

TARGETS OF OPPORTUNITY?
THE HISTORY, LAW, AND PRACTICE OF
AFFIRMATIVE ACTION IN UNIVERSITY FACULTY
HIRING

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Can universities legally employ race- and sex-based preferences in faculty hiring? This Article explores the history, law, and practice of faculty-related affirmative action, tracing its origins back to several largely forgotten legal challenges brought in the early 1970s concerning universities' blatant discrimination against women. Since that time, universities have developed hiring schemes that are typically hidden from public view and steer certain minority and female faculty candidates into special hiring processes. These special processes, called "Target of Opportunity Programs" (TOPs), create faculty positions for which candidates are identified on the basis of race and sex and for which candidates from non-preferred demographics cannot apply. The legality of TOP searches is rarely discussed openly on campus. While some have suggested that the Supreme Court's diversity rationale in the admissions context permits preference-based faculty hiring, this Article shows that the diversity rationale translates poorly to the context of faculty hiring. Moreover, faculty hiring, unlike admissions, is regulated by a complex system of anti-discrimination norms in state law, federal employment law, and administrative regulations that appear to tightly constrain permissible employment-related affirmative action. This Article concludes that race- and sex-based preferences for faculty hiring are problematic; they are difficult to justify under the standard diversity rationale, and they seem to violate employment law and an Executive Order governing government contractors by creating the functional equivalent of race- and sex-based set asides.

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INTRODUCTION

Debates about affirmative action in a university setting almost inevitably center around the application of racial, ethnic, or sex preferences in the student-admissions process.¹ Legal scholars have paid far less attention to affirmative action in the area of university faculty hiring. This lack of attention is unfortunate. Affirmative action in faculty

1. For conciseness, in the discussion below I use the word “universities” to refer in shorthand to institutions of higher education, including “colleges.” I also conflate the categories of “race” and “ethnicity,” as is common in discussions of affirmative action. See David E. Bernstein, *Schuetz v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 N.Y.U. J.L. & LIBERTY 210, 227 (2013); David E. Bernstein, *The Modern American Law of Race*, S. CAL. L. REV. (forthcoming), <https://ssrn.com/abstract=3592850> [<https://perma.cc/84GA-LQKN>].

hiring is longstanding and widespread,² and it is likely to increase in the wake of 2020's racial reckoning.³ Yet, it raises legal and practical issues that are more complex and more uncertain than those that characterize contemporary discourse about affirmative action in admissions.

Modern affirmative action programs for faculty hiring follow a common model—the “Target of Opportunity Program,” or TOP.⁴ TOPs are rarely discussed openly in academia, and this Article's main contribution is to trace the history of such programs in the context of analyzing the legal risks and practical problems that they pose. As shown below, the TOP model of hiring differs substantially from what some might call the “normal” faculty hiring process.⁵ The normal process is characterized by open, advertised, and competitive searches for, at least in theory, the objectively “best qualified” candidate in a particular area of scholarly expertise.⁶ TOPs are designed to increase the chances of hiring a faculty member possessing characteristics that are perceived to be undervalued in a “normal” search.⁷ University administrators are often vague as to what special characteristics are sought, but a TOP search will typically focus on hiring faculty members of a particular sex or race, where individuals with those characteristics are perceived as underrepresented in the relevant community.⁸

2. See, e.g., Lacey Fosburgh, *Berkeley Plan Could End Hiring Bias in 30 Years*, N.Y. TIMES, Mar. 5, 1975, at 36; Iver Peterson, *Columbia Vows an Effort to Hire 900 to Fulfill U.S. Antibias Rule*, N.Y. TIMES, Nov. 15, 1972, at 51; Orlando Taylor, Cherly Burgan Apprey, George Hill, Loretta McGrann & Jianping Wang, *Diversifying the Faculty*, PEER REV., Summer 2010, at 15.

3. Memorandum from M. Katherine Banks, Dean of Eng'g, Tex. A&M Univ., to Employees of the Texas A&M Engineering Experimentation Station (Aug. 12, 2020), https://tees.tamu.edu/reporting/_files/_documents/Narrative2020.pdf [<https://perma.cc/V9AU-H4BK>]; Duke Today Staff, *President Price Message on Anti-Racism Initiatives*, DUKE TODAY (Oct. 15, 2020), <https://today.duke.edu/2020/10/president-price-message-anti-racism-initiatives> [<https://perma.cc/QST7-BHE4>].

4. TOPs are also sometimes referred to as “ToOs.”

5. I use the word “normal” because I believe that the hiring process that I describe as such is normatively preferable in most cases and because universities routinely portray their standard hiring process as an actual “norm” (where norm means something that is usual, typical, or standard).

6. See *Recruitment, Assessment, and Selection of Academic, Faculty, Limited, and University Staff Employees*, UNIV. OF WIS.-MADISON OFF. OF HUM. RES., <https://kb.wisc.edu/ohr/policies/page.php?id=53208> [<https://perma.cc/2A66-ZXTP>] (last visited Oct. 27, 2020).

7. See generally, Kåri Knutson, *Enhancement to Faculty Recruitment Program to Help Diversify Faculty*, UNIV. OF WIS.-MADISON NEWS (Sept. 26, 2018), <https://news.wisc.edu/enhancement-to-faculty-recruitment-program-to-help-diversify-faculty/> [<https://perma.cc/W6LK-MSTJ>].

8. *Id.*

As compared to the “normal” search, the TOP search is usually not as open, not as advertised, and not as competitive.⁹ Indeed, as a matter of university bureaucratic discourse and legal risk management, the search may not be a “search” at all.¹⁰ TOPs seem to be rarely, if ever, challenged in court, and judicial guidance on the legality of the programs is, at best, indirect.¹¹ At least part of the reason for the lack of litigation is due to the way in which the TOP process is designed: the process makes it very difficult to identify an adversely affected party who will recognize a reason and an opportunity to complain.¹² While this design feature makes TOPs difficult to litigate, it does not make the programs necessarily legal.

Given the vastness of the existing literature on affirmative action in university admissions,¹³ it might be surprising that scholarship on affirmative action in university faculty hiring is not more common. Legal scholars have occasionally written on the subject, but those discussions exhibit important limitations of approach and execution. Some are overtly polemical.¹⁴ Others, strangely, completely ignore the law.¹⁵ Another strand offers highly personalized—but still valuable—descriptions of the

9. See, e.g., *Faculty Diversity Initiative*, UNIV. OF WIS.-MADISON OFF. OF THE PROVOST, <https://facstaff.provost.wisc.edu/faculty-diversity-initiative/#top-target-of-opportunity-support> [<https://perma.cc/2SMQ-K3H3>] (last visited Oct. 28, 2020) [hereinafter *UW Faculty Diversity Initiative*].

10. See *id.*

11. See generally *Shuford v. Ala. State Bd. of Edu.*, 897 F. Supp. 1535 (M.D. Ala. 1995) (holding a proposed partial consent decree which incorporated procedures to recruit qualified women and people of color for faculty members as constitutional).

12. See *UW Faculty Diversity Initiative*, *supra* note 9; Louis Menard, *The Changing Meaning of Affirmative Action*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action> [<https://perma.cc/ZZ7V-7FL6>].

13. See, e.g., Linda D. Martin, *Affirmative Action in University of California Admissions: An Examination of the Constitutionality of Resolution SP-1*, 19 WHITTIER L. REV. 373 (1997); Attashin Safari, *Ensuring the Constitution Remains Color Blind vs. Turning a Blind Eye to Justice: Equal Protection and Affirmative Action in University Admissions*, 50 LOY. L.A. L. REV. 269 (2017); Herbert C. Brown, Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 21 WM. & MARY J. WOMEN & L. 603 (2015).

14. See, e.g., Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993) (presenting an imagined judicial opinion finding that a university’s preferential hiring regime violates the U.S. Constitution and federal civil rights law). Paulsen’s opinion was accompanied by a contrary imagined opinion by Richard Delgado, purportedly of a trial court finding against a disappointed faculty candidate’s reverse-discrimination lawsuit. Richard Delgado, *Five Months Later (The Trial Court Opinion)*, 71 TEX. L. REV. 1011 (1993).

15. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (advocating for law schools to adopt aggressive and explicit racial hiring quotas, without discussing the proposal’s obvious legal or political shortcomings).

professional and emotional struggles of minority faculty members, who describe feelings of isolation and overburdening responsibility as ambassadors of their sex and race.¹⁶ Less frequently do we find exposés presenting the underside of faculty hiring by those claiming reverse discrimination.¹⁷ Those accounts do not attract much attention from the legal academy and, indeed, may even attract scorn.¹⁸

Where discussions do focus on the underlying legality of affirmative action in university faculty hiring, they tend to present incomplete accounts of the legal framework, privileging the U.S. Constitution's Equal Protection Clause that takes center stage in the admissions litigation¹⁹ or, secondarily, focusing on Title VII of the Civil Rights Act of 1964.²⁰ They completely ignore parallel, but not necessarily identical, state laws,²¹ and they slight the executive orders and regulations that provide the main day-to-day interface between the federal government and universities as both government contractors and as employers.²² These same regulatory structures remain intact today and are potentially a significant source of legal vulnerability for universities that too openly, aggressively, or haphazardly incorporate race- or sex-based hiring preferences into their affirmative action schemes.²³

Existing discussions also fail to engage much with university affirmative action practices in faculty hiring as they are actually structured or implemented by the university bureaucracy.²⁴ This lack of attention is due in part to the understandable interest of universities in keeping the

16. Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988); Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81 (1990).

17. See, e.g., Ken Feagins, "Wanted—Diversity: White Heterosexual Males Need Not Apply," 4 WIDENER J. PUB. L. 1 (1994).

18. Delgado's imagined trial court opinion provides a good example of what I mean by scorn. Delgado, *supra* note 14. An analogue in the context of university admissions is Osamudia James's unsympathetic discussion of Abigail Fisher, the plaintiff in the most recent U.S. Supreme Court cases on the subject. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 427–29 (2014).

19. See, e.g., Paulsen, *supra* note 14.

20. See, e.g., *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305 (2d Cir. 1997).

21. See, e.g., WIS. CONST. art. 1, § 1; Wisconsin Fair Employment Act, WIS. STAT. § 111.31 (2017–18).

22. For an important exception, see Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1017 (2016).

23. For insight on the earliest days of faculty-related affirmative action, see Gwendolyn H. Gregory, *Making the Affirmative Action Plan Work*, 1 J. COLL. & U.L. 16, 17 (1973).

24. Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 972 (1974).

details of their affirmative action hiring programs largely hidden from view; that university practice and discourse around affirmative action might lack a certain amount of candor is unsurprising. The politically dangerous and legally uncertain nature of the topic has long been recognized as discouraging “complete openness and frankness.”²⁵ What universities actually do when they engage in affirmative action hiring is thus difficult to observe. The lack of transparency renders discussions of the legality of affirmative action abstract and potentially unreliable as a guide to how and whether particular forms of affirmative action, as actually implemented, may pose legal risks.

Before providing a roadmap of the Article’s contents, let me briefly mention two limitations of scope. First, my discussion is not meant to provide a treatise on the law of affirmative action or of employment discrimination, nor to serve as a how-to guide for those who would legally defend or attack university hiring practices. Second, I do not try to tackle, let alone to resolve, the longstanding and probably irresolvable moral debates that underlie academic and public arguments about the merits and demerits of racial preferences in hiring. Charles Lockhart describes the “struggle over affirmative action [as] an irreconcilable clash between rival ways of life.”²⁶ One way emphasizes egalitarianism, refusing to “accept the application of standardized procedures as adequate for realizing equality of opportunity because persons from various backgrounds have sharply different opportunities for developing the attributes that standardized procedures seek to measure.”²⁷ The other emphasizes individualism, typically focusing on “procedural fairness.”²⁸ Charles Lockhart argues that both “egalitarians” and “individualists” support the “symbol” of affirmative action as about “equality of opportunity,” but they disagree on the “concept.”²⁹ At the outset, I think it is important to admit that my personal moral leanings tend toward the individualist. But this is not to say that my central claim—that race and sex preferences in faculty hiring are legally problematic—is inherently normative. That is, to point out a problem of potential illegality is very different from normatively claiming that a potentially illegal practice should be illegal.

My examples will often draw upon the experiences of my own institution (the University of Wisconsin-Madison, or, for simplicity, UW), but the Article is not meant as an exposé of UW’s hiring practices. I focus on UW (using publicly available sources of information, without resort to

25. *Id.* at 972–73.

26. Charles Lockhart, *Socially Constructed Conceptions of Distributive Justice: The Case of Affirmative Action*, 56 REV. POL. 29, 34 (1994).

27. *Id.* at 35.

28. *Id.* at 34.

29. *Id.*

Wisconsin's freedom of information law) for two reasons. First, UW is relatively transparent about its affirmative-action efforts. Second, UW has long served as an innovative example of how faculty-related affirmative action programs might be designed. As discussed further below, UW's "Madison Plan" of the late 1980s served as an early template for what would become the standard TOP model of minority faculty hiring initiatives.³⁰ UW illustrates both the historical cutting edge and the modern standard for the design of preferential regimes, and it accordingly provides an especially appropriate foundation for an analysis of the legal and practical challenges that such regimes face. That said, UW's TOP practices are by no means unique.³¹ TOPs or their close cousins appear to be very common in higher education, even if the details are typically obscured in shadow.³²

The Article proceeds as follows. Part I sets the stage by defining what I mean by "affirmative action" in the context of university faculty hiring.

30. See UNIV. OF WIS.-MADISON, THE MADISON PLAN, <https://diversity.wisc.edu/wp-content/uploads/2010/10/Madison-Plan-19881.pdf> [<https://perma.cc/G9EP-HUD5>] [hereinafter THE MADISON PLAN].

31. See the following sources for identified evidence of TOP-like programs at these institutions. Note that this list is only meant to be illustrative and does not include all TOP-like programs. *Target of Opportunity Appointments*, BATES DEAN OF THE FAC., <https://www.bates.edu/dof/governance-and-policies/target-of-opportunity-appointments/> [<https://perma.cc/C7E8-PZ7M>] (last visited Oct. 18, 2020) (Bates College); *People*, BROWN UNIV. OFF. OF INSTITUTIONAL EQUITY & DIVERSITY, <https://www.brown.edu/about/administration/institutional-diversity/pathways/implementation/people> [<https://perma.cc/VM9K-NRQG>] (last visited Oct. 18, 2020) (Brown University); *Enhancing the Recruitment of Underrepresented Staff*, BRYN MAWR COLL., <https://www.brynmawr.edu/sites/default/files/EnhancingRecruitmentUnderrepresentedStaff.pdf> [<https://perma.cc/5M9S-8Y4V>] (last visited Oct. 27, 2020) (Bryn Mawr College); *CUNY Search Committee Guide*, CUNY OFF. OF RECRUITMENT & DIVERSITY (Version 1.2, Aug. 2013), <https://www.cuny.edu/wp-content/uploads/sites/4/page-assets/about/administration/offices/hr/recruitment-diversity/recruitment-retention/CUNY-Search-Committee-Guide-1.2-1.pdf> (the City University of New York); *Report of the Initiative for Faculty Race and Diversity*, MASS. INST. OF TECH., <http://web.mit.edu/provost/raceinitiative/exec-g.html> [<https://perma.cc/JC46-CK2N>] (last visited Oct. 26, 2020) (MIT); *Target of Opportunity Program (TOP)*, METRO. STATE UNIV. OF DENVER OFF. OF DIVERSITY & INCLUSION, <https://www.msudenver.edu/employingdiversity/employmentprograms/targetofopportunityprogramtop> [<https://perma.cc/VY78-STT9>] (last visited Oct. 29, 2020) (Metropolitan State University of Denver); 3D Memo, Promoting Diversity in Hiring, NC State Univ. (Mar. 5, 2018), <https://3dmemos.ncsu.edu/memo/promoting-diversity-in-hiring-3/> [<https://perma.cc/E5JJ-EQU3>] (NC State University); *Search Waivers*, UNIV. OF COLO. BOULDER HUM. RES., <https://www.colorado.edu/hr/search-waivers> [<https://perma.cc/WGB5-QVVY>] (last visited Oct. 26, 2020) (UC-Boulder); *Search Waivers*, BERKELEY OFF. FOR FAC. EQUITY & WELFARE, <https://ofew.berkeley.edu/recruitment/search-waivers> [<https://perma.cc/3Y6L-23TW>] (last visited Oct. 26, 2020) (UC-Berkeley).

32. See *supra* note 31.

Part II presents the historical origins of those affirmative action efforts, highlighting a presidential executive order prohibiting employment discrimination by government contractors, Executive Order 11,246. Part III describes early models of affirmative action in faculty hiring, focusing on UW's "Madison Plan" of 1988. Part IV describes in detail the modern state of the art—the TOP model—which appears to be widely used by universities and which is viewed by the higher education community as particularly effective at promoting the hiring of targeted minorities. Part V presents the main legal analysis, focusing on the legality of the TOP model under the Equal Protection Clause, Title VII of the Civil Rights Act of 1964, Executive Order 11,246, and state law. Part VI concludes.

I. DEFINING AFFIRMATIVE ACTION IN FACULTY HIRING

As a legal or policy concept, "affirmative action" was, at its origins, almost entirely unspecified.³³ At a general level, though, and in the context of modern employment law, it is usually described as practices that an employer is required or encouraged to implement in order to provide "equal opportunity" of employment among officially demarcated demographic groups.³⁴ Affirmative action can take place at the hiring stage, where it focuses on the identification and hiring of qualified employees,³⁵ and at the post-hiring stage, where traditionally it focused on such things as providing equal opportunities for training and promotion.³⁶ This Article focuses entirely on affirmative action at the hiring stage. That focus means that the full panoply of post-hiring practices that modern employers implement as part of their wider "diversity management practices" is not discussed.³⁷

Debates about what affirmative action means are, in large part, debates about which particular practices or techniques for achieving equal opportunity should be viewed as legitimate and legal. As sociologist Frank

33. Dobbin traces the term "affirmative action" to the Wagner Act of 1935, which "directed judges to take 'affirmative action' to compensate union organizers who had faced discrimination, action such as reinstatement with back pay." FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 32 (2009).

34. *Id.* at 14. This understanding of the relationship between affirmative action and equal opportunity is well-reflected in the employment law literature from the 1970s. *See, e.g.*, Michael Dotsey, *Equal Employment Opportunity—A Brief History and the New Federal Approach Through Affirmative Action*, 8 *FORUM* 100, 106 (1972).

35. *See, e.g.*, UNIV. OF WIS.-MADISON OFF. OF HUM. RES., *supra* note 6.

36. *See* Rich, *supra* note 22, at 1062.

37. *Id.* at 1061–63 (discussing "diversity management practices"). Examples might include diversity, racial sensitivity, or implicit bias training, but may also include "work teams that exhibit demographic diversity, race- or sex-matched mentoring, status-based affinity groups, flexible work schedules, subsidized childcare, and even egg-freezing policies." *Id.* at 1062–63.

Dobbin has shown, the practices that have become part of the standard practice of affirmative action have evolved less at the direction of courts or enforcement agencies than through the “inventions” of human resources personnel.³⁸ These “inventions” can be grouped into two basic strategies: “increasing the pool” and preference-granting.³⁹

A. Affirmative Action to Increase the Pool

On the one hand are employment practices aimed at what is often referred to as increasing the size (or, perhaps, the breadth or depth) of the “pool” of qualified applicants who are seriously considered for a given position.⁴⁰ This is by far the most prominent type of affirmative action practice and is by far the less controversial.⁴¹ This understanding of affirmative action has grown to reflect a rhetoric of business efficiency.⁴² Businesses should focus on hiring the objectively best employees, and job searches that fail to attract a sufficient number of minority applications, or that otherwise fail to give minority applicants fair consideration, increase the likelihood that the objectively best person available will not be hired—and, worse, might be hired by a competitor.⁴³ Discrimination in hiring, like cronyism, is viewed as bad for business not because firms that discriminate risk legal punishment, but because discrimination, by leading to sub-optimal employment decisions, harms the firm’s competitive position in

38. DOBBIN, *supra* note 33, at 2–5, 20–21.

39. For a similar bifurcation, see Karst & Horowitz, *supra* note 24, at 955 n.1. Furthermore, Rich suggests that “[a]ffirmative action generally refers to the assignment of positions or the assignment of positions or training opportunities using race- or other status-based preferences.” Rich, *supra* note 22, at 1061. The lack of inclusion of increase-the-pool strategies is problematic both historically and normatively. Historically, pool-increasing affirmative action was viewed as the most important type, in part because it tended to be much less controversial than preference-granting affirmative action and could thus be deployed widely without political and legal risk. *See id.* at 1048–52. Normatively, equating “affirmative action” as preference-granting allows opponents of efforts to legally prohibit preference-granting to misleadingly imply that banning preference-granting represents an abandonment of all efforts to address the lasting harms of overt discrimination. *See id.*

40. *See* Karst & Horowitz, *supra* note 24, at 955 n.1.

41. *See generally* DOBBIN, *supra* note 33, at 133–60; Lauren Weber & Khadeeja Safdar, *Numerical Diversity Hiring Targets Attract Government Scrutiny*, WALL ST. J. (Oct. 8, 2020, 7:52 PM), <https://www.wsj.com/articles/numerical-diversity-hiring-targets-attract-government-scrutiny-11602198359>.

42. *See generally* DOBBIN, *supra* note 33, at 133–60; Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOCIO. 1589, 1591 (2001). For a concise and well-sourced overview, see Rich, *supra* note 22, at 1048–57.

43. DOBBIN, *supra* note 33, at 140–41.

the market.⁴⁴ Understood in this way, complying with an anti-discrimination norm through affirmative action programs becomes self-interested and voluntary, rather than imposed by law.

Increase-the-pool theories of affirmative action pervade university presentations of their faculty hiring practices. UW provides a good example that is broadly representative of the practices at other universities.⁴⁵ UW maintains a formal policy governing faculty hiring that reflects a civil service model that is “fair and transparent,” “unbiased, fair and equitable,” and that aims to select the “best candidate” through a “merit selection” process that is based upon “objective criteria.”⁴⁶ The policy emphasizes that the university, as an “equal opportunity employer,” hires “without regard to . . . gender, race, color, national origin, sexual orientation, creed, religion, age, marital status, disability, genetic information, political affiliation, ancestry, status as a veteran or disabled veteran, or other classifications protected by state or federal laws,” and encourages women and minorities to apply for open positions.⁴⁷

To implement this policy, the university requires the hiring unit to “publicly post vacancies” and to “accept applications from all interested applicants.”⁴⁸ Posting and advertising must be proactive, and campus units should recruit “widely and aggressively” in order to “attract the best pool of applicants” and “a more diverse pool of qualified applicants.”⁴⁹ “Units” that have notable shortfalls in minority hiring (“underutilizat[ion],” a concept which described in more detail further below) must design a “[r]ecruitment [e]fforts [p]lan,” approved by a specialized university bureaucracy, that will “help ensure a diverse pool of applicants.”⁵⁰ The decision to hire from the resulting pool, however, “will be based on qualifications and merit,” reflecting an analysis of “predetermined, job-

44. *Id.* at 130–34. This understanding of and justification for affirmative action recalls Gary Becker’s influential *The Economics of Discrimination*, which used microeconomic analysis to argue that employment discrimination posed costs on discriminatory firms, and that under certain circumstances competitive market forces would eventually eliminate the phenomenon. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1st ed. 1957).

45. For example, UCLA describes its faculty hiring processes in much the same way as does UW. Compare UNIV. OF WIS.-MADISON OFF. OF HUM. RES., *supra* note 6 (discussing UW’s hiring practices), with Memorandum from UCLA Off. of the Vice Chancellor for Equity, Diversity & Inclusion, Faculty Search Process Policy Memorandum (June 30, 2020) (<https://ucla.app.box.com/v/facultysearchpolicymemo> [<https://perma.cc/GJA8-UJDB>]), and *Appendix 23: Faculty Search Guidelines*, UCLA ACAD. PERSONNEL (Aug. 9, 2010), <https://www.apo.ucla.edu/policies-forms/the-call/appendices/appendix-23-faculty-search-guidelines> [<https://perma.cc/B6JQ-K3YX>].

46. UNIV. OF WIS.-MADISON OFF. OF HUM. RES., *supra* note 6.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

related, and nondiscriminatory criteria and benchmarks . . . assess[ing] each candidate’s qualifications[.]”⁵¹ Those criteria and benchmarks must not be “based on gender, race,” or the other demographic characteristics listed above.⁵² The applicant selected must, ultimately, be the “best-qualified” from among the pool of applicants.⁵³ Applicants who feel they have been “discriminated against” in the hiring process are encouraged to contact relevant university, state, or federal agencies to complain of illegal treatment.⁵⁴

This formal policy, binding on hiring units,⁵⁵ is complemented by a much longer and more detailed guide for search committees that describes various best practices for “[s]earching for [e]xcellence [and] [d]iversity.”⁵⁶ The guide is produced by the Women in Science & Engineering Leadership Institute (WISELI), a research center at UW, and is part of the center’s effort to increase the representation of women in the science and engineering disciplines.⁵⁷ However, the guide presents its recommendations as best practices for faculty searches in other disciplines, and the university provides copies of it to all faculty search committees.⁵⁸

The guide’s best practices repeat the modern (and, as Stephen Rich calls it, “hegemonic”⁵⁹) rhetoric of diversity, which is presented in instrumental terms as helping the university to achieve its institutional aims while also promoting “efficiency” by avoiding costly failed searches or mis-hires.⁶⁰ A large portion of the guidelines are aimed at “building a diverse pool of applicants” in order to maximize the chance that the “best candidates” will be included in the pool and to minimize the influence of

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. EVE FINE & JO HANDELSMAN, WOMEN IN SCI. & ENG’G LEADERSHIP INST. UNIV. OF WIS.-MADISON, SEARCHING FOR EXCELLENCE & DIVERSITY (2d ed. 2012) [hereinafter WISELI Guide].

57. *About WISELI*, UNIV. OF WIS.-MADISON WISELI, <https://wiseli.wisc.edu/about/> [https://perma.cc/C8HV-STCF] (last visited Oct. 30, 2020). Science and engineering faculty have historically been predominantly male, both in the United States and elsewhere. Colleen Flaherty, *The Missing Black Professors*, INSIDE HIGHER ED (Aug. 22, 2017), <https://www.insidehighered.com/news/2017/08/22/study-top-public-universities-finds-limited-faculty-diversity-and-yet-signs-progress> [https://perma.cc/U7NZ-ASN7].

58. WISELI Guide, *supra* note 56. By talking about the WISELI guide here I do not mean to imply any criticism of it. The guide is professionally executed and offers a broad array of practical advice.

59. Rich, *supra* note 22, at 1051.

60. WISELI Guide, *supra* note 56, at 117.

bias in decisions to interview and hire.⁶¹ Suggested strategies include “broad[ening] [the] definition of the position;” favoring “preferred” rather than “required” qualifications, so as not to “exclude women and minority applicants because of pipeline issues;” advertising the vacant position in “publications targeted to women and underrepresented minority scholars;” and asking administrators in women-and-minority-focused fellowship programs to circulate the position announcement to their fellows.⁶² The recruitment strategy should be “active and aggressive,” with the initial goal being expanding the pool of applicants and then the “sifting and winnowing of applicants” “later in the process.”⁶³ Search committees should engage in training and internal discussion about the problem of unconscious bias and should devise evaluation processes, like non-quantitative evaluation rubrics and a common set of predetermined interview questions, in order to avoid making hiring decisions that do not result in an offer being made to the best candidate for the position.⁶⁴

The guide also contains substantial and repeated discussion of the contributions of faculty diversity to the achievement of the university’s research and educational missions.⁶⁵ While Part V.A addresses the diversity rationale for affirmative action in university faculty, understand that diversity is presented in the faculty hiring context, as it is also presented in the university admissions context and in the corporate human resources literature, in essentially instrumental and relatively narrow terms: diversity should be pursued because a diverse faculty is more likely to achieve excellence in research and teaching than is a faculty that is not diverse.⁶⁶

Traditional increase-the-pool strategies generally pose no significant legal or public relations risk.⁶⁷ They also are not likely to be very effective at increasing the representation of women and minorities in academia beyond what has already been accomplished.⁶⁸ In the early days of affirmative action in faculty hiring, universities might have seen significant positive results by attempting to more systematically and broadly solicit applications for specific positions. Indeed, one of the main complaints at the time was that most faculty hiring took place through an “old boy network” in which vacant positions were not really advertised at all, and most hiring was done on the basis of word-of-mouth

61. *Id.* at 3–4, 28.

62. *Id.* at 28–30.

63. *Id.* at 29–30.

64. *Id.* at 43–79.

65. *See, e.g., id.* at 117.

66. *See infra* Part V.A.

67. Weber & Safdar, *supra* note 41.

68. *See infra* notes 78–81 and accompanying text.

recommendations from friends and colleagues.⁶⁹ As described by the New York Times in 1972:

At the City University, as at most institutions of higher learning, the discretionary hiring powers are virtually absolute. Outsiders rarely know of job openings in departments, friends help friends, and those without inside contacts usually face insuperable obstacles. For example, a young assistant professor at an upstate college two years ago applied for a job at the City University. His unsolicited resume was filed in the wastebasket by the department chairman. The job applicant thereupon prevailed upon a friend, who taught at the same city college but in a different department, to bring the resumé to the chairman's attention. Ironically, that young assistant professor today is deeply concerned that City University's merit system is being diluted by the advancement of minority members of the faculty. Reminded that he did not get his job solely on merit, or through conventional channels, he replies, with justification, that he was nonetheless superbly qualified for the post—being an excellent teacher and scholar.⁷⁰

Today, the faculty hiring process has become significantly more transparent and formalized.⁷¹ In many disciplines, it is highly centralized with a well-defined and universally recognized path to follow, both as to advertising positions and applying for them. In law, for example, entry-level candidates register for and attend the Association of American Law Schools (AALS) fall hiring conference.⁷² Law schools advertise their openings in the AALS placement bulletin, and they choose who to interview by perusing summary candidate information published in the AALS Faculty Appointments Register.⁷³ Economics has an equivalent

69. Cheryl M. Fields, *Report on Affirmative Action*, N.Y. TIMES (Jan. 15, 1975), <https://www.nytimes.com/1975/01/15/archives/report-on-affirmative-action.html> [<https://perma.cc/2C5G-WFV5>].

70. Martin Tolchin, *City Ethnic Survey Is Center of Dispute*, N.Y. TIMES, March 7, 1972, at 50.

71. Change seems to have come very quickly. “Perhaps the greatest over-all change in college procedures . . . has been to advertise almost all vacant academic and administrative positions in educational journals and newspapers and to contact women’s and minority groups for the names of possible job candidates rather than rely on the ‘old boy’ system of filling jobs.” Fields, *supra* note 69.

72. For a humorous but insightful presentation of the AALS process, see Kevin H. Smith, *How to Become a Law Professor Without Really Trying: A Critical, Heuristic, Deconstructionist, and Hermeneutical Exploration of Avoiding the Drudgery Associated with Actually Working as an Attorney*, 47 KAN. L. REV. 139 (1998).

73. *Id.* at 151, 155.

structure and process (organized through the American Economic Association), as do many other disciplines.⁷⁴

When departments continue to have fewer-than-desired members of certain demographic groups, the reason may be due in some part to geographic factors, for minority candidates may find certain locales undesirable.⁷⁵ It may also be due to exogenous factors that affect the demographic distribution of interest in certain disciplines.⁷⁶ It could be due to implicit bias.⁷⁷ However, the most important cause is usually thought to be one of “pipeline.”⁷⁸ That is, the proportion of minority and female entry-level PhDs in the STEM fields is relatively low compared to the general population,⁷⁹ as is also the case in economics.⁸⁰ Law teaching likely also faces a pipeline problem.⁸¹ Potentially cost-effective responses

74. See, e.g., JOHN CAWLEY, A GUIDE AND ADVICE FOR ECONOMISTS ON THE U.S. JUNIOR ACADEMIC JOB MARKET (Sept. 21, 2018), <https://www.aeaweb.org/content/file?id=869> [<https://perma.cc/H7YA-NE43>].

75. Daryl G. Smith, Caroline S. Turner, Nana Osei-Kofi & Sandra Richards, *Interrupting the Usual: Successful Strategies for Hiring Diverse Faculty*, 75 J. HIGHER EDUC. 133, 135 (2004).

76. See Lisa Dickson, *Race and Gender Differences in College Major Choice*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 108 (2010).

77. This claim, however, is contested. See, e.g., Stephen J. Ceci & Wendy M. Williams, *Women Have Substantial Advantage in STEM Faculty Hiring, Except When Competing Against More-Accomplished Men*, 6 FRONTIERS PSYCH., Oct. 2015, at 1, 8 (“[W]omen have significant advantages in actual, real-world hiring—they are hired at higher rates than men. Some of our critics seem reluctant to acknowledge this fact, which is shown clearly in multiple audit studies that analyze who is actually hired at universities in the U.S. and Canada.”).

78. See Marybeth Gasman, Jessica Kim & Thai-Huy Nguyen, *Effectively Recruiting Faculty of Color at Highly Selective Institutions: A School of Education Case Study*, 4 J. DIVERSITY HIGHER EDUC. 212, 213 (2011); Smith, Turner, Osei-Kofi & Richards, *supra* note 75, at 134.

79. Stacy-Ann A. Allen-Ramdial & Andrew G. Campbell, *Reimagining the Pipeline: Advancing STEM Diversity, Persistence, and Success*, 64 BIOSCIENCE 612, 612–14 (2014).

80. In the 2015–16 academic year, there were only 15 PhDs in economics awarded to African Americans nationwide (3.1%). AM. ECON. ASS’N, REPORT OF THE COMMITTEE ON THE STATUS OF MINORITY GROUPS IN THE ECONOMICS PROFESSION (CSMGEP) 3 (2017), <https://www.aeaweb.org/content/file?id=6592> [<https://perma.cc/5FJ7-RSGY>]. No PhDs in economics were awarded to Native Americans. *Id.* African Americans make up a similarly small percentage of PhDs awarded in STEM fields more generally (4.4% in 2015–16). *Id.*

81. The AALS collects, but no longer reports, statistics on the racial and gender composition of the pool of would-be law professors, but the last-reported data (from the fall 2008 hiring conference) is available on the Wayback Machine internet archive service. See *2008–2009 AALS Statistical Report on Law Faculty*, ASS’N AM. L. SCHS., <https://web.archive.org/web/20140425080234/http://www.aals.org/statistics/2009far/race.html> (last visited Oct. 10, 2020). In that year, 875 candidates registered for the hiring fair. *Id.* Self-identified nonwhite candidates accounted for just 18.5% of registered job seekers. *Id.* There were 73 African Americans seeking law professor positions (8.3% of the total),

at the departmental or even the university level are far from obvious. Typical suggestions—such as special fellowship programs that would prepare more women and minority PhDs to compete for faculty positions or greater efforts to steer women or minorities into particular undergraduate majors—are costly to scale up⁸² and may suffer from some free-rider problems: the targets of such efforts may not even pursue, let alone accept, a faculty position at the university that originally incurred the costs of such programs.⁸³

B. Preference-Granting

The second affirmative action strategy entails granting preferences to particular classes of candidates. Preferences are not discrimination in a lay sense because they need not reflect bigotry or prejudice. They may nonetheless be discrimination in a legal sense, as the law bans or strictly limits the use of suspect factors.⁸⁴ Preference-granting is controversial because it exists in sharp conflict with societal norms and personal beliefs centered around the normative ideals of color blindness and merit selection.⁸⁵ Employment discrimination law and practice reinforces those norms and beliefs by widely advertising a nondiscrimination norm and by encouraging parties who feel that they have suffered discrimination during the hiring process to file bureaucratic or legal complaints.⁸⁶ Those

37 Hispanic/Latino candidates (4.2%), and only 5 American Indian/Alaskan Native candidates. *See id.* Women were also a minority (34.4%). *Id.*

82. For example, the University of Wisconsin Law School's William H. Hastie Fellowship Program, which runs two-year, diversity-focused fellowships that prepare fellows for careers in legal academia, currently pays each fellow a \$48,000 stipend and \$4,000 in research support annually, plus benefits. *William H. Hastie Fellowship Program*, UNIV. OF WIS. L. SCH., <https://law.wisc.edu/grad/hastie/> [<https://perma.cc/SA3N-2SX9>] (last visited Oct. 15, 2020).

83. *See, e.g.*, Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1294, 1300–02 (Many of the skills that make employees successful are learned on-the-job at significant costs to employers, and that those “costs of investment . . . are heightened if an employee has the opportunity not only to leave with the skills that the employer has subsidized, but also to use those skills against the employer by working for a competitor business.”).

84. *See, e.g.*, Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination on the basis of “race, color, religion, sex, or national origin”).

85. The merit of “merit” as a guiding principle for public and private decision-making is (and has long been) contested. *Compare* Paul Seabury, *The Idea of Merit*, COMMENT., Dec. 1972, at 41, <https://www.commentarymagazine.com/articles/paul-seabury/the-idea-of-merit/> [<https://perma.cc/7SZB-BWAQ>], *with* Karst & Horowitz, *supra* note 24, at 956–63. The ideal of color-blindness is often criticized as preventing desirable preference-granting. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 62–68 (1991).

86. For example, individuals seeking redress for employment discrimination under local, state, and federal laws can find guidance on the proper way to file a

advertisements are figurative (they exist in legal and policy documents), but they are also literal.⁸⁷ For example, every break room on campus is decorated with an equal opportunity poster describing one's rights to a workplace free of discrimination.

By encouraging employees to view themselves as enjoying an individual and enforceable right to be free of the adverse consequences of preference-granting affirmative action, such advertisements (and the underlying laws that generate them) make it difficult to articulate and justify the countervailing notion that, at least in some cases, individuals may be asked to bear a substantial personal burden in the pursuit of a societal-level goal like remedying past discrimination or achieving social and professional integration.⁸⁸

Given the substantial legal and social risks, it is unsurprising that even strong defenders of modern workplace diversity efforts urge employers to design those efforts so as to avoid explicit preference-granting.⁸⁹ One important question is why the law (and society generally) seems less concerned with the propriety of increase-the-pipeline affirmative action compared to preference-granting affirmative action, as both strategies have the potential to causally redistribute rewards from one person to another. The answer lies in the fact that increase-the-pipeline strategies are causally less direct than are preference-granting strategies⁹⁰ and that they do not obviously conflict with the merit ideal. Indeed, such strategies support the ideal by helping to ensure that the best-qualified candidate,

discrimination claim with the Equal Employment Opportunity Commission and with similar state agencies. *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-charge-discrimination> [<https://perma.cc/MUQ2-ZD8Y>] (last visited Oct. 30, 2020).

87. Employers that are subject to federal nondiscrimination laws are required to post notices describing these laws and procedures for filing complaints. “*EEO Is the Law*” Poster, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eeo-law-poster> [<https://perma.cc/4989-S6RD>] (last visited Oct. 30, 2020).

88. On the tensions between an individual-level and society-level understanding of anti-discrimination law, see Karst & Horowitz, *supra* note 24, at 962–63, 972–73.

89. See, e.g., Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 61, 70–71, 71 n.48 (2017).

90. In a study of a variety of hypothetical affirmative action procedures for admitting students to higher education or hiring employees, participants were more supportive of procedures that adversely affected unidentifiable, as opposed to identifiable, individuals; in some of the study's experiments, the latter were seen as more causally related to the harm to rejected nonminority applicants. Ilana Ritov & Eyal Zamir, *Affirmative Action and Other Group Tradeoff Policies: Identifiability of Those Adversely Affected*, 125 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 50, 50–51, 58–59 (2014).

regardless of sex or race, is actually considered for the position.⁹¹ Once the pool is constructed (with the aim of making it as inclusive as feasible), all applicants are considered equally—that is, suspect characteristics are not supposed to enter into the comparative merit-measuring exercise.⁹²

C. The Problem of Defining Diversity

In recent years “affirmative action” has fallen out of favor as a term in public and professional discourse, replaced by talk of equity, inclusion, and, especially, diversity.⁹³ Despite the shifting nomenclature, I use “affirmative action” throughout this Article because it remains deeply embedded linguistically and operationally in the relevant legal regimes.⁹⁴ It is helpful, though, to discuss the rough outlines of a working definition of “diversity” because, as I discuss in Part V.A, legal defenses to preference-granting as an affirmative action strategy are deeply intertwined with diversity rhetoric.⁹⁵

Social scientific and legal literatures on diversity usually leave the concept entirely undefined; or, if it is defined, it is done so with little uniformity or precision.⁹⁶ As a result, diversity has become an “[e]nigma,”

91. See Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 *FORDHAM L. REV.* 2457, 2479–81 (2015) (noting that expanded outreach to and recruitment of minority and female job candidates “can generate demonstrable results” in hiring well-qualified employees, giving as an example the effectiveness of the National Football League’s Rooney Rule, which requires teams to expand minority recruitment and outreach).

92. Among proponents of race-conscious affirmative action, such as Neil Gotanda, a notion of equality that fails to explicitly take into account a person’s racial identity is not real equality. See Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 *HASTINGS CONST. L.Q.* 1135, 1150–51 (1996). It is portrayed as a moral travesty that unfairly denies that identity any “social worth.” See *id.* at 1141. Gotanda’s insistence that decisions to admit or to hire recognize the social worth of an individual’s race conflicts with equally insistent complaints that diversity-promotion efforts improperly exploit racial identity by using it to advance the corporate mission. See Osamudia R. James, *Diversity, Democracy and White Racial Identity: Schuette v. Coalition to Defend Affirmative Action*, 71 *NAT’L LAWS. GUILD REV.* 1, 2 (2014).

93. See ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015).

94. For example, *Fisher II* explained the Court’s principles for determining whether an “affirmative-action program” for public university admissions is constitutional. *Fisher v. Univ. of Texas at Austin (Fisher II)*, 136 S. Ct. 2198, 2207–08 (2016).

95. *Infra* Part V.A.

96. For an example of a study of faculty hiring that acknowledges imprecision in the definition of diversity, see Gasman, Kim & Nguyen, *supra* note 78, at 215 (“Faculty and administrators had various definitions of diversity and varying opinions as to who should be included in the broader category of ‘faculty of color.’”).

a “‘presumptively positive’ but superficial buzzword” whose meaning slips and slides according to the instrumental needs of the user.⁹⁷ Without a conceptually rigorous and widely accepted definition and, moreover, one that is measurable, debates about diversity become deeply nonsensical.⁹⁸

We can usefully draw upon debates about species diversity in the ecology literature to contribute to these current debates about diversity.⁹⁹ The ecology literature suggests that a logically defensible, empirically operationalizable concept of diversity will reflect the presence and, usually, the relative abundance of different theoretically distinct types of individuals located within a given space.¹⁰⁰ We tend intuitively to view a departmental faculty consisting of nine white people and one Black person as less diverse than one with six white people and four Black people, and one consisting of four Black people, four white people, and two Asian people as probably more diverse yet. The way in which legal debates about diversity have developed reinforce this “structural” or “compositional”

97. Mario Barnes, 52 *LAW & SOC’Y REV.* 532, 532–33 (2018) (reviewing and quoting ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015)); see also Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 175, 178 (Gary Orfield & Michal Kurlaender eds., 2001) (“[T]here is little consensus on what constitutes a racially diverse student population. Conventional approaches equate color with diversity; that is, the more nonwhites on campus, the more ‘diverse’ the student body. This approach fails to measure heterogeneity, and thus fails to address the educational rationale for maintaining race-conscious admissions practices—namely, that diversity enriches education because students learn most from those who have very different life experiences from their own.”).

98. I mean nonsensical in a Carrollian sense, where language “is not merely gibberish, nor parody or satire, but a true and distinct art form, which . . . ‘both supports the myth of an informative and communicative language and deeply subverts it’ by first whetting then frustrating the reader’s ‘deep-seated need for meaning.’” Lauren Millikan, *Nonsense Literature*, *CURIOUSER & CURIOUSER: THE EVOLUTION OF WONDERLAND* (Mar. 1, 2011), <https://www.carleton.edu/departments/ENGL/Alice/CritNonsense.html> [<https://perma.cc/7CAB-P5GS>] (quoting JEAN-JACQUES LECERCLE, *PHILOSOPHY OF NONSENSE: THE INSTITUTIONS OF VICTORIAN NONSENSE LITERATURE* 3 (1994)).

99. Root Gorelick & Susan M. Bertram, *Multi-Way Multi-Group Segregation and Diversity Indices*, *PLoS ONE*, June 2010, at 1, (applying ecological theory to derive a measure of diversity in the employment context); see also Aisling J. Daly, Jan M. Baetens & Bernard De Baets, *Ecological Diversity: Measuring the Unmeasurable*, *MATHEMATICS*, July 2018, at 1; Hanna Tuomisto, *Do We Have a Consistent Terminology for Species Diversity? Yes, If We Choose to Use It*, 167 *OECOLOGIA* 903 (2011) [hereinafter *Do We Have a Consistent Terminology for Species Diversity?*]; Hanna Tuomisto, *A Consistent Terminology for Quantifying Diversity? Yes, It Does Exist*, 164 *OECOLOGIA* 853 (2010) [hereinafter *A Consistent Terminology for Quantifying Diversity?*].

100. ANNE E. MAGURRAN, *ECOLOGICAL DIVERSITY AND ITS MEASUREMENT* 1 (1988).

understanding.¹⁰¹ The ecology literature offers calculation techniques that correspond to that intuition and that can be converted into indices of diversity that allow us to measure and compare structural diversity across institutions, or across time.¹⁰² The Article's purpose here, however, is to suggest three less technical points of guidance for the discussion that follows.

First, the sociolegal concept of diversity, like its ecological cousin, is inherently a community-level characteristic.¹⁰³ To speak of individuals as "diverse" in and of themselves demotes "diversity" from concept to euphemism. Whether an individual adds to a community's diversity depends both upon the individual's "type" and the existing distribution of "types" within the community.¹⁰⁴

Second, we need a taxonomy based upon measurable, theoretically relevant markers of difference that are used to define and populate types, such that each type "has a unique and unambiguous name."¹⁰⁵ Ecologists can rely upon widely accepted codes of nomenclature based upon measurable differences in morphology.¹⁰⁶ Sociolegal diversity theory and practice lacks any equivalent, and there is little agreement as to which theoretically relevant personal qualities should be taken into account or how they should be taken into account.¹⁰⁷ The splintering of identity produces yet more types, magnifying the informational and computational demands necessary to properly classify individuals and to measure and compare the diversity of populations composed of them.¹⁰⁸ At the absurd extreme, we might imagine a taxonomy that declares everyone unique, a type of their own, implying, as a policy matter, that more of anyone is always better.¹⁰⁹

101. Sharon L. Fries-Britt, Heather T. Rowan-Kenyon, Laura W. Perna, Jeffrey F. Milem & Danette Gerald Howard, *Underrepresentation in the Academy and the Institutional Climate for Faculty Diversity*, J. PROFESSORIAL, Jan. 2011, at 1, 6 (2011).

102. Gorelick & Bertram, *supra* note 99.

103. See Daly, Baetens & De Baets, *supra* note 99.

104. *Id.* at 4–5.

105. Tuomisto, *Do We Have a Consistent Terminology for Species Diversity?*, *supra* note 99, at 903.

106. *Id.* at 903–04.

107. See Marlene Langholz, *The Management Diversity in the U.S. and German Higher Education*, 25 MGMT. REVUE 207, 209–10 (2014).

108. The U.S.-focused diversity-management literature tends to focus on eight characteristics—the "big eight" of race, gender, ethnicity or nationality, organizational role or function, age, sexual orientation, mental and physical ability, and religion. *Id.* at 209. The number of types will depend on how many possible values exist for each dimension, and, as the number of types increases, so too does the complexity of mathematically calculating a valid diversity index. *Id.*

109. As is sometimes suggested in the diversity management literature. See, e.g., *id.*

Third, we must decide on the appropriate boundaries of the community whose diversity we are measuring.¹¹⁰ In the university context, we might consider the space to be the university, the school, the department, or the classroom as the relevant space. As argued further below, in thinking about affirmative action in faculty hiring, the department is the most relevant space.

As an aside, we can now understand, in part, why the increasingly common practice of requiring faculty candidates to submit diversity statements is problematic. Such statements are ostensibly intended to provide the candidate with an opportunity to describe how the candidate will contribute to the diversity of the institution. But without defining the traits that the university considers relevant, and without informing the candidate about the current distribution of those traits across the relevant university community, the candidate (and the hiring committee) has no conceptual or empirical basis for making (or evaluating) any claims about how their addition to the community might impact diversity for the better or for the worse.

II. THE HISTORICAL ORIGINS OF AFFIRMATIVE ACTION IN UNIVERSITY FACULTY HIRING

Universities have engaged in affirmative action in faculty hiring at least since the early 1970s.¹¹¹ First, Part I describes that early history, focusing first on how feminist activists advocated for a federal Executive Order, E.O. 11,246, to be applied against universities. Part I then describes the shift in legal focus to Title VII, which has provided a private right of action against universities for employment discrimination since 1972.

A. Executive Order 11,246 at the Origins

The country's simmering racial tensions in the 1960s and a growing women's rights movement led to greater public awareness of and concern with the problem of race and sex discrimination in employment.¹¹² In 1964, Congress passed the landmark Civil Rights Act, Title VII of which made it unlawful for employers to engage in employment-related practices

110. See Daly, Baetens & De Baets, *supra* note 99.

111. See *More History of Affirmative Action Policies from the 1960s*, AM. ASS'N FOR ACCESS, EQUITY & DIVERSITY, https://www.aaed.org/aaed/History_of_Affirmative_Action.asp [https://perma.cc/Y3WH-P8AT] (last visited Nov. 1, 2020).

112. Eileen Boris & Michael Honey, *Gender, Race, and Labor Department Policies*, MONTHLY LAB. REV., Feb. 1988, at 26, 31–33.

that discriminate against individuals “because of such individual’s race, color, religion, sex, or national origin.”¹¹³

At that time, faculties were almost exclusively white and male,¹¹⁴ but educational institutions, including universities, were excluded from Title VII’s original scope of application.¹¹⁵ They were not excluded, however, from overlapping Executive Order 11,246 (E.O. 11,246).¹¹⁶ President Johnson promulgated the order in 1965 to prohibit discrimination in “employment by government contractors” on the basis of “race, color, religion, or national origin.”¹¹⁷ “Sex” was added as a protected characteristic in 1968;¹¹⁸ “sexual orientation” and “gender identity” were added by President Obama in 2014.¹¹⁹ Many, if not most, universities, have at least one contract with the federal government that exceeds the order’s current jurisdictional threshold of \$50,000, thus bringing all of their hiring practices—even those unrelated to a specific federal contract—under the order’s scope.¹²⁰

The E.O. received significant attention in the late 1960s as a potentially potent legal tool for addressing overt racial discrimination in the construction industry.¹²¹ Unions tended to control construction hiring, and they also tended to refuse to admit Black members.¹²² Without union membership, Black workers were excluded from eligibility for many construction jobs, especially the better-paid craft positions.¹²³ Urban race riots highlighted the need to provide inner-city Black males with better employment options, and changing the unions’ discriminatory practices became a major focus of the Nixon Administration.¹²⁴ The Administration’s efforts resulted in the famous “Philadelphia Plan” of

113. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1).

114. S. REP. NO. 92-415, at 11–12 (1971).

115. *Id.* at 11.

116. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,320 (Sept. 28, 1965).

117. *Id.* at 12,319–20.

118. Exec. Order No. 11,375, 32 Fed. Reg. 14,303, 14,303 (Oct. 17, 1967).

119. Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971 (July 23, 2014).

120. Most universities are government contractors by virtue of their acceptance of federal research funds, which are provided and administered through a contract framework. Philip J. Faccenda & Kathleen Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. L. REV. 539, 549–50 (1975).

121. *See, e.g., Note, The Philadelphia Plan: Remedial Race Classification in Employment*, 58 GEO. L. REV. 1187, 1189–92 (1970).

122. *Id.* at 1189–90.

123. DAVID HAMILTON GOLLAND, *CONSTRUCTING AFFIRMATIVE ACTION: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY* 65–66 (2011).

124. *Id.* at 101, 104–05.

1967 (and a revised Philadelphia Plan in 1969) that set enforceable numerical goals for minority hiring.¹²⁵

Given the high public salience of E.O. 11,246 in the construction context, it is not surprising that its potential applicability to employment discrimination in a university setting quickly became apparent. Bernice Sandler, a female PhD who had been discouraged from pursuing a university faculty position because of her sex,¹²⁶ had what she describes as “a genuine ‘Eureka’ moment” that the E.O. could be used to challenge the university practices that had stymied her academic career.¹²⁷ In January 1970, and with “secret and very substantial help” from federal bureaucrats, Sandler, acting through “a small women’s rights organization, the Women’s Equity Action League . . . filed the first administrative class action complaint . . . against every university and college that received federal contracts”—about 250 universities and colleges in all.¹²⁸ As part of its larger legal strategy, the group encouraged a public letter-writing campaign to members of Congress, who in turn flooded the Department of Labor with letters of their own.¹²⁹

The activists’ efforts opened a “Pandora’s Box” of public and government attention to the problem of sex discrimination in higher education.¹³⁰ The United States Department of Health, Education, and Welfare (HEW), which the Department of Labor had charged with enforcing government contracts with universities,¹³¹ threatened to suspend federal contracts with universities that failed to open their personnel records to government inspection and to develop acceptable affirmative action plans.¹³² In some cases, HEW seemed to have actually followed through on the threat, temporarily suspending federal contracts with, for example, the University of Michigan and Columbia University.¹³³ The amount of money at stake was substantial. Columbia faced the risk of

125. Paul Marcus, Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 UCLA L. REV. 817, 819–20 (1970). On this early history, see GOLLAND, *supra* note 123.

126. Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 CLEV. ST. L. REV. 473, 474 (2007).

127. *Id.* at 475. See also Bernice Sandler, *A Little Help from Our Government: WEAL and Contract Compliance*, in *ACADEMIC WOMEN ON THE MOVE* 439 (Alice S. Rossi & Ann Calderwood eds., 1973).

128. Sandler, *supra* note 126, at 475. The group’s efforts are also described in Betsy Wade, *Women on the Campus Find a ‘Weapon,’* N.Y. TIMES, Jan. 10, 1972, at E22.

129. Sandler, *supra* note 126, at 475.

130. *Id.*

131. Sandler, *supra* note 127, at 442.

132. *Id.* at 444, 446–47.

133. *Women Assail Michigan U. Hiring Plan*, N.Y. TIMES Mar. 14, 1971, at 57; Iver Peterson, *Columbia Warned on Jobs-Bias Plan*, N.Y. TIMES, Feb. 12, 1972, at 1.

losing \$13 million in federal contracts,¹³⁴ and UC-Berkeley also faced the potential loss of a similar sum.¹³⁵ Universities struggled to comply. Budgets were tight, and records were a mess. Columbia sought exception due to the “archaic ways” in which its personnel data was collected and organized.¹³⁶ The lack of systematization made it impossible for Columbia to demonstrate to the government’s satisfaction “what the university’s personnel practices in fact are.”¹³⁷ Moreover, universities lacked basic demographic data on their workforces.¹³⁸ In some cases, faculty ostentatiously refused to supply it¹³⁹ or flippantly falsified it.¹⁴⁰

Opponents within academia unsurprisingly claimed that the threat to remove federal support would pressure universities to hire unqualified women and minorities, “fostering the very . . . discrimination the Executive Order was issued to correct”¹⁴¹ by relying on the “heavy-handed” imposition of “quotas.”¹⁴² The federal government was not sympathetic to such complaints and refused to back down. For example, in response to an editorial in the *New York Times* by a New York University professor complaining about the enforcement efforts, the director of HEW’s Office for Civil Rights responded with his own editorial dismissing the professor’s concerns as “a piece of fiction” and accusing the professor of failing to do his “homework” and of tilting at “windmill[s]” with the “blunted lance . . . [of] the absurd theory that the office of civil rights must be guilty of fostering the kind of discrimination that it is supposed to eliminate.”¹⁴³ The government pressure was effective, and universities began to settle relatively quickly by adopting government-approved plans to increase minority and female hiring. For example, Berkeley’s 1975 settlement entailed a promise to hire at least 178 additional minority and female professors over the next thirty years.¹⁴⁴

134. Peterson, *supra* note 133.

135. Sheila K. Johnson, *It’s Action, but Is It Affirmative?*, *N.Y. TIMES*, May 11, 1975, at SM5.

136. M.A. Farber, *Better Personnel Records Vowed by Columbia Head*, *N.Y. TIMES*, Nov. 6, 1971, at 24.

137. *Id.*

138. See Peterson, *supra* note 133; Johnson, *supra* note 135.

139. Martin Tolchin, *City U. Union Objects to Ethnic Survey*, *N.Y. TIMES*, Feb. 21, 1972, at 23.

140. Johnson, *supra* note 135 (reporting that a faculty chair at Berkeley falsely “marked his entire staff as black (‘because they all looked rather tanned to [him].’)”).

141. Sidney Hook, *Discrimination Against the Qualified?*, *N.Y. TIMES*, Nov. 5, 1971, at 43 (Hook was a professor of philosophy at New York University).

142. Farber, *supra* note 136.

143. J. Stanley Potter, *Come Now, Professor Hook*, *N.Y. TIMES*, Dec. 18, 1971, at 29.

144. Lacey Fosburgh, *Berkeley Plan Could End Hiring Bias in 30 Years*, *N.Y. TIMES*, Mar. 5, 1975, at 36.

Columbia promised to hire 900 women and minorities at the faculty and staff levels in just five years.¹⁴⁵

B. Title VII and a Private Right of Action

The public relations debacle unleashed by E.O. 11,246 contributed to the passage of the Equal Employment Opportunity Act of 1972, which modified Title VII to bring educational institutions within its discipline.¹⁴⁶ While the expansion of Title VII's coverage to universities was just one element of a larger reform agenda, the legislative history of the 1972 Act contains sharp criticism of university hiring practices.¹⁴⁷ While the low percentage of "Negro" and "Oriental" faculty was noted, Congress's primary concern was with the lack of women in the academy.¹⁴⁸

Senator Williams of New Jersey, in debating the amendments (and arguing in favor of them), noted that:

Minorities and women continue to be subject to blatant discrimination in these [educational] institutions. . . . Negroes account for only 2.2 percent of all faculty [in institutions of higher education], Orientals 1.3 percent, and all other minorities only 0.3 percent. Perhaps the most extensive discrimination . . . is found in the treatment of women. . . . In institutions of higher education women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. Also, I would add, that this discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies.¹⁴⁹

145. Peterson, *supra* note 2.

146. Equal Employment Opportunity Act of 1972, § 2, 42 U.S.C. § 2000e.

147. H.R. REP. NO. 92-238, at 20 (1971). For a discussion of the 1972 Act's legislative and political history, see Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. RELS. L.J. 1, 1-7 (1977).

148. SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 1252 (Comm. Print 1972); H.R. REP. NO. 92-238, at 20.

149. Senator Williams's remarks can be found in SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 1252. Williams's principal adversaries in the debate were Senators Allen from Alabama and Ervin from North Carolina, both of whom focused their public opposition on the claims that including educational institutions in Title VII would require religiously affiliated schools to hire atheists, and, more broadly, would

Senator William's remarks reflected the fact that, in many academic disciplines at the time, women earned a relatively high percentage of doctoral degrees,¹⁵⁰ but, by that metric, women were substantially underrepresented in the ranks of tenure-track professors.¹⁵¹ One study counted only 35 female faculty members, out of 1,625 in faculty in total, at the nation's top law schools (2.2%).¹⁵² Harvard University had no female full or associate professors, and only 4.6% of its assistant professors were female.¹⁵³

The main structural reform in the 1972 amendments was the strengthening of Title VII's enforcement architecture. In its original version, Title VII, unlike E.O. 11,246, provided a private right of action.¹⁵⁴ Despite providing a private right of action, however, by 1972 it had become clear to many observers that Title VII's original enforcement provisions were ineffective.¹⁵⁵ Most critically, the Equal Employment Opportunity Commission (EEOC) lacked the authority to enforce the 1964 Act's non-discrimination provisions directly (through cease-and-desist orders) or indirectly through the initiation of litigation.¹⁵⁶ The 1972 amendments' "most important change[]" to Title VII was to give the "EEOC the authority to initiate civil suits in federal district courts, seeking injunctions and other remedies for unlawful practices committed by . . . institutions covered by the Act."¹⁵⁷ The EEOC's new authority would be especially useful in challenging "pattern[s] or practice[s]" of systemic

give the federal bureaucracy too much control over educational institutions' selection of faculty. *Id.* at 1229, 1254, 1360. The true concern of the Southern Senators, of course, was race, as comments by Senator Stennis of Mississippi make clear. *Id.* at 1258.

150. NAT'L COAL. FOR WOMEN & GIRLS EDUC., REPORT CARD ON GENDER EQUITY 6, <https://www.ncwge.org/PDF/TitleIXReport.pdf> [<https://perma.cc/B77Y-WHS7>] (last visited Oct. 10, 2020).

151. See Pamela Roby, *Institutional Barriers to Women Students in Higher Education*, in *ACADEMIC WOMEN ON THE MOVE* 37, 41 (Alice S. Rossi & Ann Calderwood, eds., 1973) (noting that women earned 13.3 percent of PhD or equivalent degrees in 1970).

152. Thomas M. Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 *J.L. & EDUC.* 429, 432 n.7 (1976).

153. *Id.*

154. Michael E. Kaemmerer, *Jurisdictional Prerequisites to Private Actions Under Title VII of the Civil Rights Act of 1964*, 41 *MO. L. REV.* 215, 215 (1976).

155. Hill, *supra* note 147, at 7–8, 32–33 (describing how the political compromise designed to assist passage of the Civil Rights Act led to the denial of independent EEOC enforcement powers). The EEOC had been denied independent enforcement powers as a political compromise designed to assist passage of the original Civil Rights Act. Note, *Civil Rights: Private Cause of Action Exists Under Title VII Notwithstanding EEOC Determination of No Reasonable Cause*, 1971 *DUKE L.J.* 467, 470.

156. Hill, *supra* note 147, at 7.

157. *Id.* at 51.

discrimination that would be difficult for individuals to challenge through private litigation.¹⁵⁸

Title VII soon eclipsed E.O. 11,246 as the preferred mechanism to encourage universities to abide by employment law's non-discrimination norm.¹⁵⁹ The shift took place amidst growing disenchantment with HEW's heavy-handed use of the Executive Order regime and the Nixon Administration's efforts to "gut" the Office of Federal Contract Compliance (OFCC).¹⁶⁰ And, courts were increasingly holding that E.O. 11,246 did not provide a private right of action,¹⁶¹ leaving Title VII as the non-constitutional law of choice for private litigants.

Universities in the late 1970s and well into the 1980s faced an "onslaught" of private Title VII litigation, sometimes in class action form, and mostly by women.¹⁶² Title VII protects whites and males from illegal employment discrimination¹⁶³ just as it protects women and members of minority racial and ethnic groups, and faculty-related reverse discrimination lawsuits also occurred on occasion.¹⁶⁴ Many of the faculty

158. Thomas R. Ewald, *Public and Private Enforcement of Title VII of the Civil Rights Act of 1964—A Ten-Year Perspective*, 7 URB. L. ANN. 101, 105–07 (1974) (Section 707 of the amended Civil Rights Act transferred authority from the Attorney General to the EEOC to initiate "pattern or practice" enforcement actions.).

159. See Ieuan G. Mahony, *Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Decisions*, 28 B.C. L. REV. 559, 559 (1987) ("In recent years, the EEOC has been increasingly active in investigating charges of employment discrimination brought by professors who have been denied tenure.").

160. GOLLAND, *supra* note 123, at 165 ("Indeed, by 1973 the agency [the OFCC] was losing its vision and cohesion, with the Nixon administration gutting its staff and forcing a reorganization that resulted in stunted leadership and poor field communication.").

161. See Phillip E. Hassman, Annotation, *Right to Maintain Private Employment Discrimination Action Under Executive Order 11,246, as Amended, Prohibiting Employment Discrimination by Government Contractors and Subcontractors*, 31 A.L.R. FED. 10 (2020) (containing a collection of cases so holding).

162. E.R. Shipp, *The Litigious Groves of Academe*, N.Y. TIMES (Nov. 8, 1987), <https://www.nytimes.com/1987/11/08/education/the-litigious-groves-of-academe.html> [<https://perma.cc/LY7Y-M2JF>]. For a compilation of such cases, see GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 24–33 (1987).

163. Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes*, 168 A.L.R. FED. 1 (2020).

164. Lorenzo Middleton, *Black Colleges Guilty of Racism, Some of Their White Professors Charge*, THE CHRON. OF HIGHER EDUC., Dec. 11, 1978, at 3 (noting that reverse discrimination suits seem to have been a particular problem for historically black institutions); see *Black School to Rehire Winner of Bias Lawsuit*, N.Y. TIMES (July 24, 1983), <https://www.nytimes.com/1983/07/24/us/around-the-nation-black-school-to-rehire-winner-of-bias-lawsuit.html> [<https://perma.cc/X29X-XE5M>] (discussing a 1983 lawsuit in which Howard University was forced by a court to reinstate a white male professor who claimed that the university had "discriminated against him when it dismissed

cases involved tenure-related decisions rather than claims of discrimination in hiring, but in either type of case, universities almost always won.¹⁶⁵ One study found that out of 160 faculty discrimination lawsuits decided by federal courts between 1970 and 1984, faculty won only 34 (or 21%), and of the 23 lawsuits brought by “Blacks or ethnic minorities,” universities lost just once.¹⁶⁶

These lawsuits were nonetheless expensive and unpleasant for all involved, and the relatively rare losses for universities could be financially, administratively, and reputationally costly. For example, the University of Minnesota spent seven years litigating a Title VII complaint brought by a woman who had been denied a permanent position in the chemistry department.¹⁶⁷ Her individual lawsuit morphed into a class action involving 1,300 members.¹⁶⁸ Following eleven weeks of trial, the parties settled through a consent decree advertised in major newspapers across the country in an attempt to notify potential claimants.¹⁶⁹ The decree obligated the university to design and implement an affirmative action program for female applicants and employees.¹⁷⁰ Among other things, the university was required to advertise vacancies and recruit faculty “nation-wide,” establish “sex-neutral” and “objective” criteria for evaluating the qualifications of applicants, and make “good faith efforts” to build a faculty that contained women proportionate to the number of qualified women in the academic labor pool.¹⁷¹ Faculty searches had to comply with

him and promoted blacks with less experience.”); *see also Citron v. Jackson State Univ.*, 456 F. Supp. 3 (S.D. Miss. 1977) (involving an untenured Jewish white male professor of Romanian origin who unsuccessfully argued that he had been unlawfully denied tenure at an historically black institution because of his race, national origin, and religion).

165. *See Citron*, 456 F. Supp. at 9–11 (claim related to tenure); AM. ASSOC. OF UNIV. WOMEN EDUC. FOUND. & AM. ASSOC. OF UNIV. WOMEN LEGAL ADVOC. FUND, *TENURE DENIED: CASES OF SEX DISCRIMINATION IN ACADEMIA* 63 (Susan K. Dyer ed., 1st ed. 2004) (“In most sex discrimination cases that reach trial, universities win.”).

166. Shipp, *supra* note 162.

167. *Id.* (also discussing a sex discrimination lawsuit against the City University of New York (CUNY)). *See LANOUE & LEE, supra* 162, at 177–219, for a chapter-length detail of the extraordinary story of the Minnesota litigation.

168. Shipp, *supra* note 162.

169. *See, e.g., Legal Notice: Notice of Sex Discrimination Claim Procedures, University of Minnesota Class Action Suits*, L.A. TIMES, Oct. 30, 1980, at 16; *Notice of Settlement of Class Action Suit, University of Minnesota*, CHI. TRIB., June 4, 1980, at 10; *Legal Notice: Notice of Sex-Discrimination Claim Procedures, University of Minnesota Class Action Suit*, N.Y. TIMES, Nov. 5, 1980, at A29.

170. *Consent Decree from Rajender v. The University of Minnesota*, 8 J. COLL. & U.L. 219, 220 (1981) (The decree formed the basis of a later gender-discrimination lawsuit that resulted in a significant amount of litigation, including *Kobrin v. Univ. of Minn.*, 121 F.3d 408 (8th Cir. 1997)).

171. *Id.* at 220, 239, 248.

a detailed process spelled out in an exhibit to the decree,¹⁷² and in the event that a male and female applicant were “approximately equal” in qualifications, the university must “prefer” the female.¹⁷³ The lead plaintiff received \$100,000 in compensation,¹⁷⁴ and the university paid plaintiffs lawyers approximately \$2,000,000 in fees and expenses.¹⁷⁵

III. EARLY MODELS OF PREFERENCE-GIVING IN FACULTY HIRING

E.O. 11,246 and Title VII forced universities to begin designing and implementing remedial hiring programs to address the legacies of their discriminatory practices.¹⁷⁶ But the universities were in a challenging position. In the early days, it was unclear what exactly Title VII or E.O. 11,246 required or permitted universities to do to increase the proportion of female and minority faculty members.¹⁷⁷ At the same time, universities faced considerable pressure from litigants, activist students, and even from alumni to take quick and effective action.¹⁷⁸ Some within academia openly advocated for race- and sex-based hiring quotas.¹⁷⁹ Professional

172. *Id.* at 238–39, 245–50.

173. *Id.* at 221 (“[A]ffirmative action requires that preference be given to an approximately equally well qualified female candidate over another candidate who is not also a member of a protected class as defined by this Decree.”).

174. *Id.* at 241.

175. *Rajender v. Univ. of Minn.*, 546 F. Supp. 158 (D. Minn. 1982).

176. See generally Robert S. Stitt & Anthony P. Limitone, Jr., *University Fair Employment Practices Litigation Strategy and Tactics*, 1 J. COLL. & U.L. 20, 24 (1973).

177. See Lewis D. Solomon & Judith S. Heeter, *Affirmative Action in Higher Education: Towards a Rationale for Preference*, 52 NOTRE DAME L. REV. 41, 50 (1976) (“As an indication of the slow start in the implementation of the affirmative action program, a survey conducted by the American Council on Education in 1973 showed that the number of women on United States faculties had increased less than one percent, from 19.1 to 20 percent, since issuance of Executive Order No. 11,246 in 1968.”).

178. For example, see Gene Maeroff, *School of Government at Harvard Accused of Bias in Hiring Practices*, N.Y. TIMES, Oct. 17, 1980, at A16, reporting on a demand letter sent by eighty graduates of the Harvard School of Government demanding that the dean take “immediate action to identify, interview and hire qualified women and minorities and report on progress in this regard to both alumni and graduates of executive programs.” Student demands for greater minority-faculty hiring are today a routine item in demand lists presented by minority-student groups to university administrations. For a collection of student demand lists, visit THE DEMANDS, <https://www.thedemands.org> [<https://perma.cc/PLK3-KWW7>] (last visited Nov. 1, 2020).

179. Herma Hill Kay, *The Need for Self-Imposed Quotas in Academic Employment*, 1979 WASH. U. L.Q. 137, 137–40, 145 (Kay does not define “quotas” or address their legality in any depth, though near the end of her article she suggests that what she has in mind is that faculty positions will be “targeted for female and minority appointments.”); Charles R. III Lawrence, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 438 (1986) (“[T]he most efficacious institutional policy for achieving faculty desegregation entails giving highest priority to filling a substantial number of positions with minority appointments and holding these

organizations, like the AALS, added to the pressure.¹⁸⁰ It is unsurprising that universities were, from early on, accused of sometimes going too far, and suspicions that at least some universities had implemented arguably illegal schemes abounded.¹⁸¹ Those suspicions did not lack for circumstantial evidence. For example, in the 1971–72 academic year, the State University of New York hired 111 women or minorities, but only five white males.¹⁸² In 1974, “more than four-fifths of all [of Stanford’s] new employees were either women or members of minorities.”¹⁸³ There was even a report of a “midwestern university” that planned to integrate one department by terminating eight male instructors and replacing them with nine females.¹⁸⁴

Universities continued to implement preferential hiring schemes in the 1980s, but the focus seems to have shifted from sex to race.¹⁸⁵ Such

positions open until vigorous recruitment, combined with an equally rigorous selection process, results in a minority appointment. Only by making an institutional choice to designate existing slots for minority candidates will faculties free themselves from the constraints of institutionalized practices and internalized preconceptions that perpetuate discrimination without advancing the quality of our law schools.”).

180. See Frank T. Read & Elisabeth S. Petersen, *Sex Discrimination in Law School Placement*, 18 WAYNE L. REV. 639 (1972). In 1970, the AALS passed a resolution prohibiting discrimination by its member law schools on the basis of “race, color, religion, national origin, or sex” in law school admissions and employment. *Id.* at 654–55 n.56. The resolution was understood by member law schools as “requir[ing] affirmative action.” *Legal Educational Opportunities—A Nationwide Movement*, GARGOYLE, Spring 1973, at ix–x, <https://gargoyle.law.wisc.edu/wp-content/uploads/sites/1169/2014/02/volume4issue3.pdf> [<https://perma.cc/9GSA-X6AA>]. The AALS has continued to advocate forcefully for affirmative action in university faculty hiring. Veryl Victoria Miles, *Recruiting and Retaining Faculty of Color in the Legal Academy: A Longstanding Commitment of the Association of American Law Schools*, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 65, 66–67 (2004). The Association’s formal recommendations tend to focus largely on “increase the pool” strategies. Other academic professional associations also urged their memberships to end discriminatory hiring practices. Henry Raymond, *Professors Vow to Open Up Field: Political Scientists to Study Race and Sex Exclusion*, N.Y. TIMES, Sept. 7, 1969, at 31 (describing efforts by the American Political Science Association to address discrimination in the discipline).

181. Tom Wicker, *No Retreat Needed*, N.Y. TIMES, Jan. 14, 1975, at 32 (“[T]he belief has grown, with some reason, that in order to hang on to their Federal funds, colleges must hire women and blacks almost exclusively.”). While acknowledging that the data “scarcely supports the idea that white males can no longer get teaching jobs,” Wicker also points out that certain universities had recently dramatically increased the proportion of new hires that were women or minorities. *Id.*

182. Seth A. Goldberg, Note, *A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program*, 30 STAN. L. REV. 803, 817–19 (1978).

183. Wicker, *supra* note 181, at 32.

184. Goldberg, *supra* note 182, at 819 n. 73.

185. Race was more challenging in significant part because of the limited number of Black academics with PhDs. By the late 1970s, it was plausibly argued that Black academics were at “full employment” and that, due to intense competition, were

programs could be controversial, at least when journalists got wind of them. For example, in the early 1980s, Amherst College attracted negative national attention (and a threat of litigation by the Anti-Defamation League) for a faculty chair that, by its terms, could only be awarded to a Black professor.¹⁸⁶ In 1990, Christopher Newport College was accused of “reverse discrimination” for abandoning a faculty search that failed to uncover any qualified Black candidates despite the apparent existence of qualified white ones.¹⁸⁷

Duke University tried to impose minority hiring goals on its academic departments, but the top-down command produced a public relations fiasco. In 1988, Duke’s central administration ordered all of the university’s departments to hire at least one Black professor within five years.¹⁸⁸ The policy was unsuccessful—only eight professors were hired—and that failure, along with deep discontent with the design and implementation of the initiative, ignited a “very public fracas.”¹⁸⁹ The hiring initiative was “lambasted by [B]lack students as a sham;” its failure was cited as evidence of an institutional culture of racism; it was rejected by Duke faculty as “unrealistic” because it ignored a severe shortage of Black PhDs in certain fields; and it was dismissed by others as insultingly “paternalistic.”¹⁹⁰

The New York Times presented Duke’s experience as a perilous illustration of “the racial issues buffeting academia as well as many of the broader dilemmas involved in minority hiring initiatives nationwide.”¹⁹¹ Henry Lewis Gates, Jr., the well-known Black professor, publicly denounced his brief year at Duke as “the most racist experience of his life.”¹⁹² Carole Swain, a Black political scientist, spent a year teaching at Duke under the initiative but refused to put herself up for a permanent

advantaged, not disadvantaged, in the faculty hiring market as compared to white candidates. *Id.* at 815–17.

186. Dudley Clendinen, *Gift to Amherst College Requiring Black Professor Stirs Debate*, N.Y. TIMES (Sept. 14, 1981), <https://www.nytimes.com/1981/09/14/us/gift-to-amherst-college-requiring-black-professor-stirs-debate.html> [https://perma.cc/LHL8-4K6P]. The college used the gift to hire a Black professor away from the University of Maryland. *Amherst Obeys Terms of Gift*, BOS. GLOBE, Jan. 22, 1982, at 1.

187. James J. Kilpatrick, *Affirmative Action at CNC Demonstrates Woeful Reverse Discrimination*, DAILY PRESS (Newport News, Va.), June 9, 1990, at A10.

188. Peter Applebome, *Goal Unmet, Duke Reveals Perils in Effort to Increase Black Faculty*, N.Y. TIMES (Sept. 19, 1993), <https://www.nytimes.com/1993/09/19/us/goal-unmet-duke-reveals-perils-in-effort-to-increase-black-faculty.html> [https://perma.cc/JG26-J6MS].

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

position.¹⁹³ She described the ugly internal political dynamics that Duke's hiring initiative had unleashed. By encouraging departments to "designate one position for a Black," the initiative "stigmatized Black hirings and led some Black professors to try to undermine others, assuming they would be guaranteed tenure if they were the only blacks in their department."¹⁹⁴ "[W]hite liberals" at Duke, Swain continued, were "among the most racist people I know; they are so patronizing toward Blacks."¹⁹⁵ The initiative led to claims of illegal discrimination (a Black professor complained about his denial of tenure, which was motivated, he said, by Duke's racism)—and of reverse discrimination (a white professor claimed that he was denied tenure in order to give legal cover to Duke's rejection of the Black professor).¹⁹⁶

The University of Wisconsin-Madison provides a contemporaneous counterpoint to Duke's poorly implemented efforts. In 1988, under the leadership of a dynamic new chancellor, Donna Shalala, UW developed and heavily promoted its "Madison Plan" to improve student body and faculty diversity.¹⁹⁷ The Plan was particularly aimed at Blacks, Hispanics, and Native Americans.¹⁹⁸ Comprehensive and ambitious in design, the Plan committed millions of dollars to various diversity-promotion initiatives, setting numerical goals against which progress could be measured.¹⁹⁹ The Plan's efforts to recruit more minority undergraduate students largely failed,²⁰⁰ but its minority-faculty-recruitment efforts initially seemed promising.²⁰¹ The Plan set a goal of hiring seventy new minority faculty members within three years, and within the first year eight new Black professors had been hired.²⁰² However, the rate of minority hiring soon declined, with the university even experiencing net outflows of Black and Hispanic faculty by the mid-1990s.²⁰³

Despite that rather mixed experience, the Madison Plan remains notable on the faculty-hiring side for deploying the core elements of what

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. THE MADISON PLAN, *supra* note 30.

198. *Id.*

199. *Id.*

200. Denise K. Magner, *Wisconsin to Re-Tool Recruitment Plan as Minority Enrollment Dips 17%*, THE CHRON. OF HIGHER EDUC. (Oct. 23, 1991), <https://www.chronicle.com/article/wisconsin-to-re-tool-recruitment-plan-as-minority-enrollment-dips-17> [<https://perma.cc/4YDW-2MT4>].

201. *Id.*

202. *Id.*

203. Robin Wilson, *Hiring of Black Professors Stalls at Some Major Universities*, THE CHRON. OF HIGHER EDUC. (June 2, 1995), <https://www.chronicle.com/article/hiring-of-black-professors-stalls-at-some-major-universities> [<https://perma.cc/2C4J-2QZZ>].

would become the modern TOP model of affirmative action in faculty hiring in a highly public way. The Plan sought to incentivize departments to hire minority faculty members by “providing resources and exerting budgetary influence and moral suasion.”²⁰⁴ UW does not appear to have invented the strategy from whole cloth; there are limited examples of universities offering departments financial incentives to hire targeted minorities in the early 1970s.²⁰⁵ Little is known about those earlier efforts, however, and UW’s Madison Plan stands out in terms of its visibility and ambition.

The Plan’s embrace of “budgetary influence” meant that UW’s central administration would authorize a department to hire minority and women faculty even when the department lacked an available hiring line in its current budget, with central campus subsidizing the hire through a cost-sharing arrangement.²⁰⁶ For senior hires, the cost-sharing was negotiated on a case-by-case basis.²⁰⁷ For junior hires, the central administration would provide fifty percent of salary and other costs for a period of two years.²⁰⁸ This subsidy was viewed as the key to the program’s potential effectiveness. As a subsequent administrative review put it, the central-campus subsidy,

can be critical in helping a department recruit a prospect from one of these groups [Black, Native American, and Hispanic] when the opportunity presents itself. If a department waits until it has an opening, the opportunity to recruit the minority prospect may have passed. At the same time the department must make a long term financial commitment to the candidate, which provides incentive to insure [sic] that the candidate is indeed well qualified for the position.²⁰⁹

204. THE MADISON PLAN, *supra* note 30.

205. Lenore J. Weitzman, *Affirmative Action Plans for Eliminating Sex Discrimination in Academe*, in *ACADEMIC WOMEN ON THE MOVE* 463, 482 (Alice S. Rossi & Ann Calderwood eds., 1973) (In 1971 UC-Davis’s leadership offered departments “special funds for hiring minority faculty,” specifically “outstanding black and Chicano scholars.”). Weitzman briefly notes a similar program incentivizing the hiring of women faculty at Cal Tech and Stanford. I have not located any detailed discussions of these programs.

206. THE MADISON PLAN, *supra* note 30.

207. UNIV. OF WIS.-MADISON, *THE MADISON COMMITMENT: A REAFFIRMATION OF UNIVERSITY GOALS FOR MINORITY PROGRAMS* 2–3 (1994), https://kb.wisc.edu/images/group171/33877/139_The_Madison_Commitment_A_Reaffirmation_of_University_Goals_for_Minority_Programs.pdf [<https://perma.cc/PQ8M-85ME>] [hereinafter *THE MADISON COMMITMENT*].

208. *Id.* at 3.

209. *Id.*

The phrase “presents itself” furthers the “target of opportunity” euphemism by suggesting that targeted minorities have stumbled upon campus accidentally, and that, to seize them before they wander off, the university is forced to act quickly outside of hiring norms. But, in fact, UW departments were actively, if informally, searching for potential minority candidates and encouraging them to apply.²¹⁰ So, by presenting the university’s consideration as reactive rather than active, as haphazard rather than systematic, the university seems to have intended to distance itself legally and morally from the exercise of agency. “Presents itself” suggests that the university’s failure to solicit applications from and to consider non-minority candidates was due not to the way in which the university had consciously decided to structure the search process, but to fortune and the press of time.

The Madison Plan was not without some controversy. A history professor playing the role of campus gadfly called the “minority faculty hiring goals of the Madison Plan . . . ‘inherently unfair’ because they make race or ethnic origin the prime consideration and not merit.”²¹¹ The Plan was also challenged, ineptly and unsuccessfully, through a lawsuit by a white male whose application for a faculty position had been rejected by the UW Law School.²¹² The law school had recently embarked on a concerted and well-publicized effort to hire minority and women faculty.²¹³ The plaintiff, a recent graduate of the law school, based his case on the fact that the law school had hired seven minority and women candidates in recent years, while only hiring a comparatively small number of white males.²¹⁴ That hiring record was indeed notable, as evidenced by the fact that the law school received an award for its minority-hiring efforts from the Society of American Law Teachers (SALT), a professional association serving as an alternative to the field’s main professional association.²¹⁵ Litigation testimony by the law school’s dean confirmed

210. *See id.* at 2.

211. Larry Gordon & David Treadwell, *On Race Relations, Colleges Are Learning Hard Lessons*, L.A. TIMES (Jan. 4, 1992), <https://www.latimes.com/archives/la-xpm-1992-01-04-mn-1260-story.html> [<https://perma.cc/6VB5-GZTE>] (quoting UW history professor Theodore Hamerow).

212. Carolyn J. Mooney, *Jury Says Law School Did Not Discriminate*, THE CHRON. OF HIGHER EDUC. (Apr. 22, 1992), <https://www.chronicle.com/article/jury-says-law-school-did-not-discriminate/> [<https://perma.cc/F7DQ-LQXC>].

213. *See Wisconsin Uses Madison Plan to Enhance Diversity*, SALT EQUALIZER (Tempe, Ariz.), Oct. 1988, at 1, <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1058&context=salt> [<https://perma.cc/Y3YZ-GJBY>].

214. Mooney, *supra* note 212; Cary Segall, *Minority Hiring Focus of Lawsuit*, WIS. STATE J., Apr. 8, 1992, at 1B.

215. SALT EQUALIZER, *supra* note 213. A plaque awarded by SALT to the Law School for its commitment to faculty diversity still hangs in the law school’s faculty lounge.

that the minority professors had been hired using special campus funds that would not have been made available to the law school for the hiring of white males.²¹⁶ After a trip to the Seventh Circuit on a quixotic interlocutory appeal of a trial court scheduling order,²¹⁷ the case went to a full jury trial.²¹⁸ The plaintiff lost, with the law school seeming to have demonstrated to the jury's satisfaction that he was not minimally qualified for a law teaching position at an institution of Wisconsin's caliber, regardless of his race or sex.²¹⁹

It is difficult to assign a larger legal significance to a jury verdict given that juries do not write opinions justifying their decisions.²²⁰ We can nonetheless get a useful sense of what UW viewed as its main legal challenge, at least in the context of the plaintiff's claim that the Madison Plan itself was impermissibly discriminatory. The university's main concern was that the court not view the Madison Plan as equivalent to a race- or sex-based "quota" or "set-aside."²²¹ This concern was evident in the university's brief on interlocutory appeal to the Seventh Circuit.²²² The university, represented by the state attorney general, insisted that the Madison Plan was a rather run-of-the-mill "recruitment" plan that simply "attempts to increase the pool of qualified women and minority candidates for faculty positions . . . by means of aggressive recruitment."²²³ The

216. Segall, *supra* note 214 ("Law school Dean Daniel Bernstine acknowledged . . . that the school has gotten \$640,750 to hire women and minorities since the Madison Plan was introduced in 1988. The law school would not have received those funds (for white men), that is correct.").

217. *Reise v. Bd. of Regents of the Univ. of Wis. Sys.*, 957 F.2d 293, 294 (7th Cir., 1992).

218. Segall, *supra* note 214.

219. Mooney, *supra* note 212. The article quotes the associate dean at the time as characterizing the law school's case as "He is not the kind of person this school would hire if nobody but white males were hired." *Id.* The law school's victory contrasts with other contemporaneous reverse-discrimination faculty lawsuits reported in the specialized press. Carolyn J. Mooney, *Faculty Member Wins Bias Award*, THE CHRON. OF HIGHER EDUC. (June 16, 1993), <https://www.chronicle.com/article/faculty-member-wins-bias-award> [<https://perma.cc/U65P-2DPV>] (reporting a jury award in favor of a white faculty member at the University of South Florida who alleged that the university discriminated against her "when it gave a similarly qualified black man a higher salary and rank"); *White Man Who Charged Reverse Discrimination Wins Case*, THE CHRON. OF HIGHER EDUC. (July 21, 1995) <https://www.chronicle.com/article/white-man-who-charged-reverse-discrimination-wins-case/> [<https://perma.cc/N36S-LSVD>] (reporting a legal settlement of a claim that the University of Maine had discriminated against a white male applicant for a faculty position).

220. See Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 875 (2015).

221. See Brief & App. of Defendants-Appellees at 12, *Reise*, 957 F.2d 293.

222. *Id.*

223. *Id.* My reading of the pleadings suggests that the plaintiff's attorney did a poor job of forcing the university to reveal the working details of the Madison Plan. Judge

university went on to assert that “[n]othing in the ‘Madison Plan’ even suggests a race-based ‘set-aside’ or ‘quota’ system.”²²⁴ The argument was an important one to make given that courts had recently begun to suggest that “quotas” were close to per se illegal and that “set-asides” might be as well.²²⁵ But, in fact, and as shown below, TOPs may be reasonably viewed as establishing something like a “set-aside,” and, for that reason, the programs posed then, and pose now, some measure of legal risk for universities that adopt them.

IV. PREFERENCE-GRANTING IN MODERN FORM: THE TOP

Duke’s attempt to increase Black representation among its faculty backfired in part because the program was too easily perceived as facially equivalent to an inflexible, anti-merit “quota” of the sort that government bureaucrats, since the very early days of E.O. 11,246, had insisted were not required by, or compatible with, the Executive Order and its regulations, and that were, in any case, wildly unpopular in the public imagination.²²⁶ Wisconsin’s contemporaneous efforts were less prone to controversy because they were more subtle in design, implementation, and implication. Again, UW did not order departments to hire Blacks, but it did offer to pay for Blacks (or other qualified minorities) that the departments decided on their own to hire.²²⁷ That structure avoided the outward appearance of a “quota” by making minority hiring appear voluntary rather than coerced and by obfuscating the tradeoff of hiring one potential candidate over another.²²⁸

As I describe in this Part, the central design feature of the Madison Plan—central campus funding for special minority-only hiring slots—has become the core feature of modern TOPs at universities across the country.

Easterbrook’s scathing opinion on appeal suggests general professional incompetence on the part of plaintiff’s lawyer. *See Reise*, 957 F.2d at 293–95.

224. Brief & App. of Defendants-Appellees at 12, *Reise*, 957 F.2d 293.

225. David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926, 928 (1996) (“[T]he Supreme Court has consistently held since the late 1970s that racial quotas by the government and by businesses subject to government regulation are impermissible. . . . [Q]uotas are a dead letter”).

226. *See* Adam Clymer, *Democrats Intend to Outlaw Quotas in Civil Rights Bill*, N.Y. TIMES (May 21, 1991), <https://www.nytimes.com/1991/05/21/us/democrats-intend-to-outlaw-quotas-in-civil-rights-bill.html> [<https://perma.cc/M684-E44L>] (“Democratic members, stung by the barrage of Republican speeches and their own fear of appearing to back quotas, pressed their leaders for explicit language prohibiting quotas.”). On this model of affirmative action in faculty hiring, see Gregory, *supra* note 23, at 17.

227. THE MADISON PLAN, *supra* note 30 (stating that the university’s “goal” is to hire seventy minority faculty in the next three years); THE MADISON COMMITMENT, *supra* note 207.

228. THE MADISON PLAN, *supra* note 30.

The ubiquity of the Madison Plan model is evidenced by a 2009 article in *The Chronicle of Higher Education*, which recommended that universities interested in diversifying their faculty

[c]reate target-of-opportunity hires. Those are controversial, but they get the job done. The idea is for the provost's office to finance additional faculty lines to hire top minority prospects. Institutions can also use the money to hire the spouses and partners of minority hires. The University of North Carolina at Chapel Hill relies on opportunity hires and cluster hires, financed through the provost's office, to attract faculty members of different backgrounds to the university. Brown University's target-of-opportunity hiring program seeks to attract prominent or promising scholars who are also from underrepresented minority groups (as well as women in the sciences) and encourages departments to consider hiring those candidates even when a tenure line is not open.²²⁹

The *Chronicle* article is otherwise sparse on operational details, and it explains neither why TOPs are controversial nor why they are effective. I use publicly available descriptions of UW's current TOP program (which is ongoing at the time of writing) to fill out those details and to identify why TOPs are potentially effective. The details merit a deep dive because, despite their ubiquity, they are rarely discussed openly. A close examination allows us to draw more informed conclusions about the potential legal problems that such programs may pose.

A. *The UW TOP Model in Detail*

UW's current TOP program is part of UW's larger "Faculty Diversity Initiative," which is based in the Provost's Office and administered by a Vice Provost for Faculty and Staff, an Interim Deputy Vice Chancellor for Diversity & Inclusion, and a Chief Diversity Officer.²³⁰ The initiative is justified in terms of promoting "diversity," which is described as:

229. Anne Gallagher & Cathy A. Trower, *The Demand for Diversity*, *THE CHRON. OF HIGHER EDUC.* (Feb. 4, 2009), <https://www.chronicle.com/article/the-demand-for-diversity> [<https://perma.cc/7U3C-MWES>]; see also Colleen Flaherty, *Not Just 'Musical Chairs,' INSIDE HIGHER ED* (Sept. 19, 2016), <https://www.insidehighered.com/news/2016/09/19/beyond-well-funded-individual-campus-initiatives-experts-urge-collaboration> [<https://perma.cc/5F3U-JDJ2>].

230. *UW Faculty Diversity Initiative*, *supra* note 9. The other main aspect of the initiative is focused on "pipeline" strategies, such as providing units with modest funding to cover interview-related expenses for minority faculty candidates, to host conferences involving minority graduate students and professors from other institutions (who may later

a compelling university interest because it is integral to fulfilling our mission as a public university that makes its teaching and research available to all citizens of the state, that recognizes excellence and a commitment to the promotion of diversity as inextricably linked, and that allows it to serve the public good.²³¹

The TOP prong of the initiative provides departments with special funding for the recruitment and hiring of “targets of opportunity,” defined as:

[A] prospective faculty member who will greatly enhance the quality and diversity of an academic department. UW-Madison recognizes diversity broadly including diversity of identity, culture, background, experience, status, ability and opinion. The [TOP] program is designed to specifically support the recruitment of outstanding faculty members among historically underrepresented groups, with a particular emphasis on race, ethnicity and gender (in disciplines where women are underrepresented).²³²

When a department hires a TOP candidate, the university’s central administration provides the department with funding sufficient to cover the TOP candidate’s full salary (up to \$90,000) for six years and funding sufficient to cover fifty percent of the candidate’s salary in perpetuity thereafter.²³³ The department also covers any additional amounts through its regular budgetary allocation.²³⁴ And, TOP recruits are also eligible to receive special packages of research support, extra leave from teaching, and retention supplements.²³⁵

The public description of the UW TOP program does not specify particular races, ethnicities, or other demographic characteristics as being targeted.²³⁶ Search committees seem to have been told that they should identify candidates who add to diversity at the level of either the department, campus, or profession, but have not been given any guidance

be recruited to UW-Madison), and to fund visits by UW faculty to other institutions to “research” opportunities to recruit minorities. *Id.*

231. *Id.*

232. UNIV. OF WIS.-MADISON, CAMPUS CLIMATE PROGRESS REPORT–SPRING 2019, https://diversity.wisc.edu/wp-content/uploads/2019/02/Optimized-Climate-Change-Handout_Spring_2019.pdf [<https://perma.cc/2MDN-2XXS>] (last visited Nov. 11, 2020).

233. *UW Faculty Diversity Initiative*, *supra* note 9.

234. *Id.*

235. *Id.*

236. *Id.*

as to how to implement that charge.²³⁷ The lack of specificity helps to avoid the potentially fraught task of delineating demographic groups eligible for hiring preferences from those which are not.²³⁸ Administrators and faculty may find it uncomfortable, and perceive it as legally risky, to publicly identify specific races, ethnicities, or other demographic groups (such as homosexual or transgender people) as eligible for TOP financing while excluding others. In the absence of concrete guidance, faculty members charged with identifying TOP candidates will disagree among themselves as to who qualifies as a TOP candidate, leading to awkward debate and wasted effort if the committee's notion of who qualifies differs from central campus's unarticulated notion.

UW's TOP program provides "two ways in which a department may recruit a faculty member under [this program]."²³⁹ The first is "recruitment off the regular hiring cycle."²⁴⁰ Under this approach, the department chair and department faculty identify a qualifying TOP prospect who they would like to recruit.²⁴¹ They produce a memo that justifies the target in terms of (a) "strategic fit" with the "unit's goals," (b) the ability of the prospect to "enhance the diversity of the unit and the school/college," and (c) the prospect's membership in "a group that is historically underrepresented in the field and in the unit, including relevant data."²⁴² The memo is then approved by the dean, and forwarded to the Office of the Provost, which reviews all of the memos received and decides which proposals to fund.²⁴³ If the Provost agrees to fund a TOP position, the department then notifies the target that he or she is invited to interview for a faculty position.²⁴⁴ If the target completes the interview, the relevant unit votes on whether to extend an offer of employment "through normal governance procedures."²⁴⁵ If the unit votes to extend an offer, it then obtains a "PVL waiver" from the Office of Human Resources.²⁴⁶ A "PVL waiver" is an exception from the normal civil-service hiring process, a

237. *See id.*

238. One interesting question is whether international faculty candidates should count as TOPs. For a similar question about the diversity status of foreign Black people, see Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO STATE L.J. 1229 (2008).

239. E-mail from Sarah Mangelsdorf, Provost and Vice Chancellor for Academic Affairs, University of Wisconsin-Madison, to Deans, Academic Program Directors, and Department Chairs, University of Wisconsin-Madison (Sept. 17, 2018).

240. *Id.*

241. *UW Faculty Diversity Initiative*, *supra* note 9.

242. Mangelsdorf, *supra* note 239.

243. *UW Faculty Diversity Initiative*, *supra* note 9.

244. *Id.*

245. *See id.*

246. Mangelsdorf, *supra* note 239.

process which, according to the UW Office of Human Resources statement of policy, applies to the “vast majority of recruitments,” and which requires that a vacant position be publicly advertised and applications accepted from all interested applicants.²⁴⁷

The second path to hiring a TOP candidate is through an already-authorized search.²⁴⁸ In this case, a TOP candidate is identified during a normal faculty search already in progress and for which funding has already been secured.²⁴⁹ The target, however, must “not closely meet the needs identified in the search.”²⁵⁰ In other words, the target would not be hired through the ongoing search under a best-qualified-applicant standard.²⁵¹ If the target did meet the search criteria for the already-authorized search, the unit should hire the target through the existing search and not through the TOP program.²⁵² The unit then drafts a memo essentially identical in content to the memo described above, submitting it through a similar process to the Provost, who then decides whether to authorize and fund a position for the target.²⁵³ That position is in addition to the position already authorized and funded for the original search.²⁵⁴ If the Provost authorizes the recruitment of the target, the target is invited to interview for a position.²⁵⁵ All told, the position is not advertised, and other applications are not sought.²⁵⁶

In either case, the faculty involved in implementing the TOP process face the challenge of identifying demographically appropriate candidates. In the case of TOP searches that rely on applications received through a standard search process, applicants may not have indicated their membership in a targeted demographic class in their application materials. In the case of TOP searches that do not rely on an existing applicant pool, the candidate will not have had an opportunity to formally signal his membership in a targeted group. Faculty could ask potential TOP candidates whether they identify as a member of a targeted group, but HR

247. *Recruitment, Assessment and Selection of Academic, Faculty, Limited and University Staff Employees*, *supra* note 6. The normal policy at UW is to “proactively post and advertise for all vacancies. Passively posting a vacancy on the OHR website or advertising a vacancy in one publication is not enough to attract the best pool of applicants. Recruiting widely and aggressively will help attract a more diverse pool of qualified applicants.” *Id.* Under that normal process, the hiring unit will then assess the pool of applicants and select the “best qualified” among them. *Id.*

248. Mangelsdorf, *supra* note 239.

249. *UW Faculty Diversity Initiative*, *supra* note 9.

250. Mangelsdorf, *supra* note 239.

251. *See id.*

252. *Id.*

253. *See id.*

254. *UW Faculty Diversity Initiative*, *supra* note 9.

255. *See id.*

256. *See id.*

best practice tends to suggest that hiring committee members should generally *not* have access to personally identifiable demographic information when making preliminary candidate sorting or other employment decisions,²⁵⁷ and that employers should *not* ask candidates to reveal their race, sex, or other sensitive demographic details during the application or consideration process.²⁵⁸ Hiring committee members may thus need to read between the lines—making suppositions based upon names, membership in professional organizations, receipt of minority-branded faculty awards, and research interests—or by examining the candidate’s profiles, posts, and photos on relevant internet sites.

For law faculty searches, the task is easier. Law hiring takes place through an annual hiring fair organized by the AALS, and faculty candidates who want to be considered for law faculty positions publish one-page resumes in the AALS Faculty Appointments Register (FAR).²⁵⁹ The AALS requests that candidates explicitly identify their race and sex in their FAR resumes, and most candidates do so.²⁶⁰ That the AALS does

257. Harvard’s “best practices” manual for faculty searches notes that demographic data is visible only to the hiring committee chair, that other committee members should not be given access to that data, and that any employment decisions should not be based upon the data. HARVARD UNIV. OFF. OF THE VICE PROVOST, FACULTY DEVELOPMENT AND DIVERSITY: BEST PRACTICES FOR CONDUCTING FACULTY SEARCHES, 8–9 (2016) https://faculty.harvard.edu/files/fdd/files/best_practices_for_conducting_faculty_searches_v1.2.pdf [https://perma.cc/F33M-BHSJ].

258. See PRE-EMPLOYMENT INQUIRIES AND RACE, U.S. EEOC, https://www.eeoc.gov/laws/practices/inquiries_race [https://perma.cc/BXS7-FRNN] (last visited Oct. 9, 2020) (“In general, it is assumed that pre-employment requests for information will form the basis for hiring decisions. Therefore, employers should not request information that discloses or tends to disclose an applicant’s race unless it has a legitimate business need for such information. If an employer legitimately needs information about its employees’ or applicants’ race for affirmative action purposes and/or to track applicant flow, it may obtain the necessary information and simultaneously guard against discriminatory selection by using a mechanism, such as ‘tear-off’ sheets. This allows the employer to separate the race-related information from the information used to determine if a person is qualified for the job. Asking for race-related information on the telephone could probably never be justified.”). Unsurprisingly, academic associations that organize faculty hiring affairs, such as the American History Association, advise their member schools not to ask candidates about their race, sex, or similar qualities. *Guidelines for First Round Interviews (2019)*, AM. HIST. ASS’N, <https://www.historians.org/jobs-and-professional-development/statements-standards-and-guidelines-of-the-discipline/guidelines-for-first-round-interviews> [https://perma.cc/EQZ2-JA28] (last visited Nov. 2, 2020).

259. AALS Faculty Recruitment Services for Entry-Level Candidates, ASS’N OF AM. L. SCHS., <https://www.aals.org/services/recruitment/candidates> [https://perma.cc/7ZME-6FWU] (last visited Nov. 2, 2020).

260. See ASS’N OF AM. L. SCHS., FACULTY APPOINTMENTS REGISTER (FAR), <https://www.aals.org/services/far> [https://perma.cc/69M3-9ZPH] (last visited Nov. 2, 2020).

so is remarkable, given that the AALS may qualify as an “employment agency” and that agencies can be held liable for violating employment-discrimination law by facilitating illegal discrimination by employers who use the agency’s services.²⁶¹

The candidates’ responses (along with lists of their publications, course preferences, and other information) are then made available to faculty hiring committees in the distributed version of the FAR. Committees typically use the FAR resumes to identify candidates who they will interview in half-hour sessions at the fair, and they can also use the resumes to identify candidates who will be invited for video or on-campus interviews. The race and sex identifiers in the FAR allow committees to consciously construct race- and sex-balanced short lists, and they allow committees to intentionally steer minority and female candidates out of the normal hiring process and into a TOP hiring process.²⁶²

Faculty implementing a TOP search will also face the difficult question of how, or whether, to inform TOP candidates that they were selected for an interview or job offer through a TOP process and not through the normal process. This dilemma is an old one, recognized even in the early days of faculty affirmative action.²⁶³ It seems likely that at least some candidates will find it offensive and stigmatizing to be told that they were identified or hired through a TOP program rather than through the normal, competitive hiring process.²⁶⁴

The University of Michigan, for example, explicitly warns its search committees to avoid telling minority or female candidates that they are being considered or hired because of their race or sex: “Women and minority faculty candidates, like all candidates, wish to be evaluated for academic positions on the basis of their scholarly credentials. They will not appreciate subtle or overt indications that they are being valued on other characteristics, such as their gender or race.”²⁶⁵ That position suggests that TOPs lack what we might call “social legitimacy,” regardless of whether they are formally legal. On the other hand, a TOP candidate

261. See COVERAGE OF EMPLOYMENT AGENCIES, EEOC, https://www.eeoc.gov/laws/practices/inquiries_race [<https://perma.cc/R3HJ-JC2U>] (last visited Oct. 9, 2020).

262. Smith, Turner, Osei-Kofi & Richards, *supra* note 75.

263. The chair of Amherst’s chemistry department described trying to fill a chair designated for minority candidates as an awkward “learning experience” in which he “began calling people and . . . had to say in the beginning that I was calling them because they were black—and hope to God that didn’t offend them.” Clendinen, *supra* note 186.

264. The risk of stigmatization is a familiar argument against the legality of such preferences. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004).

265. UNIV. OF MICH., OFF. OF THE PROVOST, HANDBOOK FOR FACULTY SEARCHES AND HIRING 17 (2018).

who is not told may be upset to find out after the fact that they were hired through a special, secret process. The best thing to do in this situation (either instrumentally or morally) is far from clear.

B. Why TOPs Are Effective

The above description illustrates two core components of a modern TOP program. First, the programs use central-campus funds to financially incentivize departments to hire targeted minorities. Faculty hiring at most universities takes place largely at the departmental level, with departments initiating and managing searches, selecting candidates to interview, and deciding to whom among the interviewed candidates to extend an offer of employment. The central administration may play an oversight role in the normal faculty hiring process, but its ability to influence departmental decisions as to who to interview and who to hire is usually highly circumscribed because the funds to hire through the normal hiring process will already have been allocated to the department through the normal budgetary process. TOPs are departures from the normal practice because they allow the central administration to vet and approve specific candidates prior to making funding available. Once funding for a TOP position is made available, it must be used for the specific candidate who has been pre-approved.

Second, the TOP model moves the selection of the targeted candidate outside of the normal, open, and competitive faculty hiring process. Take, for example, the first scenario in the UW TOP model. The availability of a TOP position is not advertised, and no systematic search takes place. Candidates are identified based upon the idiosyncratic and informal search strategies of current faculty members, who can be expected to examine their personal and professional networks for potential TOP-eligible candidates. The central administration considers whether to authorize hiring the proposed TOP candidate prior to the candidate's submission of any formal application material. If the hire is authorized, only the proposed candidate interviews for what is, essentially, a *sui generis* position. No call for applications is issued, and no other candidates are invited to compete with the selected candidate.

The situation is similar under the alternative identification process in the UW model, where a TOP target is identified in the course of a normal faculty search. The target does not compete with other applicants for the advertised position because, by definition, he is not competitive for the advertised position. If the central administration nonetheless permits the department to consider hiring the non-competitive TOP candidate, he is considered individually by the department for a *sui generis* faculty position for which his qualifications are evaluated and weighed in isolation. The department does not solicit applications for the position (it

has relied exclusively upon the pool of non-competitive TOP-eligible applicants who happened to apply for the normal faculty position), nor does it bring in multiple TOP candidates from the original search's applicant pool to compete for the TOP position.

These two core features, in combination, are what make the modern TOP program effective. From the perspective of central campus, the TOP model seems to be a relatively efficient way of achieving the underlying goal of increasing minority faculty representation on campus.²⁶⁶ By design, the money is not spent unless the department hires a member of the targeted demographic. And because the hiring department's budget is always finite and rarely increases significantly year-to-year, the promise of additional funding for a TOP hire will be difficult for a department to resist. Assuming that the TOP program is adequately generous, the choice to hire a TOP candidate will rationally be viewed by members of the department as a choice between hiring a TOP candidate or hiring no one. Indeed, it is common for faculty involved in a TOP search to speak quietly of the TOP candidate as a "free hire," with the understood implication that an offer should be extended if the candidate crosses the bar of minimum qualifications but would probably not have been selected through an open search as the best qualified.

Understood in that way, we can begin to understand why TOPs might be controversial. The programs exist in obvious tension with a competing and less divisive logic of affirmative action and of widely acknowledged HR best practice. That logic emphasizes the desirability, if not the necessity, of structuring and implementing searches so as to attract the largest pool of qualified applicants, selecting as the successful candidate from the pool the applicant who is objectively the best qualified in comparison to others, without regard for race, sex, or the like.²⁶⁷ Indeed, one of the great achievements of the struggle for equal opportunity in faculty hiring in the 1970s was the professionalization and formalization of university hiring practices and the dismantling of the opaque and

266. There may be some room for gamesmanship. The strategic department will hire non-minorities using regular funds while shifting minority candidates into the TOP pool. Imagine that a department has existing funding for a normal faculty line, conducts an open, advertised search, and finds that its most-preferred candidate on the merits is a Black candidate and that its second-preferred candidate is white. In the presence of a TOP program, the department's incentive is to extend an offer to the second-preferred (white) candidate, while petitioning central campus to fund the Black candidate through the TOP. That strategy will require the department to falsely claim that the Black candidate did not meet the needs of the advertised search, but given the inescapable subjectivity of candidate evaluation and the institutionalized norm of departmental autonomy in the making of hiring decisions, such dishonesty may be difficult for the central administration to identify and sanction.

267. See, e.g., Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

unsystematic “old boy network” that produced socially undesirable patterns of hiring.²⁶⁸ TOPs are a rejection of the principles of open, advertised, competitive searches, and a return to a less transparent and more ad hoc candidate-identification process.²⁶⁹

Perhaps more problematically, at least from a purely legal perspective, TOPs seem functionally equivalent to “set-asides.”²⁷⁰ Set-asides, like quotas, are generally highly disfavored in employment law,²⁷¹ and the more a given TOP program resembles a set-aside, the more at-risk it will be of successful legal challenge. This functional equivalence is most obvious when TOP funding allows a department to hire beyond what its normal budget will allow, or when a TOP program authorizes a faculty slot that the department would otherwise not be allowed to fill. TOPs, through special funding and special authorization to hire, literally and effectively create new faculty lines that can only be filled by—that are reserved or “set aside” for—candidates of the targeted race or sex. The TOP position is available not to the best-qualified drawn from a competitive, wide and diverse pool of applicants, but to an unsystematically identified representative of a particular race or sex whose qualifications are considered in isolation, outside of the normal competitive process.

V. ARE TOPS LEGAL?

The legal landscape governing affirmative action in university faculty hiring is intricate and multifaceted. It includes legal rules and bureaucratic structures at the national, state, and even local levels of government. Governing norms derive from constitutional text and judicial interpretations, from legislation, from binding administrative rules and non-binding administrative guidance, and even from the understandings

268. See *supra* note 67 and accompanying text.

269. On the problematic nature of restrictive recruitment practices, see Elaine W. Shoben, *Employee Recruitment by Design or Default: Uncertainty Under Title VII*, 47 OHIO STATE L.J. 891 (1986).

270. It is less clear that TOPs are accurately described as “quotas.” The idea of a “quota” implies a sense of obligation and of consequence. A quota must be filled, and if it is not, the failure will be sanctioned. TOPs are “quotas” only if the university imposes negative consequences—e.g., punishes—departments for failing to hire a sufficient number of TOP candidates. I have been told by a University of California insider that the UC system administers its TOP-type programs in such a way; a department that refuses to seriously consider a suggested diversity candidate risks having the university deny funding for a future open line. I am not able to verify the accuracy of this assertion, however.

271. Steven K. DiLiberto, Comment, *Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry*, 42 DUKE L.J. 2039, 2042–45 (1997) (“[B]ecause of an organized movement against set aside programs in the construction industry, criticism of these programs has sharply risen.”).

of those norms by human resources personnel embedded in universities themselves. This Part describes this complex normative environment in more detail as it applies to the question of the legality of TOPs. Two caveats are in order before diving in. First, this discussion and analysis are not legally comprehensive, and lawyers challenging or defending TOPs will need to research and address numerous legal issues, both principal and ancillary, that are not addressed here or that are only touched upon briefly. Second, this Article offers no ultimate judgment as to whether TOPs are legal. While my own sense of their legality is quite skeptical, the law governing TOPs is too murky to allow for a definitive answer, and the subject is so politically charged that law is unlikely to play a monopolistic role in deciding the question.

This Part proceeds as follows. The first section of this Part discusses the potential applicability of the admissions decisions to the constitutionality of TOPs under the Equal Protection Clause. The next sections discuss TOP legality under Title VII, E.O. 11,246, and state law, respectively.

A. *The Fourteenth Amendment and the Diversity Justification*

The university admissions cases were argued under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.²⁷² The basic thrust of the clause, as interpreted over the years, is that courts will review a state actor's race-based classifications under a standard of "strict scrutiny," which, in practice, means that the state actor must show that the classification is "necessary" to further a "compelling state interest."²⁷³ The clause applies directly to public universities,²⁷⁴ and indirectly to private universities through Title VI of the Civil Rights Act of 1964.²⁷⁵ In the famous *Regents of the University of California v.*

272. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also *infra* note 279.

273. I assume for the purposes of simplicity that sex, like race, is subject to a strict scrutiny standard of review. See Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 185 (2019).

274. See, e.g., Russ Swafford, *Constitutional Law—Equal Protection Clause—Using the Ballot Box to Overturn Affirmative Action in University Admissions*, 82 TENN. L. REV. 687, 689–90 (2015).

275. Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517 (2003). Section 601 of Title VI provides that "[n]o person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d. Mank describes the section's meaning as unclear and the caselaw as "not easy to summarize," but notes that the section, and its regulations, prohibit both intentional discrimination as well as practices that have the effect

*Bakke*²⁷⁶ decision, the Supreme Court accepted a university's argument that race-based preferences were constitutionally permissible under a diversity theory.²⁷⁷ It might be assumed that the diversity rationale travels readily to the context of race- or sex-based preferences in faculty hiring. As shown in this section, however, the diversity rationale, persistently controversial as to admissions,²⁷⁸ is highly problematic when extended to faculty hiring. Space constraints do not permit a full retelling of the saga of the admissions cases,²⁷⁹ but I will briefly extract a handful of core lessons, applying them to the case of faculty hiring in order to illustrate the problems of transmission.

1. THE PROBLEMATIC GOALS OF DIVERSITY IN FACULTY HIRING

It would be incorrect to suggest that the admissions cases stand for the principle that the promotion of diversity in itself is a "compelling interest" which can justify racial preferences. That view ignores the way in which the cases were argued,²⁸⁰ and it ignores Justice O'Connor's emphasis in *Grutter v. Bollinger*²⁸¹ on the empirical evidence that the university defendant and their amici had presented that, she claimed, established the educational benefits of diversity as "not theoretical but real."²⁸² Diversity arguments in support of racial or sex-based preferences in faculty hiring will need to be structured around claims that faculty diversity is necessary to promote compelling outcomes specific to the university setting.

A university defending a TOP program from constitutional challenge is certain to defend the program primarily by arguing that it is necessary

of discrimination in approximately the same way as does the Equal Protection Clause. Mank, *supra*, at 517–18, 522.

276. 438 U.S. 265 (1978).

277. *Id.*

278. See *infra* note 279 and accompanying text.

279. The major post-*Bakke* cases are *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013); *Fisher v. Univ. of Texas at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

280. Brief for Respondent, *Grutter*, 539 U.S. 306 (No. 02-241).

281. 539 U.S. 306 (2003).

282. *Id.* at 330. For a similar interpretation, see Rich, *supra* note 22, at 1014 (describing the logic of *Gratz*, *Grutter*, and *Fisher II* as establishing that "[p]ublic universities thus enjoy significant constitutional latitude to pursue demographic diversity within their student body enrollments only because such diversity is expected to yield qualitative educational benefits"). The legal argument against viewing the promotion of diversity in itself as a compelling interest has been articulated by Justice Thomas. For him, diversity for its own sake amounts to "nothing more than impermissible 'racial balancing,'" which courts have long held to be "patently unconstitutional." *Fisher I*, 570 U.S. at 319 (Thomas, J., concurring).

to promote faculty diversity as an intermediate end which itself promotes a compelling state interest in providing university students with a high-quality education (the educational-benefits thesis seen in *Grutter*). It is also likely to claim that diversity promotes a compelling interest in the production of high-quality research.²⁸³ I discuss each of these justifications in turn, focusing here on conceptual and theoretical problems in their application.

Before doing so, however, it is worth briefly emphasizing a point that is too often ignored in the non-legal literature on diversity promotion in higher education—the widespread sense among legal academics, across the political spectrum, that the diversity justification for preference-granting is fundamentally flawed. Kermit Roosevelt describes the Court’s “conceptual framework” in the admissions cases as “wildly, almost absurdly wrong.”²⁸⁴ David Bernstein views the decisions as “incoherent.”²⁸⁵ Osamudia James objects to the “superficial deployment” of diversity discourse, which, she says, commodifies Blacks for the benefits of whites, discourages whites from engaging in an “honest assessment of white privilege,” and obscures “how that privilege perpetuates racism and differential societal status.”²⁸⁶ More recently, Anthony Kronman, the former dean of Yale Law School, has attacked demands for diversity in higher education as “a political campaign masquerading as an educational ideal.”²⁸⁷ Kronman’s reaction is similar to that of many other legal scholars, who, in surprising frankness, have described the diversity rationale as a “fig leaf” that was deployed in litigation as a “pretext” for actual but unconstitutional justifications for race-conscious admissions policies.²⁸⁸ Most strikingly, proponents of anti-

283. They may also portray faculty diversity as an operational necessity, drawing upon the limited existing caselaw applying a diversity rationale to the context of police officer promotion schemes. *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) (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 and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.”). The success of that argument will depend in part on how convincing the analogy is between the roles of police and universities in society.

284. Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 J. CONST. L. 729, 730 (2015).

285. Bernstein, *supra* note 1, at 213 n.13.

286. James, *supra* note 92, at 3.

287. Anthony Kronman, *The Downside of Diversity*, WALL ST. J. (Aug. 2, 2019), <https://www.wsj.com/articles/the-downside-of-diversity-11564758009> [<https://perma.cc/4LGQ-G9RS>] (discussing ANTHONY KRONMAN, THE ASSAULT ON AMERICAN EXCELLENCE (2019)).

288. Bernstein, *supra* note 1, at 214 n.15.

racism theory, popularized in part by the Black Lives Matter movement, call diversity “neither the problem, nor the solution.”²⁸⁹

Courts are undoubtedly aware of this widespread dissatisfaction with the diversity framework as a legal justification for race-based regulatory distinctions, and the most recent admissions decisions (*Fisher I* and *II*) seem to reflect a greater degree of judicial skepticism about it.²⁹⁰ Given this increasingly unfriendly environment, courts reviewing TOPs under the Equal Protection Clause may be less willing than they would have been in the past to easily accept the transposition of the diversity rationale from one context to another.²⁹¹

a. The Educational Benefits Thesis

The WISELI guide provides a representative version of the claim that a diverse faculty promotes educational benefits: “Diverse faculty members can enhance the educational experience of all students—minority and majority. Interacting with diverse faculty offers all students valuable lessons about society, cultural differences, value systems, and the increasingly diverse world in which we live.”²⁹² The claim derives from the admissions cases and suffers from similar problems when applied here: fuzzy causal logics, slippery conceptions of key input and output variables (of “diversity,” of “educational benefits”), and a lack of convincing empirical evidence discussed further below.

One relatively prominent version of the thesis suggests that hiring preferences for minorities and women are justified because of their

289. Jennifer Akamine, Nate Risdon, Matthew Lamsma, Angelica Hambrick & Alexander Jun, *Barriers and Strategies by White Faculty Who Incorporate Anti-Racist Pedagogy*, 3 RACE & PEDAGOGY J. 1, 19 (2019).

290. See generally *Fisher I*, 570 U.S. 297 (2013); *Fisher II*, 136 S. Ct. 2198 (2016).

291. In that light, a 1997 Nevada Supreme Court decision recognizing a race-conscious minority-faculty scheme as legally permissible seems less important than it might have appeared at the time. The court, overturning a jury verdict in favor of the plaintiff’s claim of racial discrimination, suggested that the college’s decision to hire a black Ugandan immigrant under a “minority bonus policy” was consistent with Title VII under a diversity rationale. *Univ. & Cmty. Coll. Sys. of Nev. v. Farmer*, 930 P.2d 730, 732, 735–36 (Nev. 1997), cert. denied, 523 U.S. 1004 (1998). The “bonus policy” was “an unwritten amendment to its affirmative action policy which allowed a department to hire an additional faculty member following the initial placement of a minority candidate.” *Id.* at 733. Jonathan Alger describes the case as a “triumph for faculty diversity.” Jonathan Alger, *When Color-Blind is Color-Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL’Y REV. 191 (1999). But the court’s analysis of the diversity rationale is paper-thin, and, unlike the typical TOP program, the college had hired the Ugandan candidate only after conducting an open, advertised search and determining that he was the best-qualified applicant. See *Farmer*, 930 P.2d 730.

292. WISELI Guide, *supra* note 56, at 27.

heightened potential to serve as “role models” for students, where students may be more receptive to the modelling of desirable behaviors when the modeler shares the students’ sex or race.²⁹³ The role-model argument is doctrinally problematic given that a plurality of the Supreme Court has rejected the sufficiency of a role-model justification in an Equal Protection challenge to an affirmative action plan involving race-based preferences in allocating teacher lay-offs.²⁹⁴ It has also been sharply criticized by minority faculty members. Universities rarely, if ever, include service as a race- or sex-specific role model in their faculty job descriptions or advertisements, suggesting that they don’t really value it as a qualification for employment. Minority faculty members who find themselves nonetheless informally expected to provide such services may find those expectations insulting, excessively burdensome, and uncompensated when it comes time for tenure and promotion.²⁹⁵ Such critiques place the defending university in a potentially difficult position—it must consider whether to openly embrace in its legal argumentation and perhaps also in its job advertisements a vision of the campus role of minority faculty members that those members themselves may find highly objectionable.

b. Diversity as Promoting Research Excellence

This theory exists largely as *ipse dixit*. It is rarely, if ever, developed with any rigor or detail, and the causal mechanisms said to be in play are unclear. The WISELI guide again provides a typical example: “[d]iverse faculty members will bring new and different perspectives, interests and research questions that can enhance knowledge, understanding, and academic excellence in any field.”²⁹⁶ A recent law review article makes a similar claim: “diverse faculty often add perspective, experience, knowledge and methodology (i.e. narrative and counter storytelling approaches) to an institution’s teaching and scholarship.”²⁹⁷

293. Richard Delgado, Essay, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223 n.5 (1991).

294. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); see also *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

295. Delgado, *supra* note 293, at 1226–30 (“Role model theory is a remarkable invention. It requires that some of us lie and that others of us be exploited and overworked.”).

296. WISELI Guide, *supra* note 56, at 27.

297. Julian Vasquez Heilig, Isabell Wong Flores, Alicia Eileen Barros Souza, Joseph Carlton Barry & Selene Barceló Monroy, *Considering the Ethnoracial and Gender Diversity of Faculty in United States College and University Intellectual Communities*, 2019 HISPANIC J.L. & POL’Y 1, 7.

Neither publication offers any empirical evidence in favor of the theory,²⁹⁸ an unsurprising lacuna given the theory's minimal specification and a point I return to directly below. The more fundamental problem is that courts have never accepted the production of academic research as a compelling state interest. Asking them to do so would require expanding the jurisprudence of the admissions cases well outside of their original domain, far afield from the concerns of breaking down racial stereotypes or of preparing students to work successfully in diverse environments that motivated Justice O'Connor's opinion in *Grutter*. Most academic research is irrelevant to those quite specific concerns. A focus on faculty diversity's impact on research quality also seems inapt as to the numerous universities that prioritize undergraduate instruction and expect their faculty to produce only minimal research.²⁹⁹

2. A LACK OF EMPIRICAL EVIDENCE?

In the admissions cases, the diversity theory was presented in empirical and not just speculative terms.³⁰⁰ The universities and their friends of the court relied heavily on various studies purportedly demonstrating that diverse student bodies were correlated with (and, by implication, caused) educational benefits,³⁰¹ and Justice O'Connor's opinion embracing the diversity rationale explicitly rested upon an appreciation and approval of the empirical evidence.³⁰² This suggests that defenders of TOPs will need to present at least some empirical evidence supporting their own diversity-related causal claims.³⁰³ The available evidence, however, is weak and often irrelevant.

298. *Id.* at 5–7. The Heilig study relies for evidence on an impressionistic and anecdotal essay by a former law dean. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549 (2011).

299. On the distinctions between research and teaching colleges and the challenges of conducting research at the latter, see Monir H. Sharobeam & Keith Howard, *Teaching Demands Versus Research Productivity: Faculty Workload in Predominantly Undergraduate Institutions*, 31 J. COLL. SCI. TEACHING 436, 437 (2002) and Mardy T. Eimers, John M. Braxton & Alan E. Bayer, *Normative Support for Improving Undergraduate Education in Teaching-Oriented Colleges*, 42 RSCH. IN HIGHER EDUC. 569, 572 (2001).

300. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 308–09 (2003).

301. *Id.* at 309, 319.

302. *Id.* at 330.

303. Suzanne E. Eckes, *Diversity in Higher Education: The Consideration of Race in Hiring University Faculty*, 2005 BYU EDUC. & L.J. 33, 37 (2005). It is less clear how persuasive that empirical evidence would need to be. In the admissions cases, Justice O'Connor displayed very little interest in exercising independent judgment as to the proffered evidence's worth, deferring almost entirely to the expert judgment of university administrators that the empirical evidence presented supported their cause. *Id.* Her

a. Evidence of Educational Benefits

Take as an initial example the small body of empirical research focused on identifying race- or sex-correlated differences in teaching techniques. One influential study, generally representative of the type, reports results of a survey of over 16,000 faculty at 159 medium and highly selective higher educational institutions in 1989–90.³⁰⁴ The authors found statistically significant differences in the utilization of various instructional techniques across faculty sex and race.³⁰⁵ Female faculty members are more likely to use “cooperative learning” techniques; men are more likely to use “extensive lecturing”; women are more likely to assign “readings on Women/Gender issues”; Black faculty are more likely to assign “readings on racial/ethnic issues.”³⁰⁶ The authors argue that the results “strongly suggest that women and different racial/ethnic faculty have distinct teaching styles that influence both the content and delivery of knowledge in the classroom” and that, accordingly, “a diverse faculty is more likely to implement or learn about pedagogical methods known to improve learning outcomes.”³⁰⁷

There are obvious problems. The regression model fails to control for confounding factors, like class size or subject matter, and the outcome variable (self-reported use of particular teaching methodologies) is assumed, rather than shown, to provide educational benefits.³⁰⁸ Most importantly, the study’s emphasis on individual demographic characteristics means that we are not able to infer anything about the effects of diversity, properly understood as an ecological concept of the

application of “strict scrutiny” thus appears to have been not very strict. *See, e.g.*, Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 *MO. L. REV.* 1243 (2010).

304. Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 187, 196 (Gary Orfield & Michal Kurlaender eds., 2001); *see also* Anthony Lising Antonio, *Faculty of Color Reconsidered: Reassessing Contributions to Scholarship*, 73 *J. HIGHER EDUC.* 582, 591 (2002) (“Faculty of color are much more likely than are white faculty to place high importance on the affective, moral, and civic development of students.”); Paul D. Umbach, *The Contribution of Faculty of Color to Undergraduate Education*, 47 *RSCH. IN HIGHER EDUC.* 317, 332–34 (2006) (reporting survey evidence that minority and women faculty members “interact with students” significantly and substantively more than do white male faculty members, and that they are more likely to use “collaborative learning techniques” and to provide “higher order cognitive “ and “diversity related” activities).

305. Hurtado, *supra* note 304, at 194–95.

306. *Id.*

307. *Id.* at 196. Empirical claims that minority and female teachers are more effective than white or male students will also have to address the awkward, but widely accepted, sense that student teaching evaluations tend to rate minority and female professors as less effective than white or male professors. *Id.*

308. *Id.* at 192–96.

type described in Part II.C, on educational benefits.³⁰⁹ Indeed, the implication of the study is not that universities should build a diverse faculty, but that they should exclusively hire women and racial minorities as the most effective teachers.

Empirical studies of the interaction between instructor and student race or sex and student performance are also problematic. Studies focusing on sex (whether female students perform better when taught by female professors) suffer from serious methodological and data challenges and “provide mixed and frequently incompatible results.”³¹⁰ Studies focusing on race more consistently show that student performance (typically measured as performance on standardized exams) increases somewhat when students are taught by an instructor of the same race.³¹¹ However, those studies focus almost entirely on primary and secondary educational institutions (often in poor, majority-minority school districts)³¹² and are of questionable relevance to a university setting. University-focused studies are rare due to formidable econometric challenges.³¹³

A recent (and apparently only) example, published in the prestigious *American Economic Review*, analyzed student performance at a California community college.³¹⁴ Using sophisticated statistical techniques, the authors identified positive effects on student performance when taught by an instructor of the same race.³¹⁵ Black students performed better when taught by Black instructors (and other minorities performed better when taught by minority instructors). White students performed better when taught by whites. The policy implications of the study are awkward—the study suggests the desirability not of “diversity” in instruction, but of racial segregation.³¹⁶ A university seeking to improve measurable

309. See *id.* at 195.

310. Iryna Y. Johnson, *Female Faculty Role Models and Student Outcomes: A Caveat About Aggregation*, 55 RSCH. IN HIGHER EDUC. 686, 687 (2014); see also Robert W. Fairlie, Florian Hoffmann & Philip Oreopoulos, *A Community College Instructor Like Me: Race and Ethnicity Interactions in the Classroom*, 104 AM. ECON. REV. 2567, 2570 n.11 (2014) (citing several such studies and noting that results are “generally mixed”).

311. Ana María Villegas & Jacqueline Jordan Irvine, *Diversifying the Teaching Force: An Examination of Major Arguments*, 42 URB. REV. 175, 178–85 (2010).

312. See *id.* at 178–80.

313. For example, university students select their courses and instructors; the lack of random assignment makes reliable statistical inference highly challenging.

314. Fairlie, Hoffmann & Oreopoulos, *supra* note 310.

315. *Id.* at 2573–74, 2577. The authors describe the identified effects of same-race instruction as “large,” but they might just as easily be characterized as “small.” Minority students taught by minority professors were “1.2 to 2.8 percentage points more likely to pass classes . . . 2.0 to 2.9 percent less likely to drop out of classes . . . and 2.4 to 3.2 percentage points more likely to get a grade of B or higher . . .” *Id.* Effects were much stronger for Black-Black student/instructor interactions than for other-minority interactions. *Id.* at 2580–81.

316. As the authors themselves recognize. See *id.* at 2589.

educational outcomes should assign Black students to Black professors, and white to white.

The role model version of the diversity-educational benefits theory is also, surprisingly, poorly supported. A recent research-survey article (written by authors sympathetic to the promotion of diversity in education) concluded that “[g]iven the current emphasis on empirical-based decision-making in matters related to public policies, such lack of evidence dramatically limits the practical value of the role model argument.”³¹⁷ There is similarly little evidence that female instructors are better at steering female students into particular majors (along with the more fundamental problem that there is no obvious reason why influencing a student’s choice of major is reasonably viewed as an educational benefit).³¹⁸

There also appears to be no evidence of any sufficient quality that a diverse faculty succeeds in exposing students to a greater variety of viewpoints. Indeed, the claim that preferences are justified to promote viewpoint diversity seems in tension with the increasing number of empirical studies that show that universities are remarkably homogenous in terms of faculty political leanings and affiliations and have little interest in viewing that homogeneity as a problem worth addressing.³¹⁹ That uncomfortable fact, along with the failure of universities to require or to encourage their students to base course selection based upon instructor demographics (or on instructor viewpoint), calls into question the extent to which universities actually structure their curriculums to encourage students to obtain the benefits of faculty diversity that faculty diversity is said to promote. The danger is that a court reviewing a TOP program will view the university’s justificatory arguments in favor of faculty diversity as insincere. That universities do not act like they believe in the underlying causal logics supposedly motivating their faculty diversity efforts risks undermining a court’s willingness to defer to university expertise claiming that such efforts are compelling.

317. Villegas & Irvine, *supra* note 311, at 178.

318. See Brandice J. Canes & Harvey S. Rosen, *Following in Her Footsteps? Faculty Gender Composition and Women’s Choices of College Majors*, 48 *INDUS. & LAB. RELS. REV.* 486, 499 (1995) (reporting a lack of evidence that female instructors promote female undergraduate enrollments in science and engineering); see also Johnson, *supra* note 310, at 687.

319. See James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 *YALE L. & POL’Y REV.* 5, 8, 10, 12 (2005); Carol Goforth, *Diversity in Law School Faculty Hiring: Why It Is a Mistake to Make It All About Race*, 56 *U. LOUISVILLE L. REV.* 237, 244, 246–47 (2018). In discussions with colleagues about this point, defenders of preference-granting emphasize that the lack of ideological diversity on campus is largely due to intractable pipeline problems—that is, to the tendency of conservatives to prefer non-academic careers. The irony is that those same defenders will often just as quickly reject similar explanations for the underrepresentation of racial or gender minorities.

b. Evidence of Research Excellence

The diversity-research excellence thesis does not appear to have been subject to any meaningful empirical testing. The closest we see are the various studies attempting to identify correlations between individual-level faculty demographics and research “productivity” (usually measured through article counts).³²⁰ For example, some studies show that female faculty members tend to publish less than males.³²¹ Others show no statistically significant difference,³²² or a difference that disappears when controlling for other factors, like having school-aged children.³²³ Black faculty members have been shown, on average, to be no less productive than other faculty members.³²⁴ They have also been shown to be modestly less productive.³²⁵ One study reports that Asian faculty members are

320. See, e.g., Linda J. Sax, Linda Serra Hagedorn, Marisol Arredondo & Frank A. Dicrisi III, *Faculty Research Productivity: Exploring the Role of Gender and Family-Related Factors*, 43 RSCH. HIGHER EDUC. 423, 424 (2002); Paul Ramsden, *Describing and Explaining Research Productivity*, 28 HIGHER EDUC. 207, 219 (1994); Meghna Sabharwal, *Productivity and Leadership Patterns of Female Faculty Members in Public Administration*, 19 J. PUB. AFFS. EDUC. 73, 85 (2013); Frank Clemente, *Race and Research Productivity*, 5 J. BLACK STUD. 157, 163 (1974).

321. See, e.g., Sax, Hagedorn, Arredondo & Dicrisi III, *supra* note 320, at 424 (noting that “[s]tudies on research productivity generally reveal that women publish less than men” and citing numerous such studies); Yu Xie & Kimberlee A. Shauman, *Sex Differences in Research Productivity: New Evidence About an Old Puzzle*, 63 AM. SOCIO. REV. 847, 847 (1998) (noting that “[n]umerous studies have found that female scientists publish at lower rates than male scientists, and research efforts to explain this gender gap have been largely unsuccessful” but arguing that gender differences in productivity are declining); Vicki L. Hesli & Jae Mook Lee, *Faculty Research Productivity: Why Do Some of Our Colleagues Publish More than Others?*, 44 PS: POL. SCI. & POL. 393, 400 (2011) (reporting evidence that female political scientists publish significantly less than male political scientists).

322. Ramsden, *supra* note 320, at 219 (in a study of Australian universities, finding that gender does not predict research productivity).

323. Sabharwal, *supra* note 320, at 85.

324. Clemente, *supra* note 320, at 163 (finding no meaningful difference in research productivity between black and non-black sociologists); Sax, Hagedorn, Arredondo & Dicrisi III, *supra* note 320, at 431–32 (reporting only a “trivial” correlation between race and research productivity); Hesli & Lee, *supra* note 321, at 402 (reporting “inconsistent” evidence that minority political scientists are less research-productive).

325. Sax, Hagedorn, Arredondo & Dicrisi III, *supra* note 320, at 432 (citing studies); Antonio, *supra* note 304, at 590–91 (presenting statistical evidence in the form of partial correlations that “white faculty appear to be slightly more prolific than faculty of color in terms of publishing journal articles, book chapters, and books.”). However, Antonio reports survey evidence suggesting that “faculty of color are much more likely to place a high degree of personal importance on engaging in research activities, spend more time per week engaged in research and writing, and feel that the opportunity to pursue research was a very important consideration in choosing a career in academe.” *Id.* at 591.

somewhat more productive than their white faculty members, and much more productive than Black faculty members.³²⁶

The focus on the race or sex of individual faculty members means that these studies have nothing to say about whether diversity as an ecological concept is correlated with or causes research excellence, and the results suggest that a department should exclusively hire faculty possessing those racial identities correlated with superior research performance. If more is better, if Asians on average publish more than whites and Blacks, and men more than women, then the best hiring strategy for maximizing research productivity would be to hire only Asian men. Such a strategy would lead, obviously, to a manifest *lack* of race or sex diversity.

A more acceptable theory might claim that diversified faculties collectively produce better research through a mechanism similar to the “better class discussion” dynamic posited in the admissions cases. Maybe a department that includes a particular mix of whites and minorities or of men and women can be expected to produce more fruitful and dynamic intra-departmental discussions and debates that will inform and inspire more interesting and impactful research. There is no empirical evidence supporting such a theory, however, and the theory’s depiction of intra-departmental interactions would seem to reflect a romanticized and outdated (pre-internet and perhaps even pre-airplane) vision of research production.³²⁷ Faculty members are highly specialized, and departments typically do not hire multiple faculty members working in a particular area of research.³²⁸

The small size and narrowly focused and intellectually dispersed interests of the typical department mean that a faculty member’s primary research community will almost always exist outside of the department in which he is employed, consisting of professors working on similar issues

326. Sabharwal, *supra* note 320, at 82–84.

327. For a decidedly unromantic picture, see WILLIAM G. TIERNEY & ESTELA MARA BENSIMON, PROMOTION AND TENURE: COMMUNITY AND SOCIALIZATION IN ACADEME 128 (1996) (“Good teaching is not particularly valued, and service is often seen as waste of time. Research is pursued not because of any intrinsic interest, but in order to attain job security. Collegial relationships are sporadic at best and intellectual conversation appears to be on the verge of extinction.”). *See also* Colleen Flaherty, *So Much to Do, So Little Time*, INSIDE HIGHER ED (Apr. 9, 2014), <https://www.insidehighered.com/news/2014/04/09/research-shows-professors-work-long-hours-and-spend-much-day-meetings> [<https://perma.cc/55EK-TG5M>] (discussing a study showing that academics “work[] mostly on their own” and spend very little time with their colleagues).

328. *See* Erin Leahey, Research Report, *Gender Differences in Productivity: Research Specializations as a Missing Link*, 20 GENDER & SOC’Y 754, 755 (2006).

from positions at other domestic and foreign universities.³²⁹ High-quality research is far more likely to be inspired by and collaboratively produced through cross- or extra-institutional interactions than by run-ins in the departmental faculty lounge—if the department even has a faculty lounge. The anachronistic nature of the claim that research innovations spring from fortuitous intradepartmental interactions is further undermined by the tendency of modern faculty to work mostly from home (or from the local coffee shop). The department, as a physical space, is increasingly irrelevant.

3. THE PROBLEM OF NARROW TAILORING

Equal Protection Clause jurisprudence requires regulatory distinctions based upon suspect classifications to be necessary (or “narrowly tailored”),³³⁰ a requirement that will focus a court’s attention on reasonably available and effective race- and sex-neutral alternatives. Justice O’Connor’s opinion in *Grutter* failed to engage in a very rigorous analysis of regulatory alternatives,³³¹ but the majority in the recent *Fisher* cases has signaled a greater attention to the issue.³³²

The ready availability of regulatory alternatives would seem a major problem for TOPs. If TOPs are justified on the ground that female and minority faculty are more likely to use effective teaching techniques, a readily available and race- and sex-neutral alternative is to train incoming faculty in the use of such techniques and to require such techniques to be used in the classroom.³³³ Candidates of any race or sex may also be screened for teaching effectiveness by integrating teaching evaluations into the search process (by, for example, having each candidate guest-teach a class, or teach a mock class, as part of the interview). Similar alternatives exist as to the mentorship justification: white males—like anyone else—could, one would think, be trained to serve as effective mentors to minorities and women.³³⁴

329. Alger, *supra* note 291, at 195. Alger fails to recognize that the point undermines his argument for the necessity of department-level faculty affirmative action. *See id.*

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

331. *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003).

332. *See Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 312 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2212–14 (2016).

333. Hurtado recognizes the possibility that “faculty can be trained to facilitate more active learning pedagogies through faculty development programs,” though she maintains that few such training programs exist in practice. Hurtado, *supra* note 304, at 199.

334. Christine A. Stanley & Yvonna S. Lincoln, *Cross-Race Faculty Mentoring*, 37 *CHANGE* 44, 48–50 (2005) (providing ten “lessons” for cross-race mentoring); Villegas & Irvine, *supra* note 311, at 187 (noting that “[i]t would be simplistic to assume that all

Similarly, if TOPs are justified on the ground that minority or female faculty are more likely to teach certain courses, or to expound certain views in their lectures, the obvious alternative is to conduct race- and sex-neutral faculty searches based on the department's curricular or viewpoint needs and interests, or to encourage or require faculty teaching particular courses to cover desired views and issues.³³⁵ An argument that one needs to be a minority to effectively teach a course involving issues of interest to women or minorities, or to effectively convey a typically female or minority point of view, seems a dangerous one for a university to make, as it contradicts the professional essence of the academic teacher as someone skilled at mastering and conveying the complex ideas of others and equipping students to discern and appreciate those ideas' strengths and weaknesses.³³⁶

The usual understanding in the university is that one need not be a Marxist to teach Marx.³³⁷ Departmental administrators routinely face curricular needs that require drafting reluctant professors to teach courses that are far removed from their PhD training or life experiences. The expectation is that the professor is smart and diligent enough to display sufficient mastery of new material even if his knowledge is rather thin at the outset. To justify an argument that normal course-assignment practices and procedures (or normal understandings of what makes a professor qualified to teach a particular subject) are not applicable to subjects involving issues of race or sex requires universities to adopt a rhetorical position uncomfortably close to race or sex essentialism.³³⁸

racial/ethnic minority teachers are effective with minority students by virtue of their race/ethnicity" and suggesting the importance of training).

335. It might be argued that administrators of public universities are prevented via the First Amendment from controlling the content of professor speech in the classroom. *But see* Josh Blackman, *#Heckled*, 18 FIRST AMEND. L. REV. 1, 31–32 (2019) (arguing that the better view is that because the classroom is not a public forum, university administrators enjoy significant latitude to direct the content of faculty lectures, restricted only by a background norm of academic freedom).

336. *See* Donald R. Cruickshank & Donald Haefele, *Good Teachers, Plural*, 58 EDUC. LEADERSHIP 26 (2001) (reviewing the professional essence of "good" teachers).

337. *See id.* at 28 (suggesting that expertise is not a requirement for good teaching).

338. For an example of something close to essentialism, see Penelope J. Moore & Susan D. Toliver, *Intraracial Dynamics of Black Professors' and Black Students' Communication in Traditionally White Colleges and Universities*, 40 J. BLACK STUD. 932, 933 (2010) (asserting that "[w]hite faculty members are not equipped" to "relate to [Black] students with genuineness, authenticity, and creativity," whereas Black faculty members, who share with Black students a "common African American culture and experience," are able to do so). The authors further assert that the "cultural bilingualism of Black faculty members gives them, and in turn their institutions, an increased ability to be effective in the classroom." *Id.* Whites, who lack cultural bilingualism, can "[a]t best . . . only empathize with Black students' academic challenges and struggles." *Id.*

The diversity-research excellence thesis faces an equally severe narrow tailoring problem. The obvious race- and sex-neutral alternative is to evaluate all candidates, of any race or sex, on the demonstrated quality and promise of their existing research, as is regularly done through the normal hiring process via an examination of a candidate's past research, his forward-looking research agenda, his reference letters, and his job talk. Even if scholars of a particular race or gender are more likely than others to produce certain kinds of scholarship, the institutional costs of soliciting and considering applications from all who care to apply are so low that limiting solicitation and consideration merely to those groups more likely to be qualified could probably not be justified even under a weak rational-basis standard, let alone under strict scrutiny.

4. THE INAPPLICABILITY OF THE ACADEMIC ABSTENTION DOCTRINE

In the admissions cases the consideration of race was admitted as a part of the diversity-weighting process but minimized as just one of “many possible,” but incompletely enumerated, “bases for diversity admissions.”³³⁹ Moreover, the weight that race might play in the admissions process was not fixed but would vary according to the complex, qualitative interplay of all other desiderata.³⁴⁰ This aspect of the litigation strategy was shrewd because it made the admissions process, and the role that race plays within it, exceedingly opaque.³⁴¹ Opacity makes it difficult for applicants denied admission to legally challenge their denial with a claim of race-based discrimination because they can never know whether, or how much, race played a role in the university's individualized decision to deny them admission.³⁴² It also allows universities to portray their admissions processes as necessarily entailing complicated, fine-grained judgements that courts lack the expertise to second-guess, inviting application of the academic privilege doctrine.³⁴³

339. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

340. *See id.*

341. For a good example of such opacity, note Justice Ginsburg's dissent in *Fisher I* that characterized the University of Texas's challenged admissions policy as one which “flexibly considers race only as a factor of a factor of a factor of a factor in the calculus.” *Fisher v. Univ. of Tex. At Austin (Fisher I)*, 570 U.S. 297, 336 (2013) (Ginsburg, J., dissenting).

342. Indeed, one of the principle reasons that the plaintiff in the *Fisher* cases lost was that she could not show that she was not treated “equally” under Texas's complicated “Top Ten Percent” admissions plan. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208–09 (2016).

343. *See* Terrence Leas, *Academic Abstention*, in *ENCYCLOPEDIA OF LAW AND HIGHER EDUCATION* 1, 1 (Charles J. Russo, ed. 2010).

That doctrine is reflected in the frequently articulated reluctance of courts to interfere with the operations of institutions of higher education.³⁴⁴ The basic idea, which is closely intertwined rhetorically with a vague theory of “academic freedom,” is that “the delicate and complex nature of academic institutions demand[s] . . . unfettered autonomy and respect for the traditional means of governance and collegiality [that] would permit higher education institutions to achieve their lofty goals.”³⁴⁵

For example, an early faculty discrimination decision from the Second Circuit, *Faro v. New York University*,³⁴⁶ asserted that “[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.”³⁴⁷ The case involved an untenured female professor who claimed that her position was terminated because of sex discrimination.³⁴⁸ The court rejected the claim, expressing great discomfort at being asked—as it saw the plaintiff asking—to substitute itself for the “subjective judgments” of the disappointed candidate’s faculty colleagues for the purposes of deciding “why the unsuccessful [candidate] was not as well qualified as the successful.”³⁴⁹ The court’s articulation of an extremely deferential standard of review proved popular to other courts as an avoidance strategy. Indeed, some courts seem to have viewed discrimination claims by faculty as close to inherently non-justiciable.³⁵⁰

To modern eyes, the persuasiveness of the *Faro* court’s invocation of its own incompetence in order to avoid a potentially difficult decision is undermined by the court’s snide and belittling description of the plaintiff as a “modern Jeanne d’Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice.”³⁵¹ In *Faro*’s defense, however, litigation in other courts seemed to show that discrimination claims could be enormously costly and complex. For example, in one highly publicized tenure denial case involving a female professor at the University of Pittsburgh, the court oversaw a seventy-four-day trial involving the presentation and evaluation

344. For a concise discussion of the abstention doctrine, see *id.* Leas traces the origins to the 1819 decision in *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819). *Id.*

345. *Id.*

346. 502 F.2d 1129 (2d Cir. 1974).

347. *Id.* at 1231–32.

348. *Id.* at 1230.

349. *Id.* at 1232–33.

350. See, e.g., *Lewis v. Chi. State Coll.*, 299 F. Supp. 1357, 1359–60 (N.D. Ill. 1969).

351. *Faro*, 502 F.2d at 1231.

of a complex array of testimony and evidence.³⁵² The court complained of the “long and exhausting . . . litigation [that] pos[ed] many difficulties for the court as well as for counsel” and that put “the court . . . way beyond its field of expertise.”³⁵³ On the other hand, it recognized the “important and serious issues involved” in academic sex-discrimination claims, and that Congress, through Title VII, “has mandated that it . . . be eradicated.”³⁵⁴ And it wistfully expressed the hope that “[c]olleges and universities [would] understand this [congressional mandate] and guide themselves accordingly.”³⁵⁵

The obvious dilemma is that the doctrine, as an anti-interventionist policy, risks leaving universities practically unfettered by anti-discrimination law.³⁵⁶ Later courts, sensitive to that risk, suggested that review of faculty-related employment decisions for non-discrimination need not be that difficult.³⁵⁷ Others said that, even if such cases were difficult, meaningful review by courts was required by the very purpose of the 1972 amendments to Title VII.³⁵⁸ Over the course of time, courts appear to have grown more comfortable reviewing allegedly discriminatory university employment decisions under a “good faith” standard that looks for evidence of overt discrimination, and where there is none, through an examination of whether the university’s “professed legitimate academic reasons” are pretextual.³⁵⁹

352. *Johnson v. Univ. of Pittsburgh*, 435 F. Supp. 1328, 1331–32 (W.D. Pa. 1977).

353. *Id.* at 1371.

354. *Id.*

355. *Id.*

356. *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 n.8 (1978); Edward B. Fiske, *About Education: More Women Seek Redress*, N.Y. TIMES, Mar. 26, 1975, at 35 (noting the concern that the principle of “academic freedom” and opaque faculty hiring practices would impede court challenges to gender discrimination).

357. *See, e.g., Huang v. Coll. of the Holy Cross*, 436 F. Supp. 639 (D. Mass. 1977). The case involved a claim of discrimination in a tenure decision by an “Oriental” faculty member. *Id.* The court recognized that “[t]enure decisions normally involve difficult qualitative judgments on whether the candidate’s qualifications meet the needs of the College in terms of curriculum courses, teaching excellence, and the condition of weakness or strength of the particular department.” *Id.* at 653. However, it rejected the implication of *Faro* and related cases that the dispute was essentially non-judicial: “to the extent that the College has established well-defined procedures and broadly defined criteria for the decision of tenure,” review by a court was feasible. *Id.* On the evidence presented, the court found no discrimination. *Id.* at 656.

358. *See, e.g., Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979) (rejecting *Faro*’s articulation of the academic abstention doctrine on the ground that “Congress [through the 1972 amendments] must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions.”).

359. *Leas, supra* note 343, at 2.

That trend toward more meaningful review of university employment-related decisions tracks the relative lack of deference that reviewing courts typically give to private business claims that sex-based discrimination has a bona fide and necessary business purpose.³⁶⁰ Given that university policies and procedures have become more formalized over the years,³⁶¹ court review under a good faith standard has become even more feasible. As Leas notes, “when educational officials enforce their rules and regulations inconsistently, the likelihood of subterfuge may override any judicial predilection for deference, thereby leading to possible litigation.”³⁶²

The point for present purposes is twofold. First, modern courts may be suspicious of exaggerated claims of academic privilege as a defense to meaningful judicial scrutiny of the TOP process, especially where the university’s TOP program seems inconsistent with its own formally articulated ideals for faculty hiring.³⁶³ Second, the way in which race or sex is incorporated into TOPs fails to raise concerns of judicial incompetence equivalent to those which motivated the early tenure-discrimination decisions.³⁶⁴ TOPs use race and sex crudely, as a single-factor gateway desideratum that determines whether a university will solicit and consider an application for a particular position.³⁶⁵ That is, race and sex are not part of a complex weighing and balancing exercise of qualitative indicators of merit; they precede it. Whether a university is legally entitled to use race and sex in this way is a question that should be well within the capabilities of a normally functioning court to decide.

5. A NOTE ON CRITICAL MASS

In the admissions context, preference-granting is often justified as constitutional through reference to a “critical mass.”³⁶⁶ Despite the

360. Benjamin O. Hoerner, *The Role-Modeling BFOQ: Court Confusion and Educational Promise*, 16 U. PA. J. BUS. L. 1211, 1228–29 (2014).

361. See Francisco O. Ramirez & Tom Christensen, *The Formalization of the University Rules, Roots, and Routes*, 65 HIGHER EDUC. 695 (2013).

362. Leas, *supra* note 343, at 2.

363. See *id.*

364. See, e.g., *Huang v. Coll. of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977).

365. See Kåri Knutson, *Enhancement to Faculty Recruitment Program to Help Diversify Faculty*, UNIV. OF WIS.-MADISON (Sept. 26, 2018), <https://news.wisc.edu/enhancement-to-faculty-recruitment-program-to-help-diversify-faculty/> [<https://perma.cc/Q4J2-ZJ7J>].

366. Critical mass theory is usually traced back to work by the sociologist Rosabeth Moss Kanter on “tokenism” and women in the corporation. Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AMER. J. SOC. 965, 966–67 (1977). Kanter guesses that tokenism begins

theory's pedigree and modern ubiquity, even supporters of the theory as applied to university admissions admit that it is poorly articulated.³⁶⁷ Under the theory, universities claim to take race into account only to the point of ensuring that their student bodies contain enough minorities—a critical mass—to ensure that individual minorities feel comfortable expressing their views, where the free expression of those views promotes educational benefits.³⁶⁸ Universities are careful not to quantify their critical-mass targets in order to avoid charges of implementing legally and politically problematic quotas, but also probably because they have no real idea of where the threshold of criticality may lie. The failure of critical mass theory to predict a theoretically informed threshold of criticality is well-known.³⁶⁹

It nonetheless seems clear that critical mass is (or should be) very different from proportional representation. Discussions of admissions-related critical mass imply that the mass necessary to sufficiently reduce student inhibition in the classroom is uniform across minority groups.³⁷⁰ If critical mass is, in fact, just another way of justifying preferences to achieve proportional representation, it seems doubtful that proportional representation for extreme minorities—say, Native Americans—would have any hope of alleviating the inhibitions said to flow from being the only, or one of just a few, members of that particular minority group. If a racial preference regime stands little or no chance of actually achieving the end invoked to justify it, the regime will be unlikely to pass “strict scrutiny” because the regime will not be viewed as necessary.

The critical mass idea extends poorly to faculty hiring. On the one hand, and as I describe more fully below, the employment-law regime forces the discussion of employment-related affirmative action squarely in the direction of proportional representation. But taken on its own terms, it

to diminish once a subgroup reaches 15 percent of the relevant population. *See id.* at 967 fig. 1. Kanter expresses as her ideal a “balanced” workforce of equal proportions of men and women. *See id.* at 966–67. The obvious problem with extending Kanter’s theory to racial minorities is that racial minorities exist as lower proportions of the overall population. Kanter’s ideal of “balance” is impossible when it comes to demographic distinctions other than male-female. Even getting past her minimal threshold for avoiding “tokenism” is probably unobtainable for some minority groups.

367. Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 EDUC. RESEARCHER 115, 115 (2014).

368. *Id.* at 117.

369. Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 2 J. BUS. ETHICS 299, 302 (2011). In the admissions context, scholars have sought to get around the problem of lack of quantification by suggesting that the theory, properly understood, is necessarily so context-dependent that quantification, at least in terms of a generally applicable threshold, is impossible. Garces & Jayakumar, *supra* note 367, at 115–16.

370. Garces & Jayakumar, *supra* note 367, at 121–22.

is not at all clear what a “critical mass” of faculty might be or what outcome we hope it might achieve. That goal cannot be to help alleviate faculty inhibition in the classroom because faculty teach individually and the minority faculty member will almost always be the only faculty member on the podium at a given time.³⁷¹ It is the very nature of the job to be comfortable speaking authoritatively to students from a position that is alone and apart. Likewise, that goal cannot be that a critical mass of faculty is necessary to alleviate student inhibition in the classroom. It could be hypothesized that minority students will be more likely to engage in class discussion when a minority faculty member is teaching the class, but that hypothesis is one about the race of the particular professor teaching the class and not about whether a critical mass of such professors exists in some larger space.

It may initially seem to make somewhat more sense to talk about a achieving a critical mass of minority faculty at the departmental (as opposed to the classroom) level. However, that alternative focus shifts the policy end of achieving a critical mass from improved student educational outcomes to improved quality of professional life for minority faculty themselves. The academic literature contains numerous anecdotal and social-scientific (typically, qualitative) accounts of the professional, social and psychological costs that minority faculty members incur as a consequence of being a minority on campus.³⁷² Achieving a critical department-level mass of minority faculty may, in theory, help to alleviate those costs by providing a community of support. Indeed, universities sometimes implement a critical mass policy by deliberately hiring multiple minority faculty members in the same hiring cycle with the aim of “lessen[ing] the sense of isolation and tokenism that often makes the new hire feel devalued.”³⁷³ The technique of hiring multiple minorities in a single cycle with the aim of creating a ready-made minority friend group is often referred to as a “cluster” search and is presented in the literature as “one of the best retention strategies” for minority faculty members.³⁷⁴

Here, though, the theory must confront the fact that the small size of most faculty departments means that racial minorities (though perhaps not women) will, even under a preference-granting regime, be represented in

371. It would also seem odd to argue that a critical mass of minority faculty is necessary to educate white faculty members about the perils of racism or sexism. Academics are extensively exposed to anti-bigotry thought and norms throughout their education and, collectively, enter the professoriate highly sympathetic to the cause.

372. See, e.g., Christine A. Stanley, *Coloring the Academic Landscape: Faculty of Color Breaking the Silence in Predominantly White Colleges and Universities*, 43 AM. EDUC. RSCH. J. 701 (2006).

373. CAROLINE SOTELLO VIERNES TURNER, *DIVERSIFYING THE FACULTY* 26 (2002).

374. *Id.*

an absolute sense only in small numbers, even if their departmental presence is proportionate to labor market supply. A meaningful critical mass of faculty will only be possible if minorities are greatly overrepresented compared to the relevant labor pool, something which employment law does not permit the use of race-or sex-based preference-granting to achieve.³⁷⁵

Moreover, it is not clear that a court would find such a policy aim, improving the professional life of minority faculty members, “compelling.”³⁷⁶ Being one of a small handful of minorities among a much larger group of whites is undoubtedly difficult, and minority faculty members certainly face professional, social, and psychological challenges, due to their minority status, that white professors do not generally face.³⁷⁷ As decent human beings, we should care that minority faculty members may feel isolated or unwelcome, and we should do what we can to alleviate those feelings. But to recognize the elimination of the professional, social, or psychological disabilities of minority status as a *constitutional* justification for racial preferences, i.e., as a compelling state interest, would greatly expand the scope of application of preference-granting affirmative action in ways that a modern court or legislature is likely to find unpalatable.

B. Title VII

Title VII provides protection from employment discrimination that overlaps with but is not identical to that provided by the Equal Protection Clause.³⁷⁸ For the purposes of this Article, 42 U.S.C. § 2000e-2(a) is the most relevant section. It is unlawful for employers:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

375. See 42 U.S.C. § 2000e-2(a).

376. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007). Let me emphasize that in saying so I in no way mean to diminish the subjectively felt experiences of minority faculty members on campus.

377. See generally Stanley, *supra* note 372.

378. *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 632 (1987) (“[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans.”).

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³⁷⁹

Title VII can be enforced directly by the EEOC administratively or through litigation.³⁸⁰ Individuals harmed by an unlawful employment practice may also pursue a private enforcement action, provided that they have first filed a complaint with the EEOC or a state fair employment practice agency.³⁸¹

The Supreme Court's recent *Bostock v. Clayton County*³⁸² decision highlighted the role that causal theory sometimes plays in employment-discrimination claims.³⁸³ Generally speaking, the plaintiff must demonstrate that the employer took the challenged action "because of" a prohibited factor. Causality may be legally necessary, but what the law means by causality is inconsistent if not incoherent.³⁸⁴ The *Bostock* decision demonstrates a preference for a but-for theory, informed by single-factor counterfactual analysis and ignoring issues of multiple causation, but alternative theories, such as "motivating factor" theory, remain available in other contexts.³⁸⁵

Proving causality in a TOP challenge would, under either theory, seem relatively easy. The inquiry here is different from that in determining whether the plaintiff suffered an adverse consequence from the challenged action. We look at whether the action itself was "caused" by the employer using race or sex in an impermissible way.³⁸⁶ Because TOPs are intentionally discriminatory—that is, because they, by design, use race and sex to determine who is told of a potential position, and to determine whether a person is interviewed, and whether a hire is financed or bureaucratically permitted, it is clear that TOPs are both "motivated" by

379. 42 U.S.C. § 2000e-2(a).

380. See 42 U.S.C. § 2000e-4(g).

381. *Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/fact-sheet/filing-charge> [<https://perma.cc/DZY9-YZ2L>] (last visited Oct. 24, 2020).

382. 140 S. Ct. 1731 (2020).

383. *Id.*

384. See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 493 (2006); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 652 (2008).

385. See Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, *supra* note 384, for an overview of the legislative and jurisprudential history of "motivating factor" theories of causation in the employment law context. Katz describes this theory as "minimally" causal, though we could also view it, potentially, as a folk version of what philosophers call a non-causal theory of reason-based agency. See Stewart C. Goetz, *A Noncausal Theory of Agency*, 49 PHIL. & PHENOMENOLOGICAL RSCH. 303 (1988).

386. See *infra* note 394 and accompanying text.

considerations of race and sex, and that such considerations “cause” such practices in a but-for sense. Indeed, race and sex are not just one causal factor behind the programs, but arguably the primary or predominate factor.

As an area of legal practice, Title VII presents a host of other complex and interesting legal issues, most of which are beyond the scope of this Article. This section focuses on two issues of specific relevance to our consideration of the legality of TOPs. First, I examine the extent to which TOPs are designed to limit exposure to private enforcement actions. Second, I discuss the main potential Title VII defenses to TOPs, assuming that the programs are correctly classified as instances of intentional discrimination (“disparate treatment”) on the basis of protected characteristics.

1. AVOIDING A “PERSON AGGRIEVED”

Under Title VII, an individual plaintiff must, as a matter of statutory standing, be a “person aggrieved” by the practice, a term undefined in Title VII and whose scope is subject to some debate.³⁸⁷ TOPs are designed to reduce the risk of private legal challenge under Title VII by making it difficult to identify “persons aggrieved” who have statutory standing to sue.³⁸⁸ By structuring TOP searches as non-searches, in which no applications are officially solicited (or by pulling non-competitive targets out of a facially neutral search in order to consider them for a *sui generis* position), and by formally evaluating targets in isolation from other would-be applicants, candidates who might have been competitive for a TOP position but-for their race or sex will not know about the position or that they have been denied an opportunity to apply and compete. With no sense of aggrievement, they will never think to complain.

In general, it is true that Title VII plaintiffs challenging a decision not to hire will usually have applied for the position which they complain to have been illegally denied. However, courts are sensitive to context and have shown some willingness to relax the usual expectation of application.³⁸⁹ It is also important to note that Section 2000e-2(a)(2)—the

387. See Ernest F. Lidge III, *A “Person Aggrieved”: Who May Sue Under Title VII?*, 40 U. MEM. L. REV. 797, 798–99 (2010).

388. The difficulty of identifying whites harmed by preference-granting affirmative action has long been recognized by proponents of preferential regimes as providing universities with both political and legal cover. See Douglas N. Husak, *Preferential Hiring and Reverse Discrimination in Favor of Blacks: A Moral Analysis*, 23 AM. J. JURIS. 143, 155–56 (1978).

389. See, e.g., *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985) (holding that a plaintiff could sue under Title VII even though they had not applied for an unadvertised meat-cutter position); *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124–

Title VII section prohibiting the segregation or classification of applicants by race—requires “only a tendency to deprive a person of employment opportunities.”³⁹⁰ That focus on “tendency” means that subsection (a)(2) “cast[s] a wider net” than the more frequently litigated subsection (a)(1), and that the plaintiff’s burden of proving an adverse effect may be lighter under the former than the latter, which “speaks more concretely in terms of actions that ‘discriminate against any individual.’”³⁹¹

It would thus be a mistake to think that a potential plaintiff’s failure to formally apply for a TOP position serves as a legal (rather than a practical) barrier to bringing an individual challenge. The relevant context here is an increasingly formalized and routinized practice of faculty recruitment and hiring, especially at the entry level. Would-be applicants, through their graduate school training, are socialized to expect universities to advertise vacant faculty positions and to fill those positions, in many cases, through centralized, discipline-specific job fairs.³⁹² Those expectations discourage spontaneous applications to departments that have failed to advertise vacant positions in the usual fora. University faculty hiring is also sporadic and infrequent, and the qualifications for vacant positions will be highly specialized (as to discipline of terminal degree, primary subjects of research, curricular areas of expertise and teaching interest, record of publication). At universities, turnover is

25 (9th Cir. 2000) (holding that a faculty candidate need not have formally applied for a tenure-track position to establish a prima facie case of employment discrimination where the context suggested, among other things, that the university had a practice of hiring candidates without requiring formal applications); N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 56.02 (2020) (“As with non-academic employment, in cases involving initial decisions to hire in the academic setting, once the plaintiff has carried the usually easy burden of showing that he or she belonged to a group protected under Title VII, a showing that the plaintiff applied for the job in question is normally required. But as to challenged promotion or tenure decisions, proof of formal application may in certain circumstances be unnecessary.”).

390. *U.S. Equal Emp. Opportunity Comm’n v. AutoZone, Inc.*, 860 F.3d 564, 569 (7th Cir. 2017).

391. *Id.*

392. In some disciplines, as in law, the relevant job fair will provide a publication in which departments advertise their vacant positions; they may also include a resume bank which to which would-be candidates submit their summary qualifications and which departmental hiring committees peruse to identify candidates for screening or full-length interviews. Participation in a resume bank—and especially participation in a discipline’s main resume bank—could potentially satisfy the “application” requirement of Title VII and a government contractor’s use of such a database may be subject to OFCCP regulation. John B. Moretta, *Just Who Is an Applicant?: The Impact of Electronic Resumes and Job Search Engines on Employment Discrimination Law*, 2 J. HIGH TECH. L. 123 (2003); see also *Internet Applicant Recordkeeping Rule*, OFF. OF FED. CONT. PROGRAMS, <https://www.dol.gov/agencies/ofccp/faqs/internet-applicants#Q5RK> (last visited Nov. 29, 2020) (describing OFCCP policy regarding electronic resume review).

infrequent,³⁹³ and qualifications are both high and specific. The probability that a given university department will have a relevant position vacant in a given candidate's zone of specialized qualification is, in a given year, quite low. Requiring would-be faculty candidates to spontaneously apply for unadvertised (and probably non-existent) vacant positions at universities across the nation in order to preserve their ability to sue for being illegally denied the opportunity to (knowingly) apply for the one or two actually available positions for which they are qualified is socially wasteful. The waste seems especially significant given that applying for faculty jobs is far more time-consuming than is, say, applying for a job at a fast-food restaurant. Cover letters must be personalized, potentially hundreds of pages of supporting materials assembled and transmitted, professor-recommenders bothered to draft, address, and mail detailed letters of recommendation, and so on.

These realities strongly suggest that the relevant legal question in an individual challenge to a TOP program is most reasonably viewed as whether the complainant was illegally denied an opportunity to apply for a position, for which he would have been qualified, by virtue of the employer's race- or sex-conscious recruitment practice. In that understanding the plaintiff's failure to apply is not irrelevant—it is the essence of his claim of employment discrimination. Moreover, the plaintiff probably need not prove that, absent the discriminatory practice that prevented or discouraged his application, he would have been selected as the best-qualified applicant. Rather, the injury is better viewed as the denial of his opportunity to compete on a race-neutral basis, with the plaintiff bearing the burden of showing that he was minimally qualified to be a plausible competitor.³⁹⁴

393. See Ronald Ehrenberg, Hirschel Kasper & Daniel Rees, *Faculty Turnover at American Colleges and Universities: Analyses of AAUP Data 5* (Nat'l Bureau of Econ. Rsch., Working Paper No. 3239, 1990).

394. This context-sensitive and flexible approach to understanding the legal significance of the failure to apply (and of how to conceptualize the plaintiff's legal injury) is well-established in the Equal Protection context. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (noting that the plaintiff had constitutional standing because his injury was the medical school's "decision not to permit [him] to compete" for a position because of his race"); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (describing a race-based set-aside program's constitutional infirmity as flowing from its denial of "certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race"); *Ne. Fla. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993). The Title VII version of this approach to deterred non-applicants can be traced back to the Supreme Court's opinion in *International Brotherhood of Teamsters*, in which the Court rejected "the company's assertion that a person who has not actually applied for a job can never . . . prevail." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977). For a more recent application in the university context, see *Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F. 3d 968, 976 (9th Cir. 1994), but see also *Whalen v. Rubin*, 91 F.3d 1041, 1045–46 (7th Cir. 1996) (noting that plaintiffs in Title VII cases still

TOPs are thus similar to the word-of-mouth, or nepotistic, applicant-referral systems successfully challenged in the 1970s for perpetuating segregated patterns of hiring through a failure to post vacancies and to select hires through a competitive application process.³⁹⁵ However, TOPs seem more legally problematic because, unlike those earlier regimes, TOPs are discriminatory by design. Because they are discriminatory by design, the TOP plaintiff will be able to avoid the burdensome need to produce statistical evidence showing, in Title VII jargon, a “disparate impact” of the employment practice. Instead, he can challenge the TOP program directly as an intentionally discriminatory incidence of “disparate treatment.”³⁹⁶ That litigation posture avoids the complex burden-shifting regime applicable to disparate-impact claims and may have the additional (and potentially quite substantial) benefits of access to punitive damages and a right to trial by jury.³⁹⁷

2. AFFIRMATIVE ACTION PLANS UNDER TITLE VII

The idea that Title VII allows race- or sex-conscious preferences in hiring, despite clearly establishing non-discrimination as the regime’s core norm, rests uneasily upon *United Steelworkers of America v. Weber*.³⁹⁸ While no federal court of appeals appears to have ever accepted a diversity rationale to justify intentional discrimination under Title VII, Title VII may, in limited cases, allow such discrimination as part of a valid affirmative action “plan.”³⁹⁹ The world of *Weber* is a distant one. The case involved an allegedly “voluntary” and “temporary” agreement between a

need to prove “injury” and suggesting that a total of lack of qualification for a position means that a plaintiff has not been injured by an allegedly discriminatory employment practice).

395. For a collection of early cases, see Michael A. DiSabatino, Annotation, *Giving Preference to Relatives of Employees When Job Openings Occur as Violation of Title VII of Civil Rights Act of 1964*, 42 U.S.C.A. §§ 2000e et seq., 37 A.L.R. FED. 15 (1978).

396. In Title VII practice, claims of intentional discrimination are referred to as claims of “disparate treatment.” To succeed, the plaintiff must demonstrate “that the defendant or its agents considered race, national origin, sex, or religion in the decisionmaking process.” George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1298 (1987). In contrast, “disparate impact” claims which involve a facially neutral employment practice such as physical-ability testing, must show an unjustified and disproportionate adverse effect on a protected class. For a critical overview of this dichotomy, see William R. Corbett, *Breaking Dichotomies at the Core of Employment Discrimination Law*, 45 FLA. STATE U. L. REV. 763, 772–80 (2018).

397. Corbett, *supra* note 396, at 771–72, 771 n.37.

398. 443 U.S. 193, 208–09 (1979).

399. Jill Hale, *Private Employers & Minority Preferences: Will Something Other than a Remedial Justification Be Sufficient?*, 55 S. TEX. L. REV. 143, 160–61 (2013).

blue-collar union and industry to set aside a portion of openings in in-plant craft-training programs for Black employees. The industry (and unions) had a recent history of overt discrimination in the allocation of skilled positions, and the “voluntary” agreement took place under threat of federal government intervention. The factual and policy context of modern faculty hiring is obviously much different.

At the time, *Weber* ignited concerns on the political right that the Court was moving toward an understanding of Title VII that might not just permit aggressive affirmative action, such as racial or sex-based quotas or set-asides, but would require them whenever an employer’s workforce failed to reflect labor pool demographics.⁴⁰⁰ That conservative nightmare never came to pass, and more recent jurisprudence and commentary suggests that we understand *Weber* as a logically and factually flawed product of a peculiar time and context.⁴⁰¹

A university seeking to rely upon whatever remains of *Weber*, or upon the later Title VII case of *Johnson v. Transportation Agency, Santa Clara County*,⁴⁰² will have to demonstrate either a recent history of actual discrimination⁴⁰³ or a “manifest [demographic] imbalance” in

400. HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION* 159–65 (1991).

401. See Kingsley R. Browne, *Title VII and Diversity*, 14 NEV. L.J. 806, 810 (2014); David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033, 1099–100 (2019) (noting that modern federal court doctrine governing affirmative action plans is recognized as “highly restrictive” and that employers who implement preferential plans at a high risk of reverse discrimination lawsuits).

402. 480 U.S. 616 (1987).

403. The past discrimination to be remediated through preference-granting affirmative action must be “identified” and particularized to the university itself, which must have the “authority and capability” to respond to the reasonably concrete and proximate present effects of its own past discrimination. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978). Institutions may not justify suspect regulatory distinctions on the basis of a desire to remedy the effects of “societal discrimination”; to recognize such a desire as compelling would “convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.” *Id.* at 310. This narrow view of the remediation justification prevented the University of Texas Law School from justifying its admission policy on alleged past discrimination by the State of Texas or by the University of Texas System. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). It also prevented the University of Maryland from justifying a race-based scholarship program as necessary to remediate the university’s poor reputation among the Black community and perceived racial tensions on campus. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994). The university was unable to connect these present effects to adequately identified and institutionally specific past discrimination. *Id.* The university’s claim that these present effects were caused by knowledge of the historical fact that the university used to deny admission to Black applicants was legally insufficient: “mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were

“traditionally segregated job categories” that the TOP program is designed to redress.⁴⁰⁴ Because universities have not overtly discriminated in decades, they will almost certainly need to show a “manifest imbalance” and “traditional segregation,” the first part of which will necessarily involve a demographic utilization analysis around which the TOP program must be constructed and administered.⁴⁰⁵ In the face of a demonstrated “imbalance,” the hiring unit may be justified or required under Title VII to implement an affirmative action “plan” to address the imbalance. Plan design is governed by relatively bare-bone regulations issued by the EEOC and supplemented by reference to the more detailed regulations on affirmative action plans issued under E.O. 11,246 (discussed more fully further below).⁴⁰⁶

Title VII underutilization analysis will consist primarily of a statistical analysis of the demographics of the larger pool of qualified potential applicants with the hiring unit’s current demographics. The goal of Title VII affirmative action is for an employer’s employee demographics to match those of the appropriate comparison pool.⁴⁰⁷ Proportionality is the standard, rather than alternatives such as critical mass.⁴⁰⁸ Proper construction of the comparison pool is critical for a legally justifiable utilization analysis,⁴⁰⁹ and an inapposite comparison pool—for example, a comparison between cross-university faculty demographics and the proportion of minorities in the national population at large—is dangerous. As the Supreme Court emphasized in *Croson*, an Equal Protection Clause case involving race-based set-asides in government procurement, utilization analysis justifying race-based preferences must reflect the relevant labor market and take into account the distribution of qualifications for employment in the particular job category.⁴¹⁰

In the university context, the relevant comparison will usually be between the demographics of a particular department and the demographics of the national supply of disciplinary-specific PhDs. A departmental and disciplinary level of focus is preferred given that faculty

otherwise, as long as there are people who have access to history books, there will be programs such as this one.” *Id.* at 154.

404. The concept of a “manifest imbalance” in a “traditionally segregated job category” remains fuzzy. LAREAU, *supra* note 389, § 78.01.

405. See, e.g., Marc Rosenblum, *The Use of Labor Statistics and Analysis in Title VII Cases: Rios, Chicago and Beyond*, 4 INDUS. REL. L.J. 685, 688–89, 698–99 (1977).

406. Title VII regulations issued by the EEOC require the plans to be “dated and in writing,” to contain “self-analysis,” and to be “reasonable.” 29 C.F.R. § 1608.4 (2020). However, the EEOC regulations also incorporate by reference the more detailed E.O. 11,246 regulations that I discuss in detail in the following section. *Id.*

407. See Rosenblum, *supra* note 405, at 688.

408. See *supra*, Section V.A.5.

409. See Rosenblum, *supra* note 405.

410. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989).

live their professional lives primarily in a department. Departments play the most important and direct role in implementing the hiring process, and the availability of qualified new faculty hires in certain demographics will differ, potentially greatly, across disciplines, each of which will usually require, as a minimum qualification, a PhD in the relevant discipline. The department has been recognized as the proper level of analysis since the very early days of affirmative action in faculty hiring.⁴¹¹

A disciplinary/department focus has important legal and practical implications. Take economics as an example. If Black academics typically make up three to four percent of new PhDs in economics nationwide (as they have in recent years),⁴¹² an economics department of 30 faculty members will, under Title VII, be expected to “utilize” only one Black faculty member. Because the 30-person economics department with a single Black faculty member does not exhibit a “manifest imbalance” compared to demographic availability, the department will be unable to justify preference-grating affirmative action as either permitted or required by Title VII.

Weber, *Johnson*, and Title VII’s overall structure suggest at least three other major challenges for universities implementing TOPs. First is the need for the university to demonstrate that the costs the TOP imposes on adversely affected parties are relatively slight. The *Weber* Court emphasized that adversely affected white employees kept their existing jobs with the employer, and they were able to apply for training opportunities as they arose in the future.⁴¹³ The costs imposed by TOPs are reasonably viewed as comparatively much higher. Would-be faculty applicants will have trained (often with great financial sacrifice) for years for an opportunity to compete for the handful of highly competitive faculty positions that will happen to be open in their field of specialty at or near the completion of their graduate studies. TOPs deny those would-be applicants an opportunity to compete, a denial that increases their chances of long-term and perhaps permanent non-employment in academia. Opportunities for tenure-track faculty positions are relatively rare.⁴¹⁴ A given university department may hire in a particular area of specialization only occasionally, depending on the random faculty departure, death or retirement. A similar opportunity to compete may be very unlikely to arise again in the near future; and the would-be candidate’s competitiveness for

411. See Weitzman, *supra* note 205, at 467–68.

412. American Economic Association, *Report: Committee on the Status of Minority Groups in the Economics Profession (CSMGEP)*, 109 AEA PAPERS & PROC. 698, 696 (2019).

413. *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979).

414. See *Data Snapshot: Contingent Faculty in US Higher Ed*, AM. ASS’N OF UNIV. PROFESSORS (Oct. 11, 2018), <https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.X4tkJKJlW> [<https://perma.cc/F635-6KXM>].

any such future position may be much lower due to strong university preferences, at least at the entry level, for hiring faculty who have recently received their terminal degrees.⁴¹⁵

Second is the possibility that a reviewing court will take seriously Title VII's requirement of a "plan" and meaningfully examine whether the university's TOP program is coherently integrated into one, both as a matter of formal design and of on-the-ground implementation. "Plan" implies a set of articulated and realistically achievable policy goals, progress towards which is measurable, and a set of reasonably detailed and implementable strategies for achieving those goals within a particular period of time. Supreme Court precedent seems to set a high standard. In *Johnson*, the underlying plan was detailed, analytic, benchmarked, and explicitly based upon statistical analysis⁴¹⁶ demonstrating the "manifest imbalance" required by *Weber*.⁴¹⁷ In contrast, universities can be surprisingly lax in formally and meaningfully linking their TOPs to the formal Title VII affirmative action regime utilization-analysis and planning framework.⁴¹⁸ It is not unusual for departments or department hiring committees to have no real sense of the actual utilization statistics that characterize their faculties or if the utilization goals might justify resorting to affirmative action. This lack of planning is legally important because it raises the possibility that a court will reject the university's invocation of a justificatory plan on the basis that no plan really exists, or that the plan as it exists was not followed, or that the plan, properly understood, fails to reflect legally significant underutilization.

Third, the university will need to avoid including legally problematic elements in the design of its TOP program. For example, the Court, in upholding the race-conscious plan in *Johnson*, emphasized that the plan "require[d] women [as the target of the plan] to compete with all other qualified applicants. No persons [were] automatically excluded from consideration; all [were] able to have their qualifications weighed against those of other applicants."⁴¹⁹ The Court traced this idea—that preference-granting affirmative action should be implemented within a competitive selection process—back to Justice Powell's opinion in *Bakke*, which

415. See, e.g., Dylan Ruediger, *The 2019 AHA Jobs Report: A Closer Look at Faculty Hiring*, PERSPECTIVES ON HIST. (2019), available at <https://www.historians.org/publications-and-directories/perspectives-on-history/february-2019/the-2019-aha-jobs-report-a-closer-look-at-faculty-hiring> [<https://perma.cc/D7E7-2LLH>] (providing data that "largely confirm anecdotal evidence that the faculty market sharply favors very recent PhDs").

416. *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 635–37 (1987).

417. *Id.* at 631–34.

418. See, for example, the plan described in *McQuillen v. Wis. Educ. Ass'n Council*, 830 F. 2d 659, 663 (7th Cir. 1987).

419. *Johnson*, 480 U.S. at 638.

distinguished an unconstitutional admissions quota system from a hypothetical system in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”⁴²⁰ In contrast, TOPs by design remove targeted applicants from competition, setting up an alternative selection mechanism in which their merits and qualifications are considered alone, rather than in competition.

3. THE BFOQ DEFENSE

Apart from affirmative action plans, some forms of intentional discrimination may be allowed under Title VII if the discriminatory practice can be justified as a “bona fide occupational qualification,” or BFOQ.⁴²¹ However, the BFOQ defense is not available to justify discrimination on the basis of race,⁴²² and it has been very restrictively interpreted and applied as to sex.⁴²³ Thus, for example, Title VII prevented a nursing home operator from requiring its employees to honor resident preferences for nursing assistants that shared the patients’ race.⁴²⁴ The absolute prohibition of race as a BFOQ means that “role model” and similar justifications for race-based preferential faculty hiring are almost certainly impermissible. The EEOC’s narrow interpretation of the BFOQ defense probably also precludes schools from making BFOQ-type arguments based upon student preferences for faculty of certain demographics. Absent special circumstances, customer, and by extension student, preferences are insufficient to establish a BFOQ.⁴²⁵

420. *Id.*

421. The BFOQ defense (42 USC § 2000e-2) is available only for intentional discrimination on the basis of religion, sex, or national origin, and only when such discrimination is reasonably necessary to the normal operation of the particular business or enterprise. 42 U.S.C. § 2000e-2(e). A conceptually similar defense of “business necessity” applies to disparate-impact discrimination. The substantive differences between the two defenses are murky, except that BFOQ is said to be “more stringent.” Corbett, *supra* note 396, at 780.

422. *See* 42 U.S.C. § 2000e-2(e).

423. For an overview of BFOQ jurisprudence, see Hoerner, *supra* note 360. For a discussion of the legal difficulties of claiming race as a BFOQ, see generally William R. Bryant, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211 (1998).

424. *Chaney v. Plainfield Healthcare Ctr.*, 612 F. 3d 908 (7th Cir. 2010). As the court noted, “It is now widely accepted that a company’s desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race.” *Id.* at 913.

425. *See, e.g.*, Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 149–50, 181–84 (2004).

4. AN EXAMPLE OF THE TITLE VII DANGER

We can get a more concrete sense of the Title VII risks that TOPs face by examining the case of race- and sex-restrictive university fellowships. Such fellowships raise Title VII implications when they are structured around an employer-employee relationship (for example, where the recipient is paid to teach, perform research, or provide other university-related services). In the early 2000s, a conservative public interest organization, the Center for Equal Opportunity, headed by Roger Clegg, initiated administrative challenges to fellowship programs at numerous universities, including the Southern Illinois University at Carbondale (SIUC).⁴²⁶

Eligibility for SIUC's programs was explicitly restricted to certain racial and ethnic minorities or women.⁴²⁷ In response to Clegg's complaints, the U.S. Department of Justice and the Department of Education's Office of Civil Rights opened a series of well-publicized investigations.⁴²⁸ The Department of Justice's investigation concluded that the SIUC program violated Title VII by discriminating "against Whites and non-preferred minorities" by restricting eligibility to "Black, Hispanic, Asian American, and American Indian students."⁴²⁹ SIUC, like many other universities challenged by Clegg, quickly folded.⁴³⁰ The university entered into a consent decree under which it promised to open up all paid fellowships to all races, genders, and ethnicities and to submit to a compliance monitoring scheme.⁴³¹

426. Peter Schmidt, *Justice Dept. to Sue Southern Illinois U. Over Graduate Fellowships for Minorities and Women*, THE CHRON. OF HIGHER EDUC. (Nov. 11, 2005), <https://www.chronicle.com/article/justice-dept-to-sue-southern-illinois-u-over-graduate-fellowships-for-minorities-and-women/> [<https://perma.cc/2UN2-8CWV>] [hereinafter *Justice Dept. to Sue*]; Caleb Hale, *Professor Suspected of Lawsuit Involvement*, SO. ILLINOISAN (Nov. 15, 2005), https://thesouthern.com/news/local/professor-suspected-of-lawsuit-involvement/article_784f60df-cf93-51de-861a-5b7d40842494.html [<https://perma.cc/93H4-JS9N>]; Peter Schmidt, *As Colleges Open Race-Exclusive Programs to All, Some Minority Students May Be Left Out in the Cold*, THE CHRON. OF HIGHER EDUC. (Jan. 26, 2006), <https://www.chronicle.com/article/as-colleges-open-race-exclusive-programs-to-all-some-minority-students-may-be-left-out-in-the-cold/> [<https://perma.cc/93H4-JS9N>] [hereinafter *As Colleges Open*].

427. Schmidt, *Justice Dept. to Sue*, *supra* note 426.

428. *Id.*

429. *Id.*

430. See Peter Schmidt, *Not Just for Minorities Anymore*, THE CHRON. OF HIGHER EDUC. (Mar. 19, 2004), <https://www.chronicle.com/article/not-just-for-minority-students-anymore> [<https://perma.cc/3HAY-K4E4>] [hereinafter *Not Just for Minorities*]; Schmidt, *As Colleges Open*, *supra* note 426.

431. Peter Schmidt, *Southern Illinois U. Agrees to Justice Department Demands to Open Programs to All Races*, THE CHRON. OF HIGHER EDUC. (Feb. 9, 2006), <https://www.chronicle.com/article/southern-illinois-u-agrees-to-justice-department->

The Justice Department's decision to sue SIUC obviously does not *establish* illegality, either as a factual or legal matter. But we can infer from Justice's threat that the Department thought it would probably win the case. And we can infer from SIUC's decision to enter into a consent decree removing the problematic eligibility restrictions that the university was not confident that it would prevail.⁴³² If race- and sex-restrictive fellowship programs are illegal under Title VII, so too, almost certainly, are race- and sex-restrictive faculty hiring programs.

C. Executive Order 11,246

While widely ignored in the legal literature, Executive Order 11,246 and its associated regulations remain a potentially serious threat to university TOPs.⁴³³ The E.O. regime remains important because it is the primary repository of legal norms explicitly governing a university's affirmative action obligations.⁴³⁴ It can provide legal cover for some sorts of affirmative action,⁴³⁵ but it can also problematize other sorts, particularly those that conflict with the regime's deeply embedded norm of equal opportunity as equal treatment at the individual level rather than as equal achievement at the societal level.⁴³⁶ The ultimate penalty for violating E.O. 11,246, debarment, the loss of existing federal contracts and ineligibility to receive federal contracts in the future,⁴³⁷ is severe and would cripple the activities of any serious university.

The E.O. and its regulations are administered and enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The regulations, first promulgated in 1971, are codified at 41

demands-to-open-programs-to-all-races/ [https://perma.cc/95D2-F2CE]. For major provisions of the consent decree, see *Southern Illinois University and U.S. Department of Justice Reach Accord Consent Decree to be in Place for Two Years*, SO. ILL. U. (Feb. 8, 2006), <https://news.siu.edu/2006/02/020806dg6001.php>.

432. Cf. Schmidt, *Not Just for Minorities*, *supra* note 430 (discussing multiple universities that chose to change race-based programs).

433. For a brief discussion of the order's early history, see Gary W. Jackson, Note, *Executive Order No. 11,246 as an Alternative to Title VII: The Elimination of Discrimination in Bona Fide Seniority Systems*, 1978 DUKE L.J. 1268, 1271–72. The president's authority to regulate employment discrimination by federal contractors through executive order was recognized in *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971).

434. Jane Farrell, Note, *The Promise of Executive Order 11,246: "Equality as a Fact and Equality as a Result,"* DEPAUL J. SOC. JUST., Summer 2020, at 1, 4–6.

435. See, e.g., *Contractors Ass'n of E. Pa.*, 442 F.2d at 163.

436. On those two distinct views of equal opportunity, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

437. 41 C.F.R. § 60-1.27 (2020).

C.F.R. § 60.⁴³⁸ While they have been amended on and off over the years,⁴³⁹ the basic structure and content has remained stable. Universities, as non-construction contractors, must develop an “affirmative action program” and update the program annually.⁴⁴⁰ The E.O.’s regulations describe such programs as “a management tool designed to ensure equal employment opportunity.”⁴⁴¹ The university must prepare an analysis that compares the “gender, racial and ethnic profile of the labor pools from which [it] recruits and selects” with the composition of its current workforce.⁴⁴² That analysis is submitted to the Department of Labor, and it may or may not also be made public.

Under the E.O. 11,246 regulations, if a university’s analysis indicates that “women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool,” it must take “specific practical steps designed to address this underutilization” in that year’s affirmative action program.⁴⁴³ The obligation to take action is triggered upon a significant departure from statistical expectations, where “significant” means, as a rule of thumb, that the employer’s utilization of a particular demographic is less than eighty percent of expected utilization.⁴⁴⁴ The university’s response to such a statistical shortfall must then entail the articulation of quantitative “placement goals,” understood as “objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.”⁴⁴⁵ Placement goals must be calculated at the level of “job group.”⁴⁴⁶ Some universities calculate “job groups” for tenure-track faculty at the school level. However, and as under Title VII, the more appropriate analytic level is almost certainly the disciplinary department.⁴⁴⁷

438. The original regulations can be found in Affirmative Action Programs, 36 Fed. Reg. 23,152 (Dec. 4, 1971) (to be codified at 41 C.F.R. pt. 60-2). A consolidated and updated historical version, along with the Department’s official justifications, can be found at Compliance Responsibility for Equal Employment Opportunity, 43 Fed. Reg. 49,240 (Oct. 20, 1978) (to be codified at 41 C.F.R. pt. 60-1 to 60-741).

439. See Farrell, *supra* note 434, at 6–7.

440. 41 C.F.R. § 60-2.1 (2020).

441. 41 C.F.R. § 60.2-10 (2020).

442. *Id.*

443. *Id.*

444. See Affirmative Action Requirements, 165 Fed. Reg. 68,002, 68,033 (Nov. 13, 2000) (to be codified at 41 C.F.R. pt. 60-1).

445. 41 C.F.R. § 60-2.16 (2020).

446. § 60-2.12.

447. *Id.* In conducting an availability analysis, section 60-2.14 requires the contractor to “separately determine the availability of minorities and women for each job group” by taking into account, among other factors, the “percentage of minorities or

OFCCP conducts compliance audits and negotiates settlements (“conciliation agreements”) with contractors deemed in violation of the regime.⁴⁴⁸ Individuals are not authorized to enforce E.O. 11,246 or its regulations through private legal action, but they (or organizations or groups) are able to submit formal complaints to the OFCCP,⁴⁴⁹ and contractors are forbidden from retaliating against employees who complain.⁴⁵⁰ OFCCP investigates the complaints received and can recommend the initiation of administrative or judicial enforcement actions.⁴⁵¹ As mentioned, debarment is the most serious potential sanction, but a range of lesser sanctions may be imposed instead.⁴⁵²

E.O. 11,246’s emphasis on quantitative, measurable placement goals risks encouraging managers to understand the proportional representation of women and minorities as something close to a mandate.⁴⁵³ The most bureaucratically efficient way of meeting the target proportion is to pursue a preference-granting strategy of affirmative action. However, E.O. 11,246’s regulations and their history strongly suggest that quota and set-aside programs are highly discouraged and probably illegal absent extraordinary circumstances.⁴⁵⁴

The idea of reverse discrimination as a major political risk of overly aggressive affirmative action was highly salient in the 1970s.⁴⁵⁵ J. Stanley Pottinger, the Director of HEW’s Office of Civil Rights and the universities’ chief tormenter under the Order, was sensitive to the danger of going too far, and he made sure to publicly emphasize that his office, in implementing E.O. 11,246, was in no way suggesting that universities establish “quotas” favoring the hiring of women and minorities:

A quota . . . means a level of employment is set in a given period of time and a failure to meet a quota would constitute a violation of the employer’s commitment. A goal is a target of expected employment, also set by the employer, using his own best judgment of what he can recruit. A failure to meet that goal

women with requisite skills in the reasonable recruitment area” and using “the most current and discrete statistical information available.” § 60-2.14.

448. 41 C.F.R. § 60-1.33.

449. See § 60-1.21.

450. § 60-1.32.

451. § 60-1.26.

452. § 60-1.27.

453. George P. Sape, *The Use of Numerical Quotas to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 496 (1975).

454. See Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,320–21 (Sept. 28, 1965).

455. See, e.g., Golderg, *supra* note 182, at 817–21.

would not in itself constitute a violation. The standard to be used is good faith effort, not quotas.⁴⁵⁶

Pottinger's distinction between "goals" and "quotas" was essential to the political palatability of his project. Though somewhat fuzzy in its articulation and much debated in the legal and policy commentary of the era,⁴⁵⁷ the distinction allowed him to undercut accusations that his office was encouraging reverse discrimination in faculty hiring. Bernice Sandler, the legal entrepreneur who came up with the idea of using E.O. 11,246 against universities, adopted a similar public line. She maintained that it was illegal under the E.O. "to force an employer to hire an unqualified person and that further, no reverse discrimination is allowed."⁴⁵⁸

The text of the E.O. 11,246 regulations also supports the idea that preference-granting is discouraged or forbidden. Government contractors were, and still are, obligated to "[r]ecruit, hire, and promote all job classifications without regard to race, color, religion, sex, or national origin" and they cannot "discriminate against any applicant or employee because of race, color, religion, sex, or national origin."⁴⁵⁹ The phrases "without regard to" and "because of" reasonably seem, on their face, to forbid the causal (but-for or motivating-factor) use of racial preferences to the detriment not just of women or minorities, but also of males and whites.

HEW similarly advised in 1972 guidelines issued to "College and University Presidents" that "reverse discrimination," "preferential treatment," and "quotas" were forbidden under the E.O. and that decisions "not to employ . . . on grounds of" race, sex, or other forbidden factors was a violation not just of the E.O. but of other federal law as well.⁴⁶⁰ Accordingly, the guidelines emphasized the obligation of universities to restructure and professionalize their recruitment practices in order to build diverse pools of candidates. It was now explicitly forbidden for universities "to state that only members of a particular minority group or sex will be considered" for a given position.⁴⁶¹ When it came to hiring, the emphasis was on the non-discriminatory application of publicly available

456. Charles Kaiser, *Faculties: For More Women and Minorities*, N.Y. TIMES, Apr. 2, 1972, at E9.

457. *See id.*

458. Wade, *supra* note 128.

459. 41 C.F.R. § 60-2.20(a)(1) (1971); 41 C.F.R. § 60-2.30 (1971).

460. Higher Education Guidelines: Memorandum to College and University Presidents, 37 Fed. Reg. 24,686, 24,686-96 (Nov. 18, 1972); Lewis D. Solomon & Judith S. Heeter, *Affirmative Action in Higher Education: Towards a Rationale for Preference*, 52 NOTRE DAME LAW. 41, 46-48 (1976) (describing the 1972 HEW guidelines).

461. Higher Education Guidelines: Memorandum to College and University Presidents, 37 Fed. Reg. at 24,688.

and “reasonably explicit” “standards and criteria for employment.”⁴⁶² This non-discrimination norm applied to “all persons, whether or not the individual is a member of a conventionally defined ‘minority group.’ In other words, no person may be denied employment or related benefits on grounds of his or her race, color, religion, sex, and national origin.”⁴⁶³

Despite the abundance of evidence that the E.O. regime was never properly understood to encourage or permit preference-granting affirmative action, covered entities professed continuing confusion over the role that “numerical goals” were to play in the regulatory scheme. In 1995, the OFCCP issued a clarifying directive “[t]o reaffirm OFCCP’s policy on the use of affirmative action program goals.”⁴⁶⁴ The directive described the regulations as having “withstood the test of time as reasonable and successful tools that aid in breaking down barriers to equal employment opportunity for women and minorities without impinging upon [sic] the rights and expectations of other members of the workforce.”⁴⁶⁵ And it emphasized, as Pottinger had two decades earlier, that “numerical goals” were not “quotas”:

At the time numerical goals were incorporated into the written affirmative action program regulations, the [OFCCP] recognized that some might misunderstand goals to be quotas which must be achieved through race-based and gender-based preferences. Accordingly, the Office of Federal Contract Compliance squarely addressed these issues in the affirmative action program regulations . . . [and through] supplemental guidance and instructions explaining the difference between permissible numerical goals, on the one hand, and unlawful preferences and quotas, on the other. . . . Despite these longstanding efforts by the [OFCCP] to ensure that numerical objectives under the Executive Order are not confused with unlawful preferences and quotas, criticism that they involve such preferences emerges periodically.⁴⁶⁶

In order to “address that criticism,” the directive sought to reaffirm a correct understanding of the regulations by emphasizing that “[g]oals [a]re [n]either [s]et-asides [n]or a [d]evice to [a]chieve [p]roportional

462. *Id.*

463. *Id.* at 24,687.

464. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, U.S. DEP’T OF LABOR, DIRECTIVE (DIR) 1996-01 (1995), <https://www.dol.gov/ofccp/regs/compliance/directives/dir207.htm> [<https://perma.cc/GUN5-MAYP>].

465. *Id.*

466. *Id.*

[r]epresentation or [e]qual [r]esults”; that despite the use of goals, “[q]uotas and [p]referential treatment” are “prohibit[ed]”; that affirmative action does not require contractors to fill positions on the basis of a protected class, even where traditional patterns of segregation were present; that affirmative action only requires “engage[ment] in outreach and other efforts to broaden the pool of qualified candidates to include minorities and women”; and that using numerical goals is consistent with “[p]rinciples of [m]erit,” such that the contractor is not required to “hire a less qualified person in preference to a more qualified person.”⁴⁶⁷

The directive’s “reaffirmation” was formalized through regulatory amendments promulgated in 2000.⁴⁶⁸ It was now clear that “quotas are expressly forbidden.”⁴⁶⁹ Furthermore, “placement goals” do not imply “set-asides”; they do not require proportional representation; they do “not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual’s employment status, on the basis of that person’s race, color, religion, sex, or national origin”; and, they should not “supersede merit selection principles.”⁴⁷⁰ A more recent amendment, covering sex discrimination, is equivalently strict: outside of a BFOQ defense, government contractors appear absolutely forbidden from making “any distinction based on sex in recruitment, hiring . . . or other terms, conditions, or privileges of employment.”⁴⁷¹ This prohibition includes “[r]ecruiting or advertising for individuals for certain jobs on the basis of sex.”⁴⁷²

The extent to which a government contractor can use race or other suspect characteristics thus seems to be very highly circumscribed. A regulatory challenge to a university TOP program is especially likely to be successful if it can be demonstrated that the program is sufficiently analogous to a “quota” or “set-aside.” Those terms are not defined in the regulation, but the overwhelming sense seems to be one of faculty positions reserved for certain categories of applicants, where possession of a favored but suspect characteristic serves as a necessary condition for consideration. And even if a TOP program is not set up so as to reserve

467. *Id.*

468. The notice of proposed rulemaking (NPRM) was published at Government Contractors; Affirmative Action Requirements, 65 Fed. Reg. 26,088 (May 4, 2000) (to be codified at 41 C.F.R. pt. 60-1 to 60-2). The final rule is at Government Contractors, Affirmative Action Requirements, 65 Fed. Reg. 68,022 (Nov. 13, 2000) (to be codified at 41 C.F.R. pt. 60-1, 60-2). The NPRM notes that the amendments were, in part, “intended to reflect [the] concepts” of the 1995 directive. Government Contractors; Affirmative Action Requirements, 65 Fed. Reg. at 26,099.

469. 41 C.F.R. § 60-2.16 (2020).

470. *Id.*

471. § 60-20.2(b).

472. § 60-20.2(b)(10).

positions based upon a protected characteristic, it may be vulnerable if it nonetheless encourages race or other characteristics to be used as the “basis” of the hiring decision.

It might be argued that a given TOP program is not a quota or a set-aside but merely an incentive or reward and that such incentives or awards are permissible as part of a good-faith effort to address underutilization as part of an affirmative action program. The federal district court of Vermont addressed the compatibility of minority-hiring incentive schemes in 1999.⁴⁷³ The plaintiff, a white woman, alleged that she had been denied a chaired faculty position because of her race.⁴⁷⁴ The position was awarded instead to an Asian-American woman.⁴⁷⁵ The university’s affirmative action program had identified a statistical underutilization of Asians on the faculty, and the university had a program in place that provided financial assistance to departments that hired underutilized minorities.⁴⁷⁶ At one point the subsidy program provided 50 percent salary support for five years; at the time of the challenged hiring decision, the program had been reduced to provide support not to exceed \$10,000 in a given year.⁴⁷⁷ The department appears to have conducted an open, broad search and to have selected the Asian-American candidate as the most-qualified candidate prior to finding out whether it would be eligible to receive the financial incentive.

The district court did not address the incentive plan’s compatibility with E.O. 11,246, but it did uphold the plan (with only limited analysis) as permissible under Title VII because the plan was expressly designed and applied to help rectify a “manifest imbalance” in the university’s workforce (as determined by the statistical comparison with nationally available Asian faculty members) and because the incentive plan was “remedial, temporary” and did not rely upon “set asides or quotas.”⁴⁷⁸ The plan “served to attain rather than maintain a balanced workforce; the awards were limited in duration and incentive funds would no longer be available to a job group which did not show under-representation.”⁴⁷⁹

The plan was potentially problematic, however, under the Equal Protection Clause. Here the court articulated the core issue as whether the incentive plan, which clearly entailed a suspect regulatory distinction, “had an influence on the decision to hire.”⁴⁸⁰ On the one hand, the policy

473. *Honadle v. Univ. of Vt. & State Agric. Coll.*, 56 F. Supp. 2d 419, 425–29 (D. Vt. 1999).

474. *Id.* at 420–21.

475. *Id.* at 420.

476. *Id.* at 422–23.

477. *Id.* at 423.

478. *Id.* at 426.

479. *Id.*

480. *Id.* at 427.

implementing the incentive plan expressly declared that the availability of incentive funds should not influence a department's hiring decision. On the other hand, it was entirely possible that the incentive plan nonetheless had the effect of exerting such influence. Whether it did so was a question for a jury.

While of limited precedential value, the case does suggest that characterizing TOPs as mere "incentives" is not likely, by itself, to secure the programs from legal challenge. The OFCCP does not appear to have ever spoken on the issue of incentives, and whether incentives are compatible with the E.O. 11,246 regime remains uncertain. It seems relatively clear that an incentive program that is implemented through something like a set-aside, or that is sufficiently generous to make a candidate's race or sex a causal factor in the decision to hire, would be viewed as highly problematic under the E.O. regime, just as it would be under the Fourteenth Amendment or Title VII. Moreover, the Vermont district court seemed especially concerned with whether the university's incentive program short-circuited a normal, competitive faculty search process. Modern TOPs do use "incentives," but they do so in a way that removes the incentivized hire from the normal process and by providing departments with an effective choice between hiring no one or hiring a preferred minority candidate. Both aspects seem to take TOPs well outside the zone of permissibility where the district court provisionally located the Vermont "incentive" plan. In fact, in another case involving a TOP-type incentive program that did go to a jury, the jury found that the university had unlawfully discriminated against the white faculty candidate.⁴⁸¹

D. State and Local Anti-Discrimination Law

States and localities maintain employment-related non-discrimination regimes that may be also be used to challenge TOPs.⁴⁸² State constitutions also have their own equal-protection-type clauses which may be interpreted more broadly than the federal equivalent.⁴⁸³ For example, Louisiana's supreme court has interpreted its constitution as banning all forms of preference-granting affirmative action.⁴⁸⁴ Citizen

481. See Jeffrey Selingo, *White Professor Wins \$122,000 from Bowling Green State in Race-Bias Case*, THE CHRON. OF HIGHER EDUC., Mar. 27, 1998, at A14.

482. Marjorie A Shields, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination in Employment Under State Law*, 14 A.L.R. 6th 277, 285–86 (2006); Chad A. Readler, Note, *Local Government Anti-Discrimination Laws: Do They Make a Difference*, 31 U. MICH. J. L. REFORM 777, 777 (1998).

483. Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1020–21 (2003).

484. See *La. Associated Gen. Contractors v. State*, 669 So. 2d 1185, 1199–201 (La. 1996); John Devlin, *Louisiana Associated General Contractors: A Case Study in the*

initiatives in California and Michigan have, famously, also constitutionalized affirmative-action bans.⁴⁸⁵

Space prevents anything close to a full fifty-state survey, and in any case, because state and local equality and non-discrimination laws are not commonly litigated,⁴⁸⁶ it is uncertain how a state or local court or agency would interpret and apply those laws in a TOPs case. It is interesting to note, though, that in the wake of California's Proposition 209, the UC system took the view that the "Target of Opportunity for Diversity" program was now illegal.⁴⁸⁷ More recently, the UC General Counsel's Office has suggested, without providing legal analysis, that Proposition 209 does *not* prevent California universities from providing "incentives" that reward departments for hiring faculty who contribute to diversity, including the provision of "additional hiring opportunities (i.e., providing partial or full FTE's above the target number for the unit)."⁴⁸⁸ Providing "additional hiring opportunities" is, as discussed above, one of the core elements of the modern TOP, and it is not clear how that practice differs from the Target of Opportunity for Diversity program that university officials earlier described as prohibited by Proposition 209.

The UC system's change in thinking was politically helpful given a major effort—the latest in a long line of such efforts—announced recently by UC President Janet Napolitano to diversify UC faculty.⁴⁸⁹ Napolitano justified the new faculty diversity program with a "role model" rationale, and said that the program will consist of a "range of programs that have

Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights, 63 LA. L. REV. 887, 905–06 (2003).

485. See Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431, 431 (2000); Melvin Butch Hollowell, *In the Wake of Proposal 2: The Challenge to Equality of Opportunity in Michigan*, 34 T. MARSHALL L. REV. 203, 204 (2008).

486. See generally ROBERT C. LAFOUNTAIN & NEAL B. KAUDER, NAT'L CTR. FOR STATE CTS., CASELOAD HIGHLIGHTS EXAMINING THE WORK OF STATE COURTS I, 1–2 (2005) (showing that of 8,311 civil cases reaching trial at state courts across forty-six counties in 2001, 107 were employment discrimination cases). See, e.g., ROBERT C. LAFOUNTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAN, CHANTAL G. BROMAGE, SARAH A. GIBSON, ASHLEY N. MASON & WILLIAM E. RAFTERY, NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS (2009) (showing that of 182,427 civil cases filed in Kansas state trial courts, 11 were employment discrimination cases); NAT'L CTR. FOR STATE CTS., CASELOAD HIGHLIGHTS NOTES FROM THE FIELD 5–7 (2011) (showing that of 127,445 civil cases filed in Pennsylvania state trial courts, 77 were employment discrimination cases).

487. See OFF. OF THE PRESIDENT, UNIV. OF CAL., AFFIRMATIVE ACTION GUIDELINES FOR RECRUITMENT AND RETENTION OF FACULTY 6 (2002).

488. See OFF. OF THE GENERAL COUNS., UNIV. OF CAL., GUIDELINES FOR ADDRESSING RACE AND GENDER EQUITY IN ACADEMIC PROGRAMS IN COMPLIANCE WITH PROPOSITION 209 19 (2015).

489. Press Release, UC Office of the President, UC Launches Major Push to Increase Faculty Diversity (Sept. 26, 2018).

been shown to improve faculty diversity—including those that strengthen the pipeline of graduate students who plan a career in academia—as well as new efforts based on best practices.”⁴⁹⁰ Without access to the UC System’s more fully articulated legal arguments, or to the operational details of Napolitano’s “best practices,” it is difficult to know whether the initiative might face credible legal challenge or, if it does, whether the current UC thinking on the compatibility of TOP-type “incentive” programs with Proposition 209 would be accepted by a California court. The only point I wish to make here is that California- (and Michigan-) specific law, and their counterparts in other states, make TOPs differently vulnerable, and in some cases more vulnerable, to legal challenge than they would otherwise be under federal law.

CONCLUSION

One of the more striking aspects of affirmative action in faculty hiring is how permanent it seems to be. UC-Berkeley’s faculty-diversity efforts span more than forty years; UW-Madison’s, more than thirty. Other universities have similar histories. The energy and funding behind specific diversity campaigns will wax and wane; campaign names will change. But race- and sex-based preferences seem to be a consistent and widespread programmatic element across time. The longevity of preference-granting faculty affirmative action butts against the repeated insistence by courts that such preference-granting be “temporary.”⁴⁹¹

While any one faculty diversity campaign may be fairly characterized as such, a broader view suggests that affirmative action in faculty hiring is here for the long haul, but not without a level of legal risk that is, admittedly, difficult to characterize with precision. As I have shown above, faculty affirmative action takes place within a complex and overlapping set of legal norms and structures. While the legal norms are not always clear or consistent, and while the legal structures do not always provide especially efficient or reliable mechanisms of challenge or redress, it seems relatively obvious that TOPs are problematic in theory and

490. *Id.* (“‘We know that students’ academic performance and career aspirations are enhanced when faculty of similar backgrounds serve as role models,’ Napolitano said”). See OFF. OF THE PRESIDENT, U.C., FINAL REPORT ON THE 2017–18 USE OF ONE-TIME FUNDS TO SUPPORT BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT 4, 10–11 (2018), the submission from Napolitano to Holly J. Mitchell, Chair of the California Joint Legislative Budget Committee, for a description of the “best practices.” Many of the initiatives described would seem to pose little legal risk. However, the document does not provide very detailed information about the program’s faculty-hiring initiatives.

491. See *Honadle v. Univ. of Vt. & State Agric. Coll.*, 56 F. Supp. 2d 419, 425–29 (D. Vt. 1999); See Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 491 (1973).

practice. They may be illegal. Justificatory logics are thin. Supporting evidence is not particularly supportive, or even relevant. The tension between public assertions of “non-discrimination” in university employment and intentionally discriminatory hiring practices is serious and real. Even where private parties harmed by a TOP program lack the knowledge or incentive to sue, government agencies can, if roused into action, cause significant trouble, as the SIUC example illustrates. However, it is also important not to exaggerate. The formal legality of TOPs may be questionable, but problems of identifying good-quality plaintiffs with standing or of convincing government enforcement agencies to act may provide partial insulation from effective legal challenge.

Let me end on a more personal note. Uncertainty about what exactly is allowed when it comes to affirmative action in faculty hiring puts faculty, who play a central role in the hiring process, in an exceedingly uncomfortable position. We are told that consideration of race and sex is impermissible, except when we are quietly, but effectively, incentivized to only consider candidates of a particular race or sex apart from those of others. We are told to value a candidate’s race and sex as inherently beneficial to the university’s achievement of its mission, but also admonished that to admit to a candidate that we have hired them because of their race or sex will cause grave offense. This is fraught territory, and the legal and social dangers force the enterprise into the shadows. Faculty end up as awkwardly complicit players in a risky game, the rules of which no one really knows and about which frank discussion is avoided or even discouraged.

Discouraging skeptical inquiry that challenges dominant ideas and practices as potentially muddle-headed or misguided is, some would say, to stand in the way of scientific progress.⁴⁹² But in discussing this project with other professors, I was repeatedly warned of the supposed risks of writing critically—or even questioningly—about faculty affirmative action. To discuss the topic openly in a doubting way is apparently viewed by many of my colleagues as professionally suicidal. It seems to me that, from the privileged position of a tenured professor, it takes no real courage and runs no real risk to speak contrarily about a supposedly taboo subject, and it is easy to dismiss the concerns and warnings as hyperbolic or meant as something close to jest. On the other hand, it would be foolish to completely ignore the extent to which the academy, to its discredit, formally and informally squelches doubt and dissent about affirmative action as actually practiced.

492. For more on this argument, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 157 (3d ed. 1996).

The UC System's current diversity-statement regime strikes me as especially discreditable because it formally and explicitly threatens serious professional sanction on candidates and employees who dare to question the diversity hegemony.⁴⁹³ A version of the "grading rubric" that UC-Davis intends to use to screen faculty candidates would give a failing grade—disqualifying the candidate from consideration for employment—for "discount[ing] the importance of diversity," "seem[ing] uncomfortable discussing diversity-related issues" or, most strikingly, for "provid[ing] reasons for not considering diversity in hiring or see[ing] it as antithetical to academic freedom or the university's research mission."⁴⁹⁴ Under that standard, it seems almost certain that having written this Article disqualifies me from a faculty position there. Policing and punishing dissent from a university administration's diversity agenda—with its obvious parallel to the UC's ugly history of anti-communist loyalty pledges—seems quite different from the "sifting and winnowing" that my own university proudly advertises as the ideal to which it aspires.⁴⁹⁵ The former may be institutionally rational—it helps to minimize the legal risks that arise from the presence of internal dissidents with access to potentially embarrassing information—but it is not admirable.⁴⁹⁶ Open and reasoned discussion and debate about TOPs are essential if we are to resolve reasonable doubts about whether the programs are a good and not just a clever idea, as a matter of theory, of policy, and of law.

493. Abigail Thompson, "The University's New Loyalty Oath," *WALL ST. J.*, Dec. 19, 2019, at A17.

494. UC Davis, Rubric to Assess Candidate Contributions to Diversity, Equity, and Inclusion (unpublished scoring rubric) (on file with author).

495. "Whatever may be limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found." The quote (with which virtually all members of the campus community are familiar) appears on a plaque in the heart of campus. The notion of "sifting and winnowing" is understood by the university administration as articulating "the heart of learning and academic freedom." *The Freedom to Sift and Winnow*, COLL. OF LETTERS & SCIS., UNIV. OF WIS.-MADISON, <http://ls.wisc.edu/learn-to-sift-and-winnow> [<https://perma.cc/6YGN-FQJX>] (last visited Oct. 15, 2020).

496. For an ironic illustration of the risk posed to aggressive affirmative action from internal dissidents, note that Berkeley's troubles with HEW in the early 1970s were exacerbated by a disaffected graduate student in political science and law, who "purloined" unfavorable university documents and leaked them strategically to the student newspaper in order to weaken the university's position in negotiations with HEW over the university's affirmative action plan. Johnson, *supra* note 135. Asked by a reporter how she had obtained the documents, "she smiled enigmatically and said, 'Perhaps the university should give some thought to the fact that most of its lowly employees are women and not all of them are as happy as they seem.'" *Id.*