

RACE AND SEX IN ORGANIZING WORK:
"DIVERSITY," DISCRIMINATION, AND INTEGRATION

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INTRODUCTION

Americans are seeing race and sex differently these days, and the workplace is no exception. Indeed, there is reason to believe that managers are voluntarily and consciously considering the race and sex of their employees in everyday employment decisions organizing work. Who will serve on a hiring or recruitment committee, who will be assigned to which client or to which market, who will be tapped for interviews and photographs for publicity materials. These are all decisions about how and by whom work is accomplished—decisions “organizing work”—rather than about who gains entry into a firm in the first place or where one is placed within a clearly defined job hierarchy.

Many of us realize that these decisions are sometimes, even frequently, based in part on race or sex. We would be surprised to see a law school appointments committee comprised entirely of white men, even if most members of the faculty are white. Outside of the academy, moreover, the “diversity” discourse popular in the business and mainstream press presents diversity as a business imperative.¹ This discourse has been embraced by businesses across a wide sector of the market, and it frames a particular diversity narrative for managers regarding the relevance of race and sex in organizing work. The diversity narrative tells managers that race and sex are relevant as means of serving increasingly globalized markets and of signaling legitimacy and adherence to egalitarian norms.

What we don't seem to realize is that race- and sex-based decisions organizing work have enormous potential to generate (and to reduce) workplace discrimination and inequality.

¹ See Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. OF SOC. 1589, 1590 (2001) (identifying a diversity rhetoric in managerial literature that “extols the virtues of a diverse workforce and advocates ‘managing diversity’ and ‘valuing diversity’”); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961-1996*, 41 AM. BEHAV. SCI. 960, 972-73 (1998) (identifying a rise in “diversity management”). The business case for diversity gained national prominence with the corporate amicus briefs filed in the equal protection case challenging the government's use of race in university and graduate school admissions, *Grutter v. Bollinger*. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing Amicus Briefs of 3M et al. and of General Motors Corp.). See generally *infra* notes 22-33 and accompanying text.

Decisions organizing work present and arrange workers in relation to one another and, accordingly, shape the context for day-to-day intergroup interactions and relationships that are established and carried out at work.² Intergroup interactions, whether at the water cooler or in the course of securing a lucrative business deal, can reinforce stereotypes or break them down. Social scientists have long understood that people tend to categorize similarities and differences during interaction as a way of making sense of each other³ and that the environmental features, or context, of an interaction can affect the salience of race and gender categories and can ultimately influence whether the interaction is stereotype confirming or stereotype challenging.⁴

This and other research suggests that race- and sex-based decisions organizing work made pursuant to the prevailing diversity narrative will produce and further entrench workplace inequality. Not only are the decisions themselves (based as they often are on ideas about group differences) likely to perpetuate stereotypes and to impose extra, “shadow work” on women and minorities, but race- and sex-based decisions organizing work made pursuant to the dominant diversity narrative are also likely to create stratification in jobs and job functions and likely to lead to devaluation along racial and gender lines, conditions that have been shown to foster stereotype-confirming interactions.⁵

² Decisions organizing work are decisions that determine who does what work once workers have been included in the institution. Although decisions organizing work can take place simultaneously with entry and promotion decisions, the decisions organizing work that I focus on in this Article allocate job functions, responsibilities, and conditions within job categories. See Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83 (2008) (recognizing that “while determining precisely what happens before and during the moment in which a prospective employee is excluded from an employment opportunity remains crucial to anti-discrimination theory and practice, employment scholars are beginning to pay more attention to what happens to that person *after* she is hired and becomes an employee”).

³ See ERVING GOFFMAN, *INTERACTION RITUAL* (1967); Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218 (1997). This process of situating self and other through categorization continues throughout interaction. See *id.* at 220.

⁴ GOFFMAN, *supra* note 3; Ridgeway, *supra* note 3; see also Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1 (2003); Cecilia L. Ridgeway, *Linking Social Structure and Interpersonal Behavior: A Theoretical Perspective on Cultural Schemas and Social Relations*, 69 SOC. PSYCHOL. Q. 5 (2006).

⁵ See *infra* notes 39-49 and accompanying text.

At the same time, a substantial body of social science research and theory also points to race and sex in organizing work as potentially one of the most effective, untapped ways of reducing workplace discrimination.⁶ Studies have shown, for example, that placing an African American on an otherwise all-white interview panel can alter the deliberation among panel members and reduce the likelihood that biases and stereotypes will negatively affect the interaction between the panel members and African American candidates.⁷ Additional research suggests that improving the racial and gender balance in the work environment and expanding opportunities for peer-like contact and collaboration among workers from different racial and gender groups can lead to better career outcomes for women and people of color.⁸ According to this research, considering race and sex to compose integrated work teams, for example, can serve to reduce discriminatory biases and stereotyping in intergroup interaction.

Legal scholars and antidiscrimination advocates alike have largely overlooked the risks and possibilities of race and sex in organizing work. There has been surprisingly little attention paid to how employment discrimination law should treat race- and sex-based decisions made for diversity reasons⁹—and none aimed at understanding the role of law, particularly the most far-

⁶ See *infra* Part II.A.

⁷ See Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 844-47 (2001); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006); see generally Russell R. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1175-77 (2008) (describing Sommers' study and other research showing how perceptions of bias can influence interaction).

⁸ See LAUREL SMITH-DOERR, *WOMEN'S WORK: GENDER EQUALITY V. HIERARCHY IN THE LIFE SCIENCES* (2004); Alexandra Kalev, *Cracking the Glass Cages? Restructuring and Ascriptive Inequality at Work*, 114 AM. J. OF SOC. 1591 (2009).

⁹ Much of the scholarship considering the law's role in regulating race- and sex-based decisions has focused on the implications of the Supreme Court's decision in *Grutter v. Bollinger* for use of race in employers' hiring decisions. See, e.g., Cynthia Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005); 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 (2004); Ronald Turner, *Grutter: The Diversity Justification and Affirmative Action*, 43 BRANDEIS L.J. 199 (2003).

This scholarship tends to coalesce around two largely competing views. One sees the ascendance of the business case for diversity as an "echo" of largely discredited market-based arguments and cautions against a regulatory model that would allow employers more freedom to make consciously race- or sex-

reaching employment discrimination statute, Title VII of the Civil Rights Act,¹⁰ in regulating consideration of race and sex in decisions organizing work.¹¹

This lack of critical examination of the permissibility of race and sex in decisions organizing work is even more striking given that decisions organizing work differ from entry, promotion, and exit decisions in ways that are important to an antidiscrimination analysis. They are “softer” in that their benefits and harms are not always immediately discernable. Indeed, the benefits of decisions organizing work for those whose work is being organized are often not discernable without reference to relations, the opportunity to impress others or to overcome stereotypes. Moreover, unlike race- and sex-based decisions at key employment junctures, like hiring or promotion, the use of race and sex in organizing work can impose tangible, work-related costs on individual women and members of minority groups, even when it is intended to further a nondiscrimination goal. A woman assigned to the hiring committee because her presence as a woman will help minimize gender stereotyping, for example, may bear a cost in the form of extra work that goes uncompensated by the firm. Even if she is financially compensated for the work,

based employment decisions. *See, e.g.*, Frymer & Skrentny, *supra* (drawing parallels between the “instrumental affirmative action” logic of *Grutter* and bfoq logic). The other sees the ascendance of the business case for diversity, and the Supreme Court’s favorable nod in *Grutter v. Bollinger*, as offering a welcome opening for greater legal deference to the conscious use of race and sex in employment decisions. *See, e.g.*, Turner, *supra*, at 230-36 (arguing that *Grutter* creates room for race- and sex-based decisions to serve business interests in diversity); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter*, 92 KY. L. J. 26 (2003-2004) (suggesting that *Grutter* presents opportunities for deference to employer use of race and sex pursuant to a diversity rationale, despite the narrow bfoq defense for sex and lack of bfoq defense for race). I argue in this Article that Title VII—at least for decisions organizing work—offers an untapped regulatory middle ground, an opportunity to reframe the narrative guiding the use of race and sex in decisions organizing work to foster workplace integration and reduced discrimination. *Cf.* Estlund, *supra*, at 31, 35-36 (recognizing the “tension” between an interpretation of Title VII that permits “pro-integration preferences” and the business case for diversity as justification for preferences and proposing an approach that “skirts” that problem by providing employers deference when they seek to address a “‘manifest imbalance’ in a predominately white workplace or job”).

¹⁰ Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2000e17.

¹¹ Several scholars have argued in favor of a non-remedial justification for race- and sex-based decisions at moments of hiring, discharge, and promotion. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1036, 1111-15 (2006) (arguing that hiring “debiasing agents” is permissible under the Constitution and Title VII); Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L. J. 1385 (2003) (arguing for a “prevention justification” under Title VII).

the assignment may hinder her career advancement by taking time and energy away from other work-related, career-building tasks.

Indeed, from a political perspective, because the benefits and harms of race- and sex-based decisions in organizing work are often “softer” and more difficult to discern, race and sex in organizing work may prove a more effective tool for reducing discrimination, and ultimately advancing social equality, than consideration of race and sex at more traditional, exhaustively contested moments of employment decision, like hiring, discharge, or promotion. Developing Title VII as it applies to decisions organizing work cannot entirely sidestep the debate surrounding affirmative action, but it does offer a new, promising avenue for change.

This Article provides the first extended analysis of the conscious consideration of race and sex in organizing work. It draws on research and literature in the fields of sociology, social psychology, and organizational theory to expose the risks and possibilities of permitting race- and sex-based decisions organizing work for workplace equality. Based on this empirical foundation and on established Supreme Court case law setting limits and conditions on the use of race and sex in employment decisions under Title VII, it presents an argument that is equally normative and doctrinal. It argues that Title VII permits (and should permit) the use of race and sex in decisions organizing work as a means of reducing workplace discrimination, although not as a means of serving business interests standing alone, and that Title VII requires (and should require) that those race- or sex-based decisions be part of an employer’s broader integrative effort, an effort comprised of various structural reforms that are likely to foster functional integration and to reduce workplace discrimination. This approach to the voluntary, conscious use of race and sex in organizing work adheres to the statutory goals of Title VII by limiting the scope of permissible justifications for race- and sex-based decision making and also by requiring a link between particular decisions that impose race- or sex-based costs on individual employees and furtherance of the statute’s broader goals.

This interpretation of Title VII offers a unique opportunity to harness the popular business incentives for taking race and sex into account in organizing work to progress meaningful workplace integration and reduce discrimination. To the extent that considering race or sex in organizing work for prevailing business reasons overlaps with using race and sex as a discrimination-reducing measure, this interpretation of Title VII creates an incentive for employers to undertake integrative efforts. At the same time, the interpretation reshapes the narrative regarding the relevance of race and sex in organizing work to emphasize functional integration; consideration of race and sex becomes relevant in organizing work as a means of facilitating stereotype- and bias-challenging, cross-boundary intergroup interaction at work and as a means of fostering work cultures in which workers are valued for individual contributions rather than for expected group differences.

In addition to providing a much-needed critical analysis of the permissibility of race and sex in organizing work and offering an opening for Title VII law to facilitate workplace integration, this Article advances a larger theoretical goal. It seeks to broaden the shift toward regulation aimed at structural and systemic change that is currently underway in the law and scholarship on employment discrimination¹² to include an understanding of the role that social interactions play in producing and reproducing disadvantage at work. Existing efforts have

¹² It is becoming increasingly clear that employment discrimination law, to be effective, must focus more on structural and systemic change over the “ex post facto identification of specific instances of discrimination.” Susan T. Fiske & Linda Hamilton Krieger, *The Policy Implications of Unexamined Discrimination: Gender Bias in Employment as a Case Study*, in BEHAVIORAL FOUNDATIONS OF POLICY (Eldar Shafir ed., 2009). Proponents of a “structuralist” move in employment discrimination law, who include social scientists as well as legal scholars, argue that the organizational and institutional conditions that facilitate workplace discrimination warrant greater regulatory attention. See Robert L. Nelson et al., *Divergent Paths: Conflicting Conceptions of Employment Discrimination in law and the Social Sciences*, 4 ANNU. REV. LAW. SOC. SCI. 103, 109 (2008) (“The narrowing of employment discrimination law and focus on individualized claims of discrimination stand in stark contrast to sociological research, which locates discrimination in the structure of employment and the workplace”); see generally Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857-65 (2007) (describing a structural approach to employment discrimination law).

tended to focus on reducing cognitive and motivational biases in key decision makers. This Article attends more closely to biases as they operate in social relations.¹³

Several important advantages inure from this theoretical move. One, of course, is accuracy. In the tradition of behavioral realism, the Article takes the position that accurately conceptualizing discrimination as it operates in the workplace (and elsewhere) is a crucial first step to devising effective avenues for change.¹⁴ Conceptualizing discrimination with a relational component makes it easier to see, among other things, that discrimination is often not the product of a single individual acting in isolation but rather of multiple people acting in concert¹⁵ and that race and gender are actively constructed and negotiated in interactions at work.¹⁶

Attending to relations also uncovers the interconnectedness of various structural mechanisms for change and reveals the importance of narrative and ideology to guide the implementation of reform in social processes within organizations. Attending to relations shows, for example, that altering organizational structures to motivate individuals to correct for their biases at moments of key decision making will be insufficient if interaction between members of different groups reinforces stereotypes and biases leading up to those decisions; nor will

¹³ Instead of drawing principally on the research and literature on implicit biases, which tends to emphasize individual mindsets or biases, I build the empirical foundation for this Article more directly from research and theory in the fields of sociology, organizational theory, and new institutionalism. These disciplines emphasize structure and systems at the same time that they conceptualize discrimination—and regulation—to include processes of social interaction. For an argument that efforts to devise discrimination-reducing measures have focused too narrowly at the individual level and should be expanded to include the relational level of discrimination, see Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L. J. 1435 (2008).

¹⁴ Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997-1002 (2006) (describing behavioral realism).

¹⁵ These actors include members of groups whose subordination the law seeks to combat. Attending to relations in employment discrimination law requires therefore that we develop both a better understanding of women and people of color as more than passive victims as well as a better understanding of how behavioral expectations can be discriminatory. See, e.g., Devon W. Carbado & Mitu Gulati, *Interactions at Work: Remembering David Charny*, 17 HARV. BLACKLETTER L.J. 13, 18 (2001).

¹⁶ See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* (2000); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). Attending to relations brings into focus the interpersonal ways in which race and gender are constructed on a daily basis. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L. J. 1757, 1760-61 (2003) (book review) (describing “race-producing practices” at the micro level).

increasing the numbers of women and minorities in a particular job category be sufficient if day-to-day relations produce and reproduce bias in ways that result in social closure.¹⁷ Similarly, structural changes at the policy level of an organization are unlikely to have much meaningful effect on discrimination and inequality at work if the dominant narrative regarding the relevance of race and sex perpetuates biases in relations between workers.¹⁸

The Article is organized in three Parts. In Part I, I set the empirical groundwork for an approach to race and sex in organizing work that is attendant to business interests but that does not defer entirely to the use of race and sex in pursuit of those interests. I briefly summarize some of the sociolegal literature uncovering the business case for diversity that is likely to guide current consideration of race and sex in organizing work, and I examine the likely effects of race- and sex-based decisions made pursuant to the prevailing narrative. I argue that the existing narrative regarding the relevance of race and sex in organizing work is likely to produce race- and sex-based decisions that entrench rather than destabilize inequality. I then present research showing that consideration of race and sex in organizing work can serve as an important discrimination-reducing measure, particularly when individual race- and sex-based decisions are part of a broader program of systemic reforms aimed at increasing opportunities for cross-boundary, peer-like interaction and collaboration. Attention to race and sex in organizing work can help shift the demographic and power imbalances that facilitate biases in relations between workers; it can foster work environments that produce stereotype-challenging rather than stereotype-reinforcing intergroup interactions.

¹⁷ See, e.g., VINCENT ROSCIGNO, *THE FACE OF DISCRIMINATION: HOW RACE AND GENDER IMPACT WORK AND HOME LIVES* (2008) (using cases from the Ohio Civil Rights Commission to uncover the social processes of discrimination and arguing that sociologists tend to focus on structures to the neglect of social interaction, the “face” of discrimination).

¹⁸ Instead, research suggests that without attention to relations changes at the policy level can become “decoupled” from day-to-day processes of discrimination. POWELL & DIMAGGIO, *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (1991); Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. OF SOC. 1531 (1992); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 33 AM. J. OF SOC. 340 (1977).

In this Part, I also consider whether and to what extent race and sex in decisions organizing work will fall beneath the radar of Title VII. I argue that, despite several doctrinal and practical hurdles, decisions organizing work are unlikely to be fully insulated from Title VII challenge. Moreover, I argue that it would be unwise to seek to insulate race- and sex-based decisions organizing work from Title VII inquiry.

In Part II, I apply Title VII to decisions organizing work. I argue for an interpretation of Title VII that permits consideration of race and sex in decisions organizing work but that requires that race- and sex-based decisions be tied to the statute's broader nondiscrimination goals. Specifically, I make the following three principal claims: (1) Title VII permits consideration of race and sex in organizing work to further the goal of reducing workplace discrimination, but not to further business interests standing alone; (2) Title VII requires a link between any individual decision considering race or sex and furtherance of the broader nondiscrimination goals of Title VII (a "micro-macro" link); and (3) that link is established when a race- or sex-based decision organizing work is part of an employer's systemic effort to foster functional, discrimination-reducing integration within its workplace.

In Part III, I consider possibilities and address anticipated concerns, including concerns about the practical difficulties in monitoring employers' integrative efforts and about the effect of a reshaped narrative regarding the relevance of race and sex in decisions organizing work on the social construction of race and sex at work.¹⁹

I.

RACE AND SEX IN ORGANIZING WORK

In this Part, I consider how race and sex are likely being considered in decisions organizing work and how they might be considered. According to the dominant narrative, race and sex are relevant in decisions organizing work primarily as means of serving particular

¹⁹ I use the term "sex" here to encompass gender.

markets and of signaling adherence to egalitarian norms and compliance with the law. Decisions made pursuant to this narrative, I argue, are likely to perpetuate stereotypes and to entrench workplace inequality. Research also suggests, however, that consideration of race and sex in organizing work can serve as an important discrimination-reducing measure.

A. *Considering Race and Sex in Organizing Work Pursuant to the Prevailing Diversity*

Narrative

1. The Dominant Narrative and Decisions Organizing Work

There are several reasons to believe that race and sex are being considered in decisions organizing work. Decisions organizing work—much more so than decisions about who should be hired in the first place or even who should be awarded a promotion—are based on perceptions arising out of day-to-day interactions. In most workplaces, those interactions are likely to be stereotype laden and reinforcing.²⁰ The substantial literature on the operation of cognitive and motivational biases confirms this basic point and suggests that biases are prevalent and likely to infect decisions organizing work.²¹

The narrative concerning the relevance of race and sex that emerges from the prevailing business case for diversity, however, suggests that race and sex are being taken into account in organizing work not just in the form of implicit biases but also in the form of consciously considered factors. The business case for diversity surfaced in the early 1990s in the professional management literature. It urges employers to diversify their workforces to reach and serve an increasingly diverse and globalized market and to manage an increasingly diverse workforce.²²

²⁰ See *infra* notes 42-45 and accompanying text (describing the effects of stratification on stereotypes and biases in interaction).

²¹ See Linda H. Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (detailing studies showing role of cognitive biases in subjective, multi-factored decisions).

²² See, e.g., TAYLOR H. COX, JR., CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH AND PRACTICE 30-31 (1993) (describing as successful examples assigning women and people of color to design targeted products and assigning black and Hispanic managers to inner city markets); Taylor H. Cox &

The diversity narrative that emerges from this rhetoric makes race and sex relevant in decisions organizing work primarily as means of serving diverse markets and of signaling adherence to egalitarian norms and compliance with the law.²³

Although researchers have yet to pinpoint the precise extent to which the business case for diversity has caught on as dominant rhetoric within firms, existing studies do suggest a shift in organizational approach toward diversity that is consistent with the rhetoric in the managerial literature. Researchers have documented, for example, a shift toward concerns about “diversity management” over equal opportunity²⁴ and others have described a managerial sense that a diverse workforce is needed “to understand and serve [their] customers better and to gain legitimacy with them.”²⁵ Over the past several decades, moreover, firms have adopted an array

Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 ACAD. OF MNGM'T EXEC. 45 (1991); *see generally* Edelman et al., *Diversity Rhetoric*, *supra* note 1, at 1612 (describing the rise of diversity rhetoric in professional management literature and tracing its emergence to a 1987 report, Workforce 2000).

²³ *See generally* Edelman et al., *Diversity Rhetoric*, *supra* note 1 (describing diversity rhetoric popular in the management literature). The business case for diversity in the managerial literature also points to the potential for enhanced creativity and productivity in team-based work. *See id.* There is little evidence, however, to suggest that race and sex are currently being considered at the level of organizing work on this basis. *Cf.* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792-1801 (2003) (book review) (describing research supporting a “homogeneity” incentive). The empirical research on whether group diversity improves productivity also reveals the importance of context on intergroup interactions. *See, e.g.* Anne S. Tsui et al., *Being Different: Relational Demography and Organizational Attachment*, 37 ADMIN. SCI. Q. 549, 571-73 (1992) (finding that demographic diversity in work groups can lead to higher levels of conflict and lower levels of employee satisfaction); Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives of Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001) (studying the role of “diversity perspectives” on outcomes). For a recent review of literature on diversity and conflict in work, *see* Karen A. Jehn, et al., *Diversity, Conflict, and Their Consequences*, in DIVERSITY AT WORK 127 (Arthur P. Brief ed., 2008).

²⁴ Kelly & Dobbin, *supra* note 1, at 972-73 (identifying a rise in “diversity management”).

²⁵ *See* David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept-Oct. 1996, at 79. The multicultural or “value-added” model of diversity documented in some firms is also consistent with the view that the business case for diversity has been accepted by some businesses, even as it may alienate minorities and derail other diversity initiatives. *See* Victoria C. Plaut, *Cultural Models of Diversity*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURALISM CHALLENGE IN A LIBERAL DEMOCRACY 365 (Richard A. Shweder et al. eds., 2002) (identifying “value-added” model); Flannery G. Stevens et al., *Unlocking the Benefits of Diversity: All-Inclusive Multiculturalism and Positive Organizational Change*, 44 J. OF APP. BEHAV. SCI. 116 (2008) (assessing limitations of multiculturalism and colorblindness models of diversity adopted by organizations).

of diversity “programs.”²⁶ This sense that the business case for diversity has been received within organizations is also reflected in the amicus curiae briefs submitted by major corporations in favor of affirmative action in higher education in the Supreme Court case, *Grutter v. Bollinger*.²⁷ The companies emphasized in their briefs that diversity in their workforces is crucial to serving an increasingly international market and to reaching specific racial and cultural communities.²⁸

Managers who make day-to-day employment decisions, including decisions organizing work, do so within this organizational frame. We can expect, therefore, at least in those organizations that have adopted the “diversity” rhetoric, that managers’ decisions organizing work will reflect and be aligned with the diversity narrative governing the relevance of race and sex in those decisions.

²⁶ See Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIOLOGICAL REV. 589 (2006) (examining the effects seven common “diversity programs”—affirmative action plans, diversity committees and taskforces, diversity managers, diversity training, diversity evaluations for managers, networking programs, and mentoring programs—on the representation of protected groups in the management ranks of private firms); see also MARY J. WINTERLE, WORK FORCE DIVERSITY: CORPORATE CHALLENGES, CORPORATE RESPONSES 21 (1992) (reporting that sixty-three percent of businesses in a 1991 study of over 400 businesses had initiated a formal diversity program; another sixteen percent reported an intent to do so).

²⁷ Brief of General Motors Corporation as Amicus Curiae in Support of Respondents 13 (Feb. 2003) (arguing that managers and employees from diverse backgrounds can translate their cross-cultural understandings to “creative product development, community outreach, and marketing and advertising campaigns” while “engag[ing] daily in transnational, cross-cultural, and interracial contacts”); Brief of MTV Networks as Amicus Curiae in Support of Respondents 2-3 (Mar. 2003) (stating that “a diverse workforce is critical to the development and marketing of programming targeted to specific racial and cultural communities . . .”); 65 Leading American Businesses as Amicus Curiae in Support of Respondents 7 (Feb. 2003) (explaining that diverse employees “are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers”); Brief of General Motors corporation as Amicus Curiae in Support of Respondents 14 (Feb. 2003). The briefs also emphasize the importance of obtaining employees who have experience with diversity or “cross-cultural competence.” See, e.g., Brief of General Motors Corporation as Amicus Curiae in Support of Respondents 4 (Feb. 2003).

Although the narrative as currently framed by the business case for diversity focuses on race and sex as means of serving diverse markets and signaling adherence to egalitarian norms, some of the corporate briefs were quite aspirational in their arguments regarding the need for cross-cultural competence, see *id.*; those aspirations are consistent with integrative efforts in employment.

²⁸ Brief of General Motors; Brief of MTV Networks, *supra* note 27.

Indeed, there is evidence from various employment sectors that managers are considering race and sex pursuant to the dominant diversity narrative.²⁹ In one recent study, seventy percent of retailers surveyed admitted to race-matching to their client base.³⁰ In another study, a manager in a financial services firm explained that the company would be “remiss not to think [that it should] . . . get some different color people in here” to a predominantly black, working-class clientele. According to the manager, “It would give the community a level of comfort that there are people in the organization who actually know how to relate to . . . the people that are in the neighborhood.”³¹

Even within the workplace, a dominant narrative that suggests that race and sex matter fundamentally because members of the same socially salient group are more likely to understand each other, to “fit” better together, is likely to translate into race- and sex-matching in the allocation of job functions and design of work teams.³² One white manager explained, “When you are talking black-Hispanic difference, the black on the job will tend to feel very isolated because the Hispanic individuals cluster together, they speak their native language, and you or I or a black person would feel outside of that group automatically.”³³

The prevailing narrative also makes race and sex relevant to employment decisions as means of signaling dedication to egalitarian norms and compliance with the law, whether to

²⁹ See COX, *supra* note 22.

³⁰ PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL AND HIRING IN AMERICA* 105 (2001); see generally John D. Skrentny, *Are America's Civil Rights Laws Still Relevant?*, 4 DU BOIS REV. 119 (2007) (describing studies supporting use of race as means of serving market in various employment sectors).

³¹ Ely & Thomas, *supra* note 23, at 244 (describing implementation of what Ely and Thomas call the “access and legitimacy perspective” of diversity).

³² See Langevoort, *Grease and Grit*; Green, *Structural Approach as Antidiscrimination Mandate*.

³³ MOSS & TILLY, *supra* note 30, at 107 (describing an interview with a white manager, who explained: “When you are talking black-Hispanic difference, the black on the job will tend to feel very isolated because the Hispanic individuals cluster together, they speak their native language, and you or I or a black person would feel outside of that group automatically”).

workers, clients, the public, and regulators.³⁴ This “signaling” prong ties race- and sex-based decision making to an increasingly diverse market but also to norms regarding fairness and diversity that are prominent in public discourse and embodied in the law. The corporate and military briefs in *Grutter* reflect this prong when they refer to the need for “legitimacy” to manage a diverse workforce,³⁵ as do reports from interviews about diversity rhetoric within organizations.³⁶

This prong of the narrative is likely to translate into requests that women and minorities serve on committees that receive public attention or that they attend certain high-profile events or appear in publicity materials. Race and sex might be considered in assigning workers to clients to ensure that high equality-concerned clients are served by more diverse workers than less equality-concerned clients,³⁷ or in devising recruitment teams with the expectation that a showing of diversity will make it more likely that the firm will be able to attract women and minority employees.

2. Equality Effects

Although it is possible that race- and sex-based decisions made pursuant to the business case for diversity at moments of entry, promotion, and exit will result in more diverse workforces

³⁴ See Estlund, *supra* note 9, at 6 (describing a compliance incentive for race- and sex-based preferences in hiring). At the level of organizing work, if juries are more likely to find discrimination when a hiring decision is made by an all-white panel of decision makers, then placing a black man on the panel may serve the business interest of reducing the likelihood that the jury will conclude that the decision was discriminatory.

³⁵ See Brief of General Motors Corporation as Amicus Curiae in Support of Respondents 15 (Feb. 2003); Brief of Lt. Gen. Julius W. Becton et al. (Feb. 2003); *Grutter v. Bollinger*, 539 U.S. 306, 330-331 (2003) (citing to corporate and military briefs).

³⁶ David B. Wilkins, *From “Separate is Inherently Unequal” to Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556-57 (2004) (describing pressure from businesses on law firms to increase diversity). The facts of the *Ricci v. DeStefano* case, recently decided by the Supreme Court, presents another example. *Ricci v. DeStefano*, 530 F.3d 88, 109 (2d Cir. 2008) (Appendix B, District Court opinion) (describing political pressure on the Mayor of New Haven to increase diversity in the Lieutenant and Captain ranks of the New Haven Fire Department).

³⁷ See Wilkins, *supra* note 36, at 1594 (describing reports by black lawyers that they were “trotted out to impress a black politician or corporate counsel”); Accounts of Wal-Mart demanding diversity in representation.

overall,³⁸ there is good reason to believe that race- and sex-based decisions at the level of organizing work are likely to entrench rather than to destabilize inequality in organizations. As should be relatively obvious from the description above, race- and sex-based decisions organizing work pursuant to the “service” prong of the prevailing narrative are likely to be based on and to perpetuate stereotypes about group difference.³⁹ Moreover, race- and sex-matching is likely to lead to stratification within workforces as women and minorities become pigeonholed into certain jobs or job functions⁴⁰ and as those jobs or functions that become labeled “female” or “minority” become devalued.⁴¹

The stratification that results from these race- and sex-based decisions organizing work is also likely to further entrench workplace inequality by setting a particular context for intergroup interaction. The segregated, low status of women’s and minorities’ jobs and job functions is likely to activate gender and racial stereotypes and biases in interaction between workers across and within jobs.⁴² A range of studies in social psychology and sociology confirm that status and power differentials lead to greater reliance on stereotypes.⁴³ Men and women are more likely, for example, to enact gender-typical behavior during interactions in which men are perceived as having higher organizational status; men are more likely in these circumstances to

³⁸ When race or sex are considered as conscious factors in entry, promotion, or exit decisions, they are more likely to take the form of “preferences” for women and people of color. *See* Estlund, *supra* note 9. The dominant narrative at that level of decision making is one of *attaining* diversity in the workforce or in sectors of the workforce. *See id.*

³⁹ *See* Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 743 (noting that the “identification of minority lawyers with minority clients may . . . become problematic . . . by increasing ethnic segmentation within firms”); Wilkins, *supra* note 36, at 1594-97.

⁴⁰ *See, e.g.*, Wilkins, *supra* note 36, at 1594-95 (describing difficulty for black lawyers seeking to practice in practice areas in which being black is not seen as providing added value).

⁴¹ DONALD TOMASKOVIC-DEVEY, *GENDER AND RACIAL INTEGRATION AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION* 3 (1993).

⁴² Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000).

⁴³ *See* Cecilia Ridgeway & Lynn Smith-Lovin, *The Gender System and Interaction*, 25 ANN. REV. SOC. 191 (1999) (describing and developing expectation states theory, which holds that men and women recreate the gender system when they interact in a context of structural inequality); Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 33 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (discussing the influence of power on stereotypic thinking and perceived intergroup differences).

interrupt in conversation and women are more likely to qualify their statements.⁴⁴ Just as the patrimonial relationships between the female secretaries and their male bosses in Rosabeth Moss Kanter's famous ethnography of the 1970s corporation worked so starkly to the disadvantage of women, so, too, the intergroup interactions carried out in modern workplaces in which women and minorities are segregated along racial and gender lines is likely to produce interactions that perpetuate stereotypes and disadvantage women and minorities.⁴⁵

Race- and sex-based decisions organizing work made pursuant to the “signaling” prong of the prevailing narrative are also likely to negatively affect the overall job successes of women and minorities, even if the decisions do not pigeonhole workers into particular job categories or perpetuate stereotypes regarding group difference. Singling women and minorities out for signaling work may serve to generate or exacerbate feelings of exploitation and isolation reported by women and people of color in male-, white-dominated workplaces.⁴⁶ At the same time, the decisions can generate feelings of resentment in white men, who are likely to believe that any time a woman or person of color is placed on a prestigious committee or team or assigned to a potentially lucrative client their race or sex must have played a role.⁴⁷

In addition, race- and sex-based decisions organizing work can disadvantage women and minorities by imposing extra work on members of those groups. In some law schools, for example, women and minority professors are asked to attend more student recruitment functions, to pose for more pictures and answer more media inquiries, and to serve on more faculty panels. Even if law school deans make these requests with laudable goals in mind (e.g., as a way of

⁴⁴ Ridgeway & Smith-Lovin, *supra* note 43. Studies suggest similar dynamics in mixed-race interactions. See Mark Chen & John H. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPMT'L SOC. PSYCHOL. 541 (1997).

⁴⁵ ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 72-87 (1977) (describing the relationship between male bosses and their female secretaries and the ways in which the relationships disadvantaged women).

⁴⁶ See, e.g., Wilkins, *supra* note 36, at 1597-98. The dominant narrative also leads to an erroneous conception that race is relevant in organizing work only for non-whites. See *infra* Part IIIB (discussing possibilities of reshaped narrative).

⁴⁷ See, e.g., Faye Crosby & Susan Clayton, *Affirmative Action and the Issue of Expectancies*, 46 J. OF SOC. ISSUES 61, 68 (1990).

increasing student diversity or of fostering alumni involvement), the women and people of color who are asked to do this extra work may suffer real job effects. Time spent recruiting students and talking to the media, after all, is time spent away from other career-building work. Similar effects are likely to carry over into non-academic settings.⁴⁸ Because the dominant narrative suggests that consideration of race and sex are justified by business interests, including the interest in signaling, employers are unlikely to take the costs imposed by race- and sex-based decisions into account, whether as a basis for financial compensation or otherwise.⁴⁹

B. Considering Race and Sex in Organizing Work as a Discrimination-Reducing Measure

Not all considerations of race and sex in decisions organizing work are counterproductive to achieving equality at work. A vast and accumulating body of social science and organizational theory shows that attention to race and sex in decisions organizing work has the potential to serve as an important discrimination-reducing measure by altering the structure and context of workplace relations. Specifically, race- and sex-conscious decisions organizing work can create opportunities for more peer-like, cross-boundary, collaborative work and can generally facilitate an integrated work environment that is likely to reduce biases and stereotyping in interaction.⁵⁰

Racial and gender integration in work has long been understood to reduce discrimination. The effects of “tokenism” are now well known.⁵¹ Women and minorities are less likely to be the subject of stereotyping and more likely to be valued for their individual contributions if they are

⁴⁸ See generally Skrentny, *supra* note 30. One African American law professor related his experience being assigned to the hiring committee as an associate at a law firm and then being criticized for low billable hours the month the firm sent him out-of-state to recruit. See email.

⁴⁹ Indeed, women and people of color might be expected to undertake this extra “diversity” work in exchange for being hired. Catherine Fisk, Presentation at Employment and Labor Law Colloquium (San Diego, Oct. 2008).

⁵⁰ The argument in this section builds on an article written by sociologist Alexandra Kalev and I in which we present research showing that bias and stereotypes are executed and reinforced in day-to-day interactions and argued that employers can reduce discrimination by organizing work in ways that change the context of workplace relations. See Green & Kalev, *supra* note 13, at 1445-53.

⁵¹ KANTER, *supra* note 45; Krieger, *supra* note 21 (reviewing studies on the cognitive bases of tokenism); Barbara M. Reskin et al., *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANN. REV. SOC. 335, 354-55 (1999) (discussing the effect of workplace demographics on stereotyping).

one among several of their group than if they are one among none or few.⁵² But research also shows that interaction between members of different groups (and not just evaluation of women and minorities by men and whites) is moderated away from discrimination rather than toward it by demographic diversity. Women and minorities working in settings where there is a “critical mass” of members of their group are likely to perceive less bias from others.⁵³ The reduced salience of minority-group status in integrated groups also eases pressure to conform and reduces feelings of isolation and inferiority that can develop in skewed groups.⁵⁴

More broadly, integration in work can reduce workplace discrimination by breaking down status and power differentials.⁵⁵ Just as segregation in jobs and job functions can lead to devaluation of those jobs or functions that are labeled as “female” or “minority”⁵⁶ and can serve to activate gender and racial stereotypes and biases,⁵⁷ conditions of integration in work in which status differentials are less salient can lead to lower levels of stereotyping and biases in intergroup interaction.⁵⁸ This basic point is consistent with the longstanding research on the contact hypothesis; the positive effects of intergroup contact are enhanced when interaction takes place in pursuit of common goals and in conditions of equal status and institutional support.⁵⁹

⁵² Kanter argued that representation of less than fifteen percent creates “skewed groups” and the detrimental effects of tokenism. *See* KANTER, *supra* note 45, at 208-09.

⁵³ *Id.*; *see generally* Robinson, *supra* note 7 (examining research on the perception of bias on the part of women and people of color, both widely and in more specific contexts, and the effect of that perception on interaction).

⁵⁴ KANTER, *supra* note 45, at 248 (noting that “[p]eople whose type are present in small numbers tend to be more visible, feel pressure to conform, often try to become invisible, find it hard to gain credibility, feel isolated and peripheral, can be excluded from informal peer networks, have fewer opportunities to be sponsored, face stress, and are often stereotyped”).

⁵⁵ *Supra* notes 39-42 and accompanying text.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Ridgeway & Smith-Lovin, *supra* note 43; *see also* Green & Kalev, *supra* note 13, at 1447 (describing several lines of research that support this point).

⁵⁹ Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751, 758-61 (2006); GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 281 (1954).

Recent research in the employment context on structures of work also suggests that integrated work teams in which peer-like collaboration is encouraged can reduce discrimination and lead to better career outcomes for women and minorities. In one study of the careers of women scientists, sociologist Laurel Smith-Doerr found that women who worked in biotechnology firms, where scientists tend to interact on collaborative projects and are rewarded as a group and evaluated by their peers, were significantly more likely to attain supervisory positions than women who worked in academia, where scientists tend to adhere to rigid job categories, individual reward structures, and hierarchies.⁶⁰

Smith-Doerr's findings are consistent with a nation-wide study of firms conducted recently by sociologist Alexandra Kalev.⁶¹ Kalev found that women and minorities were more likely to be promoted into the managerial ranks in firms that adopted cross-boundary work teams, work teams that bring together workers from different jobs on a regular basis to share information and participate in decision making, than in firms that did not adopt those types of teams.⁶² She also found that training programs that involved job rotation led to greater success for women and minorities than programs that focused on in-job training.⁶³ These findings are particularly important for the potential of race and sex in organizing work in the modern workplace as organizations restructure work to be more team based.⁶⁴

⁶⁰ LAUREL SMITH-DOERR, *WOMEN'S WORK: GENDER EQUALITY V. HIERARCHY IN THE LIFE SCIENCES* (2004); see also Kjersten Bunjer Whittington & Laurel Smith-Doerr, *Women Inventors in CONTEXT: DISPARITIES IN PATENTING ACROSS ACADEMIA AND INDUSTRY*, 22 *Gender & Soc'y* 194 (2008) (finding that women life scientists have higher patenting productivity in organizations with "network-based, collaborative work structures").

⁶¹ Kalev, *Glass Cages*, supra note 8 (the study include firms across nine industries).

⁶² Kalev, *Glass Cages*, supra note 8.

⁶³ *Id.*

⁶⁴ By 2002, between 40% and 80% of medium and large American workplace had adopted self-directed work teams, problem-solving teams, cross-job training or job training programs. See ARNE L. KALLEBERG ET AL., *ORGANIZATIONS IN AMERICA: ANALYZING THEIR STRUCTURES AND HUMAN RESOURCE PRACTICES* (1996); Paul Osterman, *Work Reorganization in an Era of Restructuring: Trends in Diffusion and Effects on Employee Welfare*, 53 *INDUS. & LABOR REL. REV.* 179 (2001). For evidence that team-based work is growing across sectors of the workforce, see Thomas Bailey et al., *The Effect of High-Performance Work Practices on Employee Earnings in the Steel, Apparel, and Medical Electronics and Imaging Industries*, 54 *INDUS. & LABOR REL. REV.* 525 (2001).

Integrated decision-making committees can also reduce discrimination, by altering both the biases of committee members and the deliberative process of the committee and also by affecting the interaction between committee members and applicants or other interviewees. Several studies have shown that whites tend to exhibit less implicit racial bias on the Implicit Attitudes Test (IAT) when they make decisions in the presence of an African American.⁶⁵ Another recent study compared the decision making of racially mixed and all-white juries after they watched a video simulating the trial of a black defendant in a criminal case.⁶⁶ The researcher found that, even before deliberating, white jurors were less likely to find the defendant guilty if they were members of a racially mixed jury than if they were members of an all-white jury.⁶⁷ During deliberations, racially mixed juries also discussed more facts and corrected more factual misstatements of fellow jurors than all-white juries.⁶⁸

Interactions during interviews, too, are likely to be affected by the racial and gender makeup of the interviewing committee. Studies reveal that interviews in which the interviewer scores high in implicit bias are more awkward—evincing more speech errors, less eye contact, and more distancing body language by both the interviewer and the interviewee—than interviews in which the interviewer scores low in implicit bias.⁶⁹ The studies show that the interviewee is likely to replicate unfriendly behavior of the interviewer so that the interaction as a whole is less

This organizational move also holds the risk of entrenching and perpetuating inequality. See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99-108 (2003) (describing some of the possible effects of reorganization toward decentralized decision making and team-based work for workplace equality).

⁶⁵ Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 844-47 (2001); see generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 981-82 (listing additional studies).

⁶⁶ See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006); see generally Robinson, *supra* note 8, at 1175-77 (describing Sommers' study).

⁶⁷ Sommers, *supra* note 66, at 603.

⁶⁸ *Id.*

⁶⁹ Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPMT'L SOC. PSYCHOL. 435 (2001).

positive.⁷⁰ Because an interview panel that is demographically diverse is less likely to be perceived as biased, it is less likely to facilitate the operation of discriminatory stereotypes and biases in the interview.⁷¹

However, despite this research supporting the idea that integration in work can reduce discrimination by expanding opportunities for peer-like contact, collaboration, and decision making among workers from different racial and gender groups, most workplaces remain highly segregated, with women and people of color concentrated in the lower-end, less-valued jobs and job functions.⁷² Moreover, the smaller representation of many protected groups in the working population as a whole makes it difficult for these groups to attain substantial numbers in each segment of a workforce. Without attention to race or sex in organizing work, therefore, work teams and decision-making committees drawn from all but the lowest level jobs will only rarely be diverse.⁷³

Beyond integration in accomplishing work, research also suggests that taking race or sex into account to alter the work environment can reduce discrimination.⁷⁴ Devising a physically integrated workplace can facilitate interaction and aide in the development of egalitarian norms.⁷⁵ Taking race and sex into account in devising promotional materials and in assigning clients or projects, provided that the materials and assignments are publicized within the firm, can also help reduce discrimination, particularly in conjunction with efforts to integrate work and decision-

⁷⁰ See Mark Chen & John H. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541 (1997).

⁷¹ See Robinson, *supra* note 7, at 1171-1173.

⁷² BARBARA F. RESKIN, *THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT* 21 (1998); TOMASKOVIC-DEVEY, *supra* note 38; Barbara F. Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 246 (1993); Donald Tomaskovic-Devey et al., *Documenting Desegregation: Segregation in American Workplaces by Race, Ethnicity, and Sex, 1966-2003*, 71 AM. SOC. REV. 565 (2006).

⁷³ This doesn't mean, of course, that members of different racial and gender groups don't interact; only that their interactions take place in a context that is likely to reinforce biases and stereotypes rather than to break them down.

⁷⁴ Jolls & Sunstein, *supra* note 66, at 981 (describing studies on the effect of population diversity on levels of implicit bias); Kang & Banaji, *supra* note 12 (on "debiasing agents").

⁷⁵ Reskin, *supra* note 68; see also Christine Jolls, *Antidiscrimination Law's Effect on Implicit Bias*, in BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION (2008) (describing how existing Title VII decreases discrimination caused by implicit biases by altering the demographic makeup of the workplace).

making bodies. This is because valuing women and people of color as contributors can help instill favorable work cultures and norms for reducing discrimination.⁷⁶ And assigning women and people of color to key, prestigious client bases can alter the informal power structures that serve to entrench segregation.⁷⁷

Taken together, this research suggests that considering race and sex in decisions organizing work—in staffing work teams, assigning clients, creating decision-making committees—can serve as an important discrimination-reducing measure. The research also indicates, however, that individual decisions organizing work are unlikely alone to result in any substantial reduction in discrimination. Indeed, the research teaches that attention to race and sex in organizing work will be most effective as a discrimination-reducing measure if it is accompanied by overarching, system-wide integrative efforts.⁷⁸ Regular monitoring of systemic and local demographics and power imbalances, structural changes that open up opportunities for collaborative work opportunities, and measures that foster egalitarian and peer-support overarching norms and work cultures are all important to achieving meaningful integration.⁷⁹

This research calls out for a regulatory middle ground. Instead of prohibiting all consideration of race and sex in organizing work or of deferring entirely to race- and sex-based decisions made pursuant to the prevailing diversity narrative, the law might harness existing business interests to advance structural and cultural changes within organizations that will increase integration in work and to foster individual race- and sex-based decisions in organizing work that serve the broader goal of reducing discrimination. In doing so, the law might reshape the narrative regarding the relevance of race and sex in organizing work to emphasize facilitating

⁷⁶ See generally Tristin K. Green, *Work Culture and Discrimination*, 93 Cal. L. Rev. 623 (2005) (describing the role that work culture plays in discrimination and identifying ways to trigger structural changes to reshape work cultures).

⁷⁷ See supra notes 39-42 and accompanying text.

⁷⁸ See *infra* Part II.B.2.a (describing systemic efforts).

⁷⁹ *Id.*

cross-boundary interactions that break down stereotypes, reduce biases, and destabilize workplace inequality.

C. The Role of Law

The social science research presented in this Part suggests that conscious consideration of race and sex in organizing work can serve as an important discrimination-reducing measure but that race- and sex-based decisions as currently being undertaken in organizing work are likely to entrench rather than to disrupt discriminatory biases and stereotypes. One response to this research might be to resist regulation of the use of race and sex in organizing work. If we are confident that the equality implications of the research will have widespread normative appeal, then legal regulation (e.g., prohibiting any use of race or sex in organizing work) may only serve to inhibit voluntary efforts by employers to reshape the prevailing narrative and to reduce discrimination through race- or sex-based decisions organizing work. At first glance, this option may seem possible because decisions organizing work can often slide under the immediate radar of Title VII. In this section, however, I illustrate that Title VII does reach decisions organizing work. Moreover, I argue that the best course for the antidiscrimination project is to develop a comprehensive analysis of Title VII as it applies to decisions organizing work. This latter argument has two parts. First, without such an analysis, race- and sex-based decisions organizing work are likely to leave women and minorities worse off than their white, male counterparts, particularly as the prevailing diversity discourse becomes more prominent and as white men bring claims of reverse discrimination. Second, by reaching even a small number of race- and sex-based decisions organizing work, whether directly or indirectly, in claims brought by traditional plaintiffs or non-traditional ones, Title VII holds the potential to harness existing business interests for taking race and sex into account to trigger structural reforms that will make it more likely that race- and sex-based decisions organizing work will actually reduce discrimination.

1. Reaching Decisions Organizing Work

The “adverse employment action” requirement of Title VII presents a potential impediment to the law’s regulation of race- and sex-based decisions organizing work. Most courts require a plaintiff to have suffered an adverse employment action before bringing a Title VII claim,⁸⁰ and many courts have defined an adverse employment action as one that involves an “ultimate employment decision,” like hiring, discharge, or promotion.⁸¹ Some courts have construed the requirement more broadly, but even those courts require that the challenged decision have had an immediate material effect.⁸² Courts have held, for example, that a change in job title⁸³ and a transfer from a position with “increased opportunities for overtime pay, more supervisory responsibilities, and additional perks, such as the use of a work-provided cellular telephone, pager, vehicle, and parking space, as well as having most weekends and holidays off,”⁸⁴ were not actionable under Title VII. Similarly, being denied administrative support, access to training and leadership courses, and mentoring and training opportunities have been held by some courts not to amount to adverse employment actions.⁸⁵ Because the harms and benefits of decisions organizing work are often more difficult to discern, particularly at the moment of decision, than the harms and benefits of decisions at entry, exit, or promotion, we can expect that many decisions organizing work will not satisfy the adverse employment action requirement.

⁸⁰ *See, e.g.,* *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (noting that “hundreds if not thousands of decisions say that an ‘adverse employment action’ is essential to the plaintiff’s prima facie case”).

⁸¹ *See, e.g.,* *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007) (holding that only “ultimate employment decisions,” such as hiring and firing decisions, meet the “adverse employment action” requirement).

⁸² *Minor*, 457 F.3d at 634 (explaining that employment decisions that do not have an immediate material effect are “not so central to the employment relation that they amount to discriminatory terms or conditions”).

⁸³ *Maclin v. SBC Ameritech*, 520 F.3d 781 (7th Cir. 2008).

⁸⁴ *Nichols v. Southern Illinois Univ.*, 510 F.3d 772, 780-81 (7th Cir. 2007) (discussing *O’Neal v. City of Chicago*, 392 F.3d 909 (7th Cir. 2004)).

⁸⁵ *Earle v. Aramark Corp.*, 2007 WL 2683821 at *5 (5th Cir. Sept. 12, 2007).

Nonetheless, there is reason to believe that some decisions organizing work will meet the requirement. Courts have held, for example, that assigning more or more burdensome work responsibilities is an adverse employment action.⁸⁶ This meant in one case that a journeyman electrician who was assigned more strenuous overhead work, was required to work more with a toxic substance, and was given less varied work than co-workers suffered an adverse employment action,⁸⁷ and in another that a scientist whose laboratory space had been relocated met the requirement.⁸⁸ Job transfers and denials of transfer requests have also been held to satisfy the adverse action requirement when a reasonable fact finder could find that the employee’s desired job was “materially more advantageous than the [undesired job], whether because of prestige, modernity, training opportunity, job security, or some other objective indicator of desirability.”⁸⁹ Although these latter decisions focus on jobs rather than assignments within jobs, the same reasoning should apply when an individual is asked to take on additional work or is not assigned, for example, to a particularly prestigious work team with substantial opportunities for client contact.

More commonly, however, Title VII reaches decisions organizing work through causation. Most courts—even those adhering to a relatively strict adverse action requirement—have been willing to reach back to earlier discriminatory decisions once those decisions cause an adverse employment action.⁹⁰ *Slack v. Havens*, an early Title VII case, serves as a textbook

⁸⁶ *Davis v. Team Electric Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008).

⁸⁷ *Id.* at 1090.

⁸⁸ *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115 (9th Cir. 2000).

⁸⁹ *Beyer v. County of Nassau*, 524 F.3d 160, 165 (2d Cir. 2008).

⁹⁰ *See, e.g., EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 482 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007) (holding that BCI could be held liable for discrimination of earlier decision maker if “the biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action”); *Dey v. Colt Constr. Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) (requiring that the plaintiff show “that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action”). Some courts have required more than causation. *See, e.g., Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290-91 (4th Cir. 2004) (requiring that the ultimate decision maker be so influenced by the subordinate that “the subordinate is the actual decisionmaker”). For an argument that the Supreme Court is likely to resolve the issue by adopting a causation standard, see Tristin K. Green, *Insular*

example of how causation permits Title VII to reach decisions organizing work.⁹¹ In that case, four black women alleged that they were discriminatorily discharged because of their race in violation of Title VII.⁹² The plaintiffs' immediate supervisor, Ray Pohasky, had assigned them to general cleanup of the bonding and coating department and had excused a white co-worker from the janitorial-type work.⁹³ The plaintiffs objected to doing the work, which they claimed was not in their job description; at some point during the interchange Pohasky commented that "Colored people should stay in their places" and that "colored folks are hired to clean because they clean better."⁹⁴ The plaintiffs were later fired for refusing to do the work.⁹⁵ The employer argued that its decision to fire the women was not racially motivated, even if the assignment to the bonding and coating department cleaning by Pohasky was.⁹⁶ The court rejected the argument, pointing out that the employer could not be allowed to divorce Pohasky's discriminatory conduct from its own "so easily."⁹⁷ Rather, because "there was a definite causal relation between Pohasky's apparently discriminatory conduct and the firings," the firings themselves were discriminatory.⁹⁸

This issue has received renewed attention of late as courts have struggled to develop a doctrine that is responsive to concerns about attenuated causation in "subordinate bias" cases,⁹⁹ but it is unlikely that courts will settle on a standard that places all biased decisions that do not immediately satisfy the adverse employment action requirement entirely outside of Title VII's

Individualism: Employment Discrimination Law After Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. 353, 369-75 (2008). Although these recent cases involve different decision makers, the causation analysis should apply to cases involving the same decision maker as well.

⁹¹ *Slack v. Havens*, 1973 WL 339 (S.D. Cal. July 17, 1973). The case is included as the first lead case in the popular employment discrimination casebook, MICHAEL ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* (2008).

⁹² *Slack*, 1973 WL 339.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Although the paradigmatic case involving the issue involves the biased action of a subordinate to the ultimate decision maker,

purview.¹⁰⁰ The Supreme Court granted certiorari in a case involving subordinate bias in 2007, only to dismiss it upon settlement of the parties.¹⁰¹ The plaintiff in the case, an African American man, sued his employer alleging racially discriminatory discharge.¹⁰² His employment was terminated by a human resources official based on a report of insubordination submitted by a biased supervisor.¹⁰³ The district court granted summary judgment for the employer on the ground that only the motivation of the human resources official matters under Title VII, and that that official could not have been biased against the plaintiff in making her decision because she did not know of the plaintiff's race.¹⁰⁴ The Court of Appeals for the Tenth Circuit reversed, holding that the employer could be held liable if “the biased subordinate’s discriminatory reports, recommendation, or other actions cause the adverse employment action.”¹⁰⁵ Although most courts compromise the basic causation standard by permitting an “independent investigation” to absolve the employer of liability,¹⁰⁶ few have gone as far as the district court in the BCI case to insulate employers from liability based on the mere fact of multiple actors alone. So long as courts continue to look to earlier decisions for the race- or sex-based determination that resulted in the later adverse action, decisions organizing work will remain within Title VII’s reach, even if they fail to satisfy the adverse employment action requirement themselves.

¹⁰⁰ To do so, after all, would shield a vast body of adverse actions from employment discrimination law. An employee who is given a poor evaluation motivated by racial bias, for example, would have no redress, even in the face of evidence that the evaluation was the sole basis for a later denial of promotion.

¹⁰¹ 450 F.3d 472 (10th Cir. 2006), *cert. granted* 127 S. Ct. 852 (2007), *cert. dismissed* 127 S. Ct. 1931 (2007).

¹⁰² *Id.* at 482.

¹⁰³ *Id.* at 479-83.

¹⁰⁴ *Id.* at 483.

¹⁰⁵ *Id.* at 487.

¹⁰⁶ *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2006). Some go further still. See, e.g., *Hill v. Lockheed Martin Logistics Mgmt., Inc.* 354 F.3d 277, 290-91 (4th Cir. 2004) (requiring that the ultimate decision maker be so influenced by the subordinate that the subordinate is the actual decision maker”). For a more in-depth description of the issue presented in these cases, see Tristin K. Green, *On Macaws and Employer Liability*, __ COLUM. L. REV. SIDEBAR __ (forthcoming 2009). Courts arguably act in contravention of the statute when they decline to impose liability on employers in these cases. See *id.* at n. __.

As a practical matter, of course, many race- and sex-based decisions organizing work will not realistically be actionable. Unlike *Slack v. Havens*, where the plaintiffs presented biased statements on the part of the initial decision maker and where the plaintiffs' discharge followed closely on the heels of that decision, it will be difficult for most plaintiffs to prove that a discretionary decision organizing work, particularly one long past, was motivated by race or sex. It will also be difficult for many plaintiffs to prove that a race- or sex-based decision caused the later adverse employment action. Although we can imagine that extra work associated with interviews and pictures for publicity materials could play a role in a later decision not to promote, it is unlikely that, absent exceptional circumstances, the employee asked to take on that work would be able to prove the necessary causal link.¹⁰⁷ Indeed, this reality underlies a longstanding critique of the adverse action requirement; it makes discrimination that occurs in day-to-day social relations and dynamics difficult to address through individual disparate treatment law.¹⁰⁸

This said, the link between race- and sex-based decisions organizing work and adverse employment actions actionable under Title VII will sometimes be relatively clear. Imagine a challenge to an employer's decision to appoint a black woman to a high-profile and prestigious work team when few black women work at the firm and a black woman has been appointed to the team for five consecutive years. A white man who is not appointed to the team alleges that his later denial of promotion for "lack of prestigious appointments and connections with high-profile clients" resulted in part from the employer's race-based decision not to place him on that team.

Plaintiffs have also had some success in challenging decisions organizing work in the systemic context. In *American Express v. Kosen*, for example, the plaintiffs argued that sex-based discriminatory bias in client assignments caused a disparity in pay and promotion between men

¹⁰⁷ It may also take several decisions organizing work, accumulating over time, to cause an adverse employment action.

¹⁰⁸ See Green, *Workplace Dynamics*, *supra* note 60, at 116-17.

and women.¹⁰⁹ A number of recent, high-profile class action lawsuits have similarly focused on discriminatory work assignments and their effect on mentoring and promotion opportunities as a factor in widespread disparities in promotions and pay.¹¹⁰

The adverse action requirement, together with the difficulty in proving that any single decision was race- or sex-based, particularly a highly discretionary decision like one organizing work, means that Title VII will reach some, but not all, race- and sex-based decisions organizing work. A decision to tap a minority worker for publicity materials, a decision to compose a racially diverse work team, even a decision to assign a woman to a hiring committee, are unlikely to see extended Title VII review. Indeed, most race- and sex-based decisions will fly under the radar of Title VII in the sense that the individuals whose race or sex was taken into account will be unable to establish that race or sex was a causal factor in an adverse employment action.

This does not mean, however, that Title VII has no role to play in regulating race and sex in decisions organizing work—or that Title VII adequately polices the decisions that it currently reaches. In the next section, I make the case for developing a comprehensive analysis of race and sex in decisions organizing work as a way of generating evenhanded scrutiny and of harnessing the potential of existing business interests to advance workplace equality and reduce discrimination. Title VII need not reach all decisions organizing work to play this role.

2. Title VII as a Guide for Race and Sex in Organizing Work

There are several reasons why it is important to develop a comprehensive analysis of Title VII as it applies to race- and sex-based decisions organizing work, even if few individuals harmed by those decisions will be able to prove that a particular decision was motivated by race or sex or that it amounted to or caused an adverse employment action. The first is reactive.

¹⁰⁹ See Complaint, *Kosen v. American Express*, at 9-20 (alleging that American Express maintained an informal system of choosing “superstars” from incoming recruits for training allotment, mentoring selection, and assignment of important leads and accounts that led to disparities in pay and promotion).

¹¹⁰ See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (describing the process and implementation of settlement in a case against Home Depot); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992) (involving assignment to various low-level jobs and effect of those assignments on later promotions).

Without a comprehensive, reasoned analysis of Title VII as it applies to all considerations of race and sex in decisions organizing work, women and minorities who suffer work-related harms as a result of these decisions are likely to end up worse off than their white, male counterparts.

The growing prominence of the business case for diversity makes it increasingly likely that reverse discrimination claims involving decisions organizing work will arise.¹¹¹ As whites and men become aware of the diversity rhetoric—and perceive it as a substitute for other justifications for race- and sex-based decision making—they may challenge more employment decisions as race or sex based.¹¹² In many cases, moreover, it will be easier for reverse discrimination plaintiffs to prove that a particular decision was motivated by race or sex. In a law firm with few African American associates, for example, regular appointment of an African American associate to a particular prestigious committee, such as a recruitment committee, will look more suspicious (less likely due to chance) than regular appointment of a white associate to that same committee.

Perceptions about the harms and benefits of decisions organizing work are also likely to differ. Because the business case for diversity has been framed as a benefit to women and minorities, workers as well as adjudicators are likely to more readily see harms to whites and men. Race- and sex-based decisions pursuant to the “service” prong of the diversity narrative, moreover, are likely to be consistent with stereotypes regarding group differences and, particularly at the level of organizing work, may therefore be viewed as natural rather than as something about which antidiscrimination law should be concerned.

¹¹¹ See, e.g., Statement of Roger Clegg before the Equal Employment Opportunity Commission, Feb. 28, 2008 (arguing that business case for diversity results in race-based decisions that harm whites). The Supreme Court’s recent decision in *Ricci* reinforces this point. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673-74 (2009) (holding that race-conscious decisions must be justified under Title VII, even when they do not result in a racial preference). For discussion of this point in the constitutional context, see Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395.

¹¹² See Statement of Roger Clegg, *supra* note __; see also Kelly & Dobbin, *supra* note __, at __ (identifying rise in “diversity management” and decline in “affirmative action”). As diversity rhetoric becomes accepted within the business community, managers may also be more likely to express diversity-based reasons for their decisions.

These realities, including the role that stereotyping is likely to play in claiming and adjudication, expose the importance of understanding how Title VII guides managers' voluntary, conscious use of race and sex in organizing work. Under the law as it is currently implemented, race- and sex-based decisions organizing work that are undertaken as business-enhancing measures—which are often stereotype confirming—will only rarely seem problematic, while similar decisions that harm men and whites will be heavily scrutinized.

Along these same lines, developing Title VII law as it applies to decisions organizing work should highlight the reality that women and minorities can (and often do) bear costs pursuant to race- and sex-based decisions organizing work. Currently, that reality tends to get buried beneath assumptions that race- and sex-based decisions made pursuant to the prevailing diversity discourse are always “affirmative action,” representing preferences for members of traditionally subordinated groups. This assumption can be problematic even at the level of entry, promotion, and exit, but it is particularly misplaced at the level of organizing work, where extra work is frequently expected of women and minorities even as they sometimes obtain benefits in the form of status or relational opportunities. A woman who is assigned to a high-profile and prestigious team based on the client's demands for diverse representation may bear a cost as well as a benefit from that assignment.

The other reason why it is important to develop a comprehensive analysis of Title VII as it applies to decisions organizing work is more opportunistic and proactive. As I have shown, the prevailing diversity discourse makes race and sex relevant in organizing work as a business matter. Firms perceive a bottom-line interest in making race- and sex-based decisions organizing work. In the next Part, I argue that although Title VII permits race- and sex-based decisions organizing work that are intended to further the statute's goal of reducing workplace discrimination, it does not permit race- and sex-based decisions organizing work that are intended to advance business interests standing alone. As a practical matter, however, there is likely to be some overlap between these decisions. Some of the same decisions, in other words, might serve

business interests at the same time that they serve Title VII's statutory goals. Placing an African American man on a recruitment committee might simultaneously signal the firm's adherence to egalitarian norms and reduce discrimination. Similarly, assigning a Latino worker to a team charged with promoting a product for a Latino market might serve the firm's business interest of reaching that market and, depending on the demographic makeup of the work team, reduce discrimination. This overlap creates an opportunity for Title VII to harness the existing business interests already embraced by employers to advance antidiscrimination goals. Indeed, because Title VII requires that even those race- and sex-based decisions that are intended to reduce discrimination be part of an employer's broader effort to foster functional integration, employers may undertake those efforts as a way of obtaining deference to their race- and sex-based decisions organizing work. Those integrative efforts, in turn, are likely to serve bottom-line interests not only by reducing discrimination but also by generating cross-cultural competence and a context for interaction that enhances productivity, creativity, and job satisfaction.¹¹³

In this way, the interpretation of Title VII presented here offers an untapped regulatory middle ground, an opportunity to reframe the narrative guiding the consideration of race and sex in decisions organizing work to foster workplace integration and reduced discrimination. Even if reverse discrimination claims are likely to serve as the catalyst for legal analysis, women and people of color serve to benefit as much as white men from the development of an antidiscrimination law that encourages employers to take race and sex into account in organizing work in ways that will reduce discrimination rather than perpetuate it.

II.

DEVELOPING TITLE VII LAW AS IT APPLIES TO

DECISIONS ORGANIZING WORK

¹¹³ Indeed, these are some of the business interests cited in the corporate amicus briefs in *Grutter*. See Brief of General Motors Corporation as Amicus Curiae in Support of Respondents 15-17 (Feb. 2003).

In this Part, I develop Title VII law governing the voluntary, conscious use of race and sex in organizing work. I argue that race- and sex-conscious decisions organizing work are and should be permissible under Title VII if they are part of a broader integrative effort by the employer aimed at furthering the Title VII goal of reducing workplace discrimination. The law under this proposal acts most directly at the level of organizational policy making; it harnesses business interests for taking race and sex into account to serve the goals of Title VII. But the effect of the law is likely to be felt more indirectly, in the reframing of the narrative that guides managerial consideration of race and sex in organizing work.

Although the interpretation of Title VII that I present here is consistent with the Supreme Court case law, it advances the law addressing conscious use of race and sex in employment decisions in two significant ways. First, it expands the permissible justifications for race- and sex-based decisions to include the goal of reducing present and future discrimination, while tethering permissible justifications to the employment context. In doing so, it resolves the question left open by the Supreme Court's dismissal of certiorari in *Taxman* in favor of deference, but it also diverges substantially from proposals made by legal scholars seeking to incorporate principles from *Grutter v. Bollinger* into the employment realm. Second, it requires that race- and sex-based decisions that are intended to reduce discrimination be tied to systemic efforts by organizations to foster integration in work. This second advancement builds directly from the Supreme Court case law in the area and extends the requirement of a micro-macro link into the realm of decisions organizing work aimed at reducing discrimination.

A. *Furthering the Goals of Title VII*

To be permissible under Title VII, any use of race or sex in employment decisions must further the goals of the statute. The Supreme Court has decided two cases presenting the question whether and under what circumstances Title VII permits an employer to make race- or sex-based

employment decisions. In each of those cases, the Court upheld the employer's use of race and sex as permissible under Title VII.

In its 1979 decision in *United Steelworkers of America v. Weber*, the Court upheld a collective bargaining plan negotiated by Kaiser Aluminum & Chemical Corp. and the United Steelworkers of America that reserved 50% of the openings in a Kaiser-sponsored craft training program for African Americans.¹¹⁴ African Americans had long been excluded from craft unions, which meant that they did not have the necessary credentials for craft work at Kaiser.¹¹⁵ At the time that Kaiser implemented the plan, less than 2% of Kaiser's craft work force was African American, compared with 39% of the local labor force.¹¹⁶ To increase the number of African Americans in craft positions, Kaiser and the union agreed that 50% of the openings for the Kaiser craft training program would be reserved for African Americans until the percentage of African American craft workers at the Kaiser plant approximated the percentage of African Americans in the local labor force.¹¹⁷

The Supreme Court in *Weber* held that Title VII does not forbid all consideration of race or sex in employment decisions.¹¹⁸ It also upheld Kaiser's use of race in selecting applicants for the training program.¹¹⁹ In two short paragraphs, the Court explained why the Kaiser plan fell "on the permissible side of the line" between permissible and impermissible consideration of race in employment:

The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). ¶At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to the advancement of white

¹¹⁴ 443 U.S. 193, 197 (1979).

¹¹⁵ *Id.* at 198-99.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 199.

¹¹⁸ *Id.* at 197.

¹¹⁹ *Id.* at 208.

employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance.¹²⁰

In *Johnson v. Transportation Agency, Santa Clara County*, less than ten years later, the Court upheld a city transportation agency plan that authorized consideration of the sex of qualified applicants in making promotions to positions within a traditionally segregated job classification in which women had been significantly underrepresented.¹²¹ The Agency took sex into account when it decided to promote a woman instead of a man into the position of road dispatcher.¹²² Applying *Weber*, the Court held that there need only be a “manifest imbalance” in a traditionally segregated job category, and not such an imbalance as would support a prima facie case of discrimination against the employer, to justify the use of race or sex as a factor in a particular decision.¹²³ Because there was such an imbalance in that case (of the 238 Skilled Craft jobs, not one was filled by a woman), and because the plan did not “unnecessarily trammel” the interests of the majority, the Court upheld the Agency’s consideration of sex in the promotion decision.¹²⁴

The affirmative action plans at issue in both *Weber* and *Johnson* were remedial in that they were intended to remedy the effects of past discrimination, whether carried out by the employer or an entity closely affiliated with the employer. Although the Court did not require the employer in either *Weber* or *Johnson* to show that it had discriminated before it could take race or sex into account in employment decisions,¹²⁵ the Court did emphasize in both cases that the plans were designed to “break down old patterns of racial segregation and hierarchy” and that the use of race or sex would end as soon as the percentage of African Americans or women in the job

¹²⁰ *Id.*

¹²¹ *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 620-21 (1987).

¹²² *Id.* at 624-25.

¹²³ *Id.* at 632.

¹²⁴ *Id.*

¹²⁵ *Weber*, 443 U.S. at 211; *Johnson*, 480 U.S. at 632.

category mirrored the percentage of members of that group in the relevant labor pool.¹²⁶ This focus on addressing the effects of past discrimination, whether the employer's or society's, rendered the plans in *Weber* and *Johnson* at least loosely remedial.

Nonetheless, although the use of race and sex in both *Weber* and *Johnson* was remedial, the Court did not foreclose race- or sex-conscious decision making to further non-remedial Title VII goals. The most immediate non-remedial goal of Title VII is reducing present and future workplace discrimination. In this section, I argue that race- and sex-based decisions organizing work can be justified under Title VII by reduced discrimination in the employer's workplace but that they cannot be justified by either the business reasons that underlie the prevailing narrative or by advancement of social equality directly. In the remainder of the Part, I then delineate the contours of a permissible plan for taking race or sex into account in organizing work.

1. Reducing Workplace Discrimination

That reducing discrimination in the workplace is a goal of Title VII is beyond cavil. As the Supreme Court stated in one of its early Title VII decisions, "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."¹²⁷ More recently, the Court has relied on the goal of reducing workplace discrimination in shaping the law of vicarious liability and the law of punitive damages under Title VII. In *Burlington Industries, Inc. v. Ellerth*, for example, the Court held that the agency principles governing vicarious liability in the Restatement 2nd of Agency should be modified for application to claims of harassment to serve Title VII's "basic

¹²⁶ *Johnson*, 480 U.S. at 632. In *Weber*, the comparison was to the local labor force because of the longstanding exclusion of blacks from craft unions. 443 U.S. at 208-09 ("Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.")

¹²⁷ *McDonnell Douglas v. Green*, 411 U.S. 792, 800 (1973); *see also Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (stating that "the primary objective [of Title VII] was a prophylactic one").

policies of encouraging forethought by employers and saving action by objecting employees.”¹²⁸

And in *Kolstad v. American Dental*, holding that employers should not be liable for punitive damages for discriminatory decisions of employees where those decisions are “contrary to the employer’s ‘good faith efforts to comply with Title VII,’” the Court explained that the statute’s “primary objective is a ‘prophylactic one’; it aims, chiefly, ‘not to provide redress but to avoid harm.’”¹²⁹

Less certain has been whether furthering the goal of reducing workplace discrimination justifies race- and sex-consciousness in decision making. In *Taxman v. Board of Education of the Township of Piscataway*, the majority of an en banc court of the Third Circuit Court of Appeals held that the only justification for race- or sex-conscious decision making that can satisfy Title VII is a remedial one.¹³⁰ Under this view, any use of race or sex must be aimed at “remedying prior discrimination [by the defendant organization] or identified underrepresentation of minorities [within the organization]”¹³¹

Taxman involved a mandatory lay off of teachers in the Township of Piscataway, New Jersey, school district.¹³² The town had adopted a policy, first implemented in 1975 and later modified in 1985, aimed at providing “equal education opportunity for students and equal employment opportunities for employees and prospective employees.”¹³³ The policy provided

¹²⁸ 524 U.S. 742, 764 (1998); *see also* Faragher v. Boca Raton, 524 U.S. 775 (1998) (explaining that it created the defense because the primary objective of Title VII is “not to provide redress but to avoid harm” and explaining: “It would . . . implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.”).

Although the Court relied in *Burlington Industries* on the prophylactic goal of Title VII, that goal neither required nor necessarily justified cutting back on vicarious liability. *See* Green, *Insular Individualism*, *supra* note __, at 359-60 (describing *Burlington Industries* as resting on a belief that individual and employer interests with respect to discrimination have diverged).

¹²⁹ 527 U.S. 526 (1999) (*quoting* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) and Faragher v. Boca Raton, 524 U.S. 775, 806 (1998)).

¹³⁰ 91 F.3d 1547, 1557 (3d Cir. 1996) (en banc).

¹³¹ *Id.* at 1550.

¹³² *Id.* at 1551

¹³³ *Id.* at 1550.

that minority status would serve as a tie-breaker between candidates of equal qualification. In 1989, the Board was faced with the task of laying off a teacher in the Business Department at the Piscataway High School.¹³⁴ Debra Williams, a black woman, and Sharon Taxman, a white woman, both taught in the department and had exactly the same tenure.¹³⁵ The Board determined that they were “two teachers of equal ability” and “equal qualifications.”¹³⁶ Invoking the town policy to break the tie, the Board voted to lay off Taxman.¹³⁷ Theodore H. Kruse, the Board’s president, explained his vote to apply the policy in terms of the educational benefits that derive from diversity in a teaching staff.¹³⁸

The Third Circuit in *Taxman* decided that because neither the school district’s affirmative action plan nor the board president’s diversity rationale furthered the remedial purpose of Title VII, the Board’s consideration of race in the decision to lay off Taxman violated Title VII.¹³⁹ According to the court, if Title VII had been designed only to eradicate discrimination—and not to remedy the consequences of prior discrimination—no race- or sex-conscious decisions would be permitted.¹⁴⁰ Because taking an individual’s race or sex into account in an employment decision is itself discriminatory, explained the court, and therefore violates Title VII’s

¹³⁴ *Id.* at 1551

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ In deposition testimony, Kruse provided the following explanation for his vote:

Basically I think because I had been aware that the student body and the community which is our responsibility, the schools of the community, is really quite diverse and there—I have a general feeling during my tenure on the board that it was valuable for the students to see in the various employment roles a wide range of background, and that it was also valuable to the work force and in particular to the teaching staff that they have—the see that in each other.

Id. at 1551-52. It is possible that Kruse intended to articulate a discrimination-reducing rationale with the latter part of his explanation, but he did not elaborate. *See id.* at 1552 (elaborating upon further questions on the “educational objective”).

¹³⁹ *Id.* at 1557-58.

¹⁴⁰ *Id.* at 1557.

nondiscrimination mandate, it can only be justified by the furtherance of another Title VII goal.¹⁴¹

As Judge Mansmann, writing for the majority, stated:

The significance of this second corrective purpose cannot be overstated. It is only because Title VII was written to eradicate not only discrimination per se but the consequences of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's antidiscrimination mandate.¹⁴²

What the Third Circuit in *Taxman* misses is that taking race or sex into account in a particular decision, while violating Title VII's nondiscrimination mandate with respect to a single individual, can further a much broader and more pervasive reduction in workplace discrimination. Indeed, as the research in Part I shows, taking race and sex into account in organizing work can be a particularly effective tool for reducing biases and stereotypes in day-to-day decision making and interaction at work.¹⁴³ If by taking race or sex into account in an employment decision the employer aims to advance this broader goal—to reduce the incidence of decisions based on racial or gender bias within the workplace as a whole—then the employer's purpose mirrors the purposes of the statute.

Applied to decisions organizing work, this interpretation of Title VII means that minorities as well as whites, women as well as men, may bear a cost for the advancement of the statute's broader nondiscrimination goals. When the only black lawyer in a law firm is assigned, for example, to staff a work-intensive case, to attend recruitment dinners for multiple minority job candidates, and to serve regularly on the firm's diversity committee, she may bear various costs. Even if the firm is required to compensate the lawyer for her extra work (and I argue that it should be), in many cases she is likely to suffer residual costs, particularly because of difficulty discerning the precise nature and extent of the costs imposed, including those associated with identity, or benefits received by decisions organizing work.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See supra* Part IB.

Focusing on the antistatutory underpinning of Title VII helps make clear why the imposition of this cost on individual women and people of color can be justified as a means of reducing discrimination more broadly within the employer's workforce, just as similar costs can be justified when they are imposed on men or whites as a means of reducing discrimination or, more traditionally, as a means of correcting a "manifest imbalance" in a particular job category. In both cases, individuals are expected to bear costs for the sake of a statutorily identified broader good. The statute seeks to alleviate the economic and social subordination of traditionally subordinated groups by reducing discrimination in employment,¹⁴⁴ and research suggests that race- and sex-based decisions organizing work can further that goal.¹⁴⁵ Just as in the traditional affirmative action context, if there were reason to believe that permitting individual race- and sex-based decisions that impose costs on women and people of color will translate into increased discrimination or subordination, within the workplace or in society more generally, then the law's approach to those decisions should be reconsidered.¹⁴⁶

2. Other Business Reasons and the Prevailing Diversity Narrative

It should be relatively clear by now that the business interests pursued under the prevailing narrative—including serving markets and signaling fairness and diversity—do not justify race- and sex-based decisions organizing work under Title VII. The interests themselves may be legitimate, but Title VII requires that employers find ways of furthering those interests without taking race or sex into account in employment decisions or by taking race and sex into account in ways that simultaneously further Title VII's broader statutory goals.

This point is in some tension with several recent circuit court cases analyzing race- or sex-conscious decisions under the Equal Protection Clause. In several cases, courts have held

¹⁴⁴ See *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-04 (1979) (describing the goals of Title VII).

¹⁴⁵ *Supra* Part IB.

¹⁴⁶ See, e.g., Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251 (1998) (considering whether the group harms associated with affirmative action in education outweigh the group benefits).

that the Equal Protection Clause does not prohibit consideration of race when it is used to further the mission of a prison or the efficacy of a police force.¹⁴⁷ *Wittmer v. Peters* involved a state-run prison boot camp, designed “to give the inmates an experience similar to that of old-fashioned military basic training.”¹⁴⁸ The camp security staff consisted of 48 correctional officers, 3 captains, and 10 lieutenants; 68% of the camp’s 200 inmates were black.¹⁴⁹ The Illinois Dept. of Corrections considered race as a factor in its decision to appoint a black man to the lieutenant position.¹⁵⁰ It argued that consideration of race was needed—and did not violate the Constitution—because “the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.”¹⁵¹

Decisions based on race must survive strict scrutiny review to be lawful under the Equal Protection Clause.¹⁵² According to strict scrutiny review, the government’s use of race must further a “compelling government interest” and be “narrowly tailored” to that interest.¹⁵³ Even without addressing what constitutes narrow tailoring, the compelling interests permitted under the Equal Protection Clause may be broader than those permitted by Title VII. In *Wittmer v. Peters*, for example, the Seventh Circuit held that success of the mission of the prison boot camp was a compelling government interest and that the preference afforded the black man in appointing him

¹⁴⁷ Because all of the recent cases illustrating this distinction between affirmative action analysis under Title VII and the Equal Protection Clause have involved race, I focus here on race. There are several differences in the sex context. First, the Supreme Court has applied somewhat less exacting scrutiny to decisions based on sex than to those based on race. *See* *United States v. Virginia*, 518 U.S. 515, 534 (1986) (requiring an “exceedingly persuasive justification”). Second, Title VII’s bfoq provision includes sex, but not race. 42 U.S.C. § 2000e-2(e).

¹⁴⁸ *Wittmer v. Peters*, 87 F.3d 916, 917 (7th Cir. 1996).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 920.

¹⁵² *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

¹⁵³ *Id.*

to the position of Lieutenant was narrowly tailored to that interest.¹⁵⁴ Similarly, in *Pettit v. City of Chicago*, the court held that the Chicago Police Department had a compelling interest in “a diverse population at the rank of sergeant in order to set the proper tone in the department to earn the trust of the community, which in turn increases police effectiveness in protecting the city.”¹⁵⁵ The courts in both of these cases pointed to the efficacy of the employer’s program as the ground for permitting race-or sex-conscious decision making.¹⁵⁶

These cases may represent a creep in the law toward deference to race- and sex-based decision making in employment. Regardless of whether the courts in these cases are correct about the permissible scope of race- and sex-based decision making under the Equal Protection Clause, however, the cases say little about Title VII.¹⁵⁷ Title VII does not ask whether the use of race or sex serves a compelling government interest. Instead, it requires that race- and sex-conscious decisions further the goals of the statute. The employer’s interest in best serving the client or in enhancing safety comes into a Title VII analysis under the bona fide occupational qualification defense, and, as others have argued before me, regulators (and courts) should be wary of expanding what is now a very narrow exception to the general prohibition on the use of race and sex in employment decisions.¹⁵⁸

3. Social Equality

Understanding the narrow limits that Title VII places on the use of race and sex in employment decisions also helps unravel why *Taxman* was rightly decided, even if the Third Circuit’s rationale and its broad pronouncement that Title VII permits only remedial justifications

¹⁵⁴ *Wittmer*, 87 F.3d at 920 (“The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.”).

¹⁵⁵ 352 F.3d 1111, 1114-15 (7th Cir. 2003).

¹⁵⁶ *Id.*; *Wittmer*, 87 F.3d at 920.

¹⁵⁷ The courts in both *Wittmer* and *Pettit* relied in part on *Grutter* as a basis for their analysis. For an argument that *Parents Involved* rendered the Seventh Circuit’s view of *Grutter* less tenable, see Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. v. Seattle School District No. 1*, 88 B.U. L. REV. 937 (2008).

¹⁵⁸ See *Frymer & Skrentny*, *supra* note 9.

for race-based decisions were wrong. The rationale put forward by the school district in *Taxman* for taking race into account can be construed in several ways. It can be construed as a matter of serving the district's clients—the students—which raises all of the concerns about the use of race and sex to serve clients already discussed. It can also be construed more explicitly as a way of advancing social equality. Research shows that black students are more likely to succeed if they are exposed to black teachers. Seeing blacks in positions of power can lower implicit biases and stereotyping in non-black students and black students, and can alter behavior accordingly.¹⁵⁹ Graduating more successful black students out of high school advances not only the interests of those students as clients but also the broader goal of social equality. Similarly, by sending into society students of all colors who are less biased and better able to interact comfortably with members of different racial groups, the school district reduces group subordination, stigmatization, and intergroup hostility, the hallmarks of social inequality, in society at large.

Along these lines, a number of legal scholars have argued that Title VII might be interpreted to permit employers to take race or sex into account in employment decisions if those decisions further broader societal interests. Professors Jerry Kang and Mahzarin Banaji make this claim most recently in their article, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action."*¹⁶⁰ They argue that an employer should be permitted under Title VII to hire an Asian professor "partly to decrease bias against Asians among business school students."¹⁶¹ According to Kang and Banaji, the employer's objective to "stop discrimination by decreasing the implicit bias in students, who will graduate to become future workers, employers, and leaders" is "consonant with the goals of Title VII, even as narrowly interpreted in *Taxman*."¹⁶² Professor Cynthia Estlund makes a similar, though slightly more nuanced claim in her article, *Putting*

¹⁵⁹ See generally Kang & Banaji, *supra* note 11, at 1106-09 (discussing research underlying support of "debiasing" agents).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1111.

¹⁶² *Id.* at 1114-15; see also *id.* at 1111 (relying on *Grutter v. Bollinger*).

Grutter to Work.¹⁶³ She argues that “*Grutter*’s recognition of the civil and societal value of integrated institutions” provides reason to read Title VII to permit an employer to address a “manifest imbalance in a predominately white workplace or job” regardless of the employer’s reason for doing so.¹⁶⁴ Professor Estlund expects that in this way *Grutter* can open Title VII to permit integrationist efforts by employers, even if those efforts are not aimed at remedying past discrimination like the efforts approved by the Court in *Weber* and *Johnson*.¹⁶⁵

It is tempting to join these scholars in seeking to interpret Title VII to permit race- and sex-conscious decision making aimed at furthering social equality directly, for such an interpretation would allow employers substantial leeway to take race or sex into account. Social equality is unquestionably an end-goal of antidiscrimination law, including Title VII, and affirmative action in a variety of work contexts could go a long way toward easing the subordination and stigmatization suffered by women and people of color for generations in this country.

But this deference approach is problematic, not only because it would leave employers free to make race- or sex-based decisions pursuant to the prevailing diversity narrative. There are at least two additional reasons why Title VII should limit consideration of race or sex in organizing work to those decisions that are aimed at furthering the goal of social equality through reduced workplace discrimination rather than through some other means, such as client exposure to a diverse workforce or student exposure to a diverse faculty. Both of these reasons are based firmly in the text and goals of Title VII. The first is broadly normative and may be applicable to all employment decisions; the second is more practical and may be specific to decisions organizing work.

¹⁶³ Estlund, *supra* note 9.

¹⁶⁴ *Id.* at 35-36.

¹⁶⁵ *Id.* Professor Estlund also makes this argument in her book, *Working Together*; she acknowledges there the difficulty that Title VII’s antidiscrimination mandate poses. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 147-49 (2003).

Title VII is the employment title of the Civil Rights Act, and as such it emphasizes the goal of reducing employment discrimination as a means of reducing economic and social subordination. Title VII does sometimes impose a cost on employers for society's wrongs. The most basic example can be found in disparate impact theory, which requires that employers alter employment practices that have a disparate impact on members of a protected group, even if that impact is caused by inferior access to education or other resources.¹⁶⁶ Taking race or sex into account in organizing work, however, places a cost directly on individuals, and that cost, as the court in *Taxman* pointed out, violates the narrow nondiscrimination mandate of Title VII by virtue of its being race- or sex-based. In this way, an employer's use of race or sex in organizing work violates individuals' rights under the Act. But while Congress in Title VII has specifically encouraged employers to take steps to reduce discrimination in their workplaces (therefore justifying the imposition of race- and sex-based costs on individuals in some circumstances), it has not done the same with respect to efforts to advance societal interests, whether in the form of reduced subordination or a healthier democracy.¹⁶⁷ Instead, societal interests, at least when race- and sex-based employment decisions are involved, must be advanced through reduced discrimination in employment.

Nor has the Supreme Court's interpretation of Title VII opened the door to the use of race or sex in workplace decision making as a means of advancing social equality directly. In *Weber* and in *Johnson* the Court held that Title VII permits employers to take race and sex into account in employment decisions as a means of remedying a manifest racial or gender imbalance between

¹⁶⁶ See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 647 (2001); see also Green, *Structural Approach*, *supra* note 13, at 877-79 (distinguishing cases in which disparate impact theory operates as an antidiscrimination mandate from those in which disparate impact theory operates as an accommodation mandate, requiring employers to bear a cost for society's wrongs).

¹⁶⁷ I agree here with Professor Yelnosky, who argues that a "prevention justification" fares better than a societal justification "in light of the existing statutory framework in which America's employers operate." Yelnosky, *supra* note 12, at 1416.

the employer's workforce and the relevant labor pool.¹⁶⁸ At first glance, this seems to support the use of race or sex in employment decisions as a means of furthering social equality directly. Kaiser, after all, was responding to the union's longstanding exclusion of blacks from the craft union, not to its own discrimination against blacks. And in *Johnson*, the Court stressed that the Agency need not have caused the underrepresentation of women which it undertook to remedy.¹⁶⁹ However, the remedial nature of the use of race and sex in *Weber* and in *Johnson* brought the plans within the bounds of the employment statute. The requirement of a manifest imbalance in a traditionally segregated job category ensures that a race or sex preference will break down racial segregation and hierarchy *in employment*.¹⁷⁰ If the defendant in either case had had a proportional representation of blacks or women in the targeted job category, even if society as a whole had engaged in or continued to engage in subordination of those groups in those job categories, the plans would not have satisfied Title VII.

Requiring that race- or sex-conscious decisions further the Title VII goal of reducing workplace discrimination also serves to limit employer discretion in a way that makes it more likely that race- or sex-conscious decisions organizing work will actually serve the broader social equality goal of nondiscrimination statutes like Title VII. One of the primary objections to social equality as a permissible justification for affirmative action is its open-endedness and lack of

¹⁶⁸ *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616, 631-32 (1987)

¹⁶⁹ *Johnson*, 480 U.S. at 634, n12 (stating that “[a] plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation”) (quoting the court of appeals). Justice O’Connor, whose concurrence supplied the sixth vote to uphold the program, objected to the *Johnson* majority’s failure to require a tighter remedial connection. She concurred only because she found a “statistical disparity sufficient to support a prima facie claim under Title VII.” *Id.* at 649 (O’Connor, J., concurring).

¹⁷⁰ In this way, with its adherence to a manifest imbalance requirement, Professor Estlund’s proposal does come back around to employment, despite her broader arguments about permitting race- and sex-based decisions to address social inequality directly. For more discussion of this requirement, *see infra* Part II.B.2.b. In the context of entry and promotion decisions, in contrast to decisions organizing work, it should be relatively clear whether a member of traditionally subordinated group is being provided a benefit.

measurable goals.¹⁷¹ Although measuring whether race and sex in organizing work is serving to reduce workplace discrimination is admittedly difficult (more difficult, for instance, than measuring whether specific numerical goals have been met), it is much easier to monitor the efficacy of discrimination-reducing measures in the workplace than in society as a whole. With a more limited goal—reduced workplace discrimination—comes greater possibility of meaningful oversight.

Indeed, the need for a focus on reducing discrimination in employment decisions (rather than on attaining the benefits of integration for society as a whole) is particularly urgent in the context of organizing work. When it comes to organizing work, the benefits and/or harms of any particular decision are difficult to discern. As discussed in Part I, a black man who is assigned to a particular work team as a way of adding diversity to an otherwise all-white or racially skewed team may suffer harm in the form of extra work that his white counterparts are not similarly asked to endure.¹⁷² Although this cost may be justified by a broader reduction in discrimination, limiting permissible interests to the Title VII interest in reducing discrimination in the employer's workplace makes it more likely that the individuals who bear the immediate and direct cost of race- and sex-based decisions organizing work will also recognize the broader benefits of those decisions.

The requirement that any use of race and sex be aimed at furthering the goal of reducing employment discrimination will constrain employers' use of race and sex in some instances. It will be difficult for employers to successfully argue, for example, that assigning a Latina woman to a predominately Latino/a-staffed sales division to serve a Latino/a market furthers the Title VII

¹⁷¹ See, e.g., *Taxman v. Bd. of Educ. of Twnshp of Piscataway*, 91, F.3d 1547, 1564 (3d. Cir. 1996) (expressing concern that use of race and sex in lay-off decisions was “devoid of goals” and led to standardless determinations “governed entirely by the board’s whim”); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (expressing concern that permitting race-based decision making to remedy societal discrimination or to provide role models for students is too “amorphous”).

¹⁷² At the same time, he may benefit from opportunities to interact with powerful people and from the prestige of the assignment. Even these benefits, however, will be highly context-dependent and may be nonexistent or outweighed by the costs in a particular case.

goal of reducing workplace discrimination. In many cases, though, race- or sex-based decisions may be simultaneously good for business and further the goal of reducing discrimination. Retaining a black teacher in the business department, for example, may simultaneously be likely to reduce workplace discrimination in employment decisions regarding other teachers and staff within the district and further social equality by exposing students to a diverse range of teachers in the business department. Similarly, asking an Asian employee to be interviewed and photographed for an internally and externally circulated publicity document might reduce discrimination in employment decisions by fostering a culture that values integration at the same time that it improves the firm's image on diversity matters with clients and applicants.¹⁷³ In this way, employers may be able to achieve many of their business goals at the same time that they further the goals of Title VII. This reality also opens the door to the harnessing potential of Title VII in this context. Race- and sex-based decisions that are permissible under Title VII need not be perceived as counterproductive to business; quite the contrary, the narrative as reshaped by Title VII should make clear that taking race and sex into account in decisions organizing work can serve business interests and simultaneously foster integration that reduces discrimination and inequality in work.¹⁷⁴

B. *Drawing a Micro-Macro Link: An Integrative Effort*

Accepting that a decision taking race or sex into account in organizing work can be justified by furtherance of the goals of Title VII, the law still needs some way of ensuring that a race- or sex-conscious decision is likely to further those goals. When the use of race or sex is meant to serve Title VII's remedial goals, like in *Weber* and *Johnson*, the link between the

¹⁷³ Similarly, the District in *Taxman* could argue that having a black teacher in the otherwise all-white business division furthers the goal of reducing discrimination against teachers. The Board President in *Taxman* may have tried to do this in his explanation of his vote, *see supra* note 138.

¹⁷⁴ Indeed, considering race and sex to reduce discrimination as part of a broader integrative effort is also likely to serve the "cross-cultural competence" argument made by major corporations in *Grutter*. *See supra* note__.

decision imposing a race- or sex-based cost on an individual and Title VII's broader remedial goal is established by the employer's showing of a "manifest imbalance" in a traditionally segregated job category. The employer makes this showing by comparing the racial or gender makeup of the employer's work force or job category with the racial or gender makeup of the relevant labor pool.¹⁷⁵ If this comparison reflects a "manifest imbalance" in the racial or gender demographics of a particular job category, then the employer is justified in taking race or sex into account in hiring, firing, or promotion decisions involving that category until a better demographic balance is attained.¹⁷⁶ The *Weber* and *Johnson* "manifest imbalance" requirement therefore ensures that the use of race or sex in any individual decision furthers the Title VII goal of "breaking down old patterns of racial segregation and hierarchy" by altering the racial or gender demographics of the job category in question.

In much the same way, the micro decisions taking race or sex into account in organizing work should link to the macro goal of reducing discrimination in the workplace. I begin this section by exploring in more depth the idea of a micro-macro link in affirmative action law under Title VII, and the implications of such a requirement. I then propose that the micro-macro link be established by a showing that any particular race- or sex-based decision is part of a comprehensive integrative effort by the employer.

1. Requiring a Micro-Macro Link: Statutory Limits & Normative Underpinnings

Requiring a micro-macro link, a link between a race- or sex-conscious decision and furtherance of a broader Title VII nondiscrimination goal, both helps set some bounds on employer use of race or sex in workplace decisions and helps ensure that the cost imposed on individuals for race- or sex-based decisions actually furthers the broader Title VII goal. Before

¹⁷⁵ *Weber* represents a divergence from the usual comparison because the pool from which the defendant drew its qualified workers had been skewed by years of discrimination against blacks. *Weber*, 443 U.S. 193, 208-09 (describing the relevant comparison as between the job category and the local labor force).

¹⁷⁶ *Weber*, 443 U.S. at 208-09; *Johnson v. Transp. Agency, Santa Clara Cnty*, 480 U.S. 616, 637 (1987).

considering what the micro-macro link might look like in the context of organizing work, I consider why a micro-macro link is necessary. I have shown that the defendants in *Weber* and *Johnson* both established such a link by identifying a manifest imbalance in a traditionally segregated job category.¹⁷⁷ But this doesn't answer the normative question: why should we require such a link? Or, put another way, does Title VII require that any race- or sex-based cost imposed on an individual do more than avoid a single instance of discrimination?

The cognitive bias research on the influence of implicit biases and perception of biases on decision making and interactions provides the foundation for a good illustration of this question. The cognitive bias research suggests that placing a black man on an otherwise all-white interview panel will reduce the biases of the panel members and alter the context of the interaction between a black applicant and the panel such that the panel's decision is less likely to be influenced by discriminatory biases.¹⁷⁸ If the black man is assigned to the interview panel, he may bear a cost in the form of extra work or time taken away from tasks that would better further his career. The black man interviewed by the panel, on the other hand, is likely to attain a benefit in the form of a panel decision that is less likely to be influenced by discriminatory biases. Does Title VII permit the employer to assign the black man to the panel as a way of reducing the likelihood that the panel's decision will be influenced by discriminatory bias?

In his article, *Perceptual Segregation*, Professor Russell Robinson answers this question in the affirmative.¹⁷⁹ Drawing on the research showing that blacks and whites, women and men tend to perceive discrimination differently and that these differing perceptions alter interactions in ways that disadvantage blacks and women, he argues that firms should assign a "critical mass" of black interviewers to a committee interviewing a black candidate.¹⁸⁰ He also argues that firms

¹⁷⁷ See *supra* notes 125-26 and accompanying text.

¹⁷⁸ See *supra* note 7.

¹⁷⁹ Robinson, *supra* note 7, at 1177-79.

¹⁸⁰ *Id.* at 1173.

should take similar measures in staffing committees that handle promotion decisions and internal equal opportunity matters.¹⁸¹

In considering the possibility that an employer's use of race or sex in staffing these committees will violate Title VII, Professor Robinson points out that describing a decision as providing a racial or gender "preference" implies that it favors or privileges an outsider (a woman or a person of color) and disadvantages an insider (a man or a white person), and he rightly emphasizes that in many cases the assignment will actually "burden[] outsiders who may have to conduct more interviews and sit on more committees than they otherwise would."¹⁸² There are also sure to be cases, however, in which being a member of the interviewing committee is prestigious or otherwise presents a valuable opportunity to network and build social capital with important people—think of a law faculty and the appointments committee. In those cases, the assignment of a black man over a white man to the committee on the basis of his race will amount to a racial "preference," potentially triggering a reverse discrimination claim.

Moreover, even if these assignments did consistently burden women and minorities, the law should still be concerned with the race- or sex-conscious employment decision, probably even more so. Professor Robinson recognizes this point when he calls on employers "to formalize their policies and give outsiders credit for performing this vital debiasing work,"¹⁸³ but a call for credit or compensation alone is unlikely to be as effective as he suggests. The "soft" nature of the benefits and harms associated with decisions organizing work, after all, make it difficult to discern when an assignment to a particular committee requires extra credit or provides a welcome opportunity. And one man's opportunity may be another man's burden.

What, then, of the equality analysis? To answer this question, it helps to think again of the reasoning provided by the Third Circuit in *Taxman* for its conclusion that Title VII permits

¹⁸¹ *Id.* at 1173, 1170.

¹⁸² *Id.* at 1179.

¹⁸³ *Id.* I make a similar suggestion with the requirement that an integrative effort incorporate processes to compensate (broadly understood) individuals for this work. *See infra* note 190 and accompanying text.

only those race- or gender-based decisions that are aimed at remedying past discrimination. According to that court, once the antidiscrimination mandate was violated by a race- or sex-based decision, it could only be justified by furtherance of another Title VII goal.¹⁸⁴ “It is only because Title VII was written to eradicate not only discrimination per se but the consequences of prior discrimination as well,” the court explained, “that racial preferences in the form of affirmative action can co-exist with the Act’s antidiscrimination mandate.”¹⁸⁵ As I argued earlier, this reasoning mistakenly equates violation of the nondiscrimination mandate in isolation with violation of the nondiscrimination mandate in toto. A single sex- or race-based decision may be justified, in other words, by furtherance of a more pervasive reduction in workplace discrimination.

A natural extension of this argument is that a race- or sex-based decision like the one proposed by Professor Robinson cannot be justified by the possibility of preventing discrimination in a single instance. Even if assigning a black man to an interview committee reduces the likelihood that discriminatory bias will infect the hiring decision regarding a black applicant, using race in organizing work in that way violates Title VII if it was not intended to (and if it was not likely to) further the broader antidiscrimination goal.¹⁸⁶ This is true whether the individual bearing a cost is the white employee who was not assigned to the committee or the black employee who was assigned to the committee. The importance of furthering broader Title VII goals is even more salient, however, once we recognize that the black employee assigned to the committee may bear a cost. In that case, the antidiscrimination mandate of Title VII has been violated *and* the goal of reducing economic and social subordination has been undermined.

¹⁸⁴ *Taxman v. Twp. of Piscataway*, 91 F.3d 1547, 1557 (3d Cir. 1996) (en banc).

¹⁸⁵ *Id.*

¹⁸⁶ The same is true if the employer is attempting to avoid Title VII liability by assigning a black man to the committee, *see supra* note and accompanying text (discussing business reasons for taking race and sex into account in organizing work).

This realization reinforces the point that there must be some link between individual race- or sex-conscious employment decisions and furtherance of Title VII's goals. A micro-macro link ties individual decisions to the statute's broader antidiscrimination goals and ensures that the individual race- or sex-based decisions are likely to further those goals. In *Weber* and *Johnson*, the link was established by the employer's showing of a manifest imbalance in the racial or gender makeup of a traditionally segregated job category. In the next section, I consider how an employer might establish a similar link for decisions organizing work aimed at furthering the goal of reducing workplace discrimination. This link is aimed most directly at the level of policy—at triggering change in structure and management—in organizations. It accordingly represents a management-based approach to reducing workplace discrimination. In Part III, I consider some of the benefits and risks associated with this regulatory strategy.

2. Establishing a Micro-Macro Link

The social science research teaches that attention to race and sex in decision making will be most effective as a discrimination-reducing measure if it is accompanied by other integrative efforts, including self-examination arising out of attention to systemic and local demographics, structural measures aimed at opening collaborative work opportunities, and institutional measures facilitating democratic, peer-support norms. Requiring the employer to establish a micro-macro link under Title VII by placing individual race- or sex-based decisions within a broader integrative effort therefore serves both to constrain race- and sex-conscious decision making (the race- or sex-based decision must be plausibly intended to reduce workplace discrimination) and to ensure that the decision aimed at reducing discrimination is actually likely to do so.

a. *An Integrative Effort*

Although the specific contours of particular integrative efforts are likely to vary depending on the structure and goals of the firm, research suggests that a comprehensive integrative effort that satisfies the micro-macro link required for considering race or sex in organizing work under Title VII will have three principal defining features: processes for self-

assessment and regular monitoring of systemic and local demographics and power imbalances; organizational measures aimed at facilitating intergroup interaction; and ongoing efforts to develop overarching norms that foster meaningful integration. These features derive from the social science and organizational research on conditions that moderate intergroup interaction to be stereotype and/or bias negating rather than stereotype and/or bias confirming.

Self-Examination & Monitoring

Any comprehensive integrative effort should reflect a contextualized awareness of the moderating effect of demographic balance and power distribution on biases in interaction and decision making. Employers looking to take race or sex into account in organizing work should be required to undertake a diagnostic self-examination of the racial and/or gender equality dynamics within their organizations and business units. They would be required to engage in systematic quantitative and qualitative data gathering and analysis of equality and integration conditions within their workforces.¹⁸⁷ The self-assessment can serve as a roadmap for integrative efforts going forward,¹⁸⁸ but it should also provide for regular monitoring of systemic and local demographic and power imbalances. The integration plan should also designate staff and funding

¹⁸⁷ This self-examination might be similar to that required of federal contractors and subcontractors under Executive Order 11246, except that it would have an emphasis on integration and equality within a workplace as well as on identifying and redressing substantial disparities between the representation of minorities and women in the employer's workforce and the relevant, qualified labor pool. *See generally* RESKIN, *supra* note 67, at 10.

This type of self-examination is also common in the environmental context. Professor Coglianese provides the following description of an environmental management system (EMS):

To create an EMS, managers begin by establishing environmental goals and creating a specific plan to achieve those goals. Managers and workers are assigned responsibilities for implementing parts of the plan, and they are trained in what they need to carry out these responsibilities. They keep records that document their compliance with the plan and periodically the firm (or an outside auditor) reviews these records and assesses the firm's performance in meeting its goals and following its internal procedures. These periodic reviews are supposed to feed into revisions and continuous improvements in the firm's overall system. When auditing turns up deficiencies or problems, managers take remedial action and, as needed, amend their plan, returning to the start of what is commonly referred to as the "plan-do-check-act" cycle.

Cary Coglianese, *The Managerial Turn in Environmental Policy*, 17 N.Y.U. ENV'T'L. L.J. 54, 56 (2008).

¹⁸⁸ The self-assessment is not intended as a limit on efforts to integrate. *See infra* Part II.B.2.b (on the role of numbers).

for carrying out the integrative effort.¹⁸⁹ And, importantly, it should include processes to ensure that individuals who are asked to take on extra work as part of the integrative effort will be compensated for that work.¹⁹⁰

Other Integration-Producing and Discrimination-Reducing Measures

An integrative effort should also include measures other than race- or sex-conscious decision making that are similarly intended to foster meaningful integration and reduced discrimination. Some of these measures will focus on how work gets accomplished. An employer might create more team-based work or alter its existing team-based work system to provide for more cross-boundary, collaborative work opportunities.¹⁹¹ Depending on the degree of functional segregation in its workforce, it might target specific job categories for inclusion in team work to foster collaborative relations across functional divisions.¹⁹² Collaborative mentoring programs can also facilitate relationships at various levels of a hierarchy, and skills-building programs can be reworked to foster job rotation and to provide workers with training and experience in different jobs.¹⁹³

Other measures will focus on how work gets evaluated. An employer might restructure a decision-making system or information distribution system to reduce the likelihood that

¹⁸⁹ Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006) (finding that structures establishing responsibility lead to increases in managerial diversity).

¹⁹⁰ Although I argue that women and minorities can be expected to bear costs as individuals for the greater good of reducing discrimination more broadly within the workplace, the costs imposed on women and minorities should be minimized.

¹⁹¹ Kalev, *Glass Cages*, *supra* note 8 (showing that self-directed work teams, which pull team members from different jobs for on-going projects and have authority for their own management processes, are more effective in increasing job success in management for women and minorities than problem-solving teams, which tend to be composed of experts, usually white men, who come together periodically to address specific issues).

¹⁹² The latter measure has the added potential advantage of altering the status of job categories themselves. Thanks to KT Albiston for this point. It is possible that some of these measures could be subject to Title VII challenge, *see, e.g., Ricci v. Stefano* (plaintiffs challenging employer's decision to disregard test results when those results had a disparate impact on blacks), though the analysis should be substantially different because no employment decision as to a particular individual will have been based on race or sex. *See supra* note and accompanying text.

¹⁹³ Kalev, *Glass Cages*, *supra* note 8 (showing that job-rotation skills programs are more effective in increasing job success in management than more traditional skills training programs).

discriminatory biases will creep into day-to-day decisions,¹⁹⁴ and/or rework formal reward structures to reward dyadic rather than individual performance.¹⁹⁵ Research shows that structural measures like these are likely to work in conjunction with race- and sex-consciousness in organizing work to facilitate meaningful integration.

Instilling Overarching Norms & Developing Work Cultures

Research also points to the moderating effect of overarching norms and work culture on discrimination and segregation. In other work, I have examined work culture as a source of discrimination against historically subordinated groups,¹⁹⁶ but work culture can also be a facilitator of the kind of integration that reduces discrimination. Indeed, studies suggest that demographic diversity is more likely to reduce discrimination in workplaces where peer-like collaboration and supportive relations are encouraged.¹⁹⁷ Structural measures aimed at facilitating integrative norms should therefore also be a component of any integrative effort.

While some of these measures will overlap with structural measures taken to produce functional integration of work, discussed above, structural changes may also be supplemented by softer ways of fostering democratic and supportive relations, whether locally in teams, across business units, or throughout the workplace as a whole.¹⁹⁸ Research suggests, for example, that certain types of feedback and consultation processes in team leadership can enhance the quality of

¹⁹⁴ Barbara M. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 214 (2000) (identifying formalization of personnel procedures and accountability as practices that can reduce biases in personnel decisions).

¹⁹⁵ Shelly Brickson, *The Impact of Identity Orientation on Individual and Organizational Outcomes in Demographically Diverse Settings*, 25 ACAD. OF MGMT. REV. 82 (2000). Laurel Smith-Doerr also identified reward structures as a key difference between university and pharmaceutical companies and biotechnology firms in her study of the careers of women scientists. SMITH-DOERR, *supra* note 8.

¹⁹⁶ Green, *Work Culture and Discrimination*, *supra* note 76.

¹⁹⁷ Samuel B. Bacharach et al., *Diversity and Homophily at Work: Supportive Relations Among White and African-American Peers*, 48 ACAD. MGMT. J. 619 (2005); Brickson, *supra* note 195; Tsui et al., *supra* note 23. See also ESTLUND, *supra* note 160, at 50-54 (describing the idea of “social capitalism” and the role of layout and architecture in advancing egalitarian norms).

¹⁹⁸ See Bacharach et al., *supra* note 197; see generally Joyce Rothschild, *Creating a Just and Democratic Workplace: More Engagement, Less Hierarchy*, 29 CONTEMP. SOC. 195 (2000) (urging democratic practices as a way of capturing the potential of the move toward team-based work).

interpersonal relations between members of different demographic groups.¹⁹⁹ This research is part of a growing body of quantitative and qualitative work on the conditions that maximize the “upside” of diversity for businesses.²⁰⁰

These primarily structural efforts instituted by employers at the policy level to foster functional integration should operate together with the normative message sent by this development of Title VII law to reshape the narrative regarding the relevance of race and sex in decisions organizing work. Race and sex become relevant under this reshaped narrative as a means of fostering meaningful integration in work, integration that will reduce stereotyping and biases in interaction, even as they may also, simultaneously serve the “diversity” business interests that are dominant in the prevailing narrative.²⁰¹ Individual decision makers assigning work, assembling work teams, recruiting employees for publicity work, etc., will be conscious of race and sex, but they will not attribute membership in racial or gender groups as evidence of particular viewpoints or work capacities.

b. *The Role of Numbers*

Given the emphasis on numbers in *Weber* and *Johnson*, courts and scholars alike tend to assume that any use of race or sex in workplace decision making will require a particular numerical disparity to establish the micro-macro link. The majority in *Taxman* provides the most obvious example, restricting employers’ use of race and sex to decisions intended to remedy a “manifest imbalance,” but progressive legal scholars who see the possibility of non-remedial justifications for race- or sex-based decision making also seem unwilling to imagine an analysis that does not require employers to show a numerical disparity in order to take race or sex into

¹⁹⁹ See Ruth Wageman, *How Leaders Foster Self-Managing Team Effectiveness: Design Choices v. Hands-on Coaching*, 12 ORG. SCIENCE 559 (2001).

²⁰⁰ See, e.g., Brickson, *supra* note 195 (discussing the importance of identifying conditions under which organizations would be better positioned to “maximize the upside and minimize the downside of diversity”). More generally, some of the business literature on ways of developing corporate culture may also be useful, though it should be viewed critically. See Green, *Work Culture*, *supra* note 76.

²⁰¹ For more discussion of the narrative that this development of Title VII law has the potential to create, see Part III.B.

account. Professor Estlund, for example, argues that *Grutter* opens Title VII to non-remedial justifications for race- or sex-conscious decision making, but she adopts the “manifest imbalance” requirement of *Johnson*.²⁰² Professor Yelnosky also carries over a numbers-based requirement into his proposed analysis of the non-remedial, prevention justification for race- and sex-based preferences in hiring.²⁰³ After arguing persuasively that *Johnson*’s manifest imbalance requirement “might not apply to prevention plans,” Professor Yelnosky proposes a requirement that “the employer . . . show an imbalance in the gender [or racial] make-up of the workforce.” Neither Estlund nor Yelnosky explain why they think that employers should be required to make a showing similar to that in *Johnson*, when the goal being served is reducing future discrimination (or, in Estlund’s view, advancing social democracy) rather than eliminating the effects of past discrimination.

While numbers—or, more accurately, the racial or gender demographics of a workforce, division, or work group—are “inescapably relevant,” as Professor Estlund puts it, to any functional integrative effort,²⁰⁴ employers should not be required to point to any particular numerical imbalance to establish the Title VII micro-macro link. On the contrary, an employer’s showing that its individual race- or sex-conscious decisions are part of a broader integrative effort serves the same purpose for the non-remedial justification of reducing discrimination as an employer’s showing of a manifest imbalance serves for the remedial justification. This showing ensures that the individual decision is linked to the broader Title VII goal in a way that makes it likely that the race- or sex-based decision is furthering that goal. Because the goal in this context is different—reducing future discrimination rather than removing the effects of past discrimination—so too is the showing required for the micro-macro link.

²⁰² Estlund, *supra* note 9, at 35-36 (“*Grutter*’s recognition of the civil and societal value of integrated institutions provides ample reason for choosing the more accommodating reading” of *Johnson*, that “[e]mployers need not cite any particular reasons for addressing a ‘manifest imbalance’ in a predominately white workplace or job; it is enough that the ‘manifest imbalance’ exists”).

²⁰³ Yelnosky, *supra* note 11.

²⁰⁴ Estlund, *supra* note 9, at 27. Indeed, the call for an integrative effort recognizes that race and sex trigger stereotypes and biases and that demographics and power are key moderators of bias and prejudice.

There are also several practical reasons for rejecting the requirement of a numbers-based showing for race- or sex-conscious decisions in organizing work. First, integration as a means of reducing discrimination requires attention to demographics at multiple levels within an organization. An employer should be simultaneously seeking to integrate work groups, to break down stratification across work divisions, and to integrate the workforce as a whole. It does not make sense, therefore, to restrict an employer's effort to a single, demographically unbalanced business unit or job category.

Second, considering race or sex in organizing work can further the goal of reducing discrimination in a variety of ways. Requiring that each individual decision be part of a broader integrative effort cabins employer discretion in making race or sex-conscious decisions at the same time that it allows employer flexibility. Employers may want to consider race or sex in developing publicity materials, for example, to portray the firm as diverse. Research shows that honoring members of different groups and portraying them positively helps instill cultures valuing diversity,²⁰⁵ but a single decision to feature a black woman in a television interview, particularly if the interview or the fact of the interview is not disseminated within the workplace, is unlikely to accomplish the goal of reducing discrimination. Instead, it needs to be disseminated to the workforce, and it needs to be part of a larger effort to integrate and to create norms that value diversity and integration.

It is possible that Professors Yelnosky and Estlund propose a requirement of demographic underrepresentation (whether as compared with another job within the employer's workforce or as compared with a relevant labor pool) because the underrepresentation serves as a short-hand, a signal that discrimination is likely to be operating in a particular workplace.²⁰⁶ If

²⁰⁵ See e.g., TRICE & BREYER, *supra* note; Jennifer A. Chatman, *Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes*, 43 ADMIN. SCI. Q. 749, 777 (1998).

²⁰⁶ Yelnosky, *supra* note 11. Professor Estlund, in contrast, seems to require a showing of a “‘manifest imbalance’ in a predominately white workplace or job” as a way of making it more likely that race- or sex-based decisions will be “pro-integration.” See Estlund, *supra* note 9, at 35-36. At the level of organizing

we take the social science research outlined in Part I seriously, though, we should need no such organization-specific demonstration, even a short-hand one. Unless the organization at issue is so demographically diverse across all sectors of its workforce that work teams and decision-making committees made entirely without regard to race or sex would be sufficiently diverse as to create stereotype- and bias-negating rather than stereotype- and bias-facilitating interactions, then race- and sex-conscious decisions organizing work—when made as part of a broader integrative effort—will serve the goal of reducing discrimination in the workplace. Such a level of diversity will be very rare, particularly given the current demographic makeup of the American workforce. Moreover, race- and sex-based decisions organizing work may still serve the goal of reducing future discrimination even in such a demographically balanced workplace.²⁰⁷

Numbers, of course, will not be irrelevant to the question of whether the employer has established the necessary micro-macro link. If Latino employees are concentrated in a particular division within a firm, for example, then it will be difficult for the employer to show that the decision was part of an integrative effort. Indeed, this is one way in which applying this interpretation of Title VII to decisions organizing work will refocus attention at the systemic over the individual level.²⁰⁸

Nor should numbers be irrelevant. One of the benefits of an integration approach to race and sex in organizing work under Title VII is its emphasis on the role of numbers in understanding discrimination and inequality in the workplace. An integration approach brings self-examination of parity and demographics back to the forefront of antidiscrimination law. To

work, however, numbers cannot establish the necessary link between using race and sex in individual decisions and advancing integration. *See supra* Part IA.

²⁰⁷ Rather than being particular to specific workplaces, it would take substantial change in the underlying prevalence of discriminatory biases and stereotypes to warrant a shift in the legality of race- and sex-based decisions organizing work as a discrimination-reducing measure. Professors Kang and Banaji make a similar point. *See Kang & Banaji, supra* note 11, at 1116 (“Fair measures that are race- or gender-conscious will become presumptively unnecessary when the nation’s implicit bias against those social categories goes to zero or its negligible behavioral equivalent.”).

²⁰⁸ *See supra* note __ (describing move toward regulatory focus on structures and systems over the ex post facto identification of specific instances of discrimination).

be permitted to use race and sex in decisions organizing work, employers must not only monitor demographics; they must ask where the obstacles are to equality and take efforts to change the social practices that entrench segregation and discrimination in their workplaces.

III.

POSSIBILITIES AND CONCERNS

Applying an integration approach to race and sex in organizing work under Title VII presents an untapped opportunity to advance workplace equality. Because decisions organizing work are “softer” than decisions about whom to hire, fire, or promote, both in the multi-factored, discretionary nature of their decision-making processes and in the discernability and immediacy of their benefits and harms, considering race and sex in organizing work—as guided by Title VII—may prove a more effective tool for reducing discrimination and advancing equality than considering race and sex in decisions regarding precise points of entry, exit, or advancement.²⁰⁹ Not only is permitting consideration of race and sex in organizing work likely to attain greater normative traction than more traditional affirmative action efforts, but by harnessing business interests at the policy level within organizations, Title VII is capable of generating a new narrative that serves to couple structural reform to day-to-day social practices.

A. *Practical Concerns*

²⁰⁹ Because the immediate harms and benefits of decisions organizing work are often softer than the harms and benefits of decisions at hiring, promotion, or discharge, race and sex in organizing work is also unlikely to trammel the interests of members of any particular group. No use of race or sex under Title VII is permitted to “trammel the interests” of others. *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 630 (1987). In *Weber*, the Court explained that the plan there did not “unnecessarily trammel the interests of the white employees” because it did not require “the discharge of white workers and their replacement with black hirees” or create “an absolute bar to the advancement of white employees.” *Weber, supra*. Considering race or sex in organizing work as one factor in determining which employees to place on a particular work team, for example, even if the decision is shown to cause harm by affecting opportunities for job tasks and relationships, is unlikely to tread upon entitlements or result in quotas or provide the immediate impetus for discharge.

I anticipate several concerns about the practical effects of the proposed interpretation of Title VII. This interpretation pushes Title VII in a new regulatory direction. Instead of mandating or prohibiting specific structures for all employers or requiring that certain outcomes, such as specific demographic balances or disparities, be achieved or avoided, this proposal propels Title VII into the realm of management-based regulation, focusing regulatory attention on employers' self-examination processes and efforts to instill a variety of integration-advancing organizational and management structures.²¹⁰ Moreover, because tying individual race- and sex-based decisions organizing work to a broader integrative effort would serve as a justification for race- and sex-based decision making, the proposed development of Title VII is likely to have an impact on the ability of plaintiffs to obtain judgments of liability in this area.

The most immediate concern raised by my interpretation of Title VII stems from the need for judicial monitoring of organizational decisions. The idea here is that courts cannot (or will not) adequately monitor employers' integrative efforts. Instead, courts will defer to employers, irrespective of the effectiveness of the measures being implemented, and employers will fill the regulatory gaps with measures that have little-to-no effect on workplace equality.²¹¹ Professor

²¹⁰ In the employment discrimination context, this approach to regulation has been most commonly called a "problem-solving approach." See Sturm, *supra* note 105, at 484. I use the term "management-based" here in an effort to better capture the role of regulatory oversight in this approach. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC. REV. 691 (2003) (examining use of management-based regulatory strategy in areas of food safety, industrial safety, and environmental protection). According to Professors Coglianese and Lazer, a management-based regulatory instrument is defined by its focus on regulating firms' planning processes and efforts at achieving specific public goals. *Id.* at 692.

²¹¹ See, e.g., Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 523 (2003). For discussion of this and other challenges faced by efforts to address discrimination in employment through a reframing of the nondiscrimination obligation, see Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 3 FORDHAM L. REV. 659 (2003). This concern is common to all management-based regulatory systems. For a discussion of the monitoring problem across substantive areas of law and drawing parallels to delegation of decision making to administrative agencies, see Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decision Making, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006). In the employment discrimination context, Professor Susan Sturm provides the most sophisticated account of possible solutions to monitoring difficulties generated by "problem-solving" approaches to regulation. See, e.g., Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006) (using a case study as a springboard for exploring the role of institutional intermediaries in monitoring change); Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the*

Lauren Edelman's research on the endogeneity of law provides support for this concern.²¹² Her research shows that judges over time have tended to view institutionalized organizational structures—those that have become commonly adopted across organizations—as indicators of nondiscrimination even if those structures do little to reduce discrimination.²¹³ Moreover, it appears that judges are more likely to defer to these institutionalized structures when they are asked to review organizational attributes that are not directly observable.²¹⁴

One way of reducing the difficulties associated with judicial review of integrative efforts might be to carve a greater role for agencies and/or private entities to play in overseeing and in devising integrative efforts.²¹⁵ Much as the Office of Federal Contract Compliance Program (OFCCP) monitors federal contractors' affirmative action efforts through compliance reviews,²¹⁶ so, too, might a government agency such as the Equal Employment Opportunity Commission monitor integrative efforts. Firms seeking to undertake race- and sex-conscious decisions organizing work might engage with social scientists and other experts employed by the EEOC to develop and provide evidence of integrative efforts. Private, third-party auditors might also serve as monitors.²¹⁷

The concern about judicial willingness may also hold somewhat less weight in this context because of the courts' long history examining affirmative action plans to determine whether they were adopted for a permissible purpose and likely to further that purpose. Indeed,

Judicial Role in New Governance, COL. J. OF EUROPEAN LAW (2007) (exploring a new role for courts in management-based regulation).

²¹² Lauren Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures* (unpublished manuscript); see also Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. OF SOC. 1401 (1990) (discussing the role of personnel professionals in diffusion of organizational compliance mechanisms); Susan Bisom Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999).

²¹³ Edelman et al., *When Organizations Rule*, *supra* note 212.

²¹⁴ *See id.*

²¹⁵ Coglianesse, *supra* note 187.

²¹⁶ RESKIN, *supra* note 72, at 11.

²¹⁷ The Environmental Protection Agency has experimented with the use of private auditors in the environmental context. See Howard Kunreuther, et al., *Third Party Inspection as an Alternative to Command and Control Regulation*, 22 RISK ANALYSIS 309 (2002).

one of the benefits of undertaking a management-based strategy as part of a justification to the voluntary use of race and sex lies in its posture as a voluntary effort.²¹⁸ Because the law provides a justification for using race and sex, rather than interpreting the law's initial prohibition on discrimination (as all other proposals advocating a move toward organizational reform to date have done), it provides space for experimentation. If empirical work shows that courts (or other monitors) are doing an inadequate job of monitoring, then Congress can amend Title VII to provide for a different means of monitoring, or even so that it no longer permits any consideration of race or sex in organizing work.

Apart from the monitoring difficulty, there is also a risk that applying an integration approach under Title VII to race and sex in organizing work will be counter-productive, providing employers with a readymade escape hatch to existing, sometimes successful, efforts to hold employers liable for discriminatory biases in organizing work. Take, for example, the class action lawsuit against American Express.²¹⁹ One of the plaintiffs' allegations there was that women suffered discrimination in pay because discriminatory bias played a role in assignments to a lucrative client base.²²⁰ American Express used an informal system of choosing "superstars" from incoming recruits and assigned its best, most lucrative accounts to those stars.²²¹ The assignment of clients is likely to be a decision organizing work; the assignments did not directly determine the employee's pay and, therefore, would not themselves be considered adverse employment actions. Does applying an integration approach to these decisions offer employers a way out from under liability? Can American Express successfully argue, in other words, that it considered sex in assigning work as part of a broader integrative effort aimed at reducing discrimination? I think not, and this brings us back to the role of numbers in establishing the

²¹⁸ There is reason to believe that a management-based strategy will be more effective when it is associated with voluntary rather than mandated action on fronts that are currently not being regulated. *See generally* Coglianese, *supra* note 187, at 69.

²¹⁹ Complaint, *Kosen Am. Express Fin. Advisors, Inc.*, (No. 1:02-CV0082) (D.D.C. June 15, 2002).

²²⁰ *Id.* at 33.

²²¹ *Id.*

requisite micro-macro link. If women as a group are generally assigned the less prestigious and less lucrative clients, then employers should find it difficult to persuade a factfinder that these assignments were part of an integrative effort aimed at reducing discrimination. This said, the risk does exist that a factfinder would find for the defendant (or would defer to the employer on the belief that the employer was seeking to reduce discrimination). The risk seems no higher, however, than the risk that a factfinder will accept the employer's argument that discrimination should not be inferred from stratification/segregation statistics because the employer was otherwise concerned about the job success of women in its workplace.²²²

The impact on individual lawsuits is likely to be more substantial. Unless an individual has evidence of discriminatory animus or bias on the part of a decision maker or evidence of a pattern of assignment that is inconsistent with an integrative effort, she may lose her claim to the employer's argument that it did take her race into account in assigning work but as part of its broader integrative effort. Potential plaintiffs with comparative evidence, for example, may find another hurdle to success on a claim of individual disparate treatment. Similarly, the woman who is asked to do extra work because of her sex and is not compensated for that work may lose her claim of individual disparate treatment when the employer shows that it asked her to do that work as part of a broader integrative effort that includes processes to ensure compensation for that work.²²³ These are real costs of the interpretation of Title VII that I advance, but the costs should be outweighed by the greater benefits obtained in refocusing Title VII on structures and systems and in reshaping the narrative regarding the relevance of race and sex in organizing work to serve the goals of integration and reduced discrimination at work.²²⁴

²²² See, e.g., EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (upholding the district court's finding that an underrepresentation of women in commission jobs was due to women's lack of interest and not discrimination).

²²³ See *supra* note ___ and accompanying text (requiring procedures to compensate women and minorities for extra work).

²²⁴ Indeed, only if the justification actually protects employers against liability in some cases will employers be motivated to undertake the integrative effort.

Finally, one might question whether this approach asks too much of businesses that are sincerely committed to equality and nondiscrimination. It is not unheard of, for example, for a law school's deans to put more pressure on its women faculty and faculty of color than on its white, male faculty to attend weekend admission events and student recruitment dinners. The deans may do this with the laudable aim of attracting a more diverse student body. Under my proposal, even if the law school is otherwise committed to having a diverse faculty, and takes measures to attain and retain a diverse faculty, it will still have to show that it has undertaken a broad integrative effort and that the decision to showcase women and faculty of color to students is part of that effort. This requirement could impose in some cases substantial costs associated with undertaking an integrative effort on the organization, and may even result in the hiring of one fewer faculty member (maybe even one fewer woman and/or person of color) for lack of funds. Is the benefit worth the cost? In some individual cases, the answer may be "no," but in the general run of cases—at the level of policymaking—I think the answer will be "yes." Requiring an integrative effort forces even well-meaning institutions to take stock of demographics and power differentials, at least *if* they want to take race or sex into account in organizing work. Some institutions will decide that the cost is too high, in which case they may make more of an effort to protect against discriminatory biases in organizing work. Either way, the law will have triggered important, forward-looking inquiry into the use of race and sex in decision making and discrimination at the level of organizing work.

B. The Effect of a New Narrative

It is also important to think carefully about the effect of the reframed narrative regarding the relevance of race and sex to decisions organizing work on broader social equality goals. This narrative has the potential to dramatically alter the context of intergroup interactions at work and, accordingly, to redirect the construction of race and sex in work, but it also carries with it some risks.

Any use of race or sex in employment decision making carries with it a risk that the perceived beneficiary of the decision will be cast as undeserving. Studies show that when the perceived beneficiary casts herself as undeserving, she can suffer from an internal sense of stigma and self-doubt that can translate to lower motivation and commitment and less ambitious task selection.²²⁵ When others cast her as undeserving, moreover, they are likely to assume that she is less capable and are more likely to engage in stereotyping.²²⁶ The research also shows, however, that the self-derogation effects of the use of race or sex in decision making tend to disappear when subjects are told that qualifications as well as group membership were used in making selections.²²⁷ Race and sex in organizing work, guided by Title VII, should be part of an employer's broad pronouncement that race and sex may be considered as one factor in otherwise complex and multi-factored, discretionary decisions about the organization of work and work tasks. To the extent that qualifications rather than group membership takes center stage in making these decisions, therefore, the risks of taking race and sex into account should be reduced substantially.

Relatedly, consideration of race and sex in organizing work is also less likely to generate perceptions of unfairness than consideration of those characteristics at points of entry, exit, or promotion.²²⁸ Again, because decisions organizing work are typically multi-factored and discretionary, the use of race and sex as a factor in these decisions is less likely to be viewed as antithetical to the merit-based norm.

There remains some risk, nonetheless, that using race and sex in organizing work will reinforce stereotypic assumptions about outgroup inferiority by providing a plausible situational

²²⁵ For a detailed discussion of this research, see Krieger, *supra* note 146, at 1264-70.

²²⁶ *Id.*

²²⁷ *Id.*; see also Brenda Major, et al., *Attributional Ambiguity of Affirmative Action*, 15 BASIC & APP. SOC. PSYCHOL. 113, 118 (1994).

²²⁸ Joyce Rothschild, *Creating a Just and Democratic Workplace: More Engagement, Less Hierarchy*, 29 CONTEMP. SOC. 195 (2000); see also Krieger, *supra* note 146, at 1271-72 (describing the role of perceived fairness in resistance to affirmative action programs).

attribution for the job successes of women and minorities. Employees will not know when race played a role; they may assume that it always plays a role. Indeed, research suggests that they are likely to assume that it played a role more often when women or minorities are placed in positions of power or prestige than when white men are placed in those positions.²²⁹ Some risk of stereotype-reinforcing assumptions is attendant to all uses of race and sex in decision making, and using race and sex in organizing work is no exception.

Based in part on this reality, I expect some commentators will object to the Title VII analysis presented here on the ground that it permits classification on the basis of protected factors at all. Any race- or sex-based classification, this argument goes, perpetuates stereotyping and exacerbates intergroup tensions. Instead of permitting consideration of race or sex under any circumstances, we should strive to ignore race and sex in all employment decisions.

While it is true that making intergroup differences salient can exacerbate stereotyping and bias (and for that reason an integrative effort should include efforts to foster a climate of peer-like collaboration and supportive relations), an integration approach to race and sex in organizing work serves to protect against stereotyping by deemphasizing diversity as group-based difference. Individuals organizing work are not permitted under this approach to take race or sex into account based on their assumptions about how members of particular racial or gender groups will behave or what they will contribute as members of those groups to the workplace. Rather, the narrative as reframed by the proposed interpretation of Title VII emphasizes the benefits to business and to all workers of integration.

Indeed, one of the greatest strengths of the proposed development of Title VII law may be its potential to reframe the narrative regarding the relevance of race and sex in organizing work and, ultimately, our perceptions about the relevance of race and sex to work.²³⁰ As this

²²⁹ Krieger, *supra* note 146, at 1264-70 (describing research in this area).

²³⁰ See generally Ellen C. Berrey, *How Diversity Excludes: Organizational Diversity Rhetoric and Programs in Three U.S. Field Sites*, draft manuscript May 2009 (on file with author) (highlighting the importance of probing organizational meaning-making for racial equality).

Article demonstrates, race and sex already influence decisions organizing work. Most workers now are likely to assume, moreover, that race and sex are relevant only for decisions involving women and people of color (and that they are relevant only as serving or signaling devices). Title VII has the potential to reframe the diversity narrative so that race and sex are relevant (and perceived as relevant) for all workers. If workers begin to assume that race and sex often play some role, even a very minor one, in decisions organizing work, maybe that will dampen the sense that race matters in some decisions and not in others. This could be the beginning of a new diversity narrative under which race and sex are relevant as means of creating opportunities for positive intergroup contact that will benefit workers as well as the firms for which they work.²³¹

CONCLUSION

This Article exposes the risks and possibilities of the conscious use of race and sex in organizing work, and presents a new way for Title VII to trigger structural changes as well as individual race- and sex-based decisions that are likely to increase functional integration and to reduce workplace discrimination. Without such a comprehensive approach, the use of race and sex in organizing work is likely to result in increased discrimination and entrenched inequality. The interpretation of Title VII presented here offers an opportunity for businesses to attain the bottom-line benefits associated with cross-cultural competence and reduced discrimination at the same time that those business advance the nation's social justice interests.

The Article also exposes important lines of future empirical research which can inform deliberations about whether and how the law is working to serve its goals. This research may show, for example, that courts or other monitoring actors are not adequately monitoring organizational efforts, or that the costs placed on individual women and minorities by race- and sex-based decisions organizing work is contributing to broader group-based subordination and

²³¹ See Ely & Thomas, *supra* note 23 (presenting research suggesting that “integration and learning” diversity perspective leads to better work group functioning than other perspectives).

inequality in work. Either of these findings might affect the balance between private and public monitors, the precise contours of regulatory requirements, or even the undertaking itself. Because the law developed here identifies a justification for race- and sex-based decision making, policy makers should be particularly receptive to evidence that the justification is either directly ineffective or that its indirect effects are taking antidiscrimination law or norms astray.

More broadly, the Article attends to relations in employment discrimination law. It focuses attention on the role that social interactions play in producing and reproducing disadvantage at work and the role of organizational and institutional structures both in enabling and shaping biased interactions and in generating meaningful interventions for reform. In doing so, it pushes us to think more concretely about contextual influences not just on individual mindsets but also on the social interactions through which the contemporary dynamics of race and sex are carried out.