* at 524.

87. *Id.* at 508 (emphasis added).

88. Derum & Engle *supra* note 78, at 1179.

89. Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1511-12 (1996). Ann McGinley is the William S. Boyd Professor of Law at the University of Nevada, Las Vegas Boyd School of Law where she has taught several courses including employment law and employment discrimination. *Faculty*, UNLV WILLIAM S. BOYD SCH. OF L., https://law.unlv.edu/faculty/ann-mcginley.

90. Young, *supra* note 80. Donna E. Young is the inaugural dean of the Faculty of Law at Toronto Metropolitan University. When she wrote this article, she served as an Associate Professor of Law at Albany Law School. Her scholarship focuses on inequality and race and gender discrimination. *Faculty*, TORONTO METRO. UNIV., https://torontomuresearch.kosmos.expertisefinder.com/donna-e-young#:~:text=Bio%2FResearch,member%20at%20the%20Univ.

91. *Id.* at 355.

bad motives by the employer, even when not necessarily true.[92] One scholar argues that "ascertaining the truth in such cases is often difficult. There is probably some merit and some error in the contentions of both the employee and the employer, as there often is in the contentions of both the husband and the wife in marital difficulties."[93] Given the latitude employers have to control the terms and conditions of employment, employment-at-will provides another barrier for plaintiffs who lack overt evidence of *racial* animosity.[94]

Title VII's purpose is to eliminate unlawful discrimination. However, plaintiffs face many challenges. This is not to say that Title VII has never facilitated progress and equality. It makes cases of blatant discrimination unlawful and was significant in taking the first steps towards equality in the workplace.[95] However, the Court's relatively narrow conception of equality under Title VII has limited efforts to diversify the workplace.

II. OVERVIEW OF AFFIRMATIVE ACTION

A. History Of Affirmative Action in Public Education

Though there is much discourse around how affirmative action is defined and what it includes, I use the broad definition of affirmative action to mean "a formal effort to give people of color, women, and other disadvantaged groups . . . access to education, employment, and government contract."[96] Given the Court's substantial jurisprudence addressing educational

92. Brian F. Berger, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 159 (1981).

93. Richard W. Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L.J. 881, 886 (1983).

94. Evaluating the merits of the arguments for and against employment-at-will is outside the scope of this Note. For the sake of my argument, I merely assume that the employment-at-will doctrine poses proof difficulties for an employee who *has* faced discrimination, given the latitude that employers have to control the terms of employment.

95. The Court's endorsement of the disparate impact theory in *Griggs* even incentivized some employers to be proactive in implementing affirmative action programs. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, 480 U.S. 616 (1987).

96. Symposium, *Comments of George E. Curry*, 30 COLUM. HUM. RTS. L. REV. 445, 446 (1999). Affirmative action lacks a clear definitive definition and is often defined differently based on the view of the concept itself. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 953 (1996) (noting that "[o]pponents have defined affirmative action as a program that threatens fundamental values of fairness, equality, and democratic opportunity."). On the other hand, for many advocates, "affirmative action is really a range of remedies" that can include "affirmative outreach and recruiting," to quotas, which "courts have rejected fairly consistently." Deval L. Patrick, *A Perspective on Civil Rights Challenges*, 25 U. BALT. L. REV. 169, 172 (1996); *see generally* John Valery White, *What is Affirmative Action*, 78 TUL. L. REV. 2117, 2117 (2004) (arguing that the lack of a "rigorous" definition of affirmative action has "distorted and undercut American antidiscrimination law.").

affirmative action, I first discuss this history before discussing the Court's rulings on private employer plans.

For claims against public employers and institutions, affirmative action critics point to the Equal Protection Clause in the Fourteenth Amendment of the Constitution, which prohibits the government from treating people unequally without valid justification,[97] and Title VI of the Civil Rights Act, which prohibits racial discrimination in programs receiving federal funding or assistance.[98] The Court first addressed the constitutionality of a public university's affirmative action plan in 1978 in *Regents of University of California v. Bakke*.[99] The University of California, Davis Medical School had a special admissions program that reserved sixteen of the one hundred positions in each class for disadvantaged minority students.[100] The Court held that under the Fourteenth Amendment's Equal Protection Clause, the admissions program did not pass constitutional muster.[101] Justice Powell, writing for the Court, held that because race and ethnicity are suspect classifications, explicit use of the classification is constitutional only when necessary to advance a compelling state interest.[102] He also argued that the school's justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools" was essentially "[p]referring members of any one group for no reason other than race or ethnic origin," which was impermissible under the Constitution.[103] Justice Powell characterized this as "discrimination for its own sake."[104] Therefore, he disapproved of the substantive view of equality to justify the use of race in school admissions. He argued that while "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," the goals articulated must be "far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."[105] Despite its disapproval of the

97. The Equal Protection Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 2.

98. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

99. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

100. *Id.* at 275-76.

101. *Id.* at 320.

102. *Id.* at 299, 305.

103. *Id.* at 306-7.

104. *Id.* at 307.

105. *Id.*

substantive view of equality, the Court stated in dicta that "race or ethnic background may be deemed a 'plus' in a particular applicant's file," so long as it is only one factor among a number of factors and is not used to disqualify an applicant from being considered for a spot.[106]

Nearly twenty years after *Bakke*, in *Grutter v. Bollinger*, the Court contemplated whether a state university's race-conscious admissions policy was unconstitutional.[107] The Court held that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[108] The school's admissions policy was constitutional if it satisfied strict scrutiny.[109] Under this standard, the Court first asks "whether the racial classification is used to 'further compelling governmental interests,'" and second, "whether the government's use of race is 'narrowly tailored,' meaning 'necessary' to achieve that interest."[110] The Court endorsed the dicta in *Bakke*, holding that "student body diversity is a compelling state interest that can justify using race in university admissions."[111] These education affirmative action cases signaled the Court's early endorsement of the forward-looking view of equality, emphasizing that a diverse population can yield benefits for everyone, not just racial minorities.

B. History of Affirmative Action for Private Employers

One year after *Bakke*, the Court considered for the first time the permissibility of an employer's voluntary affirmative action plan in *United Steelworkers v. Weber*.[112] There, a union and employer entered into a collective bargaining agreement that included an affirmative action plan.[113] Before the plan was implemented in 1974, only 1.83% (5 out of 273) of the skilled craftworkers at the plant were Black as a result of a long history of excluding Black workers from craft unions.[114] This plan sought to eliminate significant racial imbalances in the employer's nearly exclusively white

106. *Id.* at 317.
107. Grutter v. Bollinger, 539 U.S. 306 (2003).
108. *Id.* at 344.
109. *Id.* at 326-27.
110. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206-7 (quoting Arand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); then quoting Grutter v. Bollinger, 539 U.S. at 326 (2003); then quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311-12 (2013)).
111. *Grutter*, 539 U.S. at 325.
112. United Steelworkers v. Weber, 443 U.S. 193 (1979).
113. *Id.* at 197-98.
114. *Id.* at 198.

craftwork force by reserving 50% of the openings for Black craftworkers "until the percentage of black skilled craftworkers in the [] plant approximated the percentage of [black workers] in the local labor force."[115] The Court held that Title VII's prohibition against racial discrimination did not "condemn all private, voluntary, race-conscious affirmative action plans" and found that the affirmative action plan aligned with Title VII's purpose. Emphasizing the *Griggs* Court's substantive view, the Court reasoned that the plan's purpose was to "eliminate traditional patterns of racial segregation."[116] The Court explained that § 703's text and legislative history further supported the plan's permissibility.[117]

The Court's second and final case concerning a private employer's affirmative action plan was *Johnson v. Transportation Agency of Santa Clara County*.[118] In 1978, the Santa Clara County Transportation Department adopted an affirmative action plan that allowed a qualified applicant's sex to be considered as a factor in the promotion process.[119] The plan was intended to achieve a "statistically measurable yearly improvement in hiring, training and promotion of minorities and women in all major job classifications where they are underrepresented," and the "long-term goal is to attain a work force whose composition reflected the proportion of minorities and women in the area labor force."[120] Before the plan, women were "egregiously underrepresented" as "*none* of the 238 positions was occupied by a woman."[121] Reaffirming its rationale in *Weber*, the Court said that an employer need only point to a "conspicuous imbalance" in "traditionally segregated" job categories.[122] Ruling that the affirmative action plan did not violate Title VII, the Court noted that affirmative action in this context "represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force."[123] This plan was "fully consistent" with the meaning of Title VII because of the "contribution that

115. *Id.* at 199.

116. *Id.* at 201. The Court further explained that the "prohibition against racial discrimination in §§ 703(a) and (d) must be read against the background of the legislative history of Title VII and the historical context from which the Act arose." *Id.*

117. *Weber*, 443 U.S. at 208 (explaining that "[t]he purposes of the plan mirror those of the statute . . . [it was] designed to break down old patterns of racial segregation and hierarchy," and "structured to open employment opportunities for Negroes in occupations which have been traditionally closed to them.") (internal citations omitted).

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

119. *Id.* at 621.

120. *Id.* at 621-22 (internal citations omitted).

121. *Id.* at 636.

122. *Id.* at 640.

123. *Id.* at 642.

voluntary employment action can make in eliminating the vestiges of discrimination in the workplace."[124] The Court reasoned that its "decision [in *Weber*] was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts."[125]

Crucially, the Court's early Title VII jurisprudence embraced the substantive view of equality, at least when it came to considering employers' private affirmative action programs. When an employer took affirmative steps to ensure greater representation in its workplace that historically had a legacy of discrimination, the use of race was consistent with Title VII's purpose.

C. SFFA's Implications for Diversity in the Workplace

In *SFFA*, the Supreme Court struck down two universities' affirmative action programs, ending the decades-long practice of asking applicants for their race and considering race as a factor in admissions.[126] This case effectively overruled *Grutter v. Bollinger*, reversing nearly twenty years of precedent.[127] The Supreme Court's decision in *SFFA* marks a stark departure from the Court's earlier attitude towards affirmative action and equality.[128]

The Court held that Harvard's and UNC's admissions programs, which considered race as one of many factors when evaluating an applicant, were unconstitutional and violated the 14th Amendment's Equal Protection Clause.[129] As in *Grutter*, the Court first determined that strict scrutiny applied because race-based classifications are inherently suspect, even when race is just one of many factors. Regarding the first question—whether the racial classification is used to "further compelling government interests,"—the Court found that the universities' articulated goals were not

124. *Id.*
125. *Id.* at 630.
126. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).
127. Grutter v. Bollinger, 539 U.S. 306 (2003). The *SFFA* Court effectively overruled Grutter but did not explicitly say so. However, considering that the Grutter Court allowed consideration of race in the admissions program there, SFFA comes to an opposite conclusion. In any case, *SFFA* marks a significant departure from the Grutter Court's attitude toward affirmative action in the forward-looking sense. *See* Bill Watson, *Did The Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113, 130-31 (2023) (arguing that "*SFFA* partially overruled *Grutter* by removing some. . . holdings from the law," specifically the "diversity-interest and the deference holdings.").
128. *Students for Fair Admissions*, 600 U.S. 181.
129. *Id.* at 230.

"sufficiently coherent for purposes of strict scrutiny."[130] The majority reasoned that the colleges' admissions programs "fail[ed] to articulate a meaningful connection between the means they employ and the goals they pursue."[131] In the Court's view, the goals were too abstract because they were "unmeasurable," and there was no way to determine whether the goals had been achieved.[132] In addition to finding the goals too amorphous to satisfy strict scrutiny, the Court criticized the means used to accomplish them. It described the college admissions evaluation process as a "zero-sum" process that confers a "benefit . . . to some applicants but not to others," which "necessarily advantages the former at the expense of the latter."[133] Moreover, the Court found that the schools, by considering race, were engaged in stereotyping through the "offensive and demeaning assumption that [students] of a particular race, because of their race, think alike."[134] The *SFFA* Court's endorsement of a color-blind approach marked a significant retreat from *Grutter*.[135]

However, the Court did not prohibit the consideration of race altogether in admissions programs; it cautioned that the opinion does not prohibit "universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[136] This exception contradicts the Court's reasoning, given that it clearly stated that universities may not consider race in admissions decisions. Further, this exception seems to allow universities to further the same policy goals the Court found lofty and unmeasurable.[137] The Court reasoned that if an applicant discusses race themselves, then there is no racial stereotyping by the university.[138] However, this caveat contradicts the

130. Harvard's identified goals included: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." *Id.* at 214. Similarly, UNC sought to achieve similar benefits including "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *Id.*

131. *Id.* at 215.

132. *Id.* at 227 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-6 (1989)).

133. *Students for Fair Admissions*, 600 U.S. at 218-19 (2023).

134. *Id.* at 220-21 (quoting Miller v. Johnson, 515 U.S. 900, 911-12 (1995)).

135. Grutter v. Bollinger, 539 U.S. 306, 340 (2003)

136. *Students for Fair Admissions*, 600 U.S. at 230 (2023).

137. *Id.* at 227. Additionally, it is ironic that the Court endorses a color-blind approach, but now many students of color must dedicate a substantial portion of their application to writing an essay about why their race matters.

138. *Id.* at 230-31.

Court's conclusion that consideration of race violates the Equal Protection Clause and the zero-sum rationale.[139]

Although I argue that the Court's ruling in *SFFA* will influence employers' DEI efforts, there are relevant differences in the standards applied to public employers and private employers. The different outcomes in *Bakke* and *Weber* and *Johnson* demonstrate competing views of affirmative action in the Court's jurisprudence. On one view, affirmative action is necessary and contemplated by Title VII to remedy past effects of discrimination.[140] On the other view, affirmative action is impermissible discrimination.[141] The contrasting rationales in these cases suggest that *SFFA* may not have an impact on employers' DEI initiatives because the Court has taken different approaches towards universities, which are strictly subject to the Equal Protection Clause and Title VI, and private employers that are only bound by Title VII.

If an employer's affirmative efforts were challenged today, the Court would find these efforts impermissible under Title VII considering its approach in *SFFA*. In both *Weber* and *Johnson*, the Court conditioned its approval of affirmative action plans on the fact that the plans did not "unnecessarily trammel" the opportunities of other employees.[142] The Court would probably not come to the same conclusion under its "zero-sum" principle. If we accept the Court's view that considering race necessarily advantages some at the expense of others, the employer plans in *Weber* and *Johnson* should not survive Title VII scrutiny.[143] Further, the notion that using race as a selection factor inherently involves negative stereotyping applies with equal force in the employment context. The Court in *Weber* and *Johnson* indicated that, to the extent that an employer affirmative action plan is permissible under Title VII, the plan should presumptively go away after there is a correction of racial imbalance.[144]

> [T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percent of black skilled craftworkers in the Gramercy plan approximates the percentage of blacks in the local labor force.[145]

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139. *Id.* at 218.

140. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, 480 U.S. 616 (1987).

141. *See, e.g.*, Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

142. *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 617.

143. *Students for Fair Admissions*, 600 U.S. at 218-19.

144. *Id.* at 208-9.

145. *Weber*, 443 U.S. at 208-9.

Johnson later clarified that the employer's plan did not necessarily need an "explicit end date," because the employer's "flexible, case-by-case approach was not expected to yield success in a brief period of time."[146]

Today, few employer DEI mission statements directly address discrimination, its history, or its lingering effects.[147] In *SFFA*, the Court took up Harvard's and UNC's articulated goals which emphasized the importance of increasing cultural competence, empathy, innovation, and respect among its students and society.[148] In recent decades, scholars have observed employers increasingly advancing DEI initiatives using forward-looking justifications.[149] Kathleen M. Sullivan argues:

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146. *Johnson*, 480 U.S. at 639.

147. *See* Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 658 (1989) (explaining that "[a]lthough affirmative action previously was justified solely as a means of remedying past discrimination, many businesses now believe affirmative action leads to a variety of benefits, including increased productivity and better consumer relations.") (internal citations omitted); *see, e.g.*, BANK OF AM., https://about.bankofamerica.com/en/working-here/diversity-inclusion (last visited Jan. 28, 2024). This mission statement claims, "[w]e firmly believe all employees should be treated with respect, live free of discrimination, and be able to bring their whole selves to work . . . We are committed to addressing inequality through a company through a company-wide commitment to advancing economic opportunity across diverse communities."

148. Harvard's articulated goals included: "(1) training future leaders in the public and private sectors; (2) preparing graduates to adapt to an increasingly pluralistic society; (3) Better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks." Similarly, UNC sought to achieve similar benefits including "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *Students for Fair Admissions*, 600 U.S. at 214 (internal citations omitted).

149. Note, *supra* note 147, at 658. *See, e.g.*, CHEVRON, https://www.chevron.com/sustainability/social/diversity-inclusion (last visited Jan. 28, 2024) ("A diverse workforce and inclusive culture help us strengthen areas that need improvement and inspire creative solutions. We believe the attention given to diversity and inclusion makes us more agile, trustworthy and innovative."); *Culture*, DISNEY, https://impact.disney.com/diversity-inclusion/ (last visited Jan. 28, 2024) ("Across Disney, we cultivate, value, and encourage curiosity, collaboration, and creativity from everyone and we strive to build supportive environments that inspire optimism and drive innovation."); *Winning Through Diversity and Inclusion*, VERIZON, https://www.verizon.com/about/our-company/diversity-and-inclusion (last visited Jan. 28, 2024) ("Diversity and inclusion is how we achieve success. By celebrating diversity across all spectrums, including but not limited to race, national origin, religion, gender, sexual orientation, gender identity, disability, veteran/military status, and age, we are a stronger company and culture."); *Diversity, Equity, and Inclusion*, WELLS FARGO, https://www.wellsfargo.com/about/diversity/diversity-and-inclusion/ (last visited Jan. 28, 2024) ("We're committed to advancing diversity, equity, and inclusion by helping ensure that all people across our workforce, our communities, and our supply chain feel valued and respected and have equal access to resources, services, products, and opportunities to succeed.").

> [P]ublic and private employers often adopt affirmative action less to purge their past than to build their future. In so doing, they are not "engineering" racial balance as an end in itself but are promoting a variety of goals dependent on racial balance, from securing workplace peace to eliminating workplace caste.[150]

These justifications frame DEI initiatives as beneficial for everyone. According to many employers' DEI mission statements, benefits flow down to customers, partners, and consumer-communities.[151] Relying solely on the historical justification for DEI efforts bolsters the perception that such initiatives as unfairly penalizing white people.[152] A racially diverse workplace cannot bring benefits if DEI initiatives are met with hostility.[153] Courts and scholars often distill the substantive view to a single purpose: remedying the enduring effects of past discrimination. This is an oversimplification. The substantive view should entail seeing people as a whole and acknowledging their experiences, both positive and negative.[154] This means recognizing that race continues to have salience today.[155]

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150. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80-81 (1986). Kathleen M. Sullivan, previously a law professor at Harvard and Stanford and Dean of Stanford Law School, does commercial litigation as Senior Counsel at Quinn Emanuel Urquhart & Sullivan, LLP. *Attorneys*, QUINN EMANUEL URQUHART & SULLIVAN, LLP, https://www.quinnemanuel.com/attorneys/sullivan-kathleen-m/.

151. *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677 (2004) (noting that "affirmative action is increasingly being justified not as a remedy to historical discrimination and inequality, but as an instrumentally rational strategy used to achieve the positive effects of racial and gender diversity in modern society.") (internal citations omitted).

152. One example can be seen in Justice Powell's opinion in *Bakke* where he disapproved of the medical school's plan because of how it harmed "innocent persons" for "grievances not of their making." Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 298 (1978).

153. *See, e.g.*, Estlund, *infra* note 157, at 89 (noting that in diverse workplaces, it would be unwise to implement racial preferences "among incumbent coworkers that would impose a serious cost on identifiable individuals" because "such preferences are highly likely to engender interracial resentment rather than constructive engagement.") (internal citations omitted).

154. *See* Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633 (2017) (advocating for a substantive account, but also noting this view's drawbacks).

155. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991) (arguing for a color-conscious approach because color-blindness "has now become an impediment in the struggle to end racial equality.").

III. ADVANCING DIVERSITY AS AN AFFIRMATIVE, POSITIVE DUTY

There are significant benefits in moving affirmative action toward a forward-looking approach.[156] Focusing on diversity as a positive value that benefits everyone encourages people to coalesce around a common ideal.[157] This narrative shift is essential for coworkers of all different racial and ethnic backgrounds to view each other as equals.

A forward-looking approach finds supports in the Court's education jurisprudence.[158] In *Grutter*, the Court reasoned,

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogenous society must have confidence in the openness and integrity of the educational institutions that provide this training. [159]

Many employers frame their own DEI mission statements in similar terms, focusing more on forward-looking positive justifications.[160] We have seen the limits of centering the historical approach, especially in *SFFA*. A significant problem with a purely historical approach is that it suggests that once the effects of historical discrimination have been remedied,

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156. *See* Sullivan, *supra* note 150; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063 (2006) (observing that the forward-looking frame has doctrinal support and has thus gained political traction over the backward-looking view. But note that Kang and Banaji also highlight several shortcomings of the forward-looking view); Estlund, *infra* note 157; Paul Frumer & John D. Skrentny, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063, 1065 (2006) (arguing that "a presentist framing . . . provides an independent and compelling case for action" beyond the historical view); *see generally* Ronald J. Krotoszynski Jr., *The Argot of Equality: On the Importance of Disentangling Diversity and Remediation as Justifications for Race-Conscious Government Action*, 87 WASH. U.L. REV. 907 (2010).

157. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 80 (2000) (arguing that "there is a compelling societal interest in creating and maintaining spheres of real integration" in which diverse citizens "are induced to interact constructively toward common goals, to explore commonalities and differences, to break down stereotypes, and to form personal bonds of empathy and understanding.").

158. *Id.* at 81. "[T]he diversity argument has had little currency or judicial support outside the educational context, where it is fortified by claims of academic freedom in the selection of students and faculty" (internal citation omitted).

159. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

160. Note, *supra* note 147, at 661 (noting that by the late 1970s, "[b]usinesses began to view affirmative action as a means not only of complying with federal remedial policies, but also of achieving independent nonremedial benefits.").

consideration of race will no longer be necessary. The forward-looking argument for diversity and inclusion has no end date. This approach advocates for the continued consideration of race regardless of the racial balance of the workplace because diversity continues to bring positive benefits.

A. The Importance of Diverse Workplaces

> At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.[161]

Justice Blackmun's concurrence in *Bakke* captures a sentiment many Americans share today. However, from the perspective of people with a strong sense of racial and ethnic identity, meaningful equality includes seeing people's race. Many people from different historically marginalized groups take pride in their racial communities, and not only because of overcoming past discrimination.[162] Title VII did not consider this in its inception, which is intuitive given the statute's historical context. The history of race in the United States has been overwhelmingly oppressive and devastating, and the legislature was facing this reality at the time.

The United States is an incredibly diverse country that continues to be widely segregated. Neighborhoods are still largely segregated due to the enduring influence of past laws preventing people of color, especially Black people, from living in neighborhoods with white people and denying them home ownership in these areas.[163] However, people from different racial backgrounds came together through desegregation in the military, higher

161. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring).

162. *See, e.g.*, Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 128 (1997) (claiming that "[r]eligion, race, and ethnicity are types of cultural groupings and consequently are important sources of self-definition … In this respect, a sense of belonging to and identification with a community provides assurance and confidence engendered by group solidarity."); WILL KYMLICKA, LIBERALISM, CMTY. & CULTURE 175 (1st ed. 1989) ("Cultural heritage, the sense of belonging to a cultural structure and history, is often cited as the source of emotional security and personal strength").

163. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) for a comprehensive in-depth account of how *de jure* segregation—government-mandated laws and policies—promoted the racial divisions that persist today. Such segregation was perpetuated through state-sanctioned violence, block-busting, explicit racial-zoning laws, and more.

education, and importantly, the workplace.[164] Racially diverse work environments bring significant societal benefits.[165] Cynthia Estlund argues, "the workplace spawns conversations, alliances, and friendships among individuals who would have no other point of connection – bonds that transcend family, neighborhood, and often, given the partial success of Title VII, racial and ethnic identity."[166] In psychology and sociology, the "contact hypothesis" suggests that contact between people from different racial and ethnic groups reduces prejudice given certain conditions.[167] Empirical data generally supports the contact hypothesis, particularly in the case of workplace proximity.[168] Being in a workplace that advances the forward-

164. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 17 (2000) (arguing that "[t]he single most important arena of racial and ethnic integration is the workplace."). Cynthia L. Estlund is the Crystal Eastman Professor at the New York University School of Law, where she teaches Labor Law and Employment Law. *Faculty*, NYU SCH. OF L., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=25449.

165. *See* Cynthia L. Estlund, *Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 53-54 (1998) (arguing that "the basic constitutive elements of a democratic society—freedom of expression, equal protection, due process, and even democratic governance itself—have been underappreciated. These democratic elements help to support and enhance the role of the workplace as a crucial arena of constructive interracial engagement.").

166. *Id.* at 58.

167. *See generally* GORDON ALLPORT, THE NATURE OF PREJUDICE 261-281, 4th ed. 1954 (first introducing the contact hypothesis, specifying four conditions for optimal intergroup contact: equal group status, common goals, intergroup cooperation, and authority support); Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANNUAL REVIEW OF PSYCHOLOGY 65 (1998) (expanding on Allport's contact hypothesis by identifying four practices that reduce prejudice: learning about the outgroup, changed behavior, affective ties, and intergroup appraisal). *See also* Mary R. Jackman & Marie Crane, *"Some of my best friends are Black…": Interracial Friendship and Whites' Racial Attitudes*, 50 PUB. OP. Q. 459 (1986).

168. *Id.* at 483-84. It is important to note that there have been mixed studies on the contact hypothesis; in general, it remains foundational in understanding how inter-group contact influences social attitudes, though its effectiveness can depend on the context and manner of contact. At least some evidence shows that frequent, positive contact between white and Black adults of equal status tends to be associated with more positive beliefs towards members of the opposite race. *See* Estlund, *supra* note 164, at 62 (noting that while the contact hypothesis has its limitations as a means for resolving ethnic conflict and tensions, it is clear that more positive interaction between people from different racial backgrounds is necessarily a part of the solution); *see generally* Linda R. Tropp & Thomas F. Pettigrew, *Relationships Between Intergroup Contact and Prejudice Among Minority and Majority Status Groups*, 16 PSYCH. SCI. 951 (2005) ("Although greater intergroup contact is typically assocaitaed with less intergroup prejudice, the present results indicate that contact-prejudice effects vary significantly in relation to societal status of the groups involved.") (internal citations omitted); Amir Yehuda, *Contact Hypothesis in Ethnic Relations*, 71 PSYCH. BULL. 319; Lee Sigelman and Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781 (1993). *But see* Tamar Saguy et al.,*The Irony of Harmony: Intergroup Contact Can Produce False Expectations for Equality*, 20 PSYCH. SCI. 114 (2009) (arguing that "because focusing on commonalities directs group members' attention to intergroup similarities rather than attending to group differences in resources and power . . . [which] can have consequences for group members' expectations regarding intergroup relations and hierarchy.").

looking view of equality fosters positive and meaningful interactions between coworkers of different races.[169]

B. The Court's Mischaracterization of Race as a Negative or Stereotype

Estlund's argument about the importance of diverse workplaces highlights a crucial flaw in the *SFFA* Court's argument. The Court ultimately frames the consideration of race as an isolated and purely transactional exchange.[170] This perspective has many shortcomings. First, it assumes that the general practice of considering race only disadvantages non-marginalized groups. In this view, by considering race, the admissions process deprives a non-minority applicant of a seat they would otherwise be entitled to.[171]

Another issue with the *SFFA* Court's rationale is that it adopts a paternalistic stance towards students by characterizing the consideration of race as necessarily requiring negative stereotyping.[172] The Court argues that considering race requires the "offensive and demeaning assumption that [students] of a particular race, because of their race, think alike."[173] However, it is possible to recognize that race affects people's lives without asserting that they must think one singular way because of their race. Additionally, Justices Sotomayor and Jackson, the only two women of color currently serving on the Supreme Court, highlight in their dissents that the reality for many people of color is that their race *has* affected their life in some way.[174] Dissenting, Justice Sotomayor observed that "[a] guarantee of racial equality . . . can be enforced through race-conscious means in a society that is not, and has never been, colorblind."[175] Similarly, Justice Jackson points out the flaws in the Court's simple caricature of the universities' practices as "an unfair race-based preference" that is more

169. *See* Estlund, *supra* note 164.

170. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 218-19 (2023). By transactional, I mean the issue is framed, for example, as such: when a university accepts one Black student, it rejects one white student.

171. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046, 1048 (2002) (arguing that the "causation fallacy"—"the common yet mistaken notion that when white applicants like Allan Bakke fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action"—"by unduly magnifying the practical harm suffered by white applicants, stands in the way of any rational effort to evaluate the fairness of affirmative action.").

172. *Id.*

173. *Id.* at 220-21 (quoting Miller v. Johnson, 515 U.S. 900, 911-12 (1995)).

174. *Id.* at 318 (Sotomayor, J., dissenting).

175. *Id.*

fairly understood to be "a personalized assessment . . . [that] ensures a full accounting of everything that bears on an individual's resilience."[176]

When people claim that they, "don't see race," they often are trying to convey they treat everyone the same regardless of their race.[177] However, to many people of color, this sentiment is dismissive of their experiences and ignorant to the fact that race influences many aspects of people's lives.[178] To pretend that someone's race doesn't matter is to fail to see an important part of who they are.[179] Acknowledging a history of racial discrimination is an essential part of seeing race, but it is not the only part. People of color are not exclusively defined by their group members' history of discrimination; many people of color take pride and inspiration in their shared cultural experiences.[180] The Court asserts that it is doing a service to people of color by advancing the color-blind approach, but it is doing the opposite. Its mischaracterization of DEI efforts in *SFFA* fatally assumes that when one considers race, they must do so to someone's detriment.[181]

One response to this criticism is that the Court left open the possibility for candidates to discuss how race has affected their own life, be it through "discrimination, inspiration, or otherwise."[182] This loophole is not only difficult to reconcile with the Court's overall conclusion, but also morally worrisome. While at first glance it seems to prevent universities from using race as a "negative" or "stereotype," it effectively places the burden on the applicant of color to explain why their race has affected them.[183] It forces an applicant from a marginalized groups to justify why, because of their race, they deserve a spot that could otherwise go to essentially a more "deserving" applicant not belonging to an underrepresented community. This is further complicated by the fact that common standards of merit, through test scores, personal connections, legacies, and family contracts

176. *Id.* at 402 (Jackson, J., dissenting).

177. *See* Wright, *supra* note 1, at 213-14 (arguing that color-blind theories permit the exacerbation of "grave disparities in the opportunities and advantages available to persons of different races" and "ignores the context in which the problem of inequality has persisted . . . .").

178. *See generally* Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

179. *See, e.g.*, *id.*

180. *See* Yang, *supra* note 162; Kymlicka, *supra* note 162.

181. *Students for Fair Admissions*, 600 U.S. at 220-21 (majority opinion). Though the Court permits an applicant to discuss how race has affected their lives, "be it through discrimination, inspiration, or otherwise," the Court's characterization largely conceptualizes the consideration of race in terms of discrimination. *Id.* at 230.

182. *Id.*

183. *Id.* at 218-19.

were implemented against a background of discrimination.[184] The effect is these standards perpetuate and may even exacerbate existing inequalities. Why are we asking applicants to explain why race matters? Many universities and employers, as evidenced through their mission statements, have accepted that race plays a part in people's lives. The color-blind approach reverses progress made in cross-cultural competency and empathy.[185]

There are further problematic implications for the Court's narrow exception. In placing the burden on an applicant to explain the effect that race has on them, it conveys the message that one's race only matters to the extent that they are willing to make the case for it.[186] Despite the Court's assertion that its ruling forbids a university from engaging in negative racial stereotyping, only allowing for consideration of race in applicants' individual statements will ultimately require universities to engage in morally problematic racial stereotyping, anyway.[187] However, if a university is simply allowed to consider race, then it is not necessarily forced to value one minority applicant's experience with race over another. While students often had the choice to write diversity statements as part of their applications before *SFFA*, they did not need to for their race to be considered. Moreover, if an applicant can only have their race be considered by expressly raising the issue in a diversity statement, they must ask themselves, "what does this university want to hear from me? How can I use race as a selling point in my story that conveys it as something that has affected my life?" Forcing an applicant to think about their race in such a transactional way is questionable from a moral standpoint, especially if one accepts the principle that race still plays a significant role today. This concern also applies in the employment context if the Court decides to apply its reasoning in *SFFA* to similarly limit a private employer's DEI initiatives.

184. *See* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 618, 623 (1999) (noting that standardized tests have extremely limited value, despite being increasingly relied upon by schools, and arguing that "standardized tests measure two things: the ability to take other standardized tests and economic class.").

185. *See* Wright, *supra* note 1.

186. *Students for Fair Admissions*, 600 U.S. at 230.

187. For example, take a Black applicant who chooses to discuss how discrimination has affected their life, and another Black applicant who chooses to focus on their cultural history. If both applicants have otherwise similar test scores, writing abilities, and grades, how is the university to judge which experience should be weighted more? This forces universities to engage in determining which experience they value more, which is morally problematic. Does it prioritize the forward-looking view or the formal approach to discrimination?

CONCLUSION

In conclusion, the Court's jurisprudence on discrimination endorses competing views of equality. Title VII, enacted to eliminate discrimination in the workplace, has many shortcomings. An aggrieved plaintiff faces challenges with proof, unconscious bias, the underlying employment-at-will doctrine, and more. One of the best approaches to addressing inequality now is aiming for diverse workplaces. An approach that centers the forward-looking view is especially helpful because it unifies workers toward a common ideal and fosters cooperation and harmony among workers. However, the Court's Title VII jurisprudence does not contemplate this approach. Though forward-looking justifications find support in the Court's education jurisprudence, *SFFA* shut the door on affirmative efforts premised on these grounds. The Court's reasoning in *SFFA* has worrisome implications for racial equality in the classroom, workplace, and other social spheres.