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## Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport

N. Jeremi Duru  
*Temple University*

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# FIELDING A TEAM FOR THE FANS: THE SOCIETAL CONSEQUENCES AND TITLE VII IMPLICATIONS OF RACE-CONSIDERED ROSTER CONSTRUCTION IN PROFESSIONAL SPORT

N. JEREMI DURU\*

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\* Assistant Professor of Law, The James E. Beasley School of Law, Temple University. J.D., Harvard Law School; M.P.P., Harvard University, John F. Kennedy School of Government; B.A., Brown University. I am grateful to Pamela Coukos, Timothy Davis, Roger Fairfax, Richard Lapchick, Khary Lazarre-White, Robin Lenhardt, Frank McClellan, Kenneth Shropshire, and Melissa Woods for reviewing various drafts of this article. In addition, I am grateful to The Honorable Damon J. Keith for his enduring mentorship, tutelage, and friendship and to Cyrus Mehri for his inspiration and for introducing me to the fascinating issues at the intersection of race, law, and sport. I also wish to thank my research assistants, Chanelle Williams and Elizabeth Myers, as well as Noa Kaumeheiwa and John Necci of Temple’s Law Library, for their valuable assistance. Finally, I wish to thank my wife, Mellissa Campbell Duru, and my son, Kanayo Alexander Duru, for their unconditional and loving support.

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## INTRODUCTION

A professional sports organization's relationship with its players and potential players is, at base, an employer's relationship with its employees and, like other employer-employee relationships, is regulated under state and federal law.<sup>1</sup> As such, an organization's approach to fielding a team must comply with, among other mandates, the provisions of Title VII of

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1. See Alison M. Barnes, *The Americans with Disabilities Act and the Aging Athlete After Casey Martin*, 12 MARQ. SPORTS L. REV. 67, 84 (2001) (explaining that sports teams are generally "employers of their athletes" and thus subject to the Americans with Disabilities Act); Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 104-05 (1994-1995) (articulating the presumption that "professional athletes are included under state workers' compensation plans"); Teresa Herbert, *Are Player Injuries Adequately Compensated?*, 7 SPORTS LAW. J. 243, 245, 263 (2000) (describing professional sports teams as employers and their athletes as employees and exploring the consequent applicability of workers' compensation statutes in the professional sports context); Steven I. Rubin, *The Vicarious Liability of Professional Sports Teams for On-the-Field Assaults Committed by Their Players*, 1 VA. J. SPORTS & L. 266, 268 (1999) (identifying the relationship between a professional sports franchise and its players as one between employer and employee and exploring the doctrine of *respondeat superior* in the professional sports context); Deanne L. Ayers, Comment, *Random Urinalysis: Violating the Athlete's Individual Rights?*, 30 HOW. L.J. 93, 126 (1987) (explaining that "owners of professional sports teams are private employers engaged in a business enterprise" and examining the privacy implications of subjecting players to random drug testing).

the Civil Rights Act of 1964 (“Title VII”) prohibiting racial discrimination in employment.<sup>2</sup>

Although professional sports organizations’ acquisitions and terminations are regularly detailed in newspapers across the country, the high-profile and generally highly remunerated nature of professional athletic employment makes it no less regulated under Title VII than actions to which the statute might more intuitively apply. Indeed, the law offers no distinction between the half-billion-dollar sports franchise to which millions of fans are devoted and the modest, fifteen-employee, convenience store of which only a few hundred patrons are aware.<sup>3</sup> Both organizations must comply with Title VII. Notwithstanding Title VII’s directives, however, professional sports organizations’ consideration of race in crafting their rosters has long impacted American professional sport, just as racial discrimination in other industries has long impacted the American workplace more broadly.<sup>4</sup>

The consequences of employment discrimination—whether a professional sports organization’s race-considered roster construction or a non-sports-related employer’s discriminatory hiring practices—can be several and severe.<sup>5</sup> Professional sports organizations are, however,

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2. See Michael Corey Dawson, Comment, *A Change Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must be Eliminated*, 9 SETON HALL J. SPORT L. 551, 556 (1999). In pertinent part, § 703 of Title VII states:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

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

42 U.S.C. § 2000e-2(a) (2000). The provisions of 42 U.S.C. § 1981 (2000), which prohibit racial discrimination in contract creation and enforcement, see Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 487 (2005), would also apply to a professional sports organization’s employment decisions. Although § 1981 and Title VII are procedurally distinct, § 1981 jurisprudence has largely adopted the methods of proof applied in Title VII intentional discrimination challenges and the two statutes are, therefore, often applied in tandem. See *id.* at 487–88.

3. Employers with fewer than fifteen employees are not subject to liability under Title VII. See 42 U.S.C. § 2000e(b).

4. See *infra* Part II.

5. See Recent Cases, *Title VII—Bona Fide Occupational Qualification Defense—Necessity of Sex Discriminatory Policy Should Be Evaluated According to a Totality of the Circumstances Test—Torres v. Wisconsin Department of Health and Social Services*, 859 F.2d 1522 (7th Cir. 1988), 102 HARV. L. REV. 2048, 2053 n.42 (1989) (“minority employment discrimination” results in “vast social

unique among employers. Unlike other employers, professional sports organizations have fans—avid supporters with no official organizational affiliation—who follow and celebrate the organizations' competitive exploits.<sup>6</sup> Fans pay large sums of money to watch these organizations compete, adorn their cars, homes, and offices with the organizations' emblems, and dress in the organizations' colors. In short, they identify with the organizations.<sup>7</sup>

This unique organizational context creates the possibility of unique employment discrimination consequences. To the extent that a professional sports organization engages in discriminatory employment practices and creates a racially imbalanced or homogeneous team, it risks fans' identification not only with that team, but also with the team's racial imbalance or homogeneity. And because of the zealous support sport fanmanship engenders, it risks the possibility that fans' support of team in competition devolves into fans' support of race in competition, perpetuating racial division and attendant socially detrimental racially motivated animosity.

Considering the unique character of employment discrimination in the race-considered roster construction context, it is necessary to explore the dangers specific to employment discrimination in that context, the import and nature of Title VII scrutiny of such employment discrimination, the extent to which some instances of race-considered roster construction might pass Title VII muster, and whether Title VII inapplicability in those instances results in societal detriment. This Article seeks to do so.

Part I examines Title VII, its history, and the prospect of its application in the race-considered roster construction context. Part II engages the phenomenon of race-considered roster construction and explores its persistence in the post-civil rights era, primarily through historical examination of Major League Baseball's Boston Red Sox and the National Basketball Association's Boston Celtics, two professional sports organizations for years associated with racially imbalanced rosters. This part also explores the consequences unique to employment discrimination in the race-considered roster construction context. Part III examines the applicability of Title VII doctrine to race-considered roster construction, exploring the factors involved in establishing liability as well as the means

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consequences . . . afflict[ing] the whole of the nation") (quoting *Patterson v. Newspaper & Mail Deliverers' Union*, 384 F. Supp 585, 593 (S.D.N.Y. 1974)).

6. See Debra A. Laverie & Dennis B. Arnett, *Factors Affecting Fan Attendance: The Influence of Identity Salience and Satisfaction*, 32 J. LEISURE RES. 225 (2000).

7. See *id.*

by which a professional sports organization might seek to defend against a Title VII action. Part IV explores race-considered roster construction favoring non-white players, rather than white players, through examining the construction of the 2005 New York Mets. This part analyzes the extent to which Title VII applies differently to such roster construction, the role of affirmative action in that application, and whether such roster construction, even if deemed lawful, risks generating the negative societal consequences traditionally associated with race-considered roster construction favoring white players. Finally, Part V encourages sustained Title VII scrutiny of professional sports organizations' personnel decisions to reduce the incidence of unlawful race-considered roster construction and, thus, eliminate the negative societal consequences it breeds.

#### I. TITLE VII AS A TOOL AGAINST RACE-CONSIDERED ROSTER CONSTRUCTION

The Civil Rights Act of 1964 ("1964 Act" or "Act"), passed in the midst of significant societal discord and violence and with an aim toward diffusing it, is widely recognized as the most significant civil rights legislation enacted in our nation's history.<sup>8</sup> Congress passed the Act "to implement our national commitment to equality," and in doing so instituted change across a wide swath of law,<sup>9</sup> resulting in its reputation as "the most far-reaching bill on civil rights in modern American history."<sup>10</sup> All told, the Act has eleven titles<sup>11</sup> outlawing discrimination in realms of American life from voter registration to public accommodations access.<sup>12</sup>

Such wide-ranging change is not quietly catalyzed, and the factors resulting in the Act's passage reveal the Act was certainly no exception. Indeed, as noted above, the Act was born of tumultuous violence.<sup>13</sup> When the United States abolished chattel slavery, those formerly enslaved did not experience freedom in any meaningful sense.<sup>14</sup> Rather, their

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8. See Emmanuel O. Iheukwumere & Phillip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 *TEMPLE POL. & CIV. RTS. L. REV.* 1, 14–21 (2001).

9. Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 *HOFSTRA LAB. & EMP. L.J.* 431, 432 (2005).

10. Iheukwumere & Aka, *supra* note 8, at 14 (quoting STEFFEN W. SCHMIDT ET AL., *AMERICAN GOVERNMENT AND POLITICS TODAY* 164 (2001–2002 ed.) (2001)).

11. Belton, *supra* note 9, at 432.

12. See SCHMIDT ET AL., *supra* note 10, at 164.

13. See Iheukwumere & Aka, *supra* note 8, at 21.

14. See Robert Pettus Hay, *Writing History: Time and the Story of Slavery*, 52 *MISS. Q.* 329, 330 (1999).

oppression merely shifted gears.<sup>15</sup> Although no longer property, the former slave population remained socially, economically, and politically subjugated as the nineteenth century gave way to the twentieth and the twentieth marched toward its latter half.<sup>16</sup> Black Americans, and others sympathetic to their plight, agitated for change throughout that period, but agitation increased in scope in the 1950s and early 1960s resulting in substantial social unrest.<sup>17</sup> While this movement for equality, known popularly as the Civil Rights Movement, was largely peaceful,<sup>18</sup> responses to it were often violent and murderous.<sup>19</sup> “Although killings, beatings, and torture of the civil rights activists were well known to those intimately involved in the movement,”<sup>20</sup> much of America, lawmakers and residents alike, turned a blind eye to the violence.<sup>21</sup>

When the violence became impossible to ignore, however, a federal legislative response began taking shape.<sup>22</sup> Having observed the widespread violence as well as the courageous stand of the civil rights community against it, then-Attorney General Robert Kennedy developed a keen interest in addressing the problem,<sup>23</sup> which became for Kennedy, in 1961, quite personal.<sup>24</sup> In that year, while in Alabama, the Attorney General’s administrative assistant was set upon by a mob of club-wielding whites, knocked unconscious, and left lying on the sidewalk for thirty minutes before help was summoned.<sup>25</sup> This personal connection to the racial violence of the day intensified Kennedy’s dedication to the problem, and, on May 17, 1963, during a flight from Washington, D.C., to North Carolina, he began, with an aide, to craft the bill that would eventually become the 1964 Act.<sup>26</sup>

Attorney General Kennedy’s brother, President John F. Kennedy, was far more hesitant to engage the issue.<sup>27</sup> Eventually, however, he too recognized the nation’s need for comprehensive civil rights legislation and

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15. *See id.*

16. *See id.*

17. *See* Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 64–65 (1998).

18. *See* Sally Avery Bermanzohn, *Violence, Nonviolence, and the Civil Rights Movement*, 22 NEW POL. SCI. 31, 41–48 (2000).

19. *See id.* at 31.

20. Iheukwumere & Aka, *supra* note 8, at 21.

21. *See* Bermanzohn, *supra* note 18, at 34.

22. *See id.* at 32–33.

23. *See* CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 5 (1985).

24. *See id.*

25. *Id.*

26. *See id.*

27. *See id.*

was likely spurred to action after witnessing national television footage of a brutal response to a peaceful civil rights demonstration in Birmingham, Alabama, during which the Alabama Police Commissioner ordered officers to attack the demonstrators—adults and children alike—with police dogs and cattle prods.<sup>28</sup> If, indeed, the violent footage motivated President Kennedy’s attention to the issue, he was not alone. The televised Alabama attacks, perhaps more than any other individual occurrence, “convinced a substantial majority of the public that action was needed to ameliorate the injustices against their fellow citizens.”<sup>29</sup> The violence became, to the majority of the nation, intolerable, and congressional action was deemed necessary to establish equality under the law for all Americans in order that America’s long-standing racial wound heal.<sup>30</sup>

On June 26, 1963, President Kennedy presented to Congress the first iteration of the 1964 Act,<sup>31</sup> and fundamental to that first iteration was equal employment opportunity.<sup>32</sup> Although the proposed legislation would endure significant filibuster, debate, and amendment before President Lyndon Johnson signed it into law on July 2, 1964,<sup>33</sup> equal employment opportunity remained a central theme of the legislation, embedded firmly in the seventh of the Act’s many Titles.<sup>34</sup> In spite of the many amendments that have impacted the 1964 Act since its passage, Title VII remains integral to this nation’s civil rights protections.<sup>35</sup> Indeed, of all the Act’s titles, “Title VII has emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality.”<sup>36</sup>

Title VII reads, in relevant part, “[i]t shall be an unlawful employment practice for an employer . . . 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 . . . .”<sup>37</sup> This prohibition on employment discrimination governs all employers, whether private or public, with fifteen or more employees,<sup>38</sup>

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28. See Iheukwumere & Aka, *supra* note 8, at 21 n.134.

29. *Id.* at 21 n.134.

30. *See id.*

31. WHALEN & WHALEN, *supra* note 23, at 2–3.

32. *See id.* at 1–2.

33. *Id.* at 228.

34. *See id.* at 115–19.

35. *See* Belton, *supra* note 9, at 432–33.

36. *Id.*

37. 42 U.S.C. § 2000e-2(a) (2000).

38. § 2000e(b).

and therefore, governs all American professional sports organizations.<sup>39</sup> And, in that a desire to quell racial violence spurred Title VII's passage, its application in thwarting race-considered roster construction, race-based team identification, and the potential violence that flows therefrom, would certainly seem appropriate.

## II. RACE-CONSIDERED ROSTER CONSTRUCTION: THE PHENOMENON; THE CONSEQUENCES

Each of America's major professional sports leagues—the National Basketball Association (NBA), the National Hockey League (NHL), the National Football League (NFL), and Major League Baseball (MLB or the “Major Leagues”)—has its own unique history with race and racial discrimination.<sup>40</sup> The NBA included its first black player in 1950, with the Boston Celtics drafting Chuck Cooper of Duquesne University.<sup>41</sup> The NHL integrated several years later when the Boston Bruins debuted Willie O'Ree.<sup>42</sup> The NFL, founded in 1920 and originally operating as the

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39. Professor Kenneth Shropshire incisively notes that, to the extent a private professional sports organization takes on a public character through playing in a government-owned arena, the organization's hiring practices could be deemed state action and the organization could face liability under another of the 1964 Act's titles, Title II, which prohibits discrimination in places of public accommodation. *See* KENNETH SHROPSHIRE, IN *BLACK AND WHITE: RACE AND SPORTS IN AMERICA* 73 (1996). Although the majority of professional sports organizations utilize state-owned arenas, Professor Shropshire explains this legal approach would involve courts “sifting facts and weighing circumstances” to determine whether “the nonobvious involvement of the State in private conduct” constitutes state action in a particular case, and would face difficulty in successfully establishing liability. *Id.* (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

40. In addressing the integration of America's four major sports leagues, the author focuses on the acceptance of black players into the respective leagues. The author does so reluctantly and with awareness of the limits and dangers of a bi-polar discussion of race in a country that is multi-racial rather than bi-racial. The initial acceptance of blacks into the respective leagues, however, carries particular importance because, as Professor Shropshire explains, “the history of [discrimination in] sports . . . sets it apart from any other institution in America,” in that black athletes (particularly black baseball players) often tried to pass as members of other races—for instance, “Native Americans or [light-skinned] Latinos”—because such athletes were more readily accepted on the field of play. SHROPSHIRE, *supra* note 39, at xxii. Notably, although light-skinned Latinos were permitted to play major league baseball before blacks, for example, they often suffered discriminatorily low pay and were degradingly stereotyped. *See* Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881, 890–91 (1999).

41. *See* HARVEY ARATON & FILIP BONDY, *THE SELLING OF THE GREEN: THE FINANCIAL RISE AND MORAL DECLINE OF THE BOSTON CELTICS* 50–51 (1992); HOWARD BRYANT, *SHUT OUT: A STORY OF RACE AND BASEBALL IN BOSTON* 143 (2002). During that same season, the Washington Capitols added Earl Lloyd and the New York Knicks signed Nat “Sweetwater” Clifton. *See* SHROPSHIRE, *supra* note 39, at 31. Lloyd, although drafted after Cooper, was the first black player to actually enter an NBA game. *Id.*

42. *See* PATRICK CLARK, *SPORTS FIRSTS* 69 (1981).

American Professional Football Association,<sup>43</sup> did not initially restrict black athletes from playing in the league.<sup>44</sup> In 1934, however, the NFL's teams changed course, expurgating all black players.<sup>45</sup> Twelve years later, the NFL re-integrated, with the Los Angeles Rams signing Kenny Washington and Woody Strode in 1946.<sup>46</sup> Major League Baseball, comprised of two separate leagues, the American League and National League, and working under a joint organizational structure originally instituted in 1903,<sup>47</sup> has perhaps the most notorious experience with racial exclusion and eventual inclusion. While the two leagues permitted black players in the late 1800s, some entirely white teams refused to play against teams with black players and black players were ushered out of the leagues, ultimately organizing to play among themselves.<sup>48</sup> In 1920, the Negro National League, the first of several leagues of black baseball teams, which would together be known as the Negro Leagues, began play.<sup>49</sup> The Negro Leagues were unique on the American athletic landscape, providing successful alternative outlets for black baseball players to display their talents.<sup>50</sup> For decades, whites and blacks played baseball on parallel tracks in entirely separate leagues, meeting only occasionally in exhibition matches.<sup>51</sup>

As the second half of the twentieth century approached, however, MLB teams would slowly open their doors to black players, beginning with the Brooklyn Dodgers' 1947 decision to field former Negro Leaguer Jackie Robinson at second base.<sup>52</sup> Rather than resolutely smashing the discriminatory barrier to professional sport as is often romantically portrayed,<sup>53</sup> the Dodgers' decision to field Robinson created in the barrier

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43. *Id.* at 37. During the following year, the American Professional Football Association reorganized and changed its name to the American Professional Football League. *Id.*

44. See ARTHUR R. ASHE, JR., *A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN-AMERICAN ATHLETE SINCE 1946* 130 (1988).

45. *Id.*

46. *Id.*

47. See *THE BASEBALL ENCYCLOPEDIA: THE COMPLETE AND DEFINITIVE RECORD OF MAJOR LEAGUE BASEBALL* 6 (Jeanine Bucek ed., 1996).

48. See CLARK, *supra* note 42, at 12.

49. See ARTHUR R. ASHE, JR., *A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN-AMERICAN ATHLETE 1919-1945* 27-30 (1988); SHROPSHIRE, *supra* note 39, at 47.

50. See ASHE, *supra* note 49, at 27-30; SHROPSHIRE, *supra* note 39, at 46-47.

51. See ASHE, *supra* note 49, at 27-36.

52. See SHROPSHIRE, *supra* note 39, at 29.

53. Notably, the NFL actually integrated before MLB. See *supra* text accompanying notes 46, 52. Despite the NFL's integration a year earlier, however, "[w]hen Jackie Robinson integrated Major League Baseball in 1947, that event was hailed as the biggest civil rights success since the Civil War." SHROPSHIRE, *supra* note 39, at 19. Perhaps in part because professional baseball was at the time far

a thin breach, to which only a few black players would initially gain access.<sup>54</sup> As decades rolled by, the opening widened and professional baseball, as well as American professional sport more broadly, grew in diversity.<sup>55</sup> Different teams, however, embraced equal employment opportunity for players to different extents, with some lagging well behind others in the signing of black players. No team in any league is reputed as having been more resistant than the Boston Red Sox.<sup>56</sup>

#### A. *Race and the Red Sox*

The Red Sox's reputation was born, ironically, when the club, on April 16, 1945, invited Jackie Robinson and two other talented Negro League players, Sam Jethroe and Marvin Williams, to its home field, Fenway Park, for a tryout.<sup>57</sup> Not until the tryout commenced did the players realize the audition was a sham, resulting from a political compromise, and that the Red Sox had no interest in employing any of the three.<sup>58</sup> The Red Sox's preference for fielding a team entirely of white players was not at all aberrant at the time. As other organizations began to employ black players, however, the Red Sox remained entrenched—so much so that in 1949, they declined to hire a young and already supremely talented Willie Mays, who would go on to become arguably the best player in the history of baseball.<sup>59</sup> Indeed, after each of MLB's other fifteen clubs had opted to integrate their teams, the Red Sox held out, until finally adding a black player in 1959.<sup>60</sup> The Red Sox's discrimination in hiring to that point was clearly intentional and widely viewed as the consequence of racial animus

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more popular in America than professional football, *see* ASHE, *supra* note 44, at 128, Jackie Robinson's MLB debut was then, and continues to be, viewed as the more significant milestone.

54. *See* ASHE, *supra* note 44, at 5, providing as follows:

The period from Jackie Robinson's debut in April 1947 to 1953 can best be described as one of token integration. In this seven-year stretch, the National League added blacks at the rate of three every two years; the American League just one every two years. Some clubs would just not add any. . . . It took fourteen years for the major leagues to become integrated.

*See also* BRYANT, *supra* note 41, at 63. Career MLB home run record holder, Hank Aaron, articulated a view widely shared among black players during the early days of baseball integration that although the Major Leagues were officially integrated, "the white baseball establishment would only make room for exceptional black players." *Id.*

55. *See* ASHE, *supra* note 44, at 5.

56. *See* BRYANT, *supra* note 41, at 1–2.

57. *Id.* at 31.

58. *Id.* at 32.

59. *See id.* at 45–46; Steve Fainaru, *In Racism's Shadow: Red Sox Working to Shed Longtime Image, but Blacks In and Out of Baseball Still Uneasy*, BOSTON GLOBE, Aug. 4, 1991, at 1.

60. *See* BRYANT, *supra* note 41, at 53.

in Red Sox management.<sup>61</sup> However, the discrimination predated, and was thus not actionable under, Title VII.<sup>62</sup> For several years following Title VII's 1964 enactment, the Red Sox fielded relatively racially balanced teams,<sup>63</sup> but the team's roster soon fell back into conspicuous racial imbalance.<sup>64</sup> In the years following the widespread eruptive opposition to Boston's 1974 implementation of an integrationist busing program for public school children, the Red Sox's percentage of black players steadily declined.<sup>65</sup> By 1979, the Red Sox had only one black player, All-Star outfielder Jim Rice, who would remain the only black player on the team for roughly four seasons.<sup>66</sup> The imbalance continued through the 1980s, during which decade the Red Sox fielded fewer black players than any other Major League Baseball organization, and by decade's end "racism and the Red Sox were inseparable topics."<sup>67</sup>

The Red Sox's fan base reflected the team's disproportionality. Indeed, during the 1980s and early 1990s, many black Boston-area baseball fans felt alienated by the Red Sox and their image, and few patronized Red Sox games.<sup>68</sup> One white Red Sox fan, queried about the racial atmosphere at Red Sox games during that time period, poignantly conjured images of apartheid-stricken South Africa by describing the almost entirely white crowd as "resembl[ing] a rugby match in Pretoria."<sup>69</sup>

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61. *See id.* at 1–2.

62. It is arguable, however, that such pre-Title VII discrimination did contravene federal anti-discrimination law as set forth in § 1981. Section 1981, initially passed as a provision of the Civil Rights Act of 1866 (the "1866 Act") intended to shield non-whites from race-based oppression in slavery's aftermath, prohibits race-based employment discrimination. *See* Angela M. Ford, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 U. KAN. L. REV. 457, 460–62 (2001). While conventional wisdom suggests § 1981 did not apply to a private party's discriminatory behavior prior to the United States Supreme Court's 1975 and 1976 decisions in *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975) and *Runyon v. McCrary*, 427 U.S. 160 (1976), respectively, the text of the 1866 Act as well as its legislative history suggest that perhaps a § 1981 claim of employment discrimination in the private sector has been viable since the 1866 Act was passed. *See* N. Jeremi Duru, *Exploring Jethroe's Injustice: The Impact of an Ex-Ballplayer's Legal Quest for a Pension on the Movement for Restorative Racial Justice* (work-in-progress, on file with author) (analyzing § 1981's applicability to the racial discrimination claims of former Negro League baseball players).

63. *See* BRYANT, *supra* note 41, at 69–70, 120–22.

64. *See id.* at 138–39.

65. Boston, a city famous for "neighborhoods polarized along racial borders," *id.* at 144, became increasingly polarized as the busing program took hold. *See id.* at 123. Indeed, the city was "fraught with tension," and, as a consequence, sport, like other aspects of Boston life, was inevitably linked with issues of race. *See id.* at 123–24.

66. *Id.* at 139.

67. *Id.* at 153.

68. *See id.* at 188.

69. Fainaru, *supra* note 59, at 1. An informal 1991 Boston Globe survey revealed fewer than eighty blacks at several well-attended Red Sox home games that summer and a more precise

The consequence of the Red Sox's racially imbalanced roster construction was a broadly held perception that the Red Sox were a "white" team: a team by whites and for whites.<sup>70</sup> This perception may well have reached its height in early 1986, when former Red Sox player and coach Tommy Harper publicly filed with the United States Equal Employment Opportunity Commission (EEOC) a charge of racial discrimination and retaliation against the team.<sup>71</sup> He alleged that since 1971, the team had accepted passes to the segregated Winter Haven Elks Club, located in Winter Haven, Florida, where the Red Sox annually conduct spring training, and distributed them only to white team personnel.<sup>72</sup> He further alleged that in 1984 he objected to the practice and was told it would cease.<sup>73</sup> When the practice did not cease during the spring of 1985, and Harper was interviewed about it, he opined that the practice was discriminatory.<sup>74</sup> Upon publication of the newspaper article containing his quotations, Harper alleged he was ostracized and received "no further assignments or direction from the Red Sox" for the remainder of the 1985 season.<sup>75</sup> Then, on December 19, 1985, the Red Sox terminated Harper, claiming poor performance,<sup>76</sup> and less than two months later Harper filed his EEOC charge.<sup>77</sup> During the summer of 1986, the EEOC determined the Red Sox had committed "unlawful employment practices" by firing Harper in retaliation for accusing the organization of racism.<sup>78</sup>

Etched in history as Major League Baseball's final holdout against integration, well into a decade during which they would employ fewer black players than any other Major League organization, and on the heels of public accusations of longstanding organizational racism and unlawful retaliation against the accuser, the Red Sox's reputation as a "white" team was, in the autumn of 1986, as strong as ever. With this reputation, the Red Sox would vie for Major League Baseball's World Series

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recording identified just seventy-one blacks among the 34,032 total spectators at the Red Sox-Toronto Blue Jays contest on Friday night, August 2, 1991. *Id.*

70. *See id.*

71. *See* Michael Madden, *Harper: Sox Are Racist, Fired Coach Files Charge of Discrimination Against Club*, BOSTON GLOBE, Jan. 31, 1986, at 39.

72. *See id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* BRYANT, *supra* note 41, at 149.

77. *See* Madden, *supra* note 71, at 39.

78. Michael Madden, *Harper's Charges Against Sox Upheld*, BOSTON GLOBE, July 2, 1986, at 67.

Championship. They would lose in tragic fashion, and their loss would trigger tragic events.

*1. From Rooting to Rioting: Racial Violence at UMass in the Wake of the Red Sox's World Series Defeat*

At 11:30 p.m. on October 27, 1986, the New York Mets defeated the Red Sox in the final game of a best-of-seven series to claim the World Series Championship.<sup>79</sup> The loss was devastating for the Red Sox, having been only one out short of victory in the sixth game of the series and having stormed out to an early lead in the seventh game only to collapse as the contest progressed.<sup>80</sup> The loss was devastating, too, for Red Sox fans.<sup>81</sup> The team was without a World Series title since 1918, and the team's fans, desperately desiring an end to the drought, were crestfallen, both by the fact of the loss and the manner in which it transpired.<sup>82</sup> It was a dark day for Boston Red Sox baseball.<sup>83</sup>

It was, as it turns out, a darker day still for the University of Massachusetts at Amherst ("UMass") community.<sup>84</sup> In the aftermath of the World Series loss, while much of New England was mourning the Red Sox's historic collapse, members of the UMass community were struggling to make sense of an ugly riot involving as many as three thousand students, which erupted on the heels of the game's conclusion.<sup>85</sup> Initially deemed a drunken brawl among baseball fans, further analysis revealed a different picture.<sup>86</sup> Two separate independent investigations conducted after the incident, one by Hampshire County District Attorney W. Matthew Ryan and one by Frederick Hurst of the Massachusetts Commission Against Discrimination, concluded the violence was racially motivated.<sup>87</sup>

The Hurst investigation, commissioned by the University's then-Chancellor Joseph Duffy, and resulting in a fifty-two-page comprehensive

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79. FREDERICK A. HURST, REPORT ON UMASS INVESTIGATION 1, 11 (1987) [hereinafter HURST REPORT].

80. See GLENN STOUT & RICHARD A. JOHNSON, RED SOX CENTURY 410–12, 415 (2000).

81. See *id.* at 415.

82. See *id.*

83. See *id.*

84. See Matthew L. Wald, *Racism Blamed for Brawl at U. of Massachusetts*, N.Y. TIMES, Feb. 6, 1987, at A12; Bonnie V. Winston, *Dukakis, Students Meet on UMass Violence*, BOSTON GLOBE, Feb. 15, 1987, at 43.

85. See Wald, *supra* note 84, at A12.

86. See *id.*

87. See Jonathan Kaufman, *Jackson Calls for Talks on Minorities and Colleges*, BOSTON GLOBE, Apr. 22, 1987, at 45; *Massachusetts U. Scene of Protest*, N.Y. TIMES, Feb. 13, 1988, at 17.

report, revealed UMass students largely viewed the Red Sox as a “white” team,<sup>88</sup> an unsurprising conclusion in light of the aforementioned broader prevailing perception to that effect. The Hurst investigation also revealed students viewed the Mets, the Red Sox’s opponents, as the Red Sox’s antithesis—a “black” team.<sup>89</sup> Consequently, the World Series confrontation was, to many on campus, both an athletic confrontation and a racial confrontation.<sup>90</sup> And, according to Hurst, those Red Sox fans viewing their team as the “white” team, having just witnessed a substantial defeat—in their view both athletic and racial—sought revenge implicating both sport and race.<sup>91</sup>

As Red Sox fans streamed out of their residences and into a courtyard in the campus’s Southwest residential area, at least some did so with an agenda of attacking Mets fans, and as the crowd in the courtyard grew, the agenda seemed to pervade.<sup>92</sup> The Hurst report reveals that the hostilities exchanged were initially entirely among whites,<sup>93</sup> and, indeed, only fifteen to twenty black students were in the courtyard at the time.<sup>94</sup> The anger of the crowd, however, at some point “perceptibly shifted” toward those few black students,<sup>95</sup> and as hostilities increased, the crowd was “focusing in on a surrogate target against which to take revenge for the Sox loss and that surrogate target conveniently became black students.”<sup>96</sup> As the crowd turned on the black students, any distinction among the black students that might have differentiated black Mets fans from black Red Sox fans from black students with no rooting interest dissolved, and “[t]hey all became Mets fans confronted by an increasingly violent white crowd.”<sup>97</sup> Irrespective of whether the black students supported the Mets, the crowd identified the black students with the Mets—the “black” team—and visited upon the students the animosity it felt for the team.<sup>98</sup> Ultimately, during the course of an attack peppered with racial invective, ten students sustained injuries requiring treatment, including one student who was

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88. HURST REPORT, *supra* note 79, at 8; *id.* at Attachment A, Letter from Len Zakim and Sally Greenberg, at 2 [hereinafter Zakim, Greenberg Letter].

89. *Id.* Lost in the dichotomous simplification of the Red Sox as a “white” team and the Mets as a “black” team was the reality that both teams fielded Latino players in addition to white and black players in 1986. See BASEBALL ENCYCLOPEDIA, *supra* note 47, at 588, 591.

90. See HURST REPORT, *supra* note 79, at 17.

91. *Id.* at 13–24.

92. See *id.* at 12.

93. See *id.*

94. See *id.* at 13 n.1.

95. *Id.* at 13.

96. *Id.*

97. *Id.* at 14.

98. *Id.*

kicked and beaten with sticks and poles into unconsciousness.<sup>99</sup> And, as the riot's consequence, campus race relations suffered.<sup>100</sup>

## 2. *The UMass Riot: Race-Based Team Identification's Predictable Consequence*

In reflecting on the UMass riot, it becomes necessary to assess whether the events were aberrant, on the one hand, or the predictable outcome of the factors that fueled them, on the other. If the former, the riot is reasonably viewed as a horrific but anomalous event on which a forward-looking society need not unnecessarily dwell. If the latter, society must be concerned with preventing future such incidents. Nyla R. Branscombe and Daniel L. Wann's incisive study, *Role of Identification with a Group, Arousal, Categorization Processes, and Self-Esteem in Sports Spectator Aggression*, suggests concern is in order.<sup>101</sup>

Branscombe and Wann reveal that aggression and hostility on the part of sports spectators results from several factors, including group-level identification, categorization processes, and physiological arousal.<sup>102</sup> They explain that "[t]he link between identifying oneself as a member of a group, caring about that identity, and categorization of others as members of the same group (the ingroup) or a different group (the outgroup) is well supported."<sup>103</sup> This phenomenon creates a tendency, even among group-identified people with low levels of identification, to view differences among groups in terms of "us" versus "them".<sup>104</sup> When, however, the

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99. See *id.* at 21–22; *id.* at Attachment A, Zakim, Greenberg Letter, at 2.

100. This is not to suggest an idyllic racial atmosphere prevailed on campus prior to the incident. On the contrary, pre-riot racial tension existed. See HURST REPORT, *supra* note 79, at 39–41. Without question, however, the events following the World Series severely exacerbated those tensions. Indeed, UMass's black students were so frightened of racial mob violence occurring on Halloween night just a few days after the riot that they marched en masse, demanding the administration take precautionary measures. See *id.* at 32. And during the year following the riot, both then-Governor Michael Dukakis and civil rights activist Jesse Jackson visited UMass to address concerns about the racial climate on campus and to quell racial animus. See Winston, *supra* note 84, at 43; Kaufman, *supra* note 87, at 45. The visits and attendant discussions and speeches did little to improve racial harmony on campus. In early 1988, frustrated with the continued occurrence of racially motivated incidents at the University and the University's slow implementation of the recommendations issued in the Hurst report, 200 black students took over a University building in protest. See *Massachusetts U. Scene of Protest*, *supra* note 87, at 17; *UMass Building Takeover Rooted in Longstanding Racial Tension*, BOSTON GLOBE, Feb. 14, 1988, at 44.

101. See Nyla R. Branscombe & Daniel L. Wann, *Role of Identification with a Group, Arousal, Categorization Processes, and Self-Esteem in Sports Spectator Aggression*, 45 HUM. REL. 1013, 1015–21 (1992).

102. *Id.* at 1015.

103. *Id.* at 1019.

104. See *id.*

allegiance to a group is particularly intense, the “us” versus “them” dynamic is more pronounced.<sup>105</sup> Branscombe and Wann suggest allegiance to nation as emblematic of particularly intense group identification with the potential to spur tragic societal consequences.<sup>106</sup> Racial allegiance, at least in the United States, certainly has the potential to spark group identification of similar intensity to that of national allegiance and, thus, the potential to catalyze negative societal consequences.<sup>107</sup>

The power of racial allegiance to create an “us” versus “them” dynamic in America has historically been particularly clear in the context of two members of different races meeting in competition. Boxing, a sport in which the goal is outright physical domination, provides an early example. When former heavyweight boxing champion Jim Jeffries, a white man, challenged then-current champion Jack Johnson, a black man, in 1910, the affair was, without question, more about race than sport.<sup>108</sup> During his tenure as heavyweight champion, Johnson enraged much of white America by unabashedly refusing to be racially subjugated, and much of white America called on Jeffries to defeat Johnson on behalf of all whites.<sup>109</sup> Racial hatred of Johnson was so pervasive among those attending the match that “spectators were required to check their guns at the gate” for fear Jeffries’ supporters might otherwise shoot Johnson dead in the boxing ring.<sup>110</sup> Much to the disappointment of those desiring Johnson’s defeat, Johnson beat Jeffries badly, and, in the aftermath of the match, race riots erupted “like prickly heat all over the country.”<sup>111</sup> By the time the violence subsided, hundreds of blacks were injured and at least eleven were left dead.<sup>112</sup>

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105. *See id.*

106. *See id.*

107. *See generally* Aune Valk & Kristel Karu, *Ethnic Attitudes in Relation to Ethnic Pride and Ethnic Differentiation*, 141 J. SOC. PSYCHOL. 583, 584–86 (2001); Bill Wassmuth & M.J. Bryant, *Not in Our World: A Perspective of Community Organizing Against Hate*, 1 J. HATE STUD. 109 (2001/02).

108. *See* GEOFFREY C. WARD, UNFORGIVABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON 200–01 (2004).

109. *See id.* at 133–35, 164–65, 225–26.

110. Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287, 292–93 (1996).

111. WARD, *supra* note 108, at 208–11, 216.

112. *See id.* at 217. While eleven riot-related deaths were confirmed, the estimated death tally ran as high as twenty-six. *Id.* The killings were geographically diffuse and frightful in their accounts:

A white passenger on a Houston streetcar slit a black man’s throat because he had dared to cheer for Johnson. When whites in Wheeling, West Virginia, came upon a Negro driving a handsome automobile, as Jack Johnson was now famous for doing, they dragged him out from behind the steering wheel and hanged him. Near Uvalda, Georgia, white riflemen opened fire on a black construction camp, killing three and wounding five.

*Id.*

The passage of nearly half a century would do nothing to quell the concern of racial allegiance sparking violence in conjunction with an interracial boxing match. Indeed, this particular concern motivated public policy.<sup>113</sup> For instance, as of 1955, the state of Louisiana statutorily barred all interracial bouts.<sup>114</sup> When a black boxer challenged the restriction with a lawsuit, the state's legal strategy was simple: they asserted "the police power defense" under the theory that "[s]urely if Blacks and Whites participated together in [boxing] contests race riots would follow."<sup>115</sup> The threat of racial allegiance among fans morphing into racial violence remained through the civil rights movement and into the post-civil rights era, even when competition between two athletes of different races was not direct, as evidenced by the barrage of racially motivated hate mail and death threats Hank Aaron received as he approached and eventually broke Babe Ruth's career MLB home run record.<sup>116</sup>

More recently, Tiger Woods and Venus and Serena Williams have endured race-enflamed disparagement while competing primarily against white opponents in golf and tennis, respectively. Like Johnson and Aaron when they competed, Woods has received death threats, receiving his first as a sixteen-year-old amateur golfer.<sup>117</sup> Upon becoming a professional, the threats continued and, as the only black player on the Professional Golf Association tour, Woods has had to endure hecklers calling him a nigger on golf courses throughout the nation.<sup>118</sup> While there is no indication that Venus and Serena Williams have received death threats, they too have experienced racial antagonism in connection with competition. Most notably, the Williams sisters were so disconcerted by what their family viewed as racially motivated taunts while Serena was defeating Belgian star Kim Clijsters to claim the 2001 Pacific Life Open championship in Indian Wells, California, that neither player has since returned to the

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113. See Evelyn L. Wilson, *Louis Berry—A Man Among Men*, 20 S. U. L. REV. 149, 172–74 (1993).

114. See *id.* at 172.

115. *Id.* at 174.

116. See Williams, *supra* note 110, at 293.

117. See Jon Saraceno, *Sometimes It's Scary Being Tiger*, USA TODAY, July 20, 2000, at 12C; *Tiger Woods Says Death Threats Continue*, JET, Nov. 24, 1997, at 54.

118. See Jon Fasman, *The Long Game: Shut Out For So Long From Mainstream Sport, Black Athletes Now Dominate in America*, OBSERVER, July 3, 2005, at 1; Neil McLeman, *Tiger: My Race-Hate Nightmare*, MIRROR, June 15, 2005, at 58; Saraceno, *supra* note 117, at 1. Notably, Woods does not identify as black, but rather as "Cablinasian," "which encompasses his entire Caucasian, black, American Indian and Asian heritage." Fasman, *supra*, at 1. That Woods is regarded by others as black, however, became clear to him early in life when, at the age of five, several sixth-graders bound him to a tree and threw rocks at him after painting "Nigger" across his chest. *Id.*

tournament despite its standing as the sixth-largest tennis tournament in the world.<sup>119</sup>

Intense group identification is not, however, restricted to race-based or nation-based identification, and sports fans who identify with groups as such do not restrict their identification to athletes competing individually. A strong “us” versus “them” dynamic also develops when fans identify strongly with a sports team.<sup>120</sup> Under such circumstances, the fans, according to Branscombe and Wann, “view the team as a representation of themselves . . . and as part of their own social identity.”<sup>121</sup> Consequently, “[a]n affront or loss on the part of the team . . . is a loss for the self.”<sup>122</sup> The study ultimately reveals that both race-based identification and team-based identification, in isolation, can result in derogation of, and hostility toward, fans of another team or members of another race.<sup>123</sup> The risk of such derogation and hostility, therefore, would certainly exist, and perhaps be amplified, when that isolation disintegrates—when team represents race, and fans are, thus, engaged in race-based team identification.

Fortunately, teams are less susceptible to attracting race-based identification than individual athletes, because, in the post-civil rights era, and in the absence of race-considered roster construction, teams tend to include players of different races.<sup>124</sup> Thus, even when spectators, on the basis of race, identify with or bear ill will toward a member of a team, the presence of members of various races on the team insulates the team from being identified with one race. The events in Buffalo, New York, in 1993 when the hometown Bills faced off against the visiting Miami Dolphins are illustrative.

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119. See Charles Elmore, *Jeers Still Haunt Serena*, PALM BEACH POST, Mar. 16, 2005, at 11C; John Roberts, *Fashionable for Serena to Block California Return*, INDEPENDENT, Mar. 17, 2005, at 46; Jeff Williams, *Sibling Revelry in its Ninth Slam: Williams Sisters Head to Round of 16 in One of Their Earliest Meetings*, NEWSDAY, Sept. 3, 2005, at A40. Although there is no dispute that the Williams sisters were jeered, booed, and taunted during the match, the crowd's disappointment that Serena reached the final only after Venus, citing knee tendonitis, withdrew from a semi-final match scheduled to pit the sisters against each other may have contributed to the crowd's animosity. See ELMORE, *supra*, at 11C.

120. See Branscombe & Wann, *supra* note 101, at 1019.

121. *Id.* at 1017.

122. *Id.*

123. *Id.* at 1019–21.

124. Although professional hockey, a sport in which few non-whites compete, presents a notable exception, issues of diversity and discrimination have impacted hockey as well, at times dividing “French-Canadian and European players from their American and Anglo-Canadian counterparts.” Kenneth L. Shropshire, *Minority Issues in Contemporary Sports*, 15 STAN L. & POL'Y REV. 189, 191 n.9 (2004) (citing Lawrence M. Kahn, *Discrimination in Professional Sports: A Survey of the Literature*, 44 INDUS. & LAB. REL. REV. 395 (1991)).

Throughout the game, Bills fans racially taunted Miami Dolphins linebacker Bryan Cox.<sup>125</sup> In addition to berating Cox with racial slurs, fans loudly threatened to kill him.<sup>126</sup> One fan, in particular, graphically represented the desired murder as a lynching, an image conjuring the ugliest days of America's racially enflamed history: The fan held up a black-painted dummy with Cox's jersey number scrawled on it and a noose around its neck.<sup>127</sup> Across the dummy's chest was written "Wanted . . . Dead."<sup>128</sup> As Professor Phoebe Williams suggests, such a display palpably arouses a sense of fear and potential racial aggression because, indeed, "[t]he parallel between a lynching symbol hoisted in the midst of jeering crowds screaming racial epithets for victory and the scenes of lynch mobs is remarkable."<sup>129</sup> Fortunately, violence did not erupt.

There is no evidence to suggest that either the Bills or the Dolphins competing that day were products of race-considered roster construction. With both teams having similar demographic composition, the merciless racial attack on Cox could remain an isolated attack. This is so because the taunting fans were, even as they assailed Cox, cheering for their team and, thus, the black players on it. A pure "us" versus "them" dynamic—which, in this case, is to say a pure "white" versus "black" dynamic—could not easily gain traction, because the Bills were not a "white" team. A verbal attack in this case, were it not just against Cox but against all black players competing, would be, as it were, self-inflicted, in that it would be an assault against the fans' beloved Bills just as it would be an assault against the Dolphins. Imagine, however, that the fans viewed the Bills as a "white" team and the Dolphins as a "black" team. Under this scenario, the fans' articulated racial sentiments, if broadened beyond Cox, would not be self-inflicted but would instead bear entirely on the Dolphins, and it would certainly seem that an "us" versus "them" dynamic might more easily flourish. Whether such a dynamic would, in fact, flourish is subject to speculation. The Branscombe-Wann study leaves little doubt, however, that under such circumstances, with the teams deemed to represent different races, the risk of violence would loom.

Indeed, the consequences of race-based team identification would be exacerbated as fans became increasingly physiologically aroused through

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125. See Williams, *supra* note 110, at 296–97.

126. *Id.* at 297.

127. *Id.*

128. *Id.*

129. *Id.* (internal quotation omitted).

viewing the competition.<sup>130</sup> This is because such physiological arousal reduces cognitive complexity, therefore increasing “judgment-simplifying strategies” such as reliance on group stereotypes.<sup>131</sup> Under these circumstances, Branscombe and Wann conclude, fans may well “behave aggressively toward the ‘different’ outgroup members, particularly using such persons as scapegoats when the ingroup’s own team is defeated.”<sup>132</sup>

This is, according to Hurst, precisely what happened at UMass following the 1986 World Series’s seventh game. Red Sox fans—the ingroup—viewed their team as the “white” team and the Mets as the “black” team.<sup>133</sup> Aroused by watching the game and angered by the defeat at the hands of the “black” team, the Red Sox fans, through what would certainly appear to be judgment simplification, identified the black students in the area, regardless of rooting interest, with the Mets.<sup>134</sup> As Hurst puts it, the black students “all became Mets fans confronted by an increasingly violent white crowd.”<sup>135</sup> The black students became the outgroup, were scapegoated by the ingroup Red Sox fans as responsible for the defeat, and became the “surrogate target” for the ingroup’s hostility.<sup>136</sup>

Branscombe and Wann’s analysis is eerily predictive of the UMass riot, suggesting the riot was, rather than an anomaly, a foreseeable occurrence in light of the then-prevailing race-based team identification on campus. While, as discussed above, Red Sox management’s historical racial animus is well documented, it merits noting that racial animus need not be at the root of race-considered roster construction for negative societal consequences to flow or for Title VII liability to potentially attach.<sup>137</sup> A brief discussion of the NBA team with which the Red Sox share a city, the Boston Celtics, makes this clear.

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130. See Branscombe & Wann, *supra* note 101, at 1015–17.

131. *Id.* at 1020.

132. *Id.* at 1021.

133. HURST REPORT, *supra* note 79, at 8.

134. See *id.* at 14.

135. *Id.*

136. *Id.*

137. See Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1014–15 (1997).

*B. Considering the Celtics: From Integrationist Pioneer to “the White Man’s Lone NBA Outpost”*<sup>138</sup>

Like the Red Sox of the 1980s and early 1990s, the Boston Celtics of that time period were a team comprised disproportionately of white players and viewed as a “white” team.<sup>139</sup> The Celtics, however, arrived at that designation via a different route. In sharp contrast with the Red Sox, MLB’s final team to employ a player of color, the Celtics were the NBA’s first team to do so.<sup>140</sup> In addition, the Celtics were the first NBA franchise to put an entirely black team on the court at one time,<sup>141</sup> and the first major American sports franchise of any sort to hire a black coach.<sup>142</sup> While the Red Sox for many years fought integration, even at the expense of success,<sup>143</sup> the Celtics seemed bent on pursuing success whatever the race of the individuals who could help them achieve it.<sup>144</sup> And the Celtics met with success, indeed unparalleled success, winning eleven NBA titles in thirteen years and eight titles in a row between 1957 and 1969.<sup>145</sup>

Two decades later, however, after blacks had not only been broadly accepted in the NBA, but, in fact, constituted nearly three-fourths of the league’s players,<sup>146</sup> the Celtics were conspicuous as the NBA team employing fewer black players than any other.<sup>147</sup> Indeed, during the 1985–86 and 1986–87 seasons, the Celtics’s twelve-man roster consisted of four

138. BRYANT, *supra* note 41, at 144.

139. See ARATON & BONDY, *supra* note 41, at xiii; BRYANT, *supra* note 41, at 144; Gregory Wither & Jonathan Kaufman, *Blacks Split on Backing Celtics*, BOSTON GLOBE, June 4, 1987, at 1.

140. See *supra* text accompanying note 41.

141. See ARATON & BONDY, *supra* note 41, at 58; BRYANT, *supra* note 41, at 143.

142. See ARATON & BONDY, *supra* note 41, at 51; BRYANT, *supra* note 41, at 143.

143. Enmeshed in its commitment to segregation, the Red Sox declined to sign, in addition to other young and talented black players, both Jackie Robinson and Willie Mays, two Hall of Fame baseball players considered among the sport’s all-time greats. See BRYANT, *supra* note 41, at 31, 41–46. Legend suggests the Red Sox endured an eighty-six-year drought (1918–2004) between World Series victories because they sold Babe Ruth to the New York Yankees in 1919, causing the great Ruth to burden the organization with the “Curse of the Bambino”. Fainaru, *supra* note 59, at 1. The more likely, not to mention more rational, explanation for the Red Sox’s World Series drought was the team’s initial refusal, and later reluctance, to field black players, and the consequent foregoing of talent this caused. See BRYANT, *supra* note 41, at 46; Fainaru, *supra* note 59, at 1. Indeed, facing a team including Jackie Robinson and Willie Mays in addition to Red Sox hitting great Ted Williams would have presented a formidable challenge to any opposition. See BRYANT, *supra* note 41, at 46.

144. When Celtics then-owner John Y. Brown announced he was drafting Cooper, a fellow NBA owner reputedly confronted him noting that Cooper was black, to which Brown matter-of-factly responded, “I don’t give a damn if he’s striped or polka dot or plaid . . . Boston takes Charles Cooper of Duquesne.” ARATON & BONDY, *supra* note 41, at 51.

145. See THE OFFICIAL NBA BASKETBALL ENCYCLOPEDIA 21, 106 (Alex Sachare ed. 1994)

146. By the 1985–86 NBA season, blacks constituted 72% of the NBA’s players. ARATON & BONDY, *supra* note 41, at 80.

147. See BRYANT, *supra* note 41, at 143–44.

black players and eight white players and stood in sharp contrast with the composition of the league, in which nine of every twelve players were black and only three of every twelve players were white.<sup>148</sup>

The Celtics' transformation was stark, and spurred it seems by professional basketball's, and thus the Celtics', evolution during the 1970s from a little known entertainment source into a substantial economic enterprise reliant on attracting a fan-base to pay admission and fill arena seats.<sup>149</sup> Attracting fans in racially polarized Boston, and thus ensuring economic viability, demanded a largely white team.<sup>150</sup> Alan Cohen, a part-owner of the Celtics beginning in 1983, has suggested as much, expressing the potential value of "hav[ing] some balance on the team, in terms of race" in a league that was at the time comprised overwhelmingly of black players.<sup>151</sup> Cohen was neither alone in this sentiment nor its most forceful proponent. Fellow NBA owner Ted Stepien of the Cleveland Cavaliers expressed his view on race-considered roster construction in the early 1980s, indicating that on an NBA team, "half the squad should be white. I think people are afraid to speak out on that subject. White people have to

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148. See ARATON & BONDY, *supra* note 41 at 80 (picturing the 1985–86 Celtics team); Witcher & Kaufman, *supra* note 139, at 1. That the 1985–86 Celtics and the 1986–87 Celtics were exceptionally good teams does not suggest all of the team's members were necessarily selected on merit with no consideration of race. Rather, it suggests the primary contributors were meritoriously selected. Authors Harvey Araton and Filip Bondy write, "[t]he Celtics' pattern is painfully obvious: whenever they have had enough strength among their top eight players to contend for a championship, they have stacked the back end of their roster with token whites." ARATON & BONDY, *supra* note 41, at 125. Race-considered roster construction, therefore, prevailed most significantly among players who rarely saw action in meaningful games:

With the exception of Artis Gilmore for forty-seven games in 1988, the Celtics' backup center position to Robert Parish was virtually a closed white union shop, passed down from Rick Robey to Eric Fernstern to Greg Kite to Bill Walton to Mark Acres to Brad Lohaus to Joe Kleine. If a fading white veteran such as Walton, Pete Maravich, Scott Wedman, or Jim Paxson was available, the Celtics could be counted on to make room.

*Id.* at 122. See also BRYANT, *supra* note 41, at 144 ("It's been a running joke for years: white plus height equals a job with the Boston Celtics. The white guy will always find a home in a Boston jersey. If it wasn't Jerry Sichting, it was Scott Wedman, or Greg Kite, Mark Acre, Jim Paxson, or Fred Roberts."). Notably, maintaining a disproportionately white corps of reserves was not anomalous at the time and was, in fact, the norm in the NBA. See *infra* text accompanying note 159.

149. See ARATON & BONDY, *supra* note 41, at 58.

150. See BRYANT, *supra* note 41, at 144. Former longtime Celtic Jo Jo White ascribes no racist motives to the late legendary Celtics General Manager Red Auerbach's crafting of predominately white Celtic teams. Rather, he believes the personnel decisions were economically motivated as the city of Boston "wouldn't support a majority black team, even if it were successful." *Id.* Auerbach was, therefore, in White's view "merely responding to the will of the people." *Id.* See also ARATON & BONDY, *supra* note 41, at 58.

151. *Id.* at 123.

have white heroes. I'll be truthful, I respect [blacks], but I need white people. It's in me."<sup>152</sup>

If the Celtics did, indeed, conclude they needed a certain number of white players on the team to satisfy white fans, their conclusion found support in empirical research. According to a study in the *American Journal of Economics and Sociology* published just a few years after the Celtics fielded teams with eight white players and four black players, "white fans [of the NBA] have a taste for seeing white players."<sup>153</sup> Interestingly, the study suggests that fans who wanted to see white players did not care whether the white players actually played in games as long as they were in uniform sitting on the bench.<sup>154</sup> These findings might explain the disproportionate representation of white players at the sparingly used ends of NBA benches. While, in 1991, 72.4% of the league's players were black and 27.6% were white, of the players on each team with the fewest average points per game, only 47.4% were black and 52.6% were white.<sup>155</sup> That is to say, whites were disproportionately represented among the league's infrequently used reserves. This phenomenon of white players disproportionately filling reserve roles has persisted and, interestingly, has achieved some level of acceptance in NBA circles.<sup>156</sup> Players and former players, black and white alike, have acknowledged it as a part of NBA life.<sup>157</sup> Indeed, the pervasiveness of the practice is such that NBA and college coaching great Larry Brown felt the need to prepare his black college players for it.<sup>158</sup> Brown explained, "[t]he players were better off knowing ahead of time . . . . That way, they're motivated to work harder. They have to be a little bit better than the white guys in order to make the pros."<sup>159</sup>

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152. *Id.* at 181.

153. Eleanor Brown, Diane Keenan & Richard Spiro, *Wage and Nonwage Discrimination in Professional Basketball: Do Fans Affect It?*, 50 AM. J. ECON. & SOC. 333, 343 (1991).

154. *Id.* at 339.

155. ARATON & BONDY, *supra* note 41, at 124.

156. *See id.* at 122–25.

157. *See id.* Bob Cousy, the former Celtic great and long-time Celtic television commentator, described a typical player selection process when choosing among reserves as follows: "they'll say, Okay, cut the shit, we're talking about this white guy who is six-five and that black guy who is six-five . . . . And if they're absolutely even, or close to even, then, yeah, maybe they'll keep the white guy." *Id.* at 123.

158. *See id.* at 125.

159. *Id.* While the Brown, Keenan & Spiro study concludes that "white fans have a taste for seeing white players" and that white players are overrepresented in NBA cities with large white populations, the study also challenges Coach Brown's sentiment, concluding that "minimum entry skills [for the NBA] do not seem dramatically higher for blacks." Brown, Keenan & Spiro, *supra* note 153, at 340. A similar, more recent, study draws the same conclusion, indicating there remains a correlation between a team's racial composition and the racial composition of the city in which the

Whether the Celtics believed that fielding a disproportionately white team was economically advantageous or whether they fielded a disproportionately white team for other reasons, it is extremely likely that they fielded a disproportionately white team on purpose.<sup>160</sup> Sociologist Wornie Reed of the University of Massachusetts, who analyzed the roster of the aforementioned disproportionately white 1986–87 Celtics as they played out the season, concluded that such extreme racial imbalance was no accident.<sup>161</sup> The Celtics, a team on which 66% of the players were white in a league in which 28% of players were white, seem clearly to have engaged in race-considered roster construction, and in doing so, created a disproportionately white roster.<sup>162</sup>

Consequently, like the Red Sox of the same era, the Celtics were widely viewed as a “white” team,<sup>163</sup> and as at UMass among Red Sox fans, a sense of racial confrontation followed. As the Celtics worked through the season with their disproportionately white squad, there seemed to exist in the Boston Garden a sense of racial encounter during their games.<sup>164</sup> Whatever the reaction to other exciting performances during the course of a game, “the truly raucous applause always came when Kevin McHale, the [Celtics’s] white power forward, blocked the shot of a superstar black player.”<sup>165</sup> *Boston Globe* columnist Bob Ryan, who observed the phenomenon, reluctantly recognized that race lay at the root of the eruptions: “I didn’t necessarily want to think about it, but I knew the reason why.”<sup>166</sup>

Such transmogrification of athletic competition into racial competition is of substantial concern in a nation still battling to deal with its legacy of

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team is based, suggesting individual “teams are responding to customer discrimination,” but also concluding that there does not appear to exist league-wide discrimination. Richard Burdekin, Richard Hossfeld & Janet Smith, *Are NBA Fans Becoming Indifferent to Race? Evidence from the 1990s*, 6 J. SPORTS ECON. 144, 147–48 (2002).

160. See Witcher & Kaufman, *supra* note 139, at 1.

161. *Id.*

162. *See id.*

163. ARATON & BONDY, *supra* note 41, at XIII. The NBA’s Golden State Warriors’ vice president at the time, Al Attles, went further to suggest the perception of the Celtics as a white team was so ingrained that even if the roster demographics shifted that view would prevail: “Whether or not they’re a white team, the perception is there . . . . The perception is what matters.” *Id.* Indeed, as the Celtics played for the 1986–87 NBA championship against the Los Angeles Lakers, the *Boston Globe* reported that much of Boston’s black community desired a Lakers victory, feeling the hometown Celtics were not their team, but were instead a team representing white Bostonians. *See* Witcher & Kaufman, *supra* note 139, at 1.

164. *See* BRYANT, *supra* note 41, at 145.

165. *Id.*

166. *Id.*

racial subjugation and discrimination.<sup>167</sup> It supplants the joy of sport with the pain and fear associated with that legacy and creates the risk of devolution from perceived racial competition into actual racial violence.<sup>168</sup> And although no racial violence erupted in the Boston Garden during the 1986–87 season, as discussed above, race-based team identification certainly creates such a risk, to a greater degree even than race-enflamed sport spectating in the absence of race-based team identification.

If America seeks to embrace the aims of the Civil Rights Act of 1964, it can afford neither the threat of looming racial violence nor the violence itself. Healing the nation's festering racial wounds and increasing racial harmony requires preventing racial violence and the circumstances that trigger it. Considering the prominence of sport in our society,<sup>169</sup> eradicating unlawful race-considered roster construction, through increased Title VII scrutiny, would certainly serve that end.

### III. THE TITLE VII CASE: APPLYING THE STATUTE IN THE RACE-CONSIDERED ROSTER CONSTRUCTION CONTEXT

Neither the Red Sox nor the Celtics have, in recent years, constructed rosters as racially disproportionate to others in their respective leagues as they once did. Although as of 1991 the Red Sox's entire organization—including all of its minor league teams as well as its major league team—featured the lowest number of black players among Major League organizations,<sup>170</sup> the following several years would portend significant change. With the 1992 major league arrival of black minor league standout Mo Vaughn,<sup>171</sup> the Red Sox's first signing of a black free agent player in 1993,<sup>172</sup> and the 1994 appointment of general manager Dan Duquette, a progressive administrator intent on improving the team without regard for its racial composition,<sup>173</sup> the Red Sox entered a new era in which they

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167. See Williams, *supra* note 110, at 297–98.

168. See *id.*

169. Sport, perhaps more than any other societal institution, reflects the essence of the society within which it exists. See SHROPSHIRE, *supra* note 39, at 17. As Professor Harry Edwards puts it, “sport inevitably recapitulates the character, structure, and dynamics of human and institutional relationships within and between societies and the ideological values and sentiments that rationalize and justify those relationships.” Harry Edwards, *The End of the “Golden Age” of Black Sports Participation*, 38 S. TEX. L. REV. 1007 (1997).

170. See Fainaru, *supra* note 59, at 1.

171. See BRYANT, *supra* note 41, at 221.

172. See *id.* at 223, 231.

173. See *id.* at 230.

began fielding increasingly diverse teams.<sup>174</sup> The Celtics experienced a similar transition in the early 1990s when Dave Gavitt assumed the general manager post and a group of young black Celtics players, including Dee Brown, Brian Shaw, and Reggie Lewis, gained prominence as the building blocks of the Celtics' future.<sup>175</sup>

The phenomenon of race-considered roster construction has, however, remained a factor in professional sport through the 1990s and into the new century. While the Red Sox and Celtics no longer consistently field racially disproportionate teams, the NBA's Utah Jazz, an organization recognized during the 1980s as being similarly racially imbalanced,<sup>176</sup> for instance, continues to do so. Beginning with the 1990–91 NBA season, sports and society expert Dr. Richard Lapchick (originally in association with Northeastern University's Center for the Study of Sport in Society and later in association with the University of Central Florida's Institute for Diversity and Ethics in Sport), has compiled an annual analysis of player demographics.<sup>177</sup> In each season for which Dr. Lapchick has compiled statistics, the percentage of white players on the Utah Jazz's roster has outstripped the percentage of white players in the league.<sup>178</sup> This is not to suggest the Jazz organization harbors racial animus toward black players. Indeed, it is more likely the case that, like the Celtics of the 1980s, the Jazz has limited its number of black players to appeal to a fan-base centered in Salt Lake City, Utah, a city with a higher percentage of white residents than any other city home to an NBA team.<sup>179</sup> Indeed, both

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174. See *id.* Tommy Harper's views, twenty years after he filed his EEOC charge against the Red Sox, reveal the extent to which the Red Sox have shed their reputation as a racist or "white" team. In a February 1, 2006, *Boston Globe* article, Harper, now a member of the Red Sox's community relations department, recounted his sense of exclusion as a player and coach with the team, but explained he finally felt truly accepted as a part of the organization. See Gordon Edes, *Harper Finally at Home*, BOSTON GLOBE, Feb. 1, 2006, at 10. "I never felt a part of the Red Sox family," Harper is quoted as saying, "until now." *Id.*

175. See ARATON & BONDY, *supra* note 41, at 243, 224.

176. See BRYANT, *supra* note 41, at 144.

177. See UCF College of Business Administration, Richard Lapchick (Biography), <http://www.bus.ucf.edu/sport/cgi-bin/site/sitew.cgi> (follow "Richard Lapchick, Endowed Chair/Director" hyperlink) (last visited May 11, 2006).

178. See RICHARD LAPCHICK, THE 2004 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION 17 (2005) (listing percentages of white players in the NBA from the 1990–91 season through the 2003–04 season), available at [http://www.bus.ucf.edu/sport/public/downloads/NBA\\_Report\\_Card\\_2004.pdf](http://www.bus.ucf.edu/sport/public/downloads/NBA_Report_Card_2004.pdf) (notably, Dr. Lapchick did not compile statistics for the 2002–03 NBA season); NBA.com, JAZZ: All-Time Roster, [http://www.nba.com/jazz/history/history\\_roster\\_ah.html?nav=ArticleList](http://www.nba.com/jazz/history/history_roster_ah.html?nav=ArticleList) (last visited May 11, 2006); Players Index, [www.basket-stats.info/players/abc/a.htm](http://www.basket-stats.info/players/abc/a.htm) (last visited May 11, 2006).

179. See U.S. Census Bureau, Salt Lake City, Utah—Fact Sheet, <http://factfinder.census.gov> (search for "Salt Lake City, Utah").

the *American Journal of Economics and Sociology* study<sup>180</sup> and a more recent 2002 study published in the *Journal of Sports Economics*,<sup>181</sup> predict such an outcome. Because some white fans prefer seeing white players, teams based in areas with disproportionately white populations are incentivized to field disproportionately white teams.<sup>182</sup>

#### A. *The Significance of Disproportionality*

Whatever the motivation for maintaining a disproportionately white team, that disproportionality sets the stage for Title VII liability. It is well recognized in employment discrimination law, and antidiscrimination law more broadly, that proving intentional discrimination in a particular instance is a difficult endeavor.<sup>183</sup> This is because racial discrimination, once overtly expressed with impunity, more often takes a covert, and perhaps even subconscious, form in the post-civil rights era.<sup>184</sup> As Professor Charles Lawrence explains in his groundbreaking exploration of subtle racism, “in a society that no longer condones overt racial attitudes and behavior, many of these attitudes will be repressed and prevented from reaching awareness in an undisguised form.”<sup>185</sup> This is no less the case in the sports industry.<sup>186</sup> The absence of overt discrimination, consequently, cannot reasonably be taken to mean the absence of discrimination. Thus, to deny liability where the imprimatur of racial discrimination is not evident with regard to an adverse employment decision would be to deny liability when it might appropriately lie. Whether a black player alleges discrimination as a part of a class or as an individual plaintiff, therefore, the extent to which the allegedly discriminatory team is disproportionately white would be a key factor in assessing liability.

In the class context, the Supreme Court, in its 1977 examination of *International Brotherhood of Teamsters v. United States*,<sup>187</sup> recognized the danger of employers escaping liability when discrimination exists but is not readily apparent on the face of a particular employment decision, and

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180. Brown, Keenan & Spiro, *supra* note 153.

181. Burdekin, Hossfeld & Smith, *supra* note 159

182. See Brown, Keenan & Spiro, *supra* note 153, at 343; Burdekin, Hossfeld & Smith, *supra* note 159, at 147–48.

183. See Tristan K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–99 (2003).

184. See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987).

185. *Id.* at 356.

186. See SHROPSHIRE, *supra* note 39, at 9.

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

crafted a model of proof for establishing liability under such circumstances.<sup>188</sup> *Teamsters* analysis compares the percentage of a particular racial group in a defendant's workforce with the percentage of that racial group in the broader labor market.<sup>189</sup> With no discrimination, goes the theory, the percentages should be virtually the same.<sup>190</sup> Dissimilar percentages, therefore, create an inference of systemic discrimination and a presumption of discrimination in a particular instance.<sup>191</sup> Similar logic flows in the individual context, in which the Supreme Court has concluded "statistics as to [a defendant's] employment policy and practice may be helpful" in determining the veracity of a defendant's denial of discrimination where "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices."<sup>192</sup>

To be impactful in either context, however, the disproportionality must be statistically significant.<sup>193</sup> Consider the Utah Jazz during the 2003–04 season, the most recent season for which Dr. Lapchick has published statistics regarding the NBA's racial composition. During that season, the Jazz's roster was 39% black,<sup>194</sup> while the broader labor market, the

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188. *Id.* at 337–40. *See also United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (1971) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 816–18 (2004).

189. *Teamsters*, 431 U.S. at 337–40. *See also Michelle Adams, Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 688–90 (2001).

190. *See Teamsters*, 431 U.S. at 340 n.20, providing as follows:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

191. *See id.*

192. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 & n.19 (1973) (second alteration in original) (citation omitted). *See* JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS* 68 (5th ed. 2001); HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 231 nn.3–4 (2d ed. 2004).

193. *See McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) ("statistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent") (citation omitted).

194. Of the eighteen players who were members of the Jazz during the 2003–04 regular season, seven—Raja Bell, Keon Clark, Jarron Collins, Mikki Moore, Michael Ruffin, DeShawn Stephenson and Maurice Williams—are black. *See* NBA.com, *supra* note 178; <http://www.hoopsstats.com/basketball/fantasy/nba/utah-jazz/team/roster/04/28/>; Players Index, *supra* note 178. One of the Jazz's players that season, Carlos Arroyo, is Latino, hailing from Puerto Rico. *Id.* at <http://www.basketstats.info/players/playerfile/a/carlos-arroyo.htm>. The remainder of the Jazz's 2003–04 players are white, hailing from either the United States or Europe. *See generally id.* (for player profiles).

NBA,<sup>195</sup> was 76% black.<sup>196</sup> A disparity certainly exists, but if the disparity does not have statistical significance, that is to say, if the magnum of the disparity is insufficient to suggest it results from intentional discrimination rather than coincidence, its legal relevance withers.<sup>197</sup> The manner in which statistical significance is appropriately assessed in employment discrimination cases is a matter of seemingly endless debate.<sup>198</sup> Indeed, any statistical analysis a party makes is certain to be challenged by the opposing party as to the statistical test used, the assumptions employed in conducting the test, and the conclusion the test suggests.<sup>199</sup> So, although the above-described disparity certainly seems stark, whether it demands a presumption of discrimination as a legal matter will depend on the statistical approaches of the litigants and the presiding court's assessment of those approaches.<sup>200</sup>

Assuming a court determines the disparity in the case of the 2003–04 Jazz to be statistically significant, and assuming the Jazz are unable to successfully counter the plaintiffs' statistical analysis or show the disparity resulted from neutral standards, black players claiming discrimination on the part of the Jazz organization would successfully establish Title VII liability and, therefore, the propriety of injunctive relief.<sup>201</sup> With a

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195. What constitutes the relevant labor market for purposes of disparate treatment statistical analysis is certain to engender significant debate among parties to an employment discrimination case. See Fred W. Alvarez, Michael J. Levy & Shirley C. Wang, *Class Actions and Pattern and Practice Claims: Overview of Theories, Defenses, Settlements and the Government's Activist Role*, 591 PLI/LIT 275, 308 (1998). While the broader NBA, comprised of individuals with a skill level the Jazz would be seeking, would seem the most appropriate labor market against which to assess the Jazz's team composition, the Jazz might insist a different labor market is more appropriate for the analysis. For instance, the Jazz might argue the relevant labor market includes all NBA players as well as players in competitive European leagues, leagues that have, in recent years, produced an increasing number of players with NBA-caliber skills. See Heather E. Morrow, Comment, *The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players into U.S. Professional Sports*, 26 HOUS. J. INT'L L. 649, 688–89 (2004). Adding the players in the top European leagues—leagues with a higher percentage of white players than the NBA—to the relevant labor market would decrease the percentage of black players in the relevant labor market, reduce the disparity between the Jazz's racial composition and the market's racial composition, and perhaps, therefore, decrease the likelihood of statistical significance.

196. See LAPCHICK, *supra* note 178, at 17.

197. See Green, *supra* note 183, at 121.

198. See *id.* at 121–22.

199. See *id.*

200. See *id.*

201. There lacks uniformity in the law as to whether, in addition to the statistical showing, plaintiffs must present anecdotal evidence of intentional discrimination to establish Title VII liability under the *Teamsters* analysis. See John Cocchi Day, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CAL. L. REV. 59, 96–98 (2001). It is clear, though, that some courts have deemed the statistical showing sufficient. See *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123 (8th Cir. 1969).

presumption of discrimination in place, an individual black player would be entitled to damages if the Jazz were unable to show race was irrelevant to the team's decision regarding the particular player, meaning the player would have been hired for legitimate reasons.

*B. Statistical (In)significance?: Pursuing Liability in the Absence of Statistical Disproportionality*

Even if a court were to determine the disparity to be statistically insignificant, however, Title VII liability may still be appropriate. The court's determination would mean only that *Teamsters* systemic discrimination analysis would be foreclosed. Individual disparate treatment analysis, while potentially buttressed by statistical disproportionality, is, unlike systemic discrimination analysis, certainly not dependent on it.<sup>202</sup> An individual plaintiff unable to rely on statistically significant disproportionality would simply need to establish a prima facie case of discrimination under facts specific to him. If he is able to marshal direct evidence establishing the fact of discrimination, he would establish a prima facie case.<sup>203</sup> Anything short of an admission of discrimination by the decision-maker regarding his employment, however, is unlikely to meet this standard.<sup>204</sup> Such evidence is, as one would expect in light of Charles Lawrence's revelations regarding subtle and covert discrimination, exceedingly rare, and in the absence of such evidence, establishing a prima facie case would require a plaintiff to, by a preponderance of the evidence, make several showings which would differ slightly based on the plaintiff's status with the team.<sup>205</sup>

Assuming the plaintiff has never been a member of the team, sought employment with the team through a tryout, and was denied employment for allegedly discriminatory reasons, he would have to prove that he was qualified for a roster spot the team was seeking to fill, that he was rejected despite those qualifications, and that the team continued, after his rejection, to seek players to fill the roster spot.<sup>206</sup> If the plaintiff had indeed been a team member, he would have to show he was qualified for a roster

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202. See Dean C. Berry, *The Changing Face of Disparate Impact Analysis*, 125 MIL. L. REV. 1, 6–7 (1989).

203. See FRIEDMAN & STRICKLER, *supra* note 192, at 64.

204. See *id.* at 64–65. Even a general admission of discrimination in hiring is not likely to establish a prima facie case. To constitute prima facie evidence, the admission of discrimination must regard the particular employment decision at issue. *Id.* at 65.

205. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

206. See *id.*

spot, was a satisfactory player while on the team, was terminated in spite of his qualifications, and the roster spot that was once his remained open to other candidates.<sup>207</sup> In either context, the plaintiff need not prove he was *better* qualified than the person ultimately hired, and, indeed, some courts suggest he need not even prove he was *as* qualified as the person ultimately hired.<sup>208</sup> Rather, he must prove he was qualified in that he met the position's minimum criteria.<sup>209</sup>

Success in making the *prima facie* showing would create a presumption that the Jazz did, in fact, discriminate against the plaintiff on the basis of race in violation of Title VII, leaving the Jazz to either deny the discrimination through articulating a legitimate, nondiscriminatory reason for the decision or acknowledge the discrimination and seek to justify it.<sup>210</sup> The former option would return the burden to the plaintiff to establish the proffered reason was either bogus or was only one reason for the decision, the other or others of which was or were discriminatory.<sup>211</sup> The latter option, invocation of Title VII's *bona fide* occupational qualification (BFOQ) affirmative defense, would, if successful, squelch the inquiry altogether and, as such, would appear an attractive alternative. Citing that doctrine, the Jazz might well seek shelter from liability through arguing that being white is a *bona fide* occupational qualification of playing basketball for the Jazz, a team based in overwhelmingly white Salt Lake City and reliant on attracting fans from that population center. Attractive as it may be, any such argument would be unavailing. Although the doctrine permits an employer to discriminate based on a particular characteristic when such discrimination is "reasonably necessary to the normal operation of that particular business or enterprise," the doctrine is only available to justify discrimination based on gender, religion, or national origin; it is not available to justify discrimination based on race.<sup>212</sup>

While some commentators have argued that discrimination based on race should be permitted under the exception in spite of the statutory

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207. *See id.*

208. *See* THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 69 (2001).

209. *See id.*

210. *See* Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination if She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159, 164–65 (1996).

211. *See id.* at 165.

212. *See* 42 U.S.C. § 2000e-2(e)(1) (2000). Even in the non-race context, courts are generally unwilling to accept a BFOQ defense based on customer preference. *See infra* text accompanying notes 318–20.

language, the great weight of the case law has held otherwise.<sup>213</sup> And, indeed, Congress clearly felt otherwise, as the omission of race in the BFOQ provision was decidedly not accidental.<sup>214</sup> In debating the substance of the Civil Rights Act of 1964, Congress considered an amendment that “would have allowed an employer to hire an individual based on race when ‘the employer believes, on the basis of substantial evidence, that the hiring of such an individual . . . will be more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration of race.’”<sup>215</sup> After debate, Congress rejected the amendment.<sup>216</sup> Ultimately, Congress was concerned that the inclusion of race in the BFOQ provision would, in the end, simply “permit discrimination on the basis of race or color,” and “would establish a loophole that would gut [Title VII].”<sup>217</sup>

Without access to the BFOQ defense, the Jazz would almost certainly articulate a nondiscriminatory reason for its employment decision, a far easier path in that courts have found the articulation of virtually any lawful reason discharges the burden.<sup>218</sup> The plaintiff would then ultimately prevail if he discharged his burden of persuasion in showing the Jazz’s

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213. See William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 213–14 (1998). Despite the BFOQ provision’s plain language together with the above-discussed legislative history, at least one court has indicated the desirability of applying the BFOQ exception in race cases and suggested, as an end-around, that a Title VII intentional discrimination defendant might lawfully discriminate based on race through application of Title VII’s disparate impact “business necessity” doctrine. In *Miller v. Texas State Board of Examiners*, the Fifth Circuit seemed to endorse the potential importation of the “business necessity” doctrine—which permits employers to utilize facially race-neutral employment requirements, even though they have a disproportionate impact on a particular racial group, if the requirements are “related to job performance”—into the Title VII disparate treatment context, essentially displacing application of the BFOQ doctrine, which does not permit race-based discrimination, with the “business necessity” doctrine, which does. *Miller v. Tex. State Bd. of Exam’rs*, 615 F.2d 650, 653 (5th Cir.1980). To the extent this approach may have opened an avenue for a professional sports organization to avoid liability for its rejection of a player on grounds of race, Congress closed it with the Civil Rights Act of 1991, declaring that a “demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination . . . .” § 2000e-2(k)(2).

214. See Bryant, *supra* note 213, at 215.

215. *Id.* at 217 (quoting 110 CONG. REC. 13,825 (1964)).

216. See Bryant, *supra* note 213, at 217.

217. *Id.* (quoting 110 CONG. REC. 2556 (1964)).

218. See *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). The Eleventh Circuit, in *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984), set a standard lower even than the extremely low prevailing standard in assessing what constituted a legitimate nondiscriminatory reason for an adverse employment action, finding an “employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as the action is not for a discriminatory reason.” *Id.* (citation omitted).

reason for its decision was pretext and that the decision was discriminatory, on the one hand, or, on the other hand, in showing the Jazz discharged the plaintiff with a mixed motive, which is to say, even if the Jazz's articulated reason contributed to the decision-making process, consideration of the plaintiff's race was also a motivating factor for the decision.<sup>219</sup> In either case, the plaintiff's claim would rely largely on the circumstances of his particular adverse employment action and would almost certainly involve comparison with at least one similarly situated white employee or potential employee who received a more favorable employment action.<sup>220</sup>

For instance, assume the plaintiff is a black 6'9", 240-pound free agent power forward who, during the previous NBA season, averaged eight points and three rebounds per game. Assume further the Jazz declined to hire him citing as their reasons his stature and statistics. If the plaintiff can show that, upon rejecting him, the Jazz hired a white power forward of similar stature and similar performance statistics, the plaintiff may well carry his ultimate burden of persuasion with regard to the racial discrimination claim.<sup>221</sup> Of course, if the Jazz's roster revealed statistically significant racial disproportionality, that disproportionality would bolster the plaintiff's claim of intentional individual discrimination, but individual analysis of a plaintiff's circumstances would drive the inquiry, and could certainly stand without the statistical showing.<sup>222</sup>

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219. See 42 U.S.C. § 2000e-2(m) (2000); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003). Notably, Congress has, through the Civil Rights Act of 1991 § 706(g), created limits on the relief available to a plaintiff proceeding under a mixed motive theory. If, therefore, a plaintiff pursues and prevails under a mixed motive theory, he would be entitled to declaratory relief, injunctive relief, and attorneys' fees and costs, but not to damages, hiring, or reinstatement. See § 2000e-5(g)(2)(B).

220. See Ken Nakasu Davison, Note, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 *ASIAN L.J.* 161, 166 (2005); Holly A. Williams, Note, *Reaching Across Difference: Extending Equality's Reach to Encompass Governmental Programs that Solely Benefit Women*, 13 *UCLA WOMEN'S L.J.* 375, 387 (2005) (“[I]n order to succeed on a claim of racial discrimination brought under Title VII of the Civil Rights Act of 1964, the plaintiff must satisfy the similarly situated requirement as part of his or her prima facie case.”).

221. While such situational similarity and outcome differentiation is indicative of employment discrimination in both sport and non-sport contexts, the subjectivity traditionally associated with sports organizations' player personnel hiring suggests a successful “evidentiary case” in this context may be “tough[er]” than in the non-sport context and may, therefore, require greater situational similarity. *SHROPSHIRE*, *supra* note 39, at 65.

222. Even in the absence of both a roster out of proportion with the labor market and individual circumstances reflective of intentional discrimination, however, Title VII offers the possibility of a successful employment discrimination challenge to race-considered roster construction under disparate impact theory. Under this approach, plaintiffs would have to establish that a requirement of making the team disproportionately impacts black players in a statistically significant way. See *Belton*, *supra* note 9, at 434. Assuming the organization is unable to show the requirement to be a business necessity, or that the organization is able to do so, but that the plaintiffs can show a different requirement without

It is clear, then, that a roster disproportionately devoid of black players is suggestive of racial discrimination, *as a legal matter*, when the disproportionality is statistically significant, and when it is, that disproportionality creates an inference of discrimination. Perfect proportionality, however, is no prophylactic to liability. An organization whose roster is in proportion with the rest of its league may well be found liable under Title VII if individual analysis of a particular player's circumstances reveals discrimination. Thus, while intuition inspires Title VII scrutiny of teams with disproportionately white rosters, and while that disproportionality, if statistically significant, is legally suggestive of racial discrimination, any effort to reduce race-considered roster construction in professional athletics by focusing attention solely on disproportionality would be an inadequately narrow endeavor. A perfectly proportioned team may just as readily engage in unlawful race-considered roster construction in a particular instance as an out-of-proportion team, and Title VII provides a remedy in the former case just as it does in the latter.

#### IV. RACE-CONSIDERED ROSTER CONSTRUCTION FAVORING NON-WHITES AND THE ROLE OF TITLE VII AFFIRMATIVE ACTION JURISPRUDENCE: CONSIDERING THE CURIOUS CASE OF MINAYA'S METS

This Article has, heretofore, addressed race-considered roster construction in the context of professional sports organizations' employment decisions favoring white players. And, as discussed above, race-considered roster construction has historically most often come to bear in just that context. It is of course possible, however, that a professional sports organization might engage in race-considered roster construction favoring non-white players. While Title VII analysis would be appropriate in the context of race-considered roster construction under such circumstances as it would in the context of roster construction favoring white players, Title VII would not necessarily apply in the same

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the racial impact would serve the defendant's legitimate business interest, the plaintiffs may prevail. See Rebecca S. Giltner, Note, *Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship*, 10 MICH. J. RACE & L. 427, 428 n.4 (2005). Disparate impact challenges, however, are not ideally suited for actions challenging race-considered roster construction in professional athletics. Impact analysis is appropriate only when a plaintiff can identify a "specific discriminatory hiring practice," such as a particular roster eligibility requirement that disproportionately impacts black players; because professional sports organizations tend not to apply identifiable hiring criteria, identification of such a criterion can be difficult. SHROPSHIRE, *supra* note 39, at 65. To the extent, however, that a roster eligibility requirement, such as a written test of questionable predictive value, disproportionately renders black players ineligible, disparate impact theory might accommodate a race-considered roster construction challenge.

manner. Just as examination of the 2003–04 Utah Jazz provides a window into the analysis driving Title VII scrutiny of race-considered roster construction favoring white players, examination of the 2005 New York Mets elucidates the extent to which Title VII scrutiny of race-considered roster construction favoring non-white players might differ.

After three disastrous seasons during which the Mets finished with win-loss records of 75–86, 66–95, and 71–91, team owner Fred Wilpon, in 2004, appointed Omar Minaya as the team’s general manager.<sup>223</sup> Under Minaya, the organization immediately set sights on improving the team’s play.<sup>224</sup> In addition, the team focused heavily on increasing its appeal to the community and, in particular, the Latin community.<sup>225</sup> The initiatives were several. The team created a radio advertisement featuring renowned Latino comedian John Leguizamo phoning Minaya in a desperate pursuit of game tickets.<sup>226</sup> The team selected Banco Popular, a bank heavily patronized by New York’s Latin community, as its sponsoring financial institution, and the bank in turn provided free transportation from several of New York’s predominantly Latin neighborhoods to Mets games.<sup>227</sup> The club’s ticket sales office added Spanish-speaking employees.<sup>228</sup> And those responsible for selling tickets to groups targeted institutions, such as churches and schools, in Latin neighborhoods.<sup>229</sup> These strategies are non-violative of Title VII and, indeed, are impressive and commendable attempts to provide access to Mets baseball for Latinos and Latinas in New York who might otherwise be without. In addition to the aforementioned strategies, however, the Mets may have engaged in race-considered roster construction in creating the 2005 team.

#### A. Weber, Johnson, and the Affirmative Action Defense

Importantly, a showing that the Mets considered race in the team’s player hiring decisions would not necessarily trigger Title VII liability as it would were race considered in hiring white players. There has long existed a sentiment in employment discrimination jurisprudence that discrimination in favor of a member of a traditionally underrepresented

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223. See Jonathan Mahler, *Building the Beisbol Brand*, N.Y. TIMES, July 31, 2005, § 6, at 22.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

group is “not discrimination in a *statutory sense*,”<sup>230</sup> in that such discrimination is not the discrimination Title VII was designed to thwart. As the Supreme Court explained in the landmark case *United Steelworkers v. Weber*,<sup>231</sup> “a thing may be within the letter of the statute and yet not within the statute, because it is not within its spirit, nor within the intention of its makers.”<sup>232</sup> In that case, the Supreme Court considered Kaiser Aluminum’s policy of setting aside for black employees half of the available positions in the company’s craft training program.<sup>233</sup> Nearly all of the company’s craft workers were white, and the company intended to maintain the policy until such time as its percentage of black craft workers rose to the analogous percentage in the external labor market.<sup>234</sup>

The Court upheld the voluntary affirmative action plan as lawful under Title VII.<sup>235</sup> In doing so, the Court explained that Title VII’s prohibitions should be “read against the background of the legislative history of Title VII and the historical context from which the Act arose,”<sup>236</sup> a context indicating the statute’s chief purpose was to protect the employment opportunities of minorities.<sup>237</sup> As such, the Court established the permissibility of affirmative action under Title VII. Several years later, in *Johnson v. Transportation Agency*<sup>238</sup> the Court recommitted itself to the *Weber* decision.<sup>239</sup> These cases remain good law and continue to guide Title VII affirmative action jurisprudence.<sup>240</sup>

Notably, the *Weber/Johnson* standard is restricted in its application to the context of evaluating employment decisions made pursuant to an employer’s *valid affirmative action plan*.<sup>241</sup> By demanding, in *Weber* and *Johnson*, that a race-considered employment decision favoring a member of an underrepresented population be permissible only within the context

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230. HAGGARD, *supra* note 208, at 81.

231. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

232. *Id.* at 201 (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

233. *Id.* at 197.

234. *Id.*

235. *Id.*

236. *Id.* at 201.

237. *See id.* at 202–03; Michael L. Foreman, Kristin M. Dadey & Audrey J. Wiggins, *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation’s Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81, 97 (2004); Iheukwumere & Aka, *supra* note 8, at 23.

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

239. *Id.* at 627. *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1044 (2004). Notably, although reaffirming *Weber*’s reasoning, *Johnson* held as it did in the sex discrimination context, thus expanding *Weber*’s scope. *See id.*

240. *See* Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy for Systemic Racial Discrimination Cases*, 107 DICK. L. REV. 503, 513 (2003).

241. *See id.* at 514.

of a valid affirmative action plan, the Court walked the thin line between respecting both its acknowledgment in *McDonald v. Santa Fe Trail Transportation Co.*<sup>242</sup> that Title VII protects members of all races, including whites, and its realization that discrimination in favor of members of underrepresented races may, under certain circumstances, effectuate Title VII's purpose.

Taken together, *Weber* and *Johnson* render permissible race-considered employment actions favoring members of traditionally underrepresented groups when made pursuant to an affirmative action plan with the purpose of eliminating a conspicuous or manifest racial imbalance,<sup>243</sup> even if the employer's actions did not cause the imbalance.<sup>244</sup> The Court cautioned, however, that such a decision is lawful only when it does "not unduly trammel the interests of majority group members."<sup>245</sup> And the Court offered insight as to when a plan might "trammel interests," indicating interests might be trammelled if a plan required discharge of white workers for replacement by black hires, was an "absolute bar" to white employee advancement, or was a permanent, rather than a temporary, plan.<sup>246</sup>

Notably, neither *Weber* nor *Johnson* demands that Title VII affirmative action be remedial in nature.<sup>247</sup> And, in fact, *Johnson* hinted toward the possible propriety of Title VII affirmative action intended to further non-remedial purposes.<sup>248</sup> The extent to which non-remedial affirmative action

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242. 427 U.S. 273 (1976).

243. Sullivan, *supra* note 239, at 1048. Precisely what constitutes a conspicuous or manifest imbalance is unclear. See Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 12 (2005); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 267 (2003–2004). The *Johnson* Court's approach to determining the existence of an imbalance sufficient to support affirmative action involved comparing the percentage of the underrepresented group's members in the relevant position at the organization with the percentage of the underrepresented group's members in the broader workforce with skills necessary to the position. *Id.*

244. See *Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

245. Sullivan, *supra* note 239, at 1052. See also Robert Belton, *Brown as a Work in Progress: Still Seeking Consensus After All These Years*, 34 STETSON L. REV. 487, 494–95 (2005).

246. Sullivan, *supra* note 239, at 1052 (quoting *Weber*, 443 U.S. at 208). The *Weber/Johnson* test is alternatively expressed as a three-pronged test, with the third prong being that the plan not impose quotas. See Belton, *supra* note 244, at 494–95. The two-pronged test views this third prong as the simplified conglomeration of the three factors informing whether interests are trammelled. The three-prong test, on the one hand, and the two-prong test (importing the three-pronged test's third prong into its second prong), on the other, while expressed differently, are functionally the same.

247. See White, *supra* note 243, at 274.

248. See Estlund, *supra* note 243, at 3. Justice Stevens, in his *Johnson* concurrence, was particularly adamant on this point, suggesting that non-remedial justifications for Title VII affirmative action be acceptable and that racial diversity might be such a justification. *Johnson*, 480 U.S. at 646–47 (Stevens, J., concurring).

justifications pass Title VII muster has, however, fallen into some doubt over time, largely due to the Supreme Court's decisions in *Richmond v. J.A. Croson Co.*<sup>249</sup> and *Adarand Constructors, Inc. v. Peña*<sup>250</sup> invalidating programs in the public contracting realm serving to set aside opportunities for minority businesses.<sup>251</sup> Neither *Croson* nor *Adarand*, of course, has direct application to the Title VII affirmative action standard, as both cases were decided under the Supreme Court's parallel constitutional affirmative action jurisprudence, which subjects employers charged with equal protection violations to strict scrutiny and thus requires the employer's race-consideration to serve a compelling interest and be narrowly tailored.<sup>252</sup> While the Title VII and constitutional standards are distinct, however, the Court's decisions have revealed a "permeability of the doctrinal lines" such that each of the two lines has an atmospheric impact on the other.<sup>253</sup> Thus, although *Croson* and *Adarand* had nothing in particular to say about the *Weber/Johnson* standard, they created substantial skepticism as to the availability of non-remedial Title VII affirmative action.<sup>254</sup>

*B. The Grutter Effect: Exploring the Possibility of Diversity as a Rationale for Title VII Affirmative Action and, Therefore, Affirmative Action-Inspired Race-Considered Roster Construction*

If, however, *Croson* and *Adarand* were read to close the possibility of non-remedial affirmative action under the *Weber/Johnson* standard, might the Supreme Court's 2003 constitutional affirmative action decision in *Grutter v. Bollinger*<sup>255</sup> be read to reestablish that possibility? While some scholars have expressed doubt that *Grutter* will ultimately impact Title VII affirmative action,<sup>256</sup> analysis suggests it may well.

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249. 488 U.S. 469 (1989).

250. 515 U.S. 200 (1995).

251. See Estlund, *supra* note 243, at 3–4, 9.

252. Belton, *supra* note 245, at 497 n.11 (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)). See also Belton, *supra* note 9, at 469; Monique C. Lillard, Deborah C. Malamud, Miranda Oshige McGowan, Charles A. Shanor & Robert Belton, *The Effect of the University of Michigan Cases on Affirmative Action in Employment: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups*, 8 EMPL. RTS. & EMP. POL'Y J. 127, 147 (2004) (comments of Prof. Belton) [hereinafter *AALS 2004 Annual Meeting*].

253. Estlund, *supra* note 243, at 13.

254. See *id.* at 3–4, 9.

255. 539 U.S. 306 (2003).

256. For a robust discussion concerning the possibility of a diversity interest of any sort justifying Title VII affirmative action, see *AALS 2004 Annual Meeting*, *supra* note 252.

In the *Grutter* case, the Court concluded diversity was a sufficiently compelling interest under the constitutional strict scrutiny standard to support affirmative action in an institution of higher education's selection of students.<sup>257</sup> While *Grutter* involved the admission of students to an educational institution,<sup>258</sup> Justice O'Connor's opinion detailed at length the import of diverse perspectives not only in the classroom, *but in the workplace*.<sup>259</sup> In reaching its decision, the Court drew support from amicus briefs submitted by the armed forces as well as numerous private corporations touting the importance of diversity in the workplace, one of which declared unequivocally that private companies "need the talent and creativity of a workforce that is as diverse as the world around it."<sup>260</sup> On the strength of such sentiments, the Court declared affirmative action's "benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>261</sup>

The Court's expressed language and its open reliance on the views of employers in reaching its decision suggest perhaps the need for diversity is as powerful an argument in justifying affirmative action in the employment context as it is in the educational context.<sup>262</sup> While the Supreme Court has yet to examine the constitutionality of an employment-based affirmative action plan serving a diversity interest rather than a remedial interest,<sup>263</sup> when it does so, the *Grutter* opinion itself would seemingly provide substantial ammunition for an extension of the *Grutter* rationale into the employment realm under a strict scrutiny constitutional analysis.<sup>264</sup> Already, in fact, the Seventh Circuit, in *Petit v. City of Chicago*,<sup>265</sup> has initiated the expansion of *Grutter* to the employment

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257. *Grutter*, 539 U.S. at 343. *See also* Foreman, Dadey & Wiggins, *supra* note 237, at 101.

258. The *Grutter* Court restricted the direct effect of its decision to the educational context, emphasizing the deference to which universities' decisions are accorded. 539 U.S. at 339. Courts, however, have long accorded employer's decisions substantial deference as well. *See* White, *supra* note 243, at 270–71. The deference accorded an institution's decision making would, therefore, present no meaningful distinction to a court considering importation of the *Grutter* rationale into the employment context.

259. 539 U.S. at 330–33. *See also* Foreman, Dadey & Wiggins, *supra* note 237, at 102.

260. Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents at 6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516).

261. 539 U.S. at 330.

262. *See* Foreman, Dadey & Wiggins, *supra* note 237, at 102; White, *supra* note 243, at 270.

263. *See* Foreman, Dadey & Wiggins, *supra* note 237, at 101; White, *supra* note 243, at 264.

264. *Id.* (suggesting the *Grutter* decision should, and will, be central to analysis of employment-based affirmative action).

265. 352 F.3d 1111 (7th Cir. 2003).

context, finding racial diversity of police officers to be a sufficiently compelling interest for affirmative action in the employment context under the theory that maintaining a diverse force is operationally necessary for effective policing.<sup>266</sup>

While the establishment of diversity as a compelling interest in the employment context under strict scrutiny analysis would certainly not establish diversity as a permissible justification for affirmative action under the Title VII *Weber/Johnson* standard,<sup>267</sup> the *Grutter* reasoning regarding the value of diversity in employment is certainly no less persuasive in the Title VII context than it is in the equal protection context.<sup>268</sup> As such, the *Weber/Johnson* standard could conceivably experience a broadening to include diversity as a justification for private employer affirmative action.<sup>269</sup> Professor Cynthia Estlund suggests some impact of *Grutter* on the Title VII affirmative action jurisprudence is inescapable. At the least, she suggests, *Grutter* will have an atmospheric effect, which is to say, while it may not necessarily concretely alter the Title VII standard, *Grutter* will influence the background against which affirmative action decisions, whether constitutional or Title VII-based, are made.<sup>270</sup>

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266. *Id.* at 1115. Some question the extent to which *Petit* portends a broader expansion of the *Grutter* rationale to the employment context, as the diversity interest the Chicago Police Department has in creating a force to police demographically varied neighborhoods is unique and arguably more compelling than the diversity interest articulated by more traditional employers. See *AALS 2004 Annual Meeting*, *supra* note 252, at 140 (comments of Prof. McGowan). In that the *Grutter* decision does not limit its discussion of diversity in employment to diversity in policing organizations, however, it would seem the value of diversity, in the Court's view, may well resonate beyond the *Petit* context.

267. If, of course, a professional sports organization is deemed a public employer and its hiring decisions are challenged under constitutional strict scrutiny analysis, the organization could argue that *Grutter's* education-oriented diversity rationale justifies the organization's employment-based affirmative action plan without needing to reference Title VII affirmative action jurisprudence. Establishing a professional sports organization's engagement in state action, however, would likely be a difficult task, and any action regarding such an organization's hiring practices is, therefore, likely to contemplate the organization as a private employer. See *SHROPSHIRE*, *supra* note 39, at 73.

268. See Foreman, Dadey & Wiggins, *supra* note 237, at 103.

269. See Estlund, *supra* note 243, at 35–38.

270. *Id.* at 36.

The impact, however, may be significantly more direct.<sup>271</sup> Any such shift in the law would rely on an analysis of the ends served by *Grutter*'s diversity interest in the educational context and the extent to which those ends might appropriately be served in the employment context. The Court in *Grutter* recognized that diversity at the University of Michigan's Law School contributed positively *both* to the Law School's mission of educating students *and* to the well-being of American society more broadly.<sup>272</sup> Indeed, "there was no dichotomy in *Grutter* between the pursuit of the greater social good and the pursuit of institutional objectives."<sup>273</sup> In other words, diversity serves the institution's mission of providing what the institution views as a strong education while at the same time preparing students to contribute meaningfully as members of society.<sup>274</sup> It thus serves both a "business" purpose and a "civic" purpose.<sup>275</sup>

In that private employers do not generally exist to prepare their employees for positive societal contribution or to discharge civic duties, *Grutter*'s "civic case" for diversity—the argument that the "cross-racial empathy" inuring to students educated in a diverse setting will benefit society when the students leave school—would seemingly not apply in the employment context.<sup>276</sup> As Professor Estlund explains, "[t]he civic contribution of workplace interactions among diverse workers, though powerful, is entirely incidental to the primary organizational objectives."<sup>277</sup> The institutional or "business case for diversity"—the argument that diversity is central, not incidental, to the organization's primary objectives<sup>278</sup>—would, however, more intuitively apply in the employment realm. And considering the extent to which the *Grutter*

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271. Although the Supreme Court has not yet addressed the extent to which a diversity rationale justifies Title VII race-conscious decision making, it was poised to do so after the Third Circuit rejected such a rationale in *Taxman v. Board of Education*, 91 F.3d 1547, 1550 (3d Cir. 1996) (en banc). In that case, the board of education was faced with laying off one of two teachers who were equally qualified. 91 F.3d at 1551. One of the teachers was black, and indeed the only black teacher in her department, and the other was white. *Id.* Pursuant to an affirmative action plan, the board laid off the white teacher so as to maintain its diversity. *Id.* The discharged teacher asserted a Title VII challenge against the board, and prevailed in both the district court and on appeal in the Third Circuit. *Id.* at 1552. The board appealed, but before the Supreme Court heard the case, the parties settled the matter and the case was dismissed. See Foreman, Dadey & Wiggins, *supra* note 237, at 98.

272. See Estlund, *supra* note 243, at 27.

273. *Id.*

274. See *id.* at 26–27.

275. *Id.*

276. *Id.*

277. *Id.* at 27.

278. *Id.* at 21–22.

decision emphasized the importance of diversity in the private workplace—a workplace governed by Title VII rather than constitutional jurisprudence—a business case for diversity would seem a promising justification for Title VII affirmative action. Precisely what business purpose that diversity serves, however, would likely bear heavily on its acceptability as a justification in the Title VII context.

One business purpose diversity might serve is what Professor Estlund calls “external legitimacy” and describes as appearing legitimate and credible to “external constituencies” such as “clienteles.”<sup>279</sup> As Professor Estlund points out, such a rationale for diversity would seemingly run afoul of Title VII’s long-standing refusal<sup>280</sup> to permit companies to reflect customer preference through considering race in selecting employees.<sup>281</sup> Without question, the affirmative action realm provides an entirely different context than the majority-controlled decision-making process seeking white homogeneity which gave rise to Title VII and the prohibition on customer-reflected employment composition. Still, as Professor Estlund notes, “to the extent [the external legitimacy argument necessarily] invokes the preferences of those with market power for dealing with ‘their own kind,’ it echoes employers’ discredited efforts to cite discriminatory ‘customer preferences’ as justification for their own discrimination. While workforce-wide diversity programs are a far cry from the exclusionary hiring practice that Title VII targeted, the echo is still an eerie one.”<sup>282</sup> The eerie echo Estlund describes would certainly seem to render the prospect of courts adopting an external legitimacy business rationale for Title VII affirmative action unlikely.

Perhaps the echo is so eerie, however, because the external legitimacy rationale conjures, at first blush, scenarios such as the one Professor Rebecca White explores in expressing doubt as to the success of an external legitimacy affirmative action argument. Professor White considers a hypothetical car dealership’s attempt to diversify its sales force to increase profitability and concludes any argument that the dealership “could sell more cars with a racially diverse workforce than with a more racially homogeneous one is unlikely to convince a court that the

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279. *Id.* at 22.

280. This is explicated most clearly in the BFOQ context. *See id.* at 23 n.111.

281. *See id.* at 23.

282. *Id.* (quoting *AALS 2004 Annual Meeting*, *supra* note 252, at 133 (Comments of Prof. Malamud)).

employer is entitled under the statute to prefer [salespeople] of one race over another . . . .”<sup>283</sup>

The echo would not appear as eerie in the context, for example, of a not-for-profit, nongovernmental community organization seeking to hire staff members to direct a program designed to inspire academic excellence among youth of color living in an under-resourced community and to prepare them for eventual employment. Indeed, the community organization’s reliance on an external legitimacy rationale for seeking to hire some staff members of color—namely that the youth would more readily identify with and accept counsel from staff of color—would seem more akin to the rationale the Seventh Circuit approved in *Petit v. City of Chicago*,<sup>284</sup> discussed above, than the rationale of the car dealership in Professor White’s hypothetical. Through the hires the organization would be seeking to appear legitimate to its “external constituencies”—the youth it counsels—not in order to market and sell products, but to further Title VII’s purpose of improving the economic lot of members of traditionally disadvantaged populations.<sup>285</sup> Under these circumstances, an external legitimacy argument does not “invoke[] the preferences of those with market power for dealing with ‘their own kind,’”<sup>286</sup> rather it invokes the spirit of Title VII and the Civil Rights Act of 1964. It does not offend Title VII’s heritage; it relies upon it. It would seem, then, the desire for external legitimacy, when that legitimacy is sought so as to further Title VII’s purposes, may well gain traction under Title VII jurisprudence in the event of a *Grutter*-inspired expansion.<sup>287</sup>

Even assuming the viability of such an external legitimacy argument, the argument would be inaccessible to scores of private employers who seek external legitimacy for reasons other than furthering Title VII’s purposes, and would thus have only limited application in the private workforce. Organizations unable to rely on an external legitimacy business

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283. White, *supra* note 243, at 277.

284. *Petit v. City of Chicago*, 352 F.3d 1110, 1115 (7th Cir. 2003).

285. The success of such an external legitimacy argument would rest, in part, on the premise that staff members’ race is necessarily relevant to the organization’s success in pursuing its mission. While the validity of this premise is debatable, such a premise has received some support in the law. *See id.* at 1113 (finding diversity to be operationally necessary to patrolling and protecting a diverse city); *Wittmer v. Peters*, 87 F.3d 916, 919–20 (7th Cir. 1996) (finding diversity to be operationally necessary in the corrections context).

286. Estlund, *supra* note 243, at 23 (quoting *AALS 2004 Annual Meeting*, *supra* note 252, at 133 (Comments of Prof. Malamud)).

287. Professor White seems to acknowledge the prospect of a “diversity-based approach to affirmative action” being acceptable under Title VII in situations such as these—situations, as she puts it, “in which the employer’s interest could be viewed as compelling within the meaning of strict scrutiny . . . .” White, *supra* note 243, at 278.

case for affirmative action would, however, potentially have access to a second type of business justification for diversity—an internally focused rationale.<sup>288</sup> An internally focused rationale for diversity recognizes that an organization may desire diversity not because it attracts customers or increases organizational credibility, but because, as a separate matter, it improves the product.<sup>289</sup> It might do so in two ways. First, organizational diversity tends to broaden the range of approaches taken in creating strategy or considering alternatives,<sup>290</sup> potentially resulting in more thoroughly vetted and effective decisions and actions. Second, assuming an organization is not entirely homogenous, meaning there exists at the least a minimal non-white presence, increased diversity “may yield better group effectiveness” than a scenario under which the minimal non-white presence might be isolated, marginalized, and thus perhaps hampered in contributing fully to the organization.<sup>291</sup> Through diversity, the argument goes, the organization strengthens itself and creates a better product.

In recognizing the weakness of the hypothetical car dealership’s affirmative action argument, Professor White suggests that while it is possible a profit-seeking organization might justifiably implement affirmative action, in doing so it would have to rely on “something other” than a pure profit rationale.<sup>292</sup> Perhaps the “something other” is the improved workplace dynamic the internally focused business case for diversity seeks. The internally focused case seeks an improved decision-making process as well as greater group cohesion and productivity in

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288. The internally focused business case for diversity combines elements of Professor Estlund’s “internal improved decision making” case for diversity with elements of her discussion of the circumstances under which diversity benefits more general intangible group efficacy. *See* Estlund, *supra* note 243, at 21–25.

289. *See generally* Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *supra* note 260.

290. *See* Estlund, *supra* note 243, at 21. Estlund notes that diversity may also have negative consequences, including an increase in friction among employees, but that employers who learn to effectively “manage diversity,” may “counteract” those negative consequences and yield overall improved performance. *Id.* at 22.

291. *Id.* at 25. Black centerfielder Ellis Burks’s tenure with the Boston Red Sox provides a powerful example in this regard. Burks, who joined the Red Sox in 1987, was the team’s only black player during two of his years on the roster. *See* BRYANT, *supra* note 41, at 154. Burks was a gifted athlete and a talented baseball player, and was predicted to be “the next great Red Sox outfielder.” *Id.* at 179, 186, 133. Although Burks’s early career in Boston was promising, including a 1989 All-Star season, Burks felt racially isolated and lonely playing for the Red Sox, was ultimately unable to play to his potential, and was released after the 1992 season. *See id.* at 133, 200. Burks joined the racially diverse Chicago White Sox for the 1993 season, and “[i]mmmediately, baseball was fun again.” *Id.* at 202. Burks resurrected his career in Chicago and later joined the Colorado Rockies where he achieved his potential, posting a .340 batting average, hitting 40 home runs, and placing second in voting for the National League’s Most Valuable Player award. *See id.* at 203.

292. White, *supra* note 243, at 277.

addition to, and as a basis for, improved business and increased profit; it is, indeed, grounded in “something other” than a pure profit rationale.

Considering (1) *Weber*’s pronouncement that discrimination in favor of a member of a traditionally underrepresented group is not statutory discrimination, (2) *Weber* and *Johnson*’s refusal to rule out nonremedial purposes for Title VII affirmative action plans, (3) *Grutter*’s establishment of diversity as justifying affirmative action in the educational context, (4) *Grutter*’s strong suggestion that diversity would justify affirmative action in the employment context, and (5) the “permeability of the doctrinal lines” bounding Title VII and constitutional affirmative action jurisprudence,<sup>293</sup> perhaps that “something other” is just enough to prompt open a previously closed door to diversity-based Title VII affirmative action.

Of course, whether Title VII affirmative action jurisprudence will experience a *Grutter*-inspired expansion is subject to speculation. If it does, a professional sports organization, such as the Mets, could lawfully make a race-considered decision to hire a non-white player if pursuant to an affirmative action plan justified by either intent to remedy a conspicuous racial imbalance, as discussed above, or intent to increase diversity.

### *C. Might Weber, Johnson, or Even Grutter Play for the Mets?*

Recognizing the potential permissibility of the Mets’ hiring prior to the 2005 season, it becomes necessary to further explore whether the hiring was, in fact, race-considered, and, if so, whether the Mets may seek shelter under affirmative action jurisprudence.

#### *1. The Martinez Acquisition*

As the Mets prepared for their 2005 season, they pursued, among other players, Pedro Martinez, Carlos Beltran, Miguel Cairo, and Carlos Delgado, all Latino, ultimately hiring the first three.<sup>294</sup> While much was made of the signings in the press, with some labeling the team “Los Mets”

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293. Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 12 (2005).

294. See Mahler, *supra* note 222, at 22. Although the Mets failed to sign Delgado as the 2005 season approached, they continued to pursue him and finally succeeded in trading for him after the conclusion of that season. See Ben Shpigel, *Delgado, Check. Next for Mets? Wagner, Check.*, N.Y. TIMES, Nov. 29, 2005, at D1.

in reference to their burgeoning Latino presence,<sup>295</sup> pursuing four Latino players and signing three in a league in which nearly 25% of all players are Latino<sup>296</sup> is not particularly notable. A *New York Times Magazine* feature story on the 2005 Mets, the Mets' hiring of Martinez, and the process through which the club decided to hire him, is, however, notable and, ultimately, instructive.

In December 2004, the Mets were seeking to hire a new starting pitcher to strengthen the team's pitching rotation.<sup>297</sup> Among the pitchers considered were Pedro Martinez, a Latino player, who pitched the previous year with the Boston Red Sox, and Matt Clement, a white player, who pitched the previous year with the Chicago Cubs.<sup>298</sup> There apparently existed disagreement in the organization as to which pitcher to hire.<sup>299</sup> Martinez, one of the great pitchers of his generation and one of MLB's most prominent and beloved Latino players, was obviously a strong candidate.<sup>300</sup> Clement, although far less experienced and renowned, was a strong candidate as well.<sup>301</sup> There was no debate that in 2005 Martinez would be the better pitcher, but the Mets' statistical analyst, Ben Baumer, argued Clement might possibly be the better performer for the money over the course of a four-year career.<sup>302</sup> Baumer suggested Martinez was declining as a pitcher while Clement was improving.<sup>303</sup> Apparently, Martinez's rate, in 2004, of issuing bases on balls to batters was increasing at the same time as his strikeout rate was decreasing.<sup>304</sup> And although Clement had less control of his pitches than Martinez, his strikeout rate in 2004 was better than Martinez's, and he was more successful than Martinez at preventing batters' base hits.<sup>305</sup>

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295. Mahler, *supra* note 223, at 22; Ricardo Zuniga, *Minaya's Heritage Helping Mets*, ALB. TIMES UNION, Jan. 20, 2005, at C1; Chris Smith, *Los Mets: How Omar Minaya Ensnared Players Like Pedro Martinez and Carlos Beltran to Create a New Latin Dream Team. Now, Can They Win Any Games?*, NEW YORK METRO.COM, <http://www.newyorkmetro.com/nymetro/news/sports/features/11260>.

296. See MLB.com, Major League Baseball and Chevrolet Unveil Program Celebrating the Greatest Latino Players in the History of the Game, [http://www.mlb.com/NASApp/mlb/news/press\\_releases/press\\_release.jsp?ymd=20050823&content\\_id=1180675&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://www.mlb.com/NASApp/mlb/news/press_releases/press_release.jsp?ymd=20050823&content_id=1180675&vkey=pr_mlb&fext=.jsp&c_id=mlb) (last visited May 12, 2006).

297. See Mahler, *supra* note 223, § 6, at 22.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

The Mets ultimately hired Martinez.<sup>306</sup> Under any number of factual scenarios, the hiring decision would be unworthy of note and certainly beyond the scope of Title VII application. If, after the Mets' front office personnel debated the merits of the pitchers, they simply concluded Martinez would be a better pitcher over the course of four years, no Title VII analysis would be in order. And no Title VII analysis would be in order if they concluded Clement would be the better pitcher over the course of four years, but they believed Martinez would be the better pitcher during the 2005 season and they valued immediate contribution. Similarly, if the Mets concluded Martinez and Clement would be equivalent acquisitions from a pitching talent perspective, but hired Martinez because they felt he was a stronger leader, a more loyal teammate, or possessed some other attribute Clement lacked, their decision would be in compliance with Title VII. Indeed, even if the Mets hired Martinez because they believed his extraordinary past performances and national reputation would attract fans, Title VII would not come to bear. Title VII scrutiny would, however, be appropriate if the Mets hired Martinez because he was Latino—even if they hired him also because of his talent and fame—in the belief that his being Latino would attract fans.<sup>307</sup> Apparently, this final scenario is the scenario that played out.

After the aforementioned internal analysis as to which pitcher to hire and the Mets's decision to hire Martinez, the Mets' general manager, Minaya, indicated publicly that the Mets considered race in hiring Martinez. Indeed, in making the hire, Minaya's "hope was that Martinez would bring fans—especially Latin fans—out to Shea [Stadium, the Mets' home field] and raise the team's profile in the Dominican Republic."<sup>308</sup> As such, even considering Martinez's immense skill, Minaya acknowledged "Pedro was as much a marketing signing as a baseball signing."<sup>309</sup> As a marketing matter, the personnel move was genius. When Martinez pitched his first game as a Met on Saturday, April 16, 2005, the Mets hosted more fans for a Saturday game than ever before in the team's forty-four year existence.<sup>310</sup> As a legal matter, the personnel move demands examination.

If the Mets's hiring practices were challenged as systematically discriminatory against white players, the Mets could, of course, potentially argue the lawfulness of their hiring under affirmative action doctrine. As

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306. *Id.*

307. *See* 42 U.S.C. § 2000e-2(m) (2000).

308. Mahler, *supra* note 222, at 622.

309. *Id.*

310. *See id.*

noted above, if the Martinez hire and other hires were made pursuant to an affirmative action plan intended to remedy a conspicuous racial imbalance on the roster, and did not trammel the interests of white players, no Title VII liability would attach. The argument would, however, likely be unavailing. While the Mets may have, indeed, acted pursuant to an affirmative action plan, their public indications of Martinez's race being important to their hiring decision with no reference to an affirmative action plan, suggest they did not.

Even if they acted pursuant to an affirmative action plan, to be valid, as addressed above, that plan would, under current law, have to intend remediation of a conspicuous racial imbalance. The Mets' comments in the public record, however, do not bear on racial imbalance or the remediation thereof, and without a showing of intent to remedy a conspicuous racial imbalance, any affirmative action defense would be lacking under the *Weber/Johnson* standard. To the extent, however, that *Grutter* has ripened Title VII affirmative action doctrine for expansion, the Mets would potentially be spared the requirement of such a showing, and would instead need to show their intent to increase diversity. And while there exists no evidence of any conspicuous racial imbalance or any intent by the Mets to remediate such an imbalance, the Mets *have* indicated a public commitment to diversifying their roster. While Minaya has acknowledged pursuing Martinez in part because he is Latino,<sup>311</sup> Minaya's broader articulated intent was to "field[] a club that reflects [New York's] diversity . . . ."<sup>312</sup>

Under a *Grutter*-influenced Title VII affirmative action regime, the manner in which the Mets pursued such diversity would play a fundamental role in any court's inquiry. For instance, a plan under which the Mets considered a potential player's race, as one among many factors, with a goal of building a team that is diverse in a city that is diverse, but with no firm numerical targets, would attract less suspicion than a plan aimed at mirroring New York's demographic composition.<sup>313</sup> The latter plan would almost certainly be viewed as dangerously analogous to an unlawful quota system, while the former, more flexible, plan would likely avoid that fatal characterization.<sup>314</sup>

Under either plan, however, an intent to reflect New York's diversity—whether generally or in precise terms—would appear to rely on an external

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311. *See id.*

312. Smith, *supra* note 295.

313. *See Grutter*, 539 U.S. at 335–36.

314. *See id.*

legitimacy rationale for diversity, the type of diversity rationale which, as detailed above, would likely have limited application in the private sector. To the extent the Mets considered race in its player hiring to attract more Latin fans to Shea Stadium for Mets games, as Minaya suggested, their decision would seem quite like Professor White's hypothetical car dealership's unlawful consideration of race in its hiring to increase car sales. Assuming *arguendo*, however, the Mets considered race in hiring in part to provide role models and inspiration for members of a traditionally disadvantaged population, their consideration of race would seem more analogous to the hypothetical community center's hiring and, thus, to circumstances potentially justifying affirmative action treatment under a *Grutter*-influenced Title VII jurisprudence.<sup>315</sup> In the alternative, *Grutter*-influenced Title VII jurisprudence might support the Mets' consideration of race in hiring decisions if made pursuant to an internally focused affirmative action rationale. If unable to show they operated under one of these two theories, the Mets, even under a *Grutter*-influenced Title VII regime, would likely be unable to take shelter under affirmative action's umbrella, and would be susceptible to a paradigmatic Title VII challenge.

## 2. *Can the Mets Win with Weber, Johnson, and Grutter on the Sidelines?*

Absent support from affirmative action doctrine, the Mets would have difficulty parrying a Title VII challenge. Consider the facts, as established in the public record, regarding the Martinez hire. Assuming, as those facts suggest, the Mets hired Martinez rather than Clement, at least in part, because Martinez is Latino, and they did so in the absence of a valid affirmative action plan, Clement may be able to present a court with the rarest of evidence—direct evidence of discrimination sufficient to immediately shift the burden to the Mets to articulate a legitimate nondiscriminatory reason for the hiring decision.<sup>316</sup>

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315. Although the Supreme Court rejected a similar "role model" theory in deciding *Wygant v. Board of Education*, 476 U.S. 267 (1986), it did so out of concern the theory would permit race-conscious employment decisions "long past the point required by any legitimate remedial purpose," *id.* at 275. A *Grutter*-influenced Title VII jurisprudence, however, would demand no remedial purpose, but rather a diversity purpose. See *supra* Part IV.C. Consequently, such an argument, post-*Grutter*, might well breathe new life.

316. See Sullivan, *supra* note 239, at 1057. If Clement were required to establish a *prima facie* case, his claim would implicate an extremely murky realm of employment discrimination law, namely, the extent to which the *McDonnell Douglas* *prima facie* test applies when a white plaintiff claims discrimination. Sullivan explains, "[w]here a white plaintiff challenges an employment decision against the typical white-dominated employer, it is more difficult to draw the inference that the

The Mets would almost certainly respond that they hired Martinez because he is an outstanding pitcher. In that Martinez is undoubtedly an outstanding pitcher, Clement would likely not seek to establish pretext, but would instead argue that the Mets proceeded in hiring Martinez with a mixed motive—both because he is an outstanding pitcher and because he is Latino. In doing so, Clement would need to show only that Martinez’s being Latino was a motivating factor, *not the sole factor*, of the Mets’ hire.<sup>317</sup> Again, if the Mets’ public statements are accurate, Clement would almost certainly make this showing and ultimately prevail.

Notably, the Mets in responding to Clement’s direct evidence of discrimination would have an option other than articulating a legitimate nondiscriminatory reason for their decision. While the Mets could not seek to invoke the BFOQ exception in justifying a race-considered decision to select Martinez over Clement, they could seek BFOQ protection if they framed the decision to hire the Dominican-born Martinez as resulting from national-origin consideration rather than race consideration.<sup>318</sup> Although this would be a statutorily sanctioned approach, the BFOQ exception is extraordinarily narrow,<sup>319</sup> and unlikely to support the Mets’ hire.

To prevail, the Mets would have to show both that hiring a Dominican national is “essential” to the Mets’ business and that *being a Dominican* makes Martinez a good pitcher.<sup>320</sup> Even if the Mets were able to show that being of a particular nationality means being a better baseball player, a doubtful proposition to be sure, any attempt to frame the “essence” of the Mets’ business as increasing revenue through appealing to a fan base and hiring a Dominican national as necessary to that end would fail. The courts have “steadfastly refused to permit employers to define the essence of

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employer acted because of discrimination against whites, even where the most common, legitimate reasons for the decisions are negated” and consequently some courts require such a plaintiff to “present evidence of ‘background circumstances’ that establish that the defendant ‘is that unusual employer who discriminates against the majority.’” *Id.* at 1059–63 (quoting *Iadimarco v. Runyon*, 190 F.3d 151, 156 (3d Cir. 1999)). Among courts that apply a “background circumstances” test, there appears little uniformity in the manner of its application, rendering the prima facie inquiry somewhat unpredictable. *See Sullivan, supra* note 239, at 1065–71, 1059 n.20.

317. *See id.* at 1122–23.

318. Title VII § 703(e)(1) permits national origin discrimination when national origin is a bona fide occupational qualification. *See Paul Frymer & John D. Skrentny, The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 697 (2004) (describing the law’s treatment of “Latino” as both a racial category and, for purposes of BFOQ analysis, a national origin category, but warning that a regime permitting BFOQ application with regard to a group generally categorized as a racial group, such as Latinos, but not with regard to another racial group, such as blacks, would create an anomalous and unsatisfactory result).

319. LEWIS & NORMAN, *supra* note 192, at 174.

320. *See id.* at 176–77.

their business as maximizing profit, because then customer preference—*often the embodiment of the very kind of accumulated prejudice or stereotype Title VII seeks to overcome*—could be invoked to justify a vast range of absolute exclusions . . . .”<sup>321</sup> Thus, even with a national origin-based, rather than a race-based, argument for BFOQ protection, the Mets would be unable to rely on the BFOQ exception, and would be susceptible to Title VII liability.

*D. When the Consequences Don't Flow: How Affirmative Action-Inspired Race-Considered Roster Construction Avoids Inspiring Race-Based Team Identification*

While the Mets organization, under the facts in the public record, may be an unlikely candidate for affirmative action protection regarding its pre-2005 season hiring, the Mets' or any other team's race-considered decision to hire non-white players, under different circumstances, might well avoid Title VII liability.<sup>322</sup> The possibility of lawful race-considered roster

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321. *Id.* at 175 (emphasis added).

322. Recognizing that Title VII permits race-considered roster construction pursuant to a valid affirmative action plan—whether justified by an intent to remedy a conspicuous imbalance or, perhaps, a business diversity rationale—it is possible a professional sports organization with a primarily non-white roster might seek to lawfully engage in race-considered roster construction in hiring a white player. In doing so, the organization would argue that hiring a white player to join a primarily non-white team would remedy a conspicuous imbalance or diversify the roster.

While a novel argument, it is unlikely to succeed. Recall the jumping-off point for the Supreme Court's Title VII affirmative action jurisprudence in *Weber*. Faced with a case in which a company, Kaiser Aluminum, engaged in race-conscious decision-making to ensure opportunities for its black employees, the Court concluded that the company *had not discriminated* under the statute. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979). And it concluded as such because Title VII was “triggered by [America's] concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long’ . . . .” *Id.* at 204 (internal citation omitted). To hold that a company discriminated under the statute when the company's intent was to fulfill the statute's purpose through securing opportunities for blacks would be, as the Court put it, “ironic indeed.” *Id.* So, Title VII affirmative action jurisprudence exists because such race-considered decision making, when pursuant to a justifiable rationale, *is not discrimination* and thus not actionable under Title VII. A race-considered decision to hire a white player, would not, under this formulation, fall outside the definition of discrimination under the statute. The decision *would be* statutory discrimination, *would not*, therefore, trigger *Weber/Johnson* affirmative action analysis, and would, as a consequence, be actionable. Put simply, *Weber* and *Johnson* create an exception to the *McDonald v. Santa Fe Trail Transportation Co.* rule that an employer cannot discriminate against a non-white in favor of a white, and the exception exists, according to the Court, for purposes of effectuating Title VII's core intent. There exists no analogous exception to the general rule that an employer cannot discriminate against a white in favor of a non-white, meaning any race-considered plan intended to increase numbers of white team members would likely be untenable under Title VII.

Despite Title VII's legislative history and the rationale undergirding the *Weber* decision, an argument might be made that if, despite its history and purpose, Title VII provides a cause of action

construction, of course, forces inquiry into whether such roster construction might, just like unlawful race-considered roster construction, spur race-based team identification, the consequent transmogrification of athletic confrontation into racial confrontation, and the racial violence that potentially flows therefrom. The inquiry, however, is easily answered in the negative. Because race-considered roster construction serving to remedy racial imbalance brings a roster into greater balance, it discourages race-based team identification rather than encouraging it, suggesting this exception to Title VII's prohibition on race-considered roster construction would not yield the negative societal outcomes associated with race-considered roster construction outside the affirmative action context.

Consider, for instance, the Boston Red Sox of 1983, a team on which Jim Rice was the only black player and had been the only black player during the three preceding years.<sup>323</sup> If that organization engaged in race-considered roster construction pursuant to a plan intended to remedy its conspicuous racial imbalance, it would become less of a "white" team and thus reduce the prospect of race-based team identification and the resultant negative externalities. Once the conspicuous racial imbalance ceased to exist, there would be no conspicuous imbalance to remedy, and the affirmative action propelled race-considered roster construction would, by necessity of law, stop. There is, thus, no danger the race-considered roster construction would transform an entirely "white" team into an entirely "non-white" team and so recreate the race-based identification concern with a different demographic identifying with the team on racial grounds.

The same would be true under a diversity rationale for affirmative action. Once the organization employs a critical mass of the underrepresented group, the plan would no longer justify race-considered decisionmaking.<sup>324</sup> As with employment decisions made pursuant to an

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under some circumstances to white plaintiffs, perhaps Title VII can be read to permit race-considered hiring in favor of white applicants under certain circumstances, such as when a company seeks to remedy a conspicuous racial imbalance in which whites comprise the conspicuous minority, and this argument would spawn counter-arguments. See Frymer & Skrentny, *supra* note 318, at 721–23 (considering the prospect of affirmative action benefiting "WASP males" and expressing caution with regard to that prospect in, at least, the remedial context, suggesting "[i]t is quite arguable that when affirmative action is understood in the historical / remedial model, it is most appropriately limited in use for African-Americans and other groups in society that have experienced systematic and severe forms of discrimination sponsored by the national government"). The feasibility, policy implications, and societal impact of expanding the Title VII affirmative action doctrine to embrace race-considered hiring in favor of white applicants merits investigation, but such investigation is beyond the scope of this article.

323. See BRYANT, *supra* note 41, at 139.

324. Estlund, *supra* note 243, at 18. Because the *Grutter* Court did not precisely define what constitutes a "critical mass" in the strict scrutiny context, the precise contours of "critical mass" in the

affirmative action plan serving to ameliorate a conspicuous racial imbalance, therefore, such decisions made pursuant to an affirmative action plan serving to increase diversity would not run the danger of sparking race-based team identification.

Ultimately, then, the *Weber/Johnson* affirmative action doctrine bars Title VII's general prohibition on race-considered roster construction when it serves to effectuate Title VII's core purpose of improving the economic lot of traditionally disadvantaged populations. Employment decisions made in furtherance of an affirmative action plan designed to remedy an organization's conspicuous racial imbalance would certainly qualify for *Weber/Johnson* protection and, if Title VII experiences *Grutter*-influenced expansion, so too would decisions in furtherance of an affirmative action plan aimed at increasing diversity. In neither case, however, would race-considered roster construction threaten to inspire the race-based team identification associated with non-affirmative action race-considered roster construction, because in the affirmative action context, the race-considered decision would seek to increase, rather than decrease, racial balance.

#### CONCLUSION

Since 1964, Title VII has prohibited racial discrimination on the part of employers throughout the country, and the statute regulates professional sports organizations just as it regulates other employers. All unlawful employment discrimination, regardless of the employer's industry, yields negative consequences Title VII exists to prevent. Due to the professional sports industry's unique character, however, employment discrimination in the form of unlawful non-affirmative action race-considered roster construction yields unique consequences. Professional sports organizations, unlike other employers, have fans who identify with the organizations and support the organizations' competitive endeavors, and, consequently, unlawful race-considered roster construction risks sparking race-based team identification, as it did at UMass in the aftermath of the 1986 World Series. Title VII, if applied to thwart unlawful race-considered roster construction, has the power to prevent these unique consequences.

While there exists no tradition of professional athletes mounting Title VII challenges against professional sports organizations, this is not consequent to an absence of viable claims. Unlawful race-considered

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Title VII affirmative action context are subject to speculation. *Id.*

roster construction has endured as a reality in American professional sport for decades, and if unchecked, there is no cause to believe it will cease. Title VII provides the check; professional athletes suffering discriminatory roster exclusion need only utilize it. In doing so, they would be protecting themselves from unlawful race-considered roster construction and protecting broader society from such discrimination's unsavory consequences.