

TESTIMONY OF  
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BEFORE THE  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
REGARDING  
“STRIKING A BALANCE:  
EEO, DIVERSITY, AND AFFIRMATIVE ACTION”

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Thank you, Commissioners, for the opportunity to testify this morning before the EEOC.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Sterling, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991, and that from 1993-1997 I was vice president and general counsel of the National Legal Center for the Public Interest, which is a corporate-oriented legal organization.

The point of my testimony today is that, too often, the corporate "celebration of diversity" becomes the opposite of true "equal employment opportunity"--that it is, instead, a form of "affirmative action" that is really, to use Nathan Glazer's phrase, nothing more than "affirmative discrimination." These kinds of diversity policies lack logical, empirical, legal, or moral justification. What I hope is that we finally have arrived at the point where companies will be hiring and promoting simply on the basis of individual merit. And I hope the Commission will agree with me--and enforce the law.

Before I go any further, however, it is important to define the kinds of diversity policies at issue today. No one is suggesting that there is anything wrong with having a diverse workforce. No one is suggesting that companies ought to discriminate against women or minorities, or that they should be anything less than vigilant, aggressive, and proactive in eliminating and preventing such discrimination (the original meaning of "affirmative action"). Nor is anyone suggesting that companies ought not to "cast a wide net" in their recruiting, making it clear to one and all, near and far, that they are welcome to apply for employment. (There are, however, some problems that result when the net is cast deliberately at this or that racial or ethnic group; I discuss some of those problems in the first appendix to this testimony.) And, finally, there is also nothing wrong with a company making sure that it does not have entrenched policies that, for one reason or another, discourage or retard the hiring or advancement of some people when those policies have no justification and penalize, rather than reward, productivity.

The issue, rather, is the narrow but critical one of whether companies ought to be hiring and promoting with an eye on applicants' and employees' race, ethnicity, and sex in order to achieve a predetermined and enforced diversity. It is clear that many do, unfortunately, and it is clear that they should not.

It is always useful, when considering the legality of a practice, to put the shoe on the other foot—that is, to ask what the reaction would be if a measure being proposed to advance "diversity" were, instead, being used in a way to tilt the scales in favor of whites and men. I'm not assuming that the two will always be morally equivalent--although I think they usually will be--but it is a helpful way to determine whether or not what's

going on is discrimination. That, after all, is the issue for civil rights law-enforcers, because discrimination is almost always illegal.

Thus, for example, we can dismiss the common suggestion that, so long as the beneficiary of a preference is “qualified,” then there is no problem. The question is whether the person hired or promoted is the *best* qualified; no one would allow a company to defend a pro-white or a pro-male preference by saying that it was afforded only to “qualified” white men. Nor does it matter that race, ethnicity, or sex is “just one factor” (would it be all right if being a white man was “just one factor” that weighed in an applicant’s favor?); nor that “no quotas are used” (would a “goal” to hire only white men be acceptable?).

America is becoming an increasingly multiracial and multiethnic society. The only way to enforce the antidiscrimination laws in such a society is by playing no favorites. We cannot say that Latinos are more protected than whites, but less than blacks, and the same as Asians, unless the Latino is Mexican (but not Cuban) and the Asian is Saudi (but not Filipino). And the way that Title VII is written plays no favorites.

## I. HOW WE GOT HERE: THE ROAD TO MICHIGAN

In the beginning, companies discriminated against minorities and women, often quite blatantly. That became illegal in the 1960s, except that it almost immediately became a requirement that companies have “affirmative action” plans that discriminated *in favor* of minorities and women. In 1990, R. Roosevelt Thomas, Jr. wrote an article in the *Harvard Business Review* titled “From Affirmative Action to Affirming Diversity,” the thesis of which was that affirmative action had gotten a bad name—people had figured out that it was discriminatory and unproductive—and needed to be replaced with “diversity” management. Rereading this article 17 years later, one is impressed by how influential and prescient it was in the course it set for Corporate America. On the other hand, whenever the article stops talking about the problems with affirmative action and starts talking about the need to celebrate diversity, it is either platitudinous, or gibberish, or both. Suffice it to say that “diversity” did not replace “affirmative action”; it just added some verbose window-dressing to it.

What is really depressing is that there has apparently never been a time in American history where the widespread, accepted practice was not to discriminate against anyone with regard to race, ethnicity, or sex.

The blame for the current proliferation of hiring and promoting with an eye on—and preferences according to—the race, ethnicity, and sex of applicants and employees can be widely shared, among the courts, bureaucrats, the civil rights establishment, and, of course, the companies themselves. So when a front-page article in the *Washington Post* reported in 2003 that “several dozen Fortune 500 companies” would join briefs that support the University of Michigan’s use of racial and ethnic preferences in student admissions, in the cases then pending before the Supreme Court, it came as no surprise.

Supporting the University of Michigan—and, more broadly, the civil rights establishment and the whole “diversity” agenda—is like paying protection money to the mob. Companies that don’t fall into the politically correct line believe they are more likely to be sued or boycotted by the grievance industry (that is, the Jesse Jacksons and Al Sharptons and their Johnnie Cochran-wannabe legal allies), and indeed even the *Post* article acknowledged that “the desire to avoid civil rights lawsuits and boycotts” is part of the companies’ “mix of motives.” Of course, companies may be deluding themselves, and indeed “diversity” is no guarantee against getting mau-*maued* and sued. But the point is that companies *believe* they are purchasing insurance. As the *Post* put it, “business has always been content to buy social peace at the cheapest possible price.”

It goes deeper than that, however. Most large companies now have “human relations” departments and experts. Those in these positions are institutionally driven to extol the importance of diversity, and “diversity” may even be part of their job title. Their current jobs, in any event, depend on the concept (and frequently they are beneficiaries themselves of preferences based on race, ethnicity, and sex).

Yale Law School professor Peter Schuck has observed that affirmative action “programs also tend to advantage large companies by imposing onerous reporting, staffing, and other compliance costs on smaller competitors who cannot bear them as easily.”

So if I were a lawyer for a university or for the civil rights establishment, and I wanted to persuade a company to file a brief supporting me—or do anything else I wanted—I would start out with a call to the vice president for diversity or whatever. He or she would be easily persuaded that such a brief would be a good idea, and his or her recommendation to the general counsel (and the president) to file such a brief would put them on the spot. It certainly would be awkward if it ever leaked out that they had turned down this recommendation. And, besides, why should they? As noted above, it’s good insurance.

The presence in most large companies of diversity departments and experts suggests another reason why these corporations were likely not only to file a brief supporting racial and ethnic preferences, but even to hope that the University of Michigan would win. For years now, large companies have done their hiring and promoting with a close eye on race, ethnicity, and sex. That’s what their human relations experts tell them to do, and indeed they’ve been hired to tell the company how best to do it.

Part of this is purely public relations, but part of it is a fear that, if the company doesn’t look like America, it will get into legal trouble. While, as discussed later, the legal vulnerabilities when preferences are used ought to be much greater, it cannot be denied that a company is also vulnerable if it doesn’t have “good numbers.” No matter how nondiscriminatory a company is, it’s easy to lose a civil rights lawsuit if its numbers aren’t right. Moreover, if it does any federal contracting—and large companies frequently do—then the Labor Department’s Office of Federal Contract Compliance

Programs will insist that it implement goals and timetables to correct any shortages of women and minorities. These regulations are themselves unconstitutional and inconsistent with Title VII, ironically, but no company appears to be willing to challenge them. (And the Department of Labor, to its shame, is unwilling to bring them into line with the law.)

There are, moreover, plenty of judicial decisions, from the Supreme Court on down, that have pushed companies into hiring and promoting with an eye on race, ethnicity, and sex—and that suggest courts will look the other way when they do. In 1971, the Court ruled in *Griggs v. Duke Power Co.* that a company can be held liable for illegal discrimination if it does not hire and promote proportionate numbers of minorities and women, even if the reason for this is selection criteria that are nondiscriminatory on their face, nondiscriminatorily chosen, and nondiscriminatorily applied. Eight years later, in the *Weber* case, when the legality of racial preferences under Title VII was at issue, companies argued that, because of *Griggs*, it was essential that the Court allow hiring preferences—and the Court so ruled. Companies feared that they would be in a damned-if-you-do-damned-if-you-don't dilemma: If they don't get their numbers right, they get sued; and if they keep on eye on their numbers, they get sued, too.

Thus, the companies feared in the Michigan cases that if the Supreme Court had rejected the proposition that a desire for “diversity” justifies discrimination, they would have to change the way that they've gotten used to operating, or face a significantly heightened risk that they'll be sued by someone who lost out on a job because he or she was the wrong race, ethnicity, or sex.

It's also handy if the top schools do the “race norming” for the company, choosing the top students from each racial group, rather than the top students, period. Under the current system, a large company can send its recruiters to only the most selective schools, and know that it will be able to meet its quotas there, with handy, one-stop shopping. If those schools stop using preferences, then it will be necessary for the company to send recruiters to a number of other schools, too, if it is to keep its hiring numbers right. Those additional trips are a nuisance and added expense.

So, on the one hand, there is the fear of boycotts, lawsuits, and bad publicity, as well as the companies' own internal pressures. And on the other side? It is true that racial and ethnic preferences are unpopular with the overwhelming majority of Americans, but how likely is it that these Americans will boycott General Motors because the company files a politically correct brief? As the *Post* article acknowledged, “there is little cost in terms of public image for companies that side with Michigan—and potentially large costs for those perceived as indifferent to the interests of minorities.” The same calculus has helped drive companies to support more generally the civil rights establishment's agenda and, in particular, its insistence on diversity-through-preferences.

## II. CURRENT PRACTICES

There is a significant amount of discrimination taking place now in the name of diversity. Eight out of ten business executives said that affirmative-action programs had resulted in them giving jobs and promotions to applicants who were less qualified than others, according to a 1997 survey conducted by Yankelovich Partners and commissioned by the PBS show "Nightly Business Report." Consistent with Peter Schuck's observation in the last section, the survey also found that, the larger the company, the more likely the executive was to voice support for affirmative action (59 percent for large companies, 35 for medium, and 33 for small), and the less likely to support its abolition (47 percent versus 64 percent versus 68 percent, respectively); those numbers make it appear that some executives support affirmative action *and* its abolition, doublethinking which somehow is unsurprising in this arena. *HR Magazine* reported in 1998 that "Executive recruiters confirm that more and more companies are placing orders specifically for females and ethnic minorities." The Center for Equal Opportunity, too, has found that frequently recruiters brag about their ability to find diversity hires for companies.

It is not difficult to find evidence of corporate preferential treatment. The *New York Times'* favoritism of Jayson Blair is a sensational example, but it is not at all atypical. Just visit some corporate websites or look at their own brochures. The trumpeting of minority numbers is deafening, and it is implausible that this bean-counting does not reflect and encourage the use of quotas and preferences.

Consider Wal-Mart. It is frequently accused of being politically incorrect in a variety of ways, but you wouldn't know it when it comes to "diversity." The company has told its managers that they have "diversity goals," and that they should avoid discrepancies between the percentage of qualified minorities/females who apply and the percentage actually chosen--or risk losing at least part of their annual bonuses. Thus, if a manager is faced with hiring the most qualified candidate or meeting his diversity goal--and we suspect that this choice will come up frequently--then the company has provided him with conflicting guidance. As a result, there will be frequent situations in which Title VII's ban on racial, ethnic, and gender preferences will be violated.

Wal-Mart has also imposed affirmative discrimination requirements on its outside counsel, demanding that they "submit a slate of at least three, but no more than five, attorneys from your firm to be considered for appointment as the relationship attorney. The slate of attorneys to should include at least one female and one minority attorney." The June 13, 2005 letter sent to prospective outside counsel includes a demand for other bean-counting "diversity results," and the company's general counsel was quoted last summer as already crowing, "We are terminating a firm right now strictly because of their [sic] inability to grasp our diversity expectations." (In the nonemployment context, Wal-Mart last October likewise set up a fund to help its suppliers who have inadequate access to capital--but only if the companies are not owned by white males. Supplier diversity abuses are very widespread, but this is a topic for another day and, probably, another commission.)

Wal-Mart is not the only company to use affirmative discrimination in hiring its outside counsel, by the way. The same article that discussed Wal-Mart (Meredith Hobbs, "Wal-Mart Demands Diversity in Law Firms/Outside counsel must comply or lose business, says GC at nation's biggest retailer," *Fulton County Daily Report*, July 6, 2005) also reported that Visa International, Del Monte, Pitney Bowes, and Cox Communications are making similar demands. More than 60 law firms had earlier signed a pact in which they agree to report to their corporate clients the composition by race, sex, ethnicity, and sexual preference of the legal teams doing the clients' work. Thomas Adcock, "Law Firms Agree to Give Clients Diversity Data on Legal Teams," *New York Law Journal*, May 13, 2005, available at <http://www.law.com/jsp/article.jsp?id=1115888713745>. The idea, of course, is to force law firms to meet quotas in each category. And prior to that pact, many companies--notably Shell Oil--had already been unilaterally insisting that this be done. For a discussion of why this is illegal--if such a discussion is necessary--see Appendix B. Not that law firms need a lot of encouragement in this regard; see Association of the Bar of the City of New York's "Statement of Diversity Principles" ("the opportunity to increase diversity should be one important consideration in the decision-making process"; one goal is "To hire entry-level classes that substantially reflect the diversity of graduating law students. ... We also will take diversity goals into consideration within our lateral hiring.") and "Diversity Practices" ("including minority internships/summer associate positions; participation in minority job fairs").

Another large company published a brochure that bragged, "Each year, management ... have [sic] a specific written set of performance goals established to measure their diversity performance. A set of specific written performance goals have [sic] also been implemented for all corporate management staff for annual measurement of their diversity performance. Diversity Performance measurements are attached to annual bonus calculations for ... management." The company lists and brags about its percentages of women and minorities in its workforce generally and management in particular, and asserts, "We've achieved and maintained a diverse workforce by having separate affirmative action plans" that "ensure[] that our workforce reflects the diversity of our [clients] and the communities we serve." Can you say "quota"? (When the Center for Equal Opportunity complained about this, the company agreed to append the following: "It is [the company's] policy not to use unlawful preferences or quotas or engage in unlawful discrimination with respect to the business and employment opportunities that are offered.")

Here's another example. Recently we received an e-mail, apparently from one of Intel Corporation's employees, forwarding a description by Intel of its "Diversity Employee Referral Program." The gist of it is that Intel will pay a \$6,000 bonus to employees who make successful hiring referrals of "women, African Americans, Hispanics and Native Americans," but only a \$2,000 for successful hiring referrals of anyone else (i.e., men who are of European, Asian, or Middle Eastern background). Of course, as you know, Title VII of the Civil Rights Act of 1964 bans employment-related discrimination, and specifically makes it illegal, for instance, to "classify ... applicants for employment" in a discriminatory way (42 U.S.C. section 2000e-2(a)) or "to print or

cause to be printed or published any notice ... relating to employment ... indicating any preference ... based on race, color, religion, sex, or national origin” (42 U.S.C. section 2000e-3(b)). You can imagine the outcry if the shoe were on the other foot and a company told its employees that it was three times as interested in white male referrals than referrals of minorities and women. But, when we complained Intel, we were rebuffed. (Intel also offers race- and gender-exclusive scholarships to high school students; gives a preference to “applicants from underrepresented minority groups, including women” in its Ph.D. fellowship program; and in other ways indicates on its website that some of its employees and applicants are more equal than others.)

Here are some other examples:

- At General Motors, “All managers are expected to meet or exceed their diversity goals set through the Affirmative Action Program and initiatives and efforts. Executive representation goals have been set for each GM Sector and performance and targets are expected to be fully satisfied.” John Quattrone, GM’s North American vice president for human resources, said in a recent interview that GM wants a workforce that “reflects” its “customer base.”
- Pepsi has a “Mandatory annual Affirmative Action Planning process”; “Multi-year strategic plans for diversity are developed with the same vigor and goal setting process as other business issues. Goals include turnover reduction, increased diversity hiring and creation of an ‘inclusion’ culture.”
- Kodak is pro-preference enough to merit extensive criticism on the *adversity.net* (an anti-preference website), which quotes, for instance, the company’s 2002 annual report: “Accountability is a key component of Kodak’s commitment to diversity and inclusion. Executives are held accountable for their results through metrics tied to a portion of compensation. This measures progress in workforce diversity and culture transformation.” Kodak presents an annual “diversity award” to a manager “who demonstrates excellence in advancing the company’s diversity initiatives”; the 2001 recipient, for instance, “is committed to having a diverse employee profile.” Other companies criticized on *adversity.net* include Boeing, McDonald’s, M & M Mars, and many others.
- According to *USA Today*, “Cisco Systems increased its number of minority managers by 50% of the past year [2000-01] by closely measuring hires and basing part of its executives’ compensation on diversity hiring.”
- Likewise, Abbott Laboratories’ CEO Miles White bragged in a 2002 interview about his company’s minority and female numbers, asserting that “[a]ggressive, targeted recruiting” is a “critical element,” and declared, “If people miss their diversity and inclusion goals, it hurts their bonuses.” “One way to know you’re making progress,” said White, “is if

you get a note from a white male employee, saying, 'I'm concerned about all the women getting the important jobs.'"

- Fortune Brands recently advertised for an internship, which it labeled, "Minority College student."
- A "Fortune 100 pharmaceutical Plant" recently advertised on the Internet for a position, "Diversity candidate Preferred." Another Internet posting recently sought a "diversity candidate."
- BellSouth began a "minority legal internship program" in 1999, according to *Fortune*.
- *Fortune* also reports that at Bank of America "executive bonuses are tied to diversity progress."
- Fannie Mae brags about "its compensation policies that reward managers for meeting corporate diversity objectives" and "formal compensation policies that reward managers for helping women of color advance."
- The United States Postal Service lists as a top priority "Ensuring that there is representation of all groups at all levels."
- In *Clements v. Fitzgerald's Mississippi, Inc.*, No 04-60523 (5<sup>th</sup> Cir. Apr. 5, 2005), upholding a district court finding of affirmative discrimination, a white male was told "he would lose his job 'because of Barden Gaming's desire to "diversify'"; that Don Barden publicly stated that 'if you look at our wall of managers here you'll see all white males ... so we're gonna [sic] have more women as managers and more African Americans as managers.'"
- One employee of a large, Fortune 500 company contacted us when the company announced, internally only of course, that when managers were hiring interns, if they hired three, one had to be female, one a minority, and one a "top performer." (Note the soft bigotry of low expectations here.) We told the employee that this was an illegal quota and urged her to contact the corporate general counsel. She did so, and a week or two later we received this e-mail from her: "Corporate has been very responsive. I got a call this week from the person who is investigating the issue on behalf of the general counsel's office. She said that the minutes outlining the 'policy' have been taken down. They haven't formally admitted that they are wrong, but she said that there was a 'misstatement' and that they are revising the minutes to state the correct policy. She also said that she would contact me when they have finished their investigation and let me know what they decide. However, this looks like one win for the good guys."
- A September 25, 2005, *Washington Post* article quotes "Zachary A. Hummel, a partner with Bryan Cave LLP who counsels companies [on Title VII issues]": "Promoting and making sure your workforce is a reflection of the community you're in is important." So, as I wrote the *Post*, "Does this mean that, if you're in Idaho, you should evaluate the application of an African American differently than if you're in, say, D.C.?"

- According to an October 17, 2005 article in *Newsweek* about Xerox, “Managers are judged--and compensated--on meeting diversity goals.” The article indicates that the company’s CEO, Anne Mulcahy, is dismissive of affirmative discrimination concerns: “Tales of preferential treatment--along with numerical targets for women--might raise the ire of affirmative-action opponents. So be it. ‘If [somebody] wanted to write an editorial in The Wall Street Journal, I don’t particularly care,’ Mulcahy says.”
- NBC has a special program that offers “casting internships to college sophomores, juniors, seniors, and graduate students of ethnicity in the greater Los Angeles area.”
- The Center for Equal Opportunity has written to the top brass of the country’s fifty largest companies, asking them to sign this pledge: “In its hiring and promotion decisions, the XYZ Corporation will always seek and choose the individuals most qualified to do the job, and specifically without regard to race, ethnicity, sex, or any other characteristic covered by the civil rights laws. Our commitment to diversity does not mean that we use or allow preferences, quotas, or any other form of discrimination on the basis of these characteristics.” Predictably, none has actually made this pledge, although some have responded with statements of company policy that come hearteningly close. On the other hand, one company, Ace Limited, defiantly admitted to using race and ethnicity as tiebreakers in hiring, since “diversity is its own benefit and qualification.”

Finally, I should point out that university faculties are in a class by themselves when it comes to employment discrimination. I discussed this in the May 19, 2006 issue of *The Chronicle of Higher Education*, which I would like to have included in the record. (In addition, I’ve included here Appendix C and Appendix D, legal analyses of two issues that frequently arise in the academic context: ads indicating a preference for applications from certain minorities and/or women, and “minority job fairs.”) I’ve also written in *The Legal Times* and *Engage* magazine about affirmative discrimination in federal employment.

This—very brief—discussion has been limited to politically correct hiring and promotion policies. Many large companies also make large donations to organizations like the NAACP (e.g., Wal-Mart, Shell Oil, General Motors, and American Airlines each contributed from \$100,000 to \$250,000, and Wachovia donated a cool million) or Jesse Jackson’s Wall Street Project (AOL Time Warner, Citigroup, Coca-Cola, AT&T, General Motors (again), as well as Ford, Daimler Chrysler, Kodak, IBM, and Boeing), and, as noted above, many deliberately favor minority-owned companies in their contracting as well. “Diversity training” is common, too (see Frederick R. Lynch’s 1997 classic *The Diversity Machine*), as are racially exclusive scholarship programs (for example, Xerox’s “Technical Minority Scholarships” and KPMG’s “PhD Project”).

### III. LACK OF LOGICAL JUSTIFICATION

Companies argue that “cross-cultural competence” is very important for their employees. To sell a Pepsi to a black person, you see, you have to *be* a black person, or at least to have learned how to think like one. This is why Jews, for example, have proved to be so inept in the retail trades, where they have to sell to gentiles. And the Phoenicians never could figure out how to trade with non-Phoenicians, nor the folks in Hong Kong with Westerners, right? Wrong.

Thus, the companies argue as follows: (1) that people tend to be quite different from one another depending on their melanin content and national origin, and that therefore the way one sells a product to, say, a black person is very different from the way one sells a product to a white person; (2) that these differences cannot be learned or taught on the job; and so (3) it is essential that companies that have a diverse consumer base also have a diverse workforce.

This argument has so many holes in it that one hardly knows where to begin. For starters, of course, it would justify preferences only in some parts of only some companies, namely those that do significant retailing with a broad consumer base. It would not justify special efforts to achieve diversity among truck drivers, for instance, or clerical staff, or R&D people, or the in-house accountants or lawyers, or any other employee who wasn't involved in marketing the product.

But let's be charitable and take the most plausible scenario for the diversity argument. Let's suppose that a company was going to be launching a big push to improve sales of its product to Mexican Americans in the Southwest and elsewhere in the United States, and that therefore it was going to use preferences to try to increase the number of Latinos in its marketing department. I stress that this is the *most* plausible kind of scenario for diversity-based hiring.

But wait, not all Latinos are Mexican Americans. A Cuban American or Puerto Rican might have no particular knowledge of how to market to Mexican Americans or any particular knowledge of Mexican American culture. He might speak Spanish—but he might not, and the Mexican American customer might or might not speak Spanish, and if speaking Spanish is important, that can be hired for directly, and there would be no reason not to consider an Anglo or Asian or African American who spoke Spanish. In his 2002 book *American Skin*, Leon E. Wynter—who created and wrote the “Business and Race” column for the *Wall Street Journal* for ten years—concludes that ethnic marketing is on its way out because it makes less and less sense (except in the obvious and narrow instance of advertising in a particular foreign language).

Even among Mexican Americans, the prospective employee might or might not know something about Mexican American culture. There are plenty of Mexican Americans whose parents, and they, are fully assimilated. And what is it about Mexican American culture that is so mysterious that it cannot be fathomed by someone who

happens not to have a Spanish surname? Again, traders have been trading with people different from themselves for thousands of years.

Of course, the typical scenario is not even this plausible. We frequently hear the breathtaking non sequitur that, because we live in an era of globalization, therefore American companies must hire more African Americans. So, in order to understand how to market to foreigners, companies must hire more African Americans, the quintessential Americans. And would we allow companies that do little business in, say, Asia to limit the number of Asians they hire?

Typical of this lack of logical justification for diversity programs was the Business–Higher Education Forum’s Diversity Initiative Task Force report in 2002, *Investing in People: Developing All of America’s Talent on Campus and in the Workplace* [link: <http://www.bhef.com/>]. The report asserts that diversity is essential for businesses “to adapt their services and products, as well as their marketing strategies, to appeal to customers from a wide range of cultural backgrounds.”

Another doozy from the BHEF report: “There is some evidence suggesting that companies that invest in diversity are rewarded by their investors,” because when they received awards from the Department of Labor for exemplary affirmative action programs, their stock prices went up, and when they agreed to settle discrimination cases, their stock prices went down. You see, investors know that diversity is good business, so they reward it when they see it and punish companies that don’t have it. But isn’t the more plausible explanation—assuming there is anything more than coincidence at work here—that investors get skittish when they learn a company has run afoul of the law and has to pay out millions of dollars, and are comforted when they learn that a company is in the good graces of the feds?

There is an even more ludicrous defense of diversity hiring in the report: that, marketing aside, a diverse workplace produces “better critical thinkers” and people with superior “problem-solving skills” and more “openness to new ideas.” Such talents are significantly less likely to exist, we are supposed to believe, among blacks who have not spent enough time with whites, and vice versa. Pity the poor ancient Greeks. What a struggle they must have had to become critical thinkers, to hone their problem-solving skills, to be open to new ideas, when they could talk only with other ancient Greeks (I suspect women were underrepresented at the Lyceum, to boot).

While at the Center for Equal Opportunity, Edward Blum created a (fantasy) diversity fund out of the companies that signed an amicus brief supporting the University of Michigan’s race-based admissions policy, and found that the group was badly underperforming all the major stock-market benchmarks. And, he and I pointed out in an article for *Investor’s Business Daily*, that’s no surprise. Economics Nobel Laureate Gary Becker pointed out years ago in his seminal 1957 book *The Economics of Discrimination* that those who indulge a “taste for discrimination” and refuse to hire and promote on the basis of merit will have to pay for it. When you hire and promote on the basis--in whole

or in part--of characteristics other than productivity, then your workers will be less productive. Duh.

The BHEF report presents survey data that purport to show how pro-diversity America is. But there is all the difference in the world between a general agreement with the proposition that “diversity is nice” and the proposition that, in order to achieve it, it is okay to favor some and disfavor others on the basis of skin color and ancestry. In fact, such preferences are decidedly unpopular, among individuals of all races. A recent survey—conducted by the *Washington Post*, Henry J. Kaiser Family Foundation, and Harvard University, no less—found that 84 percent of Asians, 88 percent of Hispanics, 86 percent of African Americans, and 94 percent of whites thought hiring, promotion, and college admission “Should be based strictly on merit and qualifications other than race/ethnicity,” explicitly rejecting the answer “Race or ethnicity should be a factor.”

#### IV. LACK OF EMPIRICAL JUSTIFICATION

Of course, just because we can’t think of why a particular business practice would improve a company doesn’t mean that it won’t. So, even though there is no reason to think that using preferences based on race, ethnicity, and sex would improve the corporate bottom line, maybe it turns out that they do. Only it turns out that, no, there is no such evidence.

In fact, a 2003 study concludes that there is no correlation between diversity and improved company performance. Professor Thomas A. Kochan of Massachusetts Institute of Technology’s Sloan School of Management published “The Effects of Diversity on Business Performance: Report of the Diversity Research Network” in the *Human Resource Management Journal*.

The study was discussed in the business journal *Workforce*, and Kochan observes there that “there is virtually no evidence to support the simple assertion that diversity is inevitably good or bad for business.” He concludes, “The diversity industry is built on sand. The business case rhetoric for diversity is simply naïve and overdone. There are no strong positive or negative effects of gender or racial diversity on business performance.”

Peter Wood--author of a terrific book, *Diversity: The Invention of a Concept*, with a great chapter on corporate diversity programs--notes in his discussion of the Kochan study on FrontPageMag.com that “it appears that aggregate increased commitment to diversity by companies does correlate powerfully with a couple of things—namely increased charges of racial harassment and lawsuits.” The *Workforce* article noted that “empirical studies indicate that racial and ethnic diversity may, in fact, have a negative impact on business performance unless specific forms of analysis, training, and monitoring are in place. If left unattended or mismanaged, diversity is likely to produce miscommunication, unresolved conflict, higher turnover, and lower performance.”

Professor Kochan's findings are echoed by psychologist Helen Hemphill, whose book on diversity training said it "has created even more divisiveness and disruption than existed before." And an article 14 years ago in *Forbes* calculated the cost of preferences to the economy at well over \$225 billion in 1991, or 4 percent of the GNP.

For another paper questioning the empirical case for "diversity," see Peter Arcidiacono & Jacob L. Vigdor, "Does the River Spill Over? Estimating the Economic Returns to Attending a Racially Diverse College" (March 10, 2003) (discussed by George Leef on the "Phi Beta Cons" website of *National Review Online*, April 26, 2006).

In this regard, I should note that I am disturbed that your new race-and-color compliance manual (at page 15-31, footnote omitted) states, uncritically, that "Many employers have concluded that a diverse workforce makes a company stronger, more profitable, and a better place to work ...." Some employers may have concluded this but, as discussed above, it is by no means certain that there is any logical or empirical reason for this to be so. What is more to the point, however, is that even if employers think that a workforce with a particular racial-ethnic-sex mix will make them more money, *as a matter of law* they are not allowed to try to achieve that predetermined mix. Again, put the shoe on the other foot. Suppose an employer concluded that there would be better morale and productivity if there were no minorities or no women--would that employer be allowed to "implement diversity initiatives for competitive reasons" (to quote the manual again)? Of course not. And it is to the lack of legal justification for discrimination in the name of diversity that I now turn.

## V. LACK OF LEGAL JUSTIFICATION

If a business is caught awarding preferences on the basis of race, ethnicity, or sex, some managers might defend the practice as part of a celebration of "diversity." Companies may assume that the diversity rationale in hiring and promotions will shield them from legal challenge since the Supreme Court has accepted it for university admissions, but this is not true. The fact is that the legal justifications for employment discrimination are much weaker. Current statutory and case law are strongly against them, and for a number of reasons employers that employ such preferences are asking for legal trouble.

The primary reason for companies' heightened vulnerability is that the legality of racial and ethnic preferences in student admission decisions is, for the most part, governed by Title VI of the Civil Rights Act of 1964, while hiring and promotion decisions are more directly addressed by Title VII of that 1964 act. The courts have interpreted the two statutes differently, so that what is permissible under Title VI is not necessarily permissible under Title VII.

Title VI prohibits "discrimination" on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance." While the statute's text admits to no exceptions, the Supreme Court has interpreted it as coextensive with the

ban on discrimination under the less sharply worded Equal Protection Clause of the Constitution's Fourteenth Amendment.

Title VII also contains a categorical ban, forbidding any employer to “discriminate” on the basis of “race, color, religion, sex, or national origin” in hiring, firing, or “otherwise . . . with respect to [an employee's] compensation, terms, conditions, or privileges of employment.” But the Court has not conflated Title VII with the Equal Protection Clause, and accordingly the Court's recent ruling in the University of Michigan cases that the latter permits discrimination in the name of “diversity” is inapplicable.

Will the courts nonetheless create a “diversity” exception to Title VII's prohibition of racial and ethnic discrimination? That is very unlikely.

The statute, again, admits to no exceptions. To be sure, the Court did allow racial preferences in *United Steelworkers v. Weber*, handed down in 1979, and preferences on the basis of sex in *Johnson v. Santa Clara Transportation Agency*, a 1987 decision. But the rationale the Court approved in these two cases was not based on “diversity” but on “remedying” or “redressing” past employment practices that resulted in a “manifest imbalance” of the discriminated against groups “in traditionally segregated job categories”—and in 2007, and with every tick of the clock, it is becoming less and less likely that a company can plausibly assert that any imbalance, manifest or not, is traceable to “traditional[] segregat[ion].”

It is, after all, one thing to say that an antidiscrimination statute allows preferences in order to remedy discrimination; it is very different to say that such a statute allows discrimination so long as the employer and the courts think there is a good reason for it. There is simply no way to reconcile the latter “interpretation” with the words of the statute. (This point—and others regarding why there is no “diversity” exception to Title VII—are made by Professor Kingsley R. Browne in “Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position,” 21 *Labor Lawyer* 451, 461-472 (1997). In addition, Professor Nelson Lund has argued that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected even the remedial justification for an exception to Title VII. Nelson Lund, “The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform,” 6 *Geo. Mason L. Rev.* 87 (1997).)

Note also that the Court in *Johnson* stressed that preferences could be used only to “attain” and not to “maintain” greater balance; this would make no sense in the “diversity” context, since its rationale is not about remediation and would never end. The diversity rationale also is premised on a belief in racial, ethnic, and gender differences that is quite at odds with the insistence in Title VII that people be judged individually and without regard to stereotypes.

If a “diversity” exception is created, it is hard to see why other exceptions might not also be put forward. Yet Congress explicitly declined to create even a “bona fide

occupational qualification” exception to the statute for race, even as it did so for sex, religion, and national origin. Furthermore, the diversity rationale could be—and frequently is—used to support discrimination *against* members of racial, religious, and ethnic minority groups and women. If a company’s aim is greater “diversity” and less “underrepresentation” in its workforce, this means that any group that is “overrepresented” will be on the short end of any preferential hiring or promotion. That means that, depending on the company, racial and ethnic minorities and women could all lose out. It seems very unlikely that Title VII was written to allow such antiminority and antifemale discrimination so long as an employer could adduce a business reason for it.

Xerox recently lost an employment discrimination case before the U.S. Court of Appeals for the Fifth Circuit. At issue was the company’s “Balanced Workforce Initiative,” begun “in the 1990’s for the stated purpose of insuring that all racial and gender groups were proportionately balanced at all levels of the company.” The Houston office detected a racial imbalance, and so its general manager took steps “to remedy the disproportionate racial representation” there, “set[ting] specific racial goals for each job and grade level . . . .” The Fifth Circuit found that “the existence of the [Balanced Workforce Initiative] is sufficient to constitute direct evidence of a form or practice of discrimination.” After all, “Xerox candidly identified explicit racial goals for each job and grade level,” and the evidence “indicate[d] that managers were evaluated on how well they complied with” the initiative’s objectives.

An appalling company policy and an excellent judicial decision. And here’s the kicker: The plaintiffs were African Americans and the company had concluded that “blacks were over-represented and whites were under-represented.” I was glad to see that the Commission cited this case in its new race-and-color compliance manual (footnote 117).

It is not surprising that the two federal courts of appeals to be presented with the diversity rationale in Title VII cases have refused to accept it. In *Taxman v. Piscataway Township Board of Education* (1996), the en banc U.S. Court of Appeals for the Third Circuit ruled in favor of a white schoolteacher who was laid off because of her race and the desire of a high school to have a more “diverse” business-education department. (This case was also cited in footnote 117 of your new manual.) In *Messer v. Meno* (1997), the U.S. Court of Appeals for the Fifth Circuit ruled against the Texas Education Agency, which “aspired to ‘balance’ its workforce according to the gender and racial balance of the state.” The court stated that diversity programs are not permissible “absent a specific showing of prior discrimination.”

The Supreme Court itself has not yet ruled on the issue, but it is unlikely to carve out a “diversity” exception to Title VII. Such an exception would be inconsistent with the approach and language in the Court’s *Weber* and *Johnson* decisions, as Professor Kingsley Brown discussed in a 1997 article in *Labor Lawyer*. A majority of the Court takes statutory text very seriously; the same majority is especially unlikely to bend the words of a law in order to facilitate the use of racial and ethnic preferences, which it remains very wary of. Conservatives are not alone in this prediction. In 1997, when the

Court had granted review in the *Piscataway* case, the civil rights establishment was so afraid of losing on this issue that it raised enough money to pay off the claims of the plaintiff and the fees of her lawyer.

Finally, the U.S. Court of Appeals for the District of Columbia Circuit—the most relevant circuit for the federal government as employer—has rejected the diversity justification as insufficiently compelling *as a constitutional matter* in the employment context. This decision, *Lutheran Church–Missouri Synod v. FCC* (1998), noted that “goals” based on race triggered strict scrutiny, and was then followed by a D.C. federal trial court that struck down the Army’s affirmative-action promotion policy. And remember that Justice Powell’s opinion recognizing diversity in *Bakke* as a compelling interest hinged on the medical school’s First Amendment claims to academic freedom, so that it was asserting a “countervailing constitutional interest” of its own against the white applicant’s. But that countervailing interest is unavailable in the private employment context. (On the other hand, the U.S. Court of Appeals for the Seventh Circuit did apply *Gratz* and *Grutter* to recognize diversity as a compelling interest in an employment case involving police hires—but this decision involved only a constitutional claim, not one under Title VII.)

## VI. LACK OF MORAL JUSTIFICATION

I will not argue that, so long as the corporation complies with the law, it has a moral obligation to do anything more than make money for its shareholders. But a company should not tell its shareholders that the reason it is using preferences based on race, ethnicity, or sex is because there are morally compelling reasons for doing, because the opposite is true: It is wrong to hire, promote, and fire on the basis of employees’ skin color, what countries their ancestors came from, or what kind of physical plumbing they have. And such discrimination is discrimination whether race, ethnicity, or sex is an absolute requirement or “just one factor,” and whether they are considered pursuant to hard quota or a “goal” or “timetable.”

Frequently those favoring this discrimination will assert that it is justified because of America’s sad history of discrimination against various groups, and that this discrimination has resulted in economic disadvantages still felt by many in these groups. But if the idea is to help applicants from low-income families, there is no reason to assume that no white male could possibly be poor, and that everyone who is not a white male must be from the ghetto. Moreover, preference programs frequently end up discriminating not only against white males, but also against some minorities and women in favor of other minorities and women.

Another frequent claim is that, if you oppose preferences for minorities and women, it must be because you deny that discrimination against these groups any longer exists. While I certainly think it is delusional to maintain that discrimination against minorities and women has not dramatically diminished over the past forty years, I of course do not suggest that it no longer exists. But fighting the discrimination that still exists against minorities and women does not require that there be instead preferences in

their favor. Rather, we should energetically enforce the laws on the books that have transformed the American workforce, encourage the kinds of affirmative action programs that I discussed before that do not involve affirmative discrimination--and protect members of all races and ethnicities, and both sexes, from discrimination.

## VII. A WARNING FOR THE FUTURE

All of the above should persuade any company that, if it is using preferences based on race, ethnicity, or sex in its hiring and promoting, it should stop. But, just in case some additional prodding would be helpful, the Center for Equal Opportunity will try to provide some incentives.

CEO will be identifying particularly egregious practices at various companies and bringing them to the attention of the Equal Employment Opportunity Commission and the Labor Department's Office of Federal Contract Compliance Programs, the two federal agencies with principal responsibility for ensuring that the private sector complies with the civil rights laws regarding employment discrimination. The EEOC and OFCCP then have the discretion to bring enforcement actions; if they decline to do so, then we will help individuals who have been discriminated against bring actions in federal court. And, of course, at every step of the way we will publicize the companies' discrimination.

For too long, corporations have assumed that the public wouldn't learn or wouldn't care that the "celebration of diversity" generally means that some employees are treated as more equal than others. That needs to change.

In the last paragraph of his book *American Skin*, Leon E. Wynter concluded that, as he wrote that text, his "unspoken prayer and meditation was" the following: "One race, human, one culture, American." There is no good reason for companies to consider race, ethnicity, or sex in hiring and promotion, and we will all be winners when that practice ends and employees are considered on their own merits, as individuals. The natural diversity that will result is fine, but artificial diversity achieved through discrimination is not.

If the Commission agrees that all races, all ethnicities, and both sexes are protected from corporate discrimination by Title VII, I hope that it will ensure that its regional offices follow this policy, and that the Commission itself brings a few high-profile lawsuits against some of the practices and some of the companies that I have discussed today.

Thank you very much.

## APPENDIX A: THOUGHTS ON TARGETED RECRUITMENT

Frequently it is suggested that, while preferences based on race, ethnicity, and sex when people are actually hired, promoted, or fired is objectionable, seeking to increase the number of applicants from "underrepresented" groups might not be. *Cf.* EEOC

Compliance Manual, at 15-31 (“For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment.”) (footnote omitted). While I would agree that it is certainly a step in the right direction to limit race-, ethnic-, and gender-conscious efforts in this way, I am not convinced that even this limited use of preferential classifications is a good idea.

It is always useful when considering the desirability of preferences to put the shoe on the other foot—that is, to ask what the reaction would be if a measure being proposed to help minorities and women were, instead, being used in a way to tilt the scales in favor of whites and men. That helps us to determine whether or not what’s going on is discrimination, and that, after all, is the issue for civil rights law-enforcers—because discrimination is almost always illegal, even if people disagree about whether all discrimination is morally equivalent.

So, I begin by asking, when would it be acceptable to try to increase the number of white male applicants? I think the only situation—outside of a judicial order against an extremely recalcitrant discriminator against white males—would be if an employer determined that, for some reason, white males were applying at a rate much lower than there available numbers would predict. This leads to several additional points.

The first point is that targeted recruitment should never be undertaken as a result of an imbalance among *incumbents*. It can be undertaken, if ever, only because of an imbalance among *applicants*. This is true as a theoretical matter; it’s also true as a practical matter, if we really hope to limit the use of preferences to the recruitment stage.

Second, one must be careful in concluding that there is an imbalance among applicants. For a variety of reasons, there may be fewer members of some racial or ethnic groups who are qualified for particular jobs, and fewer women than men who are interested in particular jobs, and—perhaps to a lesser extent—vice versa. Members of some groups (especially women) may be less interested in jobs with long hours and travel, and more interested in jobs with flextime; some groups (Asians, whites) are more likely to have college degrees than others (blacks, Latinos); some groups, for who knows what reasons, are more interested in working for the government, or not working for the government, or sales, or not sales, etc. than other groups. If I were looking to hire and train parachuting forest-firefighters, I wouldn’t expect a lot of female applicants, even if women are as likely as men to meet the job’s objective requirements.

Third, one must be alert to the possibility that a racial imbalance in applicants is better explained by some factor other than race per se, and thus better addressed by means other than racially targeted recruitment. For instance, suppose that a company gets fewer than expected black applicants, and it turns out that this is because it is not recruiting in the southeast part of the state, which is heavily black. It would make sense, then, to send recruiters to the southeast part of the state; it would not make sense to send recruiters to a historically black college in the northwest part of the state.

Fourth, even if you were persuaded that, for instance, women qua women were applying in too-low numbers, *the aim should never be to favor additional applications from women over additional applications from others.*

On this point, consider the following hypothetical: You are in charge of recruiting for a company, and there are two job fairs scheduled at the same time, so you can go to only one. You have concluded that, as a general matter, your company receives many fewer applications from women than from men, and this is a problem because there's no reason to think that, for this particular job, there should be much difference, given the job and the demographics of the local pool. The first job fair is being held at a women's college, and will certainly increase the percentage of qualified women in your applicant pool. The second job fair is held at a coed college, and so it will probably not change the mix you've been getting. But—and this is the key point—the job fair at the coed college is much bigger, so you are going to get more applicants there than at the women's college. (I think it is also fair to assume that, the more applicants you have, the better the employees you will end up hiring.) Under these circumstances, it would be wrong to go to the smaller job fair at the women's college.

Thus, one can look at the profile of one's applicants to determine whether there are gaps in the recruitment "net." It is permissible to look at race, ethnicity, and sex in doing so, though no more so than other demographic characteristics, like geography, age, whatever. *The ultimate aim can never be to increase applicants from a particular group per se; it can only be to increase the number of applicants, period.*

Finally, I would point out that, even if one can conceive of some situations where targeting a particular group for recruitment makes sense, doing so will almost inevitably result in giving that group an edge at the hiring stage, too. If a company sends the word out that it wants to get more black applicants, that will ineluctably be translated by the personnel bureaucracy as wanting more black hires, too.

Accordingly, I think it is a mistake to say that recruitment targeted on the basis of race, ethnicity, or sex is acceptable. It is better simply to encourage employers to cast as wide a net as possible. If they do that, I think there are going to be very few—if any—situations where there will be significant disparities in their applicant pools. The need to make exceptions to the colorblind principle is very tenuous, and once you start making exceptions to it, you will have a hard time limiting and policing them.

## APPENDIX B: THE ILLEGALITY OF LAWYER QUOTAS

More than 60 law firms have signed a pact in which they agree to report to their corporate clients the composition by race, sex, ethnicity, and sexual preference of the legal teams doing the clients' work. [link: <http://www.law.com/jsp/article.jsp?id=1115888713745>] The corporate clients' idea, of course, is to force law firms to meet quotas in each category. Many companies--notably Shell

Oil--have already been unilaterally insisting that this be done. Quota quotes from the news story:

- “For law firms, failure to adequately diversify legal teams assigned to client matters could mean the difference between retaining business or being dropped in favor of more socially progressive shops, according to speakers at a press conference announcing the pact this week.”
- “[Law firms are] going to do what they have to do in order to be retained again and again.”
- “And if your numbers don’t add up,” [a corporate general counsel] warned, ‘you’re history.’”

It is illegal “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” (Title VII of the 1964 Civil Rights Act), and it is illegal to discriminate on the basis of race in the “making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship” (Title 42, Section 1981 of the U.S. Code).

Yet the violation of these laws appears to be widespread--and at the behest and with the cheerful cooperation of lawyers, no less. There is no denying that corporate general counsel are urging their outside counsel to assign lawyers to the company’s cases with an eye on the lawyers’ race, ethnicity, and sex. Lawyers who are the wrong skin color, whose ancestors came from the wrong countries, or who have the wrong plumbing will not get the work.

There is also no denying that being able to work for prestigious clients in big cases is certainly one of the “terms, conditions, or privileges of employment.” Thus, a law firm that gives in to the company’s threats is violating Title VII. Or, if a law firm refuses to bend to this coercion and is therefore not retained, it has lost the “benefits, privileges, terms, and conditions of the contractual relationship,” and the company has violated Section 1981. It is also inevitable that clients’ preferences will translate not only into assignment discrimination but also into hiring and partnership discrimination, which violates both statutes.

Suppose Shell were to tell Kelley, Drye & Warren--one of the first large Manhattan firms to sign the recent pact--“We would prefer it if you would not assign any Negroes, Puerto Ricans, or girls to our cases”--and suppose that the law firm meekly complied. If this were exposed, would anyone bother to argue that neither Title VII nor Section 1981 had been violated? Of course not.

There is no credible claim that clients want these statistics in order to ensure that the law firms are not discriminating against minorities and women. Law firms compete

frantically today for well-qualified women and, especially, minorities, and everyone knows it.

No, today it's all about "diversity" and equal results, rather than "nondiscrimination" and equal opportunity. Frequently the claim is made that diversity of backgrounds and viewpoints is essential for a successful legal team. But white males do not all think alike; nor do all Latinas, many of whom probably think like white males, whatever that means. Nor can one deduce a person's background and experiences simply by looking at her. There is no reason to use melanin content and genitalia as a proxy for true diversity of thought and experience.

The only plausible argument for diversity is jury appeal--the need to play to a multiracial jury by having a multiracial legal team. Of course, if attorneys are being selected partly on the basis of race rather than purely on the basis of merit, the competence of the team will suffer, but let's pretend for the sake of argument that the diminution in quality is offset by much greater jury appeal. The legal response is that the drafters of Title VII allowed no exception for this kind of "customer preference"; the moral response is to ask, So would it be okay to exclude members of unpopular minority groups from a legal team if they might rub a bigoted jury the wrong way?

One article about Shell ended by noting, "Not long ago, clients wanted their attorneys to look a certain way"--and, apparently, they still do.

#### APPENDIX C: JOB ADS INDICATING A PREFERENCE BASED ON RACE, ETHNICITY, OR SEX

Frequently job ads placed by universities will single out minorities and women as being "encouraged to apply" or "strongly encouraged" or even "especially encouraged," or will say, "Applications from women and minorities particularly sought." One school's ad read, "The College intends to increase its diversity and encourages women, persons with disabilities and minorities from underrepresented groups to apply."

Title VII of the 1964 Civil Rights Act not only prohibits the consideration of race, ethnicity, or sex in hiring and promotion decisions, but explicitly makes it illegal "to print or cause to be printed or published any notice or advertisement relating to employment ... indicating any preference, limitation, specification, or discrimination" based on race, ethnicity, or sex (42 U.S.C. sec. 2000e-3(b)). Specifying particular groups from whom applications are sought, and not listing others, would seem clearly to violate this provision. Suppose, for instance, the shoe were on the other foot, and an ad specified that "White males are encouraged to apply," let alone "especially" encouraged to apply? We think that the EEOC would, quite rightly, take a dim view of this.

To be sure, the Supreme Court has of course upheld the use of limited preferences based on race, ethnicity, and sex--see *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987)--but only when there is a "manifest imbalance" in a "traditionally segregated job category." It would seem to

us very unlikely that most institutions of higher education in 2007 would be able to meet this standard, especially the necessary showing that they have a history in recent times of having “traditionally segregated” a job position.

#### APPENDIX D: THE ILLEGALITY OF MINORITY JOB FAIRS

The analysis below was written in the specific context of minority job fairs held at law schools, but the same analysis would generally apply to minority job fairs held elsewhere.

##### I. Overview: Minority Job Fairs Violate Title VII of the Civil Rights Act of 1964

Title VII provides that it is unlawful for employers “to fail or refuse to hire ... because of an individual’s race, color, religion, sex, or national origin.” 42 U.S.C. section 2000e-2(a)(1). Title VII further provides that it is unlawful for employers “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 ... because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. section 2000e-2(a)(2). Minority job fairs segregate applicants by race and by doing so tend to deprive applicants, who are not members of the specified racial or ethnic group, of employment opportunities. See also 42 U.S.C. section 2000e-2(m) (race may not be a “motivating factor for any employment practice”).

Entities involved in minority job fairs also violate 42 U.S.C. section 2000e-3(b) by publicizing and advertising them. This provision of Title VII makes it unlawful for employers and employment agencies “to print or publish or cause to be printed or published any notice or advertisement relating to employment ... indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin.”

##### II. Why Law Schools, Employers, and Other Entities Involved in Minority Job Fairs Are in Violation of Title VII

Minority job fairs take on various forms. Some are hosted by law schools, others by employers, and still others by bar associations or other similar organizations. Regardless of which entity is identified as host of such an event, law schools and employers are usually involved integrally in minority job fairs. Law schools, through their career services offices, supply applicants through advertising, résumé forwarding, and other means. Employers review résumés, select applicants to interview at the job fairs, and make job offers based upon those interviews. By participating in minority job fairs, law schools, employers, and other entities involved violate Title VII.

## A. Employer Liability

Employers participating in job fairs are typically law firms or corporations. Government agencies and offices are also potential participants.

As private employers, law firms and corporations are subject to Title VII. Specifically, law firm partnerships are employers for the purposes of Title VII. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984). To use racial preferences in hiring, a private employer must demonstrate the “existence of a ‘manifest imbalance’ ... in ‘traditionally segregated job categories.’” *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). The “traditionally segregated” element of this test requires the employer to trace the imbalance to relatively recent past discrimination, which will be difficult for law firms to do, since they have been banned from such employment discrimination for nearly forty years now. Furthermore, the “manifest imbalance” part of the test requires that “the comparison should be with those in the labor force who possess the relevant qualifications.” *Id.* It is unlikely that private legal employers could meet this burden either. (Incidentally, I think that the EEOC’s new race-and-color compliance manual (at page 15-32), while it correctly notes the need for employers to tailor carefully any affirmative discrimination plans--along the lines discussed in the next paragraph--fails to stress adequately that it cannot adopt such plans in the first place unless the elements of traditional segregation and manifest imbalance are carefully demonstrated, too.)

Even if private legal employers could demonstrate the “existence of a ‘manifest imbalance’ ... in ‘traditionally segregated job categories,’” minority job fairs would violate Title VII because they categorically exclude non-minority law students. In approving an affirmative action plan by a private employer in *Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court took note that the plan did “not unnecessarily trammel the interests of the white employees.” It also noted the plan was “a temporary measure.” *Id.* Similarly, in *Johnson*, the Court approved a plan which did not “create ‘an absolute bar to the advancement of white employees.’” 480 U.S. at 616. Because minority job fairs categorically exclude non-minority students, they do “unnecessarily trammel the interests” of non-minority applicants and present an “absolute bar” to taking advantage of this interview opportunity.

Government employers must meet an even higher standard. In addition to complying with Title VII, they must comply with the Equal Protection Clause. The entities involved cannot claim a remedial justification unless they are willing to admit that they themselves have discriminated against minority groups in the recent past. The Supreme Court “never has held that societal discrimination alone is sufficient to justify a racial classification.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). If government employers were to claim a diversity justification, which has never been accepted in the realm of employment, *id.*—two courts of appeals have rejected it in the Title VII context—the Supreme Court’s recent decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* have made it clear that “individualized consideration” would be necessary to satisfy the “narrow tailoring” prong of strict scrutiny. A job fair which excludes certain applicants because of the color of their skin does not provide

“individualized consideration.” (It also appears that even private entities must now meet this higher standard, since the Court’s *Grutter* and *Gratz* decisions say that the prohibitions against intentional discrimination in the Fourteenth Amendment, Title VI, and 42 U.S.C. section 1981—which applies to public and private employment-related matters—are coextensive.)

## B. Law School Liability

Law schools that host, participate in, or in any way assist minority job fairs are violating Title VII. Law schools, specifically the career services office within law schools, act as employment agencies and, therefore, are subject to Title VII. Title VII defines an employment agency as “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.” 42 U.S.C. section 2000e(c). The career services office within any law school satisfies this definition because its purpose is to assist law students in finding jobs both while they are in school and after they graduate. Career services offices post job opportunities, collect résumés for employers, and host on-campus interviews. 42 U.S.C. section 2000e-2(b) makes clear that they may not do so in a way that discriminates on the basis of race or ethnicity. Moreover, minority job fairs are made possible by the advertising conducted by career services offices, and such advertisement also directly violates 42 U.S.C. section 2000e-3(b).

Law schools cannot rely upon the “existence of a ‘manifest imbalance’” in “traditionally segregated job categories.” Nothing in the Civil Rights Act of 1964 indicates that the law school could rely upon a showing that the employers for whom they are recruiting have discriminated in the past. Even if they could do this, the law school would need to demonstrate that they screened each legal employer and determined that each employer had a recent history of discrimination. Considering legal employers tend to be well-versed in the law, it is unlikely that forty years after the passage of the Civil Rights Act such a showing could be made.

By violating Title VII, law schools also violate Title VI as federal funding recipients. Because universities receive federal money, law schools must satisfy the Equal Protection Clause and Title VI. Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. section 2000d. By participating in minority job fairs, law schools, which receive federal financial assistance, discriminate. For law schools to justify this violation of Title VI, they must meet the higher standard of showing that they themselves have discriminated in assisting their minority students with finding jobs.

The law school could not rely on *Grutter v. Bollinger* to claim a diversity justification. *Grutter* addresses diversity in the classroom setting only. To the extent that a law school presented a diversity justification, which again has never been accepted in the realm of employment—see *Wygant, supra*—they would still need to provide

“individualized consideration.” See *Grutter v. Bollinger*. A job fair which excludes certain applicants due to race or ethnicity does not provide “individualized consideration.”

### C. Bar Associations and Other Hosts of Minority Job Fairs

Many minority job fairs are hosted by bar associations. As with the law schools, bar associations and other hosts of minority job fairs are acting as employment agencies. They are undertaking “to procure employees for an employer or to procure for employees opportunities to work for an employer.” 42 U.S.C. section 2000e(c). As stated above, there is nothing in Title VII which suggests that an entity acting as an employment agency can rely on the past discrimination of the employer for which they are providing employees. Even if they could, the bar association would have to screen each employer to ensure that the employer had a history of discrimination. Once again, such a showing would be highly unlikely in regard to legal employers.

### III. Conclusion

By excluding participants on the basis of race and ethnicity, minority job fairs violate Title VII. Some organizers of minority job fairs may claim that their “*minority job fair*” is merely called that, but is actually open to all students. Even if this were true, such a practice would be equivalent to posting a sign stating, “No blacks need apply,” and then claiming blacks would be considered if they did apply. This latter practice would not be tolerated and neither should the former. The practice of advertising a job fair as a “minority job fair” would also violate 42 U.S.C. section 2000e-3(b) by publishing a discriminatory “preference,” “limitation,” or “specification.”

Because minority job fairs violate Title VII, they should be opened to all students and it should be clearly advertised that they are now open to all students regardless of race or ethnicity. Until this occurs, law schools, participating employers, hosting bar associations, and other entities involved with minority job fairs are violating Title VII.