
CIVIL RIGHTS

THE LEGAL IMPLICATIONS OF COMPLYING WITH RACE- AND GENDER-BASED CLIENT PREFERENCES

By Curt A. Levey*

Over forty years ago, Congress enacted the Civil Rights Act, a milestone in the fight against racial discrimination. One of the Act's most controversial provisions was Title VII, which prohibits racial discrimination by employers with more than 15 employees.¹ Some critics of this provision were concerned about employers who did not want to discriminate on the basis of race but were forced to do so because their customers demanded it. These opponents were worried that some employers who were forbidden from using race to make employment decisions would be driven out of business because some customers preferred to interact with employees only of particular races. They tried to amend Title VII with an exception that would permit employers to discriminate on the basis of race to satisfy customer preferences.²

This amendment was defeated, and it is not difficult to see today that America is better off for it. Title VII was not just about changing the attitudes of employers, but about changing the attitudes of their customers as well. When all employers are forbidden from catering to the discriminatory preferences of their customers, consumers have nowhere to turn and are forced to interact with employees of all races. The hope of Title VII was that these forced interactions would teach people that skin color should be irrelevant to doing a good job.³

One of the unfortunate realities of the civil rights movement, however, is that old habits die hard. Although many people over the last 40 years have indeed given up the racial demands they make on employers, not all have. Moreover, many of the contemporary demands for employees of a particular race come from surprising quarters.

This article is about one of these quarters: Fortune 500 companies that hire outside legal counsel. Over the last few years, large corporations have placed considerable pressure on the law firms they hire to provide them with legal teams of a particular racial composition.⁴ I describe these demands and explain why law firms that acquiesce to them violate federal anti-discrimination laws, both Title VII and 42 U.S.C. § 1981. Many of the same large corporate clients that are pressuring law firms to provide attorneys on the basis of race are also pressuring to provide them on the basis of gender. Acquiescing to these demands violates Title VII as well.

In short, the law today is still as it was in 1984, when Justice Powell declared in a Title VII suit against a law firm: "In admission decisions made by law firms, it is now widely recognized—as it should be—that in fact neither race nor sex is relevant. The qualities of mind, capacity to reason logically, ability to work under pressure, leadership, and the like are unrelated to race or sex."⁵

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I. CORPORATIONS ARE MAKING RACIAL AND GENDER DEMANDS ON THE LAW FIRMS THEY HIRE

Over the last few years, law firms have come under considerable pressure from some of their largest clients to use racial and gender preferences in hiring, promoting, and assigning work to their lawyers. These clients have begun asking for data on the racial composition of the attorneys at the law firms in order to decide whether to continue sending business to the firms.⁶

For example, a number of major corporations have begun asking their law firms to report the race and gender of every attorney assigned to their matters.⁷ In May 2005, more than 60 law firms signed a pact agreeing to report this information to over 20 corporate clients.⁸ Companies are interested not only in the racial and gender composition of the attorneys assigned to their matters; they are also interested in the racial and gender composition of the law firms they hire as a whole. Thus, companies are also asking law firms to report the race and gender of all of their attorneys, as well as the race and gender of those who have been promoted to partner.⁹

The companies are using this data to decide how much business to send to each law firm.¹⁰ Over 500 corporations have signed a statement pledging to "give significant weight" to law firms' racial and gender compositions in selecting outside counsel.¹¹ The corporations have made clear that "the failure to adequately diversify legal teams. . . could mean the difference between retaining business or being dropped."¹² As the general counsel for one company put it, "if your numbers don't add up, you're history."¹³ Several companies have already admitted to firing law firms because they did not approve of the racial and gender compositions of the firms; other law firms are reportedly teetering on the firing block for the same reason.¹⁴

Law firms appear to have received the message and are complying with their clients' demands to assemble teams of attorneys of the desired racial and gender compositions. A partner at one major corporate law firm noted that, although "[p]eople don't always think about gender and race when they staff matters," the new pressure by clients will be "a good reminder" to do so.¹⁵ A partner at another firm has said that race and gender have "become[] part of law firms' consciousness about what it takes to get business."¹⁶ Although looking at their colleagues through the prism of race and gender is "still outside of some people's comfort zone," this partner noted, "give them a business reason to do it, and it will happen."¹⁷ As a partner at another firm put it, law firms will "do what they have to do" in order to retain business.¹⁸

Doing what they have to sometimes involves creating diversity committees and hiring diversity consultants.¹⁹ Too often, it also involves using a different hiring standard for black and Hispanic attorneys than that for other races.²⁰

Law firms would be wise to be cautious in the face of these new client demands. If corporate clients were demanding that law firms increase the number of white or male attorneys on legal teams, firms would surely refuse on the ground that their clients were asking them to violate the law. As explained below, law firms that use race and gender to make hiring, promotion, and work assignment decisions in response to client pressure to increase the number of minority and female attorneys also run afoul of federal anti-discrimination statutes.²¹

II. CATERING TO THE RACIAL PREFERENCES OF CLIENTS VIOLATES FEDERAL LAW

There are two federal statutes that prohibit discrimination on the basis of race in the workplace: Title VII of the Civil Rights Act of 1964 and §1981 of the Civil Rights Act of 1866. Title VII makes it “an unlawful employment practice for an employer. . . to fail or refuse to hire. . . 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. . . .”²² Title VII also makes it unlawful “to limit. . . or classify. . . employees. . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race. . . .”²³ There is no doubt that these prohibitions apply to the relationships between law firms and their attorneys.²⁴

Similarly, Section 1981 guarantees “[a]ll persons. . . the same right. . . to make and enforce contracts. . . as is enjoyed by white citizens. . . .”²⁵ Although worded somewhat awkwardly, §1981 has been interpreted to bar private as well as public entities²⁶ from discriminating on the basis of any race²⁷ in the making of employment and other contracts. In the Civil Rights Act of 1991, Congress broadened §1981 to prohibit racial discrimination with regard to “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”²⁸ Under §1981, not only may a law firm be liable for discrimination, but so may be the individual employees and partners at the law firm that participated in the discriminatory decisions.²⁹

A law firm that hires new associates on the basis of race, promotes associates to partner on the basis of race, or assigns associates and partners to particular clients on the basis of race will fall within the prohibitions of both Title VII and §1981. Hiring and promoting based on race are the classic practices prohibited by these Acts. Moreover, a number of courts have held that work assignments fall within the “terms, conditions, or privileges of employment” language in Title VII.³⁰ As one commentator has put it, “[i]t is well established that making work assignments along the lines of race. . . is forbidden.”³¹ Although these cases are specific to Title VII, the general view is that, after the amendments by the 1991 Civil Rights Act, “§1981’s prohibition extends to the same broad range of employment actions and conditions as in the case of Title VII.”³² Indeed, the cases on work assignment have special force in the context of law firms. The ability to service the firm’s largest clients is a significant factor on which other decisions at the

firm are based, such as the amount of the year-end bonus a lawyer might receive or whether the lawyer will be promoted to partner. Those lawyers assigned to the firm’s most important clients will have material advantages over those lawyers who are not. Access to these career-advancing clients, therefore, constitute the “privileges” and “benefits” of employment at the law firm.³³

It is clear that a law firm will not be able to defend race-based hiring, promotion, and work assignments by arguing that it had to discriminate in order to satisfy client demands. Congress specifically considered whether to make any customer preferences a defense to Title VII when it debated whether to create an exception to liability whenever race is a “bona fide occupational qualification.”³⁴ Southern congressmen who opposed Title VII altogether argued in favor of this exception; they reasoned that black employees might sell better to black customers, and white employees might sell better to white customers, and, thus, in cases of business necessity, employers should be permitted to respond to the preferences of their customers.³⁵ The proponents of Title VII opposed the exception on the ground that racial preferences by customers would never be overcome if businesses were permitted to acquiesce to them, and their arguments carried the day.³⁶ Accordingly, all the courts to address the issue have held that satisfying customers does not justify racial discrimination otherwise prohibited by Title VII.³⁷

The conclusion is the same under §1981. According to recent Supreme Court precedent, §1981 claims—at very least those against a public entity—are analyzed under an Equal Protection standard.³⁸ That is, racial discrimination is permissible only if it would be excused under the Equal Protection Clause, which is even less forgiving than Title VII. Racial discrimination is permissible under the Equal Protection Clause only if it satisfies “strict scrutiny,” which requires that the discrimination serve a “compelling” interest and be “narrowly tailored” to achieve that interest.³⁹ The Supreme Court has recognized only three compelling interests sufficient to justify intentional racial discrimination: a national security emergency,⁴⁰ remedying past discrimination,⁴¹ and fostering the educational benefits of racial diversity on a university campus.⁴² It should be obvious that the satisfaction of race-based customer preferences does not fall into any of these three categories, but the next section discusses, more generally, why law firms will be unable to take advantage of any of the three compelling interests. In addition, some lower courts have, in the words of the Seventh Circuit, “left open a small window [in Equal Protection analysis] for forms of discrimination that are supported by compelling public safety concerns, such as affirmative action in the staffing of police departments and correctional institutions.”⁴³ However, it would be a great stretch for law firms to argue that acquiescing to clients’ race-based demands is a compelling public safety concern.

Several courts have treated §1981 as coextensive with Title VII in discrimination actions against private entities.⁴⁴ Under that analysis, satisfying customer preferences is not a defense to liability under §1981 precisely because it is not a defense under Title VII. More generally, the courts have held that there is no bona fide occupational qualification defense to

§ 1981 claims.⁴⁵ Thus, under any analysis, client preferences will not save law firms from § 1981 liability.

III. USING RACE TO ASSIGN, HIRE, AND PROMOTE ATTORNEYS VIOLATES FEDERAL LAW EVEN WITHOUT CLIENT PRESSURE

Part II should be the end of the analysis for any law firm that makes discriminatory hiring, promotion, and work assignment decisions in order to cater to client preferences. When considering allegations of racial discrimination under both Title VII⁴⁶ and the Equal Protection Clause (and thereby § 1981), courts consider as defenses only the *actual* reason the employer made the discriminatory decisions; post hoc rationalizations and reasons created for litigation are not credited.⁴⁷ Thus, law firms that discriminate in response to client pressure will be liable for racial discrimination.

But what if law firms told their clients that they would not make discriminatory decisions in order to retain their business, and the firms nonetheless wanted to consider changing the racial composition of its lawyers? Are there any reasons that the law firms could offer in good faith to justify their racial discrimination? The answer to this question is no. Although there are narrow exceptions created by case law to Title VII and §1981, it is unlikely that the firms could take advantage of them.

With respect to Title VII, racial discrimination is permitted in only one circumstance: to overcome a “manifest racial imbalances in traditionally segregated job categories.”⁴⁸ This is known as the “Weber exception” to Title VII. In order to take advantage of this exception, law firms will have to demonstrate four things: 1) “traditional patterns of racial segregation” in the job category in which minorities are now being favored,⁴⁹ 2) a manifest—that is, substantial—imbalance between the racial composition of the lawyers at the law firm and the racial composition of the qualified labor market,⁵⁰ 3) the discrimination is temporary and “not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance,”⁵¹ and 4) the discrimination “does not unnecessarily trammel the interests of white employees.”⁵²

It appears fairly clear that large corporate law firms will fail this test. This is the case because there is no existing manifest imbalance—no less evidence of segregation—between the racial composition of the lawyers who are at large corporate law firms and the racial composition of the qualified labor market. In fact, the available evidence indicates that large corporate law firms hire black attorneys in numbers that exceed their proportion among law students.⁵³ It is clear that continued discrimination by law firms can, at best, only seek to maintain, rather than attain, a balanced workforce.⁵⁴ And, in the words of one commentator, “[t]he Supreme Court has emphasized that affirmative action plans are permissible only if designed to attain, not maintain, balanced workforces.”⁵⁵ Indeed, it is significant that “in the two cases to come before the Court where the avowed purpose of the preference at issue was the maintenance of prior affirmative action gains, the plans were rejected.”⁵⁶

With respect to §1981, as was explained above, courts will apply either a Title VII or Equal Protection analysis.

Under the former, law firms will not be able justify their racial discrimination under §1981 precisely because they cannot do so under Title VII. Firms will fare no better under an Equal Protection analysis. In fact, most commentators have concluded that the circumstances in which an employer can engage in racial discrimination under the Equal Protection Clause are even narrower than the circumstances permitted by Title VII.⁵⁷ The strict scrutiny test requires a “compelling interest,” and the Supreme Court has recognized only three compelling interests that can justify racial discrimination: a national security emergency,⁵⁸ remedying past discrimination,⁵⁹ and fostering the educational benefits of racial diversity on a university campus.⁶⁰

It is clear that law firms will be unable to take advantage of the first two interests. There is no reason to believe that national security depends on a particular racial composition of the attorneys at corporate law firms. In addition, law firms are permitted to discriminate not to remedy “societal discrimination,” but rather only in order to remedy their own discrimination.⁶¹ Given the over-representation of blacks among new associates at most large law firms,⁶² it will be difficult for a firm to show that there has been any racial discrimination to remedy, no less to show the gross racial disparities required to justify affirmative action under equal protection standards.⁶³ Even if such a showing could be made, it is doubtful that many law firms will want to admit to discriminating in the past.

For at least six reasons, it is also unlikely that law firms will be able to take advantage of the third interest, the educational benefits of diversity.⁶⁴

First, the Supreme Court has only recognized diversity as a compelling interest for its educational benefits and in the context of selecting students; it has not recognized diversity as a compelling interest for its workplace benefits nor in the context of selecting employees.⁶⁵

Second, the reasons the Supreme Court set forth for recognizing diversity as compelling interest in the educational context do not carry over to the workplace context. The Court noted that there was a “tradition” under the First Amendment “of giving a degree of deference to a university’s academic decisions;” in light of this deference, the Court “presumed” that racial diversity did indeed yield educational benefits, and that reaping these benefits was “essential” to the mission of a university.⁶⁶ While in university admissions the First Amendment value of academic freedom must be weighed against the right to equal protection, there is no such countervailing constitutional interest or presumption with respect to law firms or employers in general. In addition, the Court noted that racial diversity fosters “cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races,” all arguably integral to the mission of an educational institution, but far removed from the core mission of a law firm.⁶⁷ Finally, the Court observed that education is “pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society,” and, indeed, “is the very foundation of good citizenship.”⁶⁸ “For this reason,” the Court said, “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or

ethnicity.”⁶⁹ As important as large corporate law firms are to the American economy, it is difficult to believe that they are “the very foundation of good citizenship” in the same way education—even college education—is.

Third, the Supreme Court’s recognition of diversity as a compelling interest in education was grounded in its belief that an extensive collection of studies, expert reports, and other empirical evidence demonstrated the educational benefits of a diverse student body.⁷⁰ There is no comparable body of scientifically developed evidence for the benefits of diversity in law firms or the workplace in general.

Fourth, the reasons racial diversity might be an asset in the workplace context are little more than “customer preferences” by another name. That is, law firms might argue that racial diversity is important to the firm because attorneys of a particular race might better understand or better persuade clients, judges, or jurors of the same race.⁷¹ But that is akin to assigning black salespersons to black customers, and white salespersons to white customers. As explained above, such customer preferences are not a defense to intentional racial discrimination under an Equal Protection analysis.

Fifth, the Supreme Court held that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷² This is unlike the narrow type of diversity—defined primarily by race and gender—demanded by corporate clients and implemented by law firms.

Sixth, for these and other reasons, courts that have considered the question have decided that the workplace benefits of racial diversity do not rise to the level of a compelling interest.⁷³

Moreover, even if a law firm could find a way to survive the compelling-interest prong of strict scrutiny, the firm would not escape liability under an Equal Protection analysis unless it could also prove that its discriminatory decisions were narrowly tailored to achieve the compelling interest. The firm would have to show that its discrimination satisfies the following factors: 1) the racial composition of the lawyers it hires, promotes, and assigns work to is justified by the racial composition of the qualified labor pool, 2) there are no race-neutral alternatives that can achieve the benefits of diversity equally effectively, 3) the discriminatory policies are of only temporary duration, and 4) the discrimination does not burden lawyers of other races unduly.⁷⁴ It will be difficult for law firms to make these showings, especially in light of the evidence indicating that black lawyers are hired by large firms in numbers greater than their proportion in the qualified labor pool.⁷⁵

In sum, whether a court applies an Equal Protection or Title VII analysis to a §1981 claim, law firms will have no defense to their racial discrimination.

IV. USING GENDER TO ASSIGN, HIRE, AND PROMOTE ATTORNEYS VIOLATES FEDERAL LAW

Up until this point, the focus of this paper has been on racial discrimination. As noted in Part I, however, corporate clients have also threatened law firms with termination if they do not have the desired number of female associates and

partners. Firms that acquiesce in these demands will violate Title VII’s prohibition on sex discrimination.⁷⁶ As it does with race, Title VII makes it “an unlawful employment practice for an employer... to fail or refuse to hire. . . 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... sex...”⁷⁷ Title VII also makes it unlawful “to limit. . . or classify... employees... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s... sex...”⁷⁸ For the same reasons advanced in Part II, it is clear that gender-based employment decisions such as hiring, promotion to partner, and assignment to certain clients will fall within the purview of Title VII’s prohibitions. Thus, the only question is whether law firms have any defense under Title VII to save them from liability.

One possible defense is the “bona fide occupational qualification” exception to intentional sex discrimination.⁷⁹ Although, Congress rejected this defense with regard to race, as noted in Part II, Congress accepted it with regard to sex (as well as religion and national origin).⁸⁰ In order to take advantage of this exception, law firms will have to show that “sex is a bona fide occupational qualification reasonably necessary to the normal operation” of the firm.⁸¹

Satisfying the demands of customers is necessary to the operation of any for-profit enterprise, but courts have held that most customer-based gender preferences do not qualify as “bona fide occupational qualifications.”⁸² As one commentator has noted “[c]ustomer preference in general will not support a BFOQ for sex discrimination.”⁸³ The reason for this was stated long ago by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*⁸⁴ In this case, an airline discriminated against men in hiring flight attendants on the basis of a survey of its customers showing that 79% of them—85% of male passengers and 69% of female passengers—preferred female flight attendants. The Fifth Circuit found the practice in violation of Title VII because “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company’s inability to perform the primary function of service it offers.”⁸⁵

Accordingly, courts have found an employee’s gender to constitute a bona fide occupational qualification only when 1) all or substantially all of the other sex cannot perform the duties of the job, or it is highly impracticable to determine on an individual basis whether members of the other sex can perform the duties of the job,⁸⁶ 2) the required job qualification goes to the essence of the business operation,⁸⁷ and 3) there are no less-discriminatory alternatives that would make the sex discrimination unnecessary.⁸⁸ Courts have generally found gender to meet these requirements in only three circumstances: where an essential job function would be performed more safely with employees of only one sex,⁸⁹ where an essential job function is related to sexual privacy,⁹⁰ or where the primary function of the employer is to sell sex-based services.⁹¹ It seems clear that

the outside counsel hired by large corporations do not fall into any of these categories. Moreover, the fact that corporations do not demand lawyers of only a single gender—but are simply seeking lawyers of a desired gender ratio—demonstrates clearly that acquiescing to these demands will not satisfy the first prong of the BFOQ test, i.e., that all or substantially all of the other sex cannot perform the job.

It should be noted that one commentator has argued that client preferences for law firm lawyers of a particular gender should meet the BFOQ test.⁹² This commentator argues that the attorney-client relationship is one built on intimate trust, and, analogizing from the privacy cases, further argues that if a client is psychologically uncomfortable with lawyers of a certain gender, then the client should be respected.⁹³ Even this theory, however, would be unavailable to law firms trying to escape liability under Title VII. In light of the fact that corporate clients are happy to work with lawyers of both genders—so long as they are kept in proper balance—it is clear that the clients are not psychologically uncomfortable with lawyers of a certain gender.

As with racial discrimination, this should be the end of the analysis under Title VII, because law firms will be held accountable for the real reason they are discriminating on the basis of gender—client preferences—and that reason will not save them from liability. However, even if a firm's reason for sex discrimination had nothing to do with client pressure, it bears noting that, as with racial discrimination, the firm would be unable to take advantage of the one exception to Title VII: correcting a "manifest imbalance" in a "traditionally segregated job category."⁹⁴ As with race, that is because there is no evidence of a manifest gender imbalance at large corporate law firms—women are represented at these firms in approximate proportion to the qualified labor pool.⁹⁵

CONCLUSION

Although law firms have indicated they are willing to acquiesce to client demands concerning the race and gender of attorneys, they would be wise to reconsider. Law firms that hire, promote, and assign lawyers based on race and gender violate federal anti-discrimination laws and expose themselves to legal liability. Indeed, some organizations have already begun to solicit potential plaintiffs to sue law firms for this very practice.⁹⁶

Even putting the law aside, there is growing evidence that the use of preferences by law firms has unfortunate consequences. Racial preferences lead to disparities in expectations and performance that harm a firm's minority attorneys and ultimately decrease the firm's diversity.⁹⁷ Although it is beyond the scope of this paper to discuss these consequences in detail, they are explored at length in Professor Richard Sander's recent law review article, *The Racial Paradox of the Corporate Law Firm*.⁹⁸ His article ultimately concludes that

The set of problems that plausibly stem from the aggressive use of racial preferences by law firms are therefore considerable: the frustration and sense of failure they foster among minority associates; the reinforcement of negative racial stereotypes among majority associates and partners; the likely crippling

of human capital development among many of the most able young minority attorneys; substantial economic costs and inefficiencies at the firms themselves; and, of course, the failure of the underlying goal of this whole process—the integration of elite firms at the partnership level. It would be hard to imagine a more counterproductive policy.⁹⁹

Thus, for both legal and practical reasons, it would seem that the better course is the one blazed decades ago by someone who fully understood the goals of our nation's civil rights laws: judge people not "by the color of their skin but by the content of their character."¹⁰⁰

Endnotes

1 42 U.S.C. § 2000e et seq.

2 In the House of Representatives, John Williams, a Democrat from Mississippi, offered an amendment to Title VII that would have permitted employers to discriminate on the basis of race whenever skin color was a "bona fide occupational qualification." He worried that "multimillion-dollar businesses which cater exclusively to a Negro clientele" would be destroyed. 110 Cong. Rec. 2550 (1964). Others argued that the amendment was necessary because "a Negro salesman would be best in dealing with selling to Negroes" or even because "Negro customers will not do business with Negro salesman." *Id.* at 2559, 2563 (statements of Representatives Curtis and Whitten). They argued that discrimination in such cases would "be a bona fide reason, it would not be racial bigotry." *Id.* at 2559. Williams's amendment was defeated 108 to 70. A similar amendment was offered in the Senate by John McClellan, a Democrat from Arkansas. It would have permitted racial discrimination whenever "the employer believes, on the basis of substantial evidence, that the hiring of such individual... will be more beneficial to the normal operation of the particular business enterprise involved or to the good will thereof..." This amendment was defeated 61 to 30. *See generally*, William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 213-18 (1998).

3 *See* 110 Cong. Rec. 2563 (statement of Representative Roosevelt) (noting that companies had discovered that "they could send out a Negro on a selling job or on a service job in an entirely white community, and if he did a good job he was as fully accepted as any white person who might go into that particular community," and arguing that "all we are trying to do is break down this unfortunate idea—this wrong idea—which unfortunately is prevalent in many areas of the country" that "white people could serve white customers and, therefore, they should be allowed to have only white servicemen or white salesmen").

4 *See* Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, NEW YORK TIMES (July 21, 2006).

5 *Hishon v. King & Spalding*, 467 U.S. 69, 81 (1984) (Powell, J., concurring).

6 *See* Donovan, *supra* note 4.

7 *See* Nathan Koppel, *Shell's Reward for Diversity: Work*, LEGAL TIMES (Jun. 28, 2004); Thomas Adcock, *Firms Agree to Give Clients Diversity Data on Lawyers*, NEW YORK L. J. (May 13, 2005).

8 *See* Adcock, *supra* note 7.

9 *See* Koppel, *supra* note 7; Meredith Hobbs, *Wal-Mart Diversity Program Sweeps in 40 New Firm Relationship Partners*, FULTON COUNTY DAILY REPORT (Oct. 25, 2005).

10 *See* Donovan, *supra* note 4.

11 Koppel, *supra* note 7.

12 *See* Adcock, *supra* note 7.

13 *Id.*

14 See Kris Hudson, *Wal-Mart Presses Suppliers To Enhance Their Diversity*, WALL STREET JOURNAL (Feb. 23, 2007) (reporting that “Wal-Mart has fired three outside [law] firms and reduced the workloads of two others for failing to show progress on diversity matters”); Kellie Schmitt, *A Little Diversity Speech Goes a Very Long Way*, Recorder (Dec. 26, 2006) (reporting that McKesson Corp. fired the law firm Gibson Dunn because it was unhappy with the racial composition of the firm); Koppel, *supra* n. 7 (reporting that “at least one [law] firm that had worked for Shell in the past . . . was bounced simply because it did not have the right stuff on diversity”).

15 Koppel, *supra* note 7.

16 *Id.*

17 *Id.*

18 Adcock, *supra* note 7.

19 See Natasha G. Kohne, *The Integrated Workplace: Ending Marginalization*, NEW YORK L. J. (February 24, 2006).

20 See Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C.L. REV. 1755, 1780-87 (2006). As an illustration of the large racial disparity in hiring standards, consider that “whites going into large firms had grades substantially above class averages. Conversely, blacks going into large firms tended to have grades . . . far below the medians at their schools.” *Id.* at 1787. Specifically, in a database for 30 elite law schools, the median first-year law school GPA of white attorneys at large firms was in the 75th percentile, while the median GPA of black attorneys was in the 18th percentile. *Id.* at 1786.

21 It is worth noting that the corporations that hire or fire law firms on the basis of their racial compositions run afoul of federal law as well. Under § 1981, corporations can be liable for hiring or firing independent contractors on the basis of race. See, e.g., *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir.1999) (“Section 1981 does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which a[n] independent contractor . . . provides service to another.”).

22 42 U.S.C. § 2000e-2(a)(1).

23 *Id.* § 2000e-2(a)(2).

24 See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

25 43 U.S.C. § 1981(a).

26 See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

27 See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (recognizing that § 1981 prohibits discrimination against white employees).

28 42 U.S.C. § 1981(b).

29 See *Employment Discrimination Law* 697 (3d ed. Supp. 2002, C. Geoffrey Weirich, ed.) (“Employees, such as supervisors who make or recommend employment decisions, are subject to individual liability under § 1981.”). See, e.g., *Williams v. United Dairy Farmers*, 20 F.Supp.2d 1193, 1202 (S.D. Ohio 1998); *Dalton v. Jefferson Smurfit Corp.*, 979 F.Supp. 1187, 1202-03 (S.D. Ohio 1997); *Richard v. Bell Atlantic Corp.*, 946 F.Supp. 54, 74 (D.D.C. 1996); *Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.*, 917 F.Supp. 1282, 1293 (N.D. Ill. 1996); *Leige v. Capitol Chevrolet, Inc.*, 895 F.Supp. 289, 293 (M.D. Ga. 1994).

30 See *Judie v. Hamilton*, 872 F.2d 919 (9th Cir. 1989); *Smith v. Texas Dep’t of Water Resources*, 799 F.2d 1026 (5th Cir. 1986); *Eubanks v. Pickens-Bond Constr. Co.*, 635 F.2d 1341 (8th Cir. 1980); *Jones v. Sch. Dist.*, 198 F.3d 403, 412 (3d Cir. 1999) (holding that a school’s failure to assign a teacher to physics classes and instead assigning him to teach science classes he regarded as less desirable was cognizable under the employment discrimination laws); *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 745 n.13 (8th Cir. 1980) (noting that a female’s allegations that her employer transferred certain of her job assignments to a male employee, if true, would constitute a prima facie case of discrimination).

31 Lex Larson, *Employment Discrimination* § 15.04 (Matthew Bender, 2d ed. 2006).

32 *Id.* at § 101.01[4].

33 *Id.* at § 15.04 (“Job assignments may also be challenged when they result in a lower chance for advancement.”).

34 See 110 Cong. Rec., *supra* note 2.

35 See, e.g., 110 Cong. Rec. 2559 (1964) (statements of Representatives Curtis) (“[A] Negro salesman would be best in dealing with selling to Negroes. That would be a bona fide reason, it would not be racial bigotry.”).

36 See 110 Cong. Rec. 2563 (statement of Representative Roosevelt) (noting that companies had discovered that “they could send out a Negro on a selling job or on a service job in an entirely white community, and if he did a good job he was as fully accepted as any white person who might go into that particular community,” and arguing that “all we are trying to do is break down this unfortunate idea—this wrong idea—which unfortunately is prevalent in many areas of the country” that “white people could serve white customers and, therefore, they should be allowed to have only white servicemen or white salesmen”).

37 See, e.g., *Knight v. Nassau County Civil Service Comm’n*, 649 F.2d 157 (2d Cir. 1981) (holding that an employer could not assign black employees to minority recruitment because it thought the employee would be more successful at recruiting than white employees); *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1178 (7th Cir. 1999) (finding “[t]he idea of a minority office catering to minority business, run by minority workers” to be unlawful); *Burwell v. E. Air Lines*, 633 F.2d 361, 370 n.13 (4th Cir. 1980) (holding that statutory BFOQ defense is not available for race discrimination).

38 See *Gratz v. Bollinger*, 539 U.S. 244, 276 n. 23 (2003) (stating that “purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981”); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (noting that “the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause”).

39 *Gratz*, 539 U.S. at 270 (2003).

40 See *Korematsu v. United States*, 323 U.S. 214 (1944).

41 See *United States v. Paradise*, 480 U.S. 149 (1987).

42 See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

43 *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002); *but see*, e.g., *Haynes v. City of Charlotte*, 10 F.3d 207, 214 (4th Cir. 1993) (holding that “confidence and acceptance” of the community was not a compelling interest under the Equal Protection Clause justifying the city’s use of race in selecting a police officers).

44 See, e.g., *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 498-99 (3d Cir. 1999); *Frost v. Chrysler Motor Corp.*, 826 F.Supp. 1290, 1294 (W.D. Okla. 1993).

45 See *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999) (upholding jury verdict under § 1981 for black telemarketing employee who had been assigned to call only black voters); Ernest F. Lidge, *Law Firm Employment Discrimination in Case Assignments At the Client’s Insistence: A Bona Fide Occupational Qualification?*, 38 CONN. L. REV. 159, 182 (2005) (“§ 1981 does not contain a BFOQ defense.”).

46 See, e.g., *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (noting that, under Title VII, the defendant will be liable for racial discrimination if its “proffered reason was not the true reason for the employment decision”).

47 See *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (“To be a compelling interest, the State must show that the alleged objective was the legislature’s ‘actual purpose’”); *Miller v. Johnson*, 515 U.S. 900, 921 (1995) (considering only the “State’s true interest” for purposes of “compelling interest” determination).

48 *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 197 (1979); see *Taxman v. Board of Education Township*, 91 F.3d 1547

3d Cir. 1996) (rejecting diversity exception, and holding that the *Weber* exception is the only exception to Title VII).

49 *Weber*, 443 U.S. at 201; *see Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1987) (“The requirement that the ‘manifest imbalance’ relate to a ‘traditionally segregated job category’ provides assurance both that sex or race will be taken into account in a manner consistent with Title VII’s purpose of *eliminating the effects of employment discrimination*, and that the interests of those employees not benefiting from the plan will not be unduly infringed.”) (emphasis added).

50 *See Johnson*, 480 U.S. at 621, 632 (*Weber* exception applicable where “women were represented in numbers *far less* than their proportion of the County labor force.” “Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.”) (emphasis added); *Schurr*, 196 F.3d at 496-98 (3d Cir. 1999) (holding that casino could not prefer black applicants to white applicants because there was no finding of a manifest imbalance in a relevant job category).

51 *Weber*, 443 U.S. at 208.

52 *Id.*

53 *See Sander, supra* note 20, at 1780-81.

54 Where minorities are overrepresented, law firms that engage in racial preferences are actually seeking a less balanced workforce.

55 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1070 (3d ed. 1996).

56 *Id.* at 1070 n.182 (citing *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984) & *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

57 *See Larson, supra* n. 31, at §62.12[1] (“The best reading of these decisions ... is that voluntary affirmative action ... is permissible under the Constitution ... under narrower circumstances than permitted by *Weber*.”).

58 *See Korematsu v. United States*, 323 U.S. 214 (1944).

59 *See United States v. Paradise*, 480 U.S. 149 (1987).

60 *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

61 *See Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

62 *See Sander, supra* note 20, at 1780-81.

63 *See Honadle v. Univ. of Vermont & State Agric. College*, 56 F.Supp. 2d 419, 429 (D. Vt. 1999) (stating that evidence of gross statistical disparities is required to withstand an equal protection challenge to an affirmative action plan) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989)).

64 As noted above, courts have already rejected diversity as a defense to Title VII claims. *See, e.g., Taxman v. Piscataway Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996).

65 *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

66 *Id.* at 328-29.

67 *Id.* at 330 (internal quotation marks omitted and alteration in original).

68 *Id.* at 331 (internal quotation marks omitted).

69 *Id.*

70 *Id.* at 330 (stating that the University of Michigan Law School’s claim of a compelling interest is supported by “expert studies and reports entered into evidence at trial [and] numerous studies show[ing] that student body diversity promotes learning”).

71 *Cf. Amicus Brief of General Motors Corporation as Amicus Curiae in Support of Respondents in Gratz*, 539 U.S. at 12-13 (arguing that businesses need a sufficient number of minority managers in order to be successful at “identifying and satisfying the needs of diverse customers . . . and forming and fostering productive working relationships with business partners and subsidiaries around the globe”).

72 *Grutter*, 539 U.S. at 325 (quoting *Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)).

73 *See, e.g., Lomack v. City of Newark*, 463 F.3d 303, 310 (3d Cir. 2006) (noting that the Supreme Court has endorsed only “the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate”); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

74 *See Paradise*, 480 U.S. at 171 (plurality opinion); *Hayes v. North State Law Enforcement Officers Ass’n*, 10 F.3d 207, 216 (4th Cir. 1993); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (reaffirming the *Paradise* factors by requiring racial classifications to pass “the ‘narrow tailoring’ test this Court has set out in previous cases”); *Angelo N. Ancheta, Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. CHI. L.J. 21, 26 (2004) (noting that “[c]ourts weigh all of these factors, and any significant departure from the standards... can render a racial classification unconstitutional”).

75 *See Sander, supra* note 20, at 1780-81.

76 Section 1981 is not applicable to this Part because it prohibits only discrimination on the basis of race.

77 42 U.S.C. § 2000e-2(a)(1).

78 *Id.* § 2000e-2(a)(2).

79 42 U.S.C. § 2000e-2(e)(1) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of...sex... in those certain instances where... sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....”).

80 *See Id.*

81 *Id.*

82 *See, e.g., Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting the conclusion of the court below that, under Title VII, “customer preferences rise to the [level] of a bona fide occupational qualification if ‘no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficacy problems’”).

83 1 Employment Discrimination Law, *supra* note 55, at 408.

84 442 F.2d 385 (5th Cir. 1971).

85 *Id.* at 389.

86 *See Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 207 (1991) (rejecting BFOQ defense because “Johnson Controls has shown no ‘factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.’”).

87 *See id.* at 203 (“[I]n order to qualify as a BFOQ, a job qualification must relate to the ‘essence’ or to ‘the central mission of the employer’s business.’”).

88 1 EMPLOYMENT DISCRIMINATION LAW, *supra* note 55, at 402-03 (citing cases).

89 *See, e.g., Johnson Controls*, 499 U.S. at 203 (citing prison security guards).

90 *See, e.g., 1 EMPLOYMENT DISCRIMINATION LAW, supra* note 55, at 407 (citing restroom custodians and hospital nurses).

91 *See, e.g., id.* at 409 (citing Playboy bunnies).

92 *See Lidge, supra* note 45, at 176-78.

93 *See id.*

94 *See Johnson*, 480 U.S. at 632 (discussing the “requirement that the ‘manifest imbalance’ relate to a ‘traditionally segregated job category’” with respect to both sex and race).

95 At the nation’s largest law firms (more than 500 attorneys), women comprise 48% of summer associates and 45% of associates. In comparison,

the percentage of women among law school graduates “has ranged from 40% to almost half since the late 1980s.” Press Release, National Association for Law Placement, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms (Nov. 17, 2005), at <http://www.nalp.org/press/details.php?id=57> (last visited March 5, 2007) (based on data in the 2005-2006 NALP Directory of Legal Employers).

96 See, e.g., Roger Clegg, *Shell Game*, AMERICAN LAWYER (Oct.1, 2004) (letter to the editor).

97 See Sander, *supra* note 20.

98 *Id.*

99 *Id.* at 1820-21.

100 Speech, Martin Luther King, “I Have A Dream” (delivered Aug. 28, 1963, Washington D.C.).

