Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses

Rachel L. Cantor
Rachel.Cantor@chicagounbound.edu

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Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment; however, Title VII also provides an exception called the bona fide occupational qualification ("BFOQ") exception or defense. The BFOQ exception permits employers to make hiring decisions based on otherwise prohibited reasons, such as sex, if such decisions are necessary to the "essence of the business." For example, the BFOQ exception permits hospitals to hire nurses on the basis of gender because respecting the privacy interests of patients is essential to the business of running a hospital. In contrast, because gender is not essential to the business of transporting passengers, gender is not a BFOQ for the position of airline attendant.

Title VII protects both men and women from discrimination in employment. In one instance, a group of men who sought and were denied employment at Hooters, a restaurant chain known for employing attractive women, brought a sex discrimination suit against the chain. The plaintiffs alleged that Hooters violated Title VII by refusing to hire men for "front of the house" positions such as serving, bartending and hosting. In granting
the group's motion for class certification, the district court identified the validity of the defendant's BFOQ defense as one of the main issues to be considered in a future trial.9

The BFOQ exception is difficult to apply when, as with the Hooters case, consumer preferences for an employee of a specific sex appear to be at issue and the essence of the business in question is unclear. Practically speaking, Hooters is somewhere between a strip club, where hiring only a single sex is permitted, and a restaurant, where hiring only a single sex is prohibited.10 Although the validity of Hooters's BFOQ defense was never determined because the parties settled, the claim is interesting because it exemplifies the difficult relation between Title VII's BFOQ defense and consumer preferences.11

Despite a presumption in the law against permitting BFOQ defenses based on consumer preferences,12 courts applying the "essence of the business" test often rule in favor of such defenses. A closer look indicates that courts uphold sex-based BFOQ defenses when sex is essential to a business's continued participation in a certain market, that is, when sex determines the relevant market.13 When consumer preferences for sex are strong enough, sex (1) becomes a product (2) for which consumers are willing to pay.14 But how can courts determine when sex is the product?

Defining the market in which a business competes helps determine whether "sex" is a business's product. If the alleged sex

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9 Id at *6-7.
10 See text accompanying notes 86-89.
11 See Hooters Agrees to Hire Men in Support Roles; But It Will Still Hire Scantily Clad Women, Balt Sun 3C (wire reports) (Oct 1, 1997) (discussing the Hooters settlement which created support jobs, such as hosts and bartenders, that would be filled without reference to gender).
12 The EEOC claims that consumer preferences cannot justify employment decisions, 29 CFR § 1604.2(a)(1)(iii) (see note 33 and accompanying text), and courts hold that consumer preferences justify BFOQ defenses only in limited instances. See, for example, Wilson v Southwest Airlines Co, 517 F Supp 292, 299 (N D Tex 1981) (collecting cases).
13 This Comment will mainly refer to "sex" and not "gender." Although both "sex" and "gender" can indicate the specific gender of an individual, the word "sex" can be used to capture "gender" plus something else, or sex as sexuality. In particular, it makes less sense to think of markets in gender than it does to think of markets in sex. Examples of markets in sex are strip clubs and calendars of attractive men. It is difficult to think of a market in gender that is not just a manifestation of the kind of gender discrimination Title VII seeks to prohibit.
14 This will undoubtedly disturb many Title VII supporters. It appears to allow employers to make an end run around Title VII by defining their business through the sale of sex. However, the purpose of Title VII is not to eliminate selling sex, but to eliminate discrimination in employment. See Part I C. Title VII does not control what employers sell; rather, it controls what factors employers use to make employment decisions.
discrimination occurs in every firm that competes in the market, then sex is likely a defining characteristic of the market, essential to the business, and thus a BFOQ for employment. Although Title VII offers no help in defining markets, antitrust law depends upon such determinations and developed around precisely these types of considerations. Consequently, the economic principles and market definition techniques employed in antitrust law can help determine the "essence" of a particular business and can help assess the validity of an employer's BFOQ defense.

Part I of this Comment discusses Title VII in general. It briefly introduces the legislative history and the Equal Employment Opportunity Commission's role in enforcing Title VII. Subparts C and D of Part I elucidate the different tests courts use to evaluate BFOQ defenses and the different classes of cases in which courts generally find BFOQ defenses valid or invalid. Part I concludes that all gender-specific employment decisions, those found invalid under the BFOQ exception as well as those found valid, are somehow based on consumer preferences.

Part II discusses the basic economics of the BFOQ exception and introduces the law's relationship to preferences and social welfare. Part III proceeds on the premise that Title VII law cannot properly evaluate its own "essence of the business" test in difficult cases where the product in question combines sex and something else. Consequently, the Section discusses the economics of pricing and introduces antitrust law's market definition techniques to demonstrate how to evaluate difficult BFOQ claims. Part III concludes that Title VII should require a market definition analysis in difficult cases. Ultimately, if the defendant can prove that sex defines the market in which the defendant competes — by examining the specific product's pricing structure and the cross-elasticities of demand to other products — then the defendant can properly assert that sex is a BFOQ for employment.

I. TITLE VII

Title VII of the Civil Rights Act of 1964 provides that:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any in-

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15 For a general overview of antitrust law, see Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice (West 1994).

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.\footnote{Id at § 2000e-2(a).}

Section 703(e)\footnote{Id at § 2000e-2(e).} of Title VII dictates that it is not unlawful for an employer to make an employment decision "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."\footnote{Id.} Thus, although Title VII generally prohibits discrimination in employment, in specific circumstances it permits such discrimination.

Under Title VII, once a plaintiff proves a prima facie case of employment discrimination, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment practices at issue.\footnote{McDonnell Douglas Corp v Green, 411 US 792, 802-04 (1973).} If the employer shows that the challenged practice is based on a bona fide occupational qualification,\footnote{Id. at § 2000e-2(e).} then the employer will meet its burden and no Title VII violation will be found to exist.\footnote{Id. at § 2000e-2(a).}

A. Legislative History

The legislative history of Title VII's prohibition against sex discrimination is markedly sparse.\footnote{See Michael L. Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Tex L Rev 1025, 1027 (1977).} The drafters of the controversial Civil Rights Bill originally sought to remedy race discrimination in employment.\footnote{Chambers v Omaha Girls Club, Inc, 834 F2d 697, 703 (8th Cir 1987).} On the last day of the House hearings on the Civil Rights Bill, an opponent of the Bill attempted to prevent the Bill's approval by proposing that the law be broad-
ened to prohibit "sex" discrimination in employment. The attempt to thwart the Bill failed; the amendment passed with the proposed change. There is correspondingly little legislative history on the BFOQ exception to Title VII. Courts often rely on an Interpretative Memorandum of Title VII — submitted by the Senate Floor Managers of the Civil Rights Bill — to determine congressional intent with regard to the BFOQ exception. The Interpretive Memorandum stressed that the BFOQ exception was meant to give employers a "limited right to discriminate . . . where the reason for the discrimination is a bona fide occupational qualification." The Interpretive Memorandum gives examples of facially discriminatory hiring policies that might be acceptable under the BFOQ exception, such as the preference of an ethnic restaurant to hire a cook of the same ethnicity or the preference of a professional sports team to hire male players.

B. The Equal Employment Opportunity Commission

In order to enforce the provisions created by the Civil Rights Act of 1964, Congress created the Equal Employment Opportunity Commission ("EEOC"). Although EEOC guidelines do not bind courts, courts afford them "great deference" in deciding employment discrimination cases.

EEOC regulations state that the BFOQ exception "should be interpreted narrowly" with regard to sex. The Commission lists

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26 110 Cong Rec 2584 (Feb 8, 1964).
27 See Wilson v Southwest Airlines Co, 517 F Supp 292, 297 n 12 (N D Tex 1981) (noting that the House barely discussed the application of the BFOQ exception to sex discrimination because sex was not added to Title VII until the final stages of deliberation).
29 Southwest, 517 F Supp at 297. See also Dothard v Rawlinson, 433 US 321, 334 (1977) (citing the Interpretative Memorandum in support of the conclusion that the BFOQ defense is "extremely narrow"); Swint v Pullman-Standard, 624 F2d 525, 535 (5th Cir 1980) (citing same for the proposition that customer preferences might be a factor for determining the validity of a BFOQ defense).
30 110 Cong Rec at S 7213; Southwest, 517 F Supp at 297.
31 110 Cong Rec at S 7213; Southwest, 517 F Supp at 297.
32 42 USC § 2000e-4(a).
33 See Griggs v Duke Power Co, 401 US 424, 433–34 (1971). But see General Electric Co v Gilbert, 429 US 125, 140–45 (1976) (declining to follow an EEOC guideline because the guideline was not created at the same time as the Civil Rights Act, yet noting that courts should generally defer to EEOC guidelines).
many situations in which refusing to hire an individual will not merit a BFOQ exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general.
(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes.
(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.35

Indeed, the Commission explicitly recognizes only one instance in which sex can be a bona fide occupational qualification: "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress."36 EEOC decisions concerning the merits of specific BFOQ defenses evidence the Commission's narrow interpretation of the defense in general.37

C. Assessing BFOQ Defenses: Defining the Employer's Business

Courts construe an employer's bona fide occupational qualification defense narrowly.38 Title VII specifically limits BFOQ defenses to instances where discrimination is (1) reasonably necessary to (2) the "normal operation" of the "particular" business.39 Although courts use several different methods to evaluate an em-

35 Id at § 1604.2(a)(1).
36 Id at § 1604.2(2).
37 See, for example, EEOC Decision No 82-4 (1982) (finding that defendant's failure to transfer female plaintiff to a higher position in a male unit of a youth home violated Title VII; no BFOQ defense could be established on the basis of inmate privacy interests, safety concerns, or the claim that women can not serve as "role models" for young male detainees, in part, because women had successfully filled the disputed position in the past); EEOC Decision No 71-2338 (1971) (finding that a customer's preference for accom paniment by a male employee to football games, hunting trips, and dinners did not justify the employer's refusal to promote a woman to branch manager); EEOC Decision No 70-11 (1969) (finding that perceived customer lack of confidence in female courier guard did not justify employer's decision to hire only men).
38 See United Auto Workers v Johnson Controls, Inc, 499 US 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly."); Dothard v Rawlinson, 433 US 321, 334 (1977) ("the bfoq exception was in fact meant to be an extremely narrow exception"); EEOC v HI 40 Corp, 953 F Supp 301, 305 (W D Mo 1996). But see Sirota, 55 Tex L Rev at 1032 (cited in note 23) (noting that the legislative history indicates that Congress intended to create a broad BFOQ exception for sex discrimination).
ployer’s BFOQ defense, all of the methods ultimately focus on the character, or “essence,” of the defendant’s business.

The most frequently applied test is the “essence of the business” test announced by the Fifth Circuit in Diaz v Pan American World Airways, Inc and later adopted by the Supreme Court in Dothard v Rawlinson and United Auto Workers v Johnson Controls, Inc. Under this test, a BFOQ defense is valid only if an employer must discriminate between employees to ensure that a job is performed. It follows that if an employee of either sex can perform the job in dispute or properly carry out the functions of the business, then an employer cannot discriminate between employees on the basis of sex.

The Supreme Court’s decisions in Dothard and Johnson Controls exemplify the different possible applications of the essence of the business test. In Dothard, the Supreme Court looked to the essence of the business test to find that sex is a BFOQ for employment in maximum security prisons in certain extreme situations. The “essence of a correctional counselor’s job” is to maintain prison security. When 20 percent of prisoners in a state’s system are incarcerated for the commission of sexual crimes, it follows that female guards are more likely to be attacked by prisoners. If female guards are more likely to be attacked by prisoners, then being female thwarts the goal of maintaining prison security. On the other hand, in Johnson Controls the Supreme Court applied the essence of the business test to reject an employer’s BFOQ defense. In Johnson Controls, the employer attempted to justify its policy of excluding fertile women from battery-production jobs on the grounds that the position required

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40 See, for example, Torres v Wisconsin Dept of Health and Social Services, 859 F2d 1523, 1527 (7th Cir 1988) (discussing the different formulations of the BFOQ exception).
41 See id at 1528 (emphasizing the importance of defining the defendant’s “business”).
42 442 F2d 385, 388 (5th Cir 1971).
44 499 US 187 (1991). Although the decision in Dothard does not clearly adopt the essence of the business test, in Johnson Controls the Court stated that Dothard stresses that a BFOQ must be related to the essence of an employee’s job or to the “central mission of the employer’s business.” Id at 203, quoting Western Air Lines, Inc v Criswell, 472 US 400, 413 (1985).
45 Johnson Controls, 499 US at 201 (“By modifying ‘qualification’ with ‘occupational,’ Congress narrowed the term to qualifications that affect an employee’s ability to do the job.”).
47 Id at 335.
48 Id at 335–36.
49 Id.
50 499 US at 203–07.
exposure to levels of lead dangerous to potential fetuses.\footnote{exposure to levels of lead dangerous to potential fetuses.\footnote{51} Although the Court found the employer’s goal of protecting potential fetuses laudable, the Court ruled that fertility does not go to the essence of battery making since fertility does not affect an individual’s ability to make batteries.\footnote{52}

Courts also evaluate an employer’s BFOQ defense with the “all or substantially all” standard. In \textit{Weeks v Southern Bell Telephone \\& Telegraph Co},\footnote{53} the court announced this standard:

\begin{quote}
[T]he principle of nondiscrimination requires that . . . in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.\footnote{54}
\end{quote}

Despite Southern Bell’s concern that women were not strong enough for the position at issue and that women should not be on call past midnight, a necessity of the position, the court found that the defendant failed to meet its burden of proving a BFOQ defense. The defendant did not introduce evidence concerning the lifting capabilities of women and the defendant already required women employed in other positions to be on call past midnight.\footnote{55} Thus, the court ruled that Southern Bell failed to meet its burden of proving that “all or substantially all” women could not safely and efficiently perform the duties of a switchman.\footnote{56}

Some courts hold that an employer asserting a BFOQ defense must also demonstrate that “there are no reasonably available alternative practices” that would eliminate the need to resort to discriminatory policies.\footnote{57} This requirement makes a BFOQ defense exceptionally hard to prove: if there is any chance that the employer can rearrange the work environment to accommodate

\begin{footnotes}
\item[51] Id at 192.
\item[52] Id at 203–04 (“No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making.”).
\item[53] 408 F2d 228 (5th Cir 1969).
\item[54] Id at 235.
\item[55] Id at 235–36 (“Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks.”).
\item[56] Id at 235.
\end{footnotes}
the individuals discriminated against, then the employer must do so regardless of inconvenience. For instance, in *Forts v Ward*, the court responded to prisoners’ requests for an injunction against assigning male guards to female housing units by ordering the prison to install shower screens and to provide sleeping garments for inmates. Although the court deferred to the inmates’ legitimate privacy interests, it ruled that the inmates’ preference for sleeping nude did not overcome the more important consideration of providing equal employment opportunities for male guards.

All of the different tests employed by courts to evaluate BFOQ defenses can be reconciled. The BFOQ exception of Title VII allows employers to make hiring decisions based on sex so long as sex defines, at least in part, the product market of the business in question. If sex defines the product then: (1) sex is the essence of the business; (2) all or reasonably all members of the sex allegedly suffering discrimination cannot perform the position in question without changing the product’s essential character and thus changing its market; and (3) no reasonably available alternative practices exist, except switching product markets (or failing).

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58 See *Gunther*, 612 F2d at 1087 (“Title VII requires administrative necessity, not merely administrative inconvenience, to satisfy the bfoq exception.”).
59 621 F2d 1210 (2d Cir 1980).
60 Id at 1216–17.
61 Id at 1217. See also *Bohemian Club v Fair Employment and Housing Commission*, 231 Cal Rptr 769, 782 (Cal App 1986) (citing *Forts v Ward* in support of its holding that the privacy interests of members of an all male club did not justify the club’s refusal to hire female employees because enclosed shower and bathroom facilities were available). But see *Brooks v ACF Industries, Inc*, 537 F Supp 1122, 1132 (S D W Va 1982) (finding that sex was a BFOQ for janitorial duties in a male bathhouse because there was no “reasonable scheme or accommodation that feasibly or reasonably could be implemented by defendant” that could properly accommodate both the plaintiff’s right to employment and the customers’ rights to privacy).
62 See, for example, *Wilson v Southwest Airlines Co*, 517 F Supp 292, 300 n 17 (N D Tex 1981) (noting that the use of different tests to evaluate employer BFOQ defenses is rarely outcome determinative).
63 See *Torres*, 859 F2d at 1528 (emphasizing the importance of defining the defendant’s “business”: “[W]e must focus on the ‘particular business’ of the employer in which the protected employee worked. Oftentimes, this task requires that a court recognize factors that make a particular operation of an employer unique or at least substantially different from other operations in the same general business or profession.”) (citation omitted).
D. Valid and Invalid BFOQ Defenses: Measuring the Strength of Consumer Preferences and Determining the Essence of the Business

All of the methods for evaluating BFOQ defenses require a market participation test: are sex-based employment policies necessary for market participation? One way successfully to conduct the market participation inquiry is to analyze the strength of consumer preferences for the characteristic at issue. If consumer preferences for a characteristic are sufficiently strong, failure to meet consumer preferences will result in a failure of the business. Conversely, if consumer preferences for a characteristic are not sufficiently strong, failure to meet those preferences may result in decreased business, but not in a failure of the business. Thus, if a consumer preference for a characteristic is not sufficiently strong, the characteristic is not essential to the business and should not justify a BFOQ defense.

Every BFOQ defense relates to consumer preferences. However, even commonly accepted justifications for BFOQ defenses, such as privacy interests and public welfare concerns, should fail to validate BFOQ defenses when the underlying consumer preferences are not strong enough to significantly affect market participation. Case law supports this characterization of BFOQ defenses: courts reject BFOQ defenses when accommodating the consumer preference at issue is not essential to the business. Finally, case law shows that employers usually fail to establish valid BFOQ defenses when the consumer preference at issue is for a specific gender employee without some additional non-gender justification, such as privacy or public welfare concerns.

1. A consumer's right to privacy.

Generally, employers can justify sex as a BFOQ when male or female consumer rights to privacy are at issue—this justification can also be characterized as a consumer preference for privacy. This BFOQ was foreshadowed in the House discussions of Title VII.

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65 See 110 Cong Rec H 2718 (Feb 8, 1964) (statement of Rep Goodell), proposing to add "sex" to the BFOQ section of Title VII: "There are so many instances where the matter of
when employers assign nurses to different shifts in nursing homes or assign orderlies to different departments in hospitals. Similarly, employers can assert valid sex-based BFOQ defenses founded on customer privacy concerns when hiring janitors to clean single-sex facilities. A market participation inquiry helps assess a BFOQ defense in customer privacy cases. For example, if a hospital wishes to attract female clientele and to remain competitive in the market for female patients, the hospital must be allowed to accommodate consumer preferences for privacy by hiring only female nurses in specific wards.

The strength of the alleged consumer preference for privacy dictates whether privacy justifies a discriminatory hiring policy and thus a BFOQ defense. For instance, in EEOC v HI 40 Corp, the court reviewed an employer's female-only hiring policy for weight loss counselor positions. The court determined that "a minimal intrusion on the privacy of customers must be tolerated if the elimination of that intrusion 'tramples' the employment opportunities" of another sex. The job of weight loss counselor included taking body fat measurements, which was potentially

sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse.

See, for example, Healey v Southwood Psychiatric Hospital, 78 F3d 128 (3d Cir 1996) (finding that the defendant hospital established a BFOQ defense for its policy of considering sex when assigning shifts since the sex considerations were necessary to protect patient privacy); Jones v Hinds General Hospital, 666 F Supp 933, 935–37 (S D Miss 1987) (holding male gender a BFOQ that justified a hospital's decision to lay off only female nursing assistants due to a shortage of male orderlies needed to attend to male patients); Backus v Baptist Medical Center, 510 F Supp 1191, 1193–97 (E D Ark 1981) (holding hospital’s employment of only female nurses in obstetrics and gynecology department justified by a BFOQ defense based on the privacy concerns of patients), vacated on other grounds, 671 F2d 1100 (8th Cir 1982); Fesel v Masonic Home of Delaware, Inc, 447 F Supp 1346, 1350–54 (D Del 1978) (holding that retirement home could justify its female-only hiring policy for nurses on the privacy interests of the guests since twenty-two of the thirty retirees were female and objected to male treatment).

Similarly, the privacy rights of inmates, coupled with additional compelling reasons, may justify a sex-based BFOQ. See Robino v Iranon, 145 F3d 1109, 1110–11 (9th Cir 1998) (finding gender a BFOQ which justified the correctional facility's policy of assigning only female workers to protect female inmates' privacy rights and to reduce the risk of sexual assaults between employees and inmates); Tharp v Iowa Dept of Corrections, 68 F3d 223, 226 (8th Cir 1995) (upholding a prison's policy of allowing only female employees to staff a women's unit of the prison on the grounds of inmate privacy, efficacy of rehabilitative services and benefit to female employees).

953 F Supp 301 (W D Mo 1996).

Id at 304–05.

Id at 304.
embarrassing to customers. Thus, some customers objected to having their measurements taken by men. The court rejected HI 40 Corporation's allegation that customers preferred female counselors and found that the alleged customer preference was not supported by sound evidence. It followed that if a consumer preference for female counselors could not be demonstrated, the consumers did not have a privacy interest strong enough to support the finding of a sex based BFOQ. The court's finding of a Title VII violation reflected the strength of the consumer preferences at issue.

2. Public welfare.

Public welfare concerns, such as safety, can also justify sex-based BFOQ defenses. In Dothard v Rawlinson, the Supreme Court found sex a BFOQ for employment in contact positions in all-male penitentiaries in Alabama. Twenty percent of the incarcerated men were sex offenders, and the state prisons were permeated by violence which created a "jungle atmosphere." The Court determined that hiring women would legitimately compromise prison safety by increasing the risk that security personnel might be attacked. In order to maintain prison security, the essence of a security guard's job, only men could be employed and therefore being male constituted a BFOQ for employment.

Although the Supreme Court's decision in Dothard does not speak in the language of consumer preferences, the decision ex-

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71 Id at 303.
72 953 F Supp at 303.
73 Id at 306.
74 See also EEOC v Sedita, 755 F Supp 808, 811 (N D Ill 1991) (holding that employer's female-only hiring policy for manager and instructor positions at a female-only club could not be based on the privacy interests of customers, in part, because the evidence of customer objection to male employees was inconclusive); Bohemian Club v Fair Employment and Housing Commission, 231 Cal Rptr 769, 782 (Cal App 1986) (rejecting employer's assertion of a BFOQ based on customer privacy because members of the male club could use enclosed bathroom and shower facilities if they were truly worried about privacy).
76 Id at 336–37.
77 Id at 334–35.
78 Id at 335–36.
79 433 US at 336–37. See also Chambers v Omaha Girls Club, Inc, 834 F2d 697 (8th Cir 1987). In Chambers, the court held that the "role model rule" of a private social club for girls justified a BFOQ. Id at 704–05. The rule mandated that the Club discontinue employment of unmarried pregnant counselors. Id at 699. Employing unmarried pregnant counselors might convey the image that the Club condoned teenage pregnancy and, in so condoning, would thwart the Club's purpose of increasing opportunities available to young girls. Id at 701–02. Arguably, the role model rule was grounds for a BFOQ defense because it was based on concern for young girls' welfare.
emphases a BFOQ justified by a consumer preference for a product characteristic essential to the product’s success in the market. The *Dothard* decision justified sex as a BFOQ for prison safety.\(^{80}\) Prison safety is a concern of the community. The community strongly prefers community safety and, by extension, prison safety.\(^{81}\) If the prison is unable to maintain safety because it fails to hire appropriate guards, then the prison will fail in the market for safety.\(^{82}\)

As with privacy concerns, courts will recognize sex-based BFOQ exceptions when the consumer preference for public welfare is strong, but not when the strength is insufficiently demonstrated. For instance, in *Johnson Controls*,\(^{83}\) the Supreme Court emphasized that safety, in particular third party safety, only justifies sex as a BFOQ when ensuring safety is the “essence of the business.”\(^{84}\) In that case, the Court found that the employer could not refuse to hire fertile females since fertility was unrelated to the job at issue: battery making.\(^{85}\) Although fetal safety is an important concern, it does not justify a BFOQ defense.\(^{86}\) The Court’s determination reflects an understanding that consumer preferences for fetal safety were not strong enough to affect the employer’s continued market participation, and therefore the employer could not justify a BFOQ defense.\(^{87}\)

3. **Consumer preferences.**

Most valid BFOQ defenses are based on consumer preferences for sex as justified by some other consumer preference, for

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\(^{80}\) 493 US at 336–37.

\(^{81}\) To elaborate: if inmates can abuse prison guards, then inmates can escape more easily, thereby subjecting the community to increased risk of crime.

\(^{82}\) It may not be completely obvious that market forces affect prisons or that a “market for safety” even exists; however, as discussed in the text, the consumers of the market for safety are members of the community. Community members strongly prefer to keep criminals behind bars, for safety reasons as well as for punishment reasons. Thus, when prisons fail, the community will act through the political market to change the situation.


\(^{84}\) Id at 202–03.

\(^{85}\) Id at 203–04.

\(^{86}\) Id.

\(^{87}\) One might argue that consumers cannot respond to the employer’s hiring policies with regards to fetal safety and thus the Court’s decision does not reflect an evaluation of the strength of the consumer preferences for safety. Perhaps, however, the consumers at issue in *Johnson Controls* are the employees. Since the employees brought the suit, it is hard to understand how their preferences for safety were strong enough to justify a discriminatory hiring policy that they did not support. Moreover, it is not clear that Johnson’s usual consumers would respond to knowledge of Johnson’s laudable goal of protecting fetuses from birth defects. If consumers do not respond, a strong consumer preference is not demonstrated, and the hiring policy has no effect on market participation and cannot be justified under Title VII.
instance, a consumer preference for privacy. In rare instances where market participation turns on consumer preference for sex, employers can successfully establish sex-based BFOQ defenses. For example, an employer can assert a BFOQ defense to protect its female-only employment policy for topless dancers.\(^8\)

Not surprisingly, sex is generally not a BFOQ for employment as a server in a restaurant because the ability to participate in the restaurant market does not hinge on the gender of the waitstaff. In *Levendos v Stern Entertainment, Inc.*,\(^9\) the court found that the employer’s policy of hiring only male waitstaff in a “high-class” restaurant would “frustrate the purpose of the anti-sex discrimination statute.”\(^9\) In disagreeing with the argument that customer preferences demand employment of male waiters, the court took “judicial note” of the fact that Pittsburgh’s newest hotel was formal enough to entertain the Prince of Wales despite the employment of female waitstaff.\(^1\) In other words, the court found that the alleged consumer preference for male servers did not justify a BFOQ defense because failing to meet the preference would not affect the employer’s ability to participate in the restaurant market.

It is unclear whether Title VII justifies a BFOQ for employment based on foreign customers’ preferences for male employees,\(^2\) in part, because it is unclear how strong foreign customers’ preferences are for male employees and, more importantly, how essential meeting such preferences is to market participation. In the only case squarely addressing the issue, *Fernandez v Wynn Oil Co.*,\(^3\) the court determined that gender was


\(1\) Id at 1107.

\(2\) Id. See also *Guardian Capital Corp v New York State Division of Human Rights*, 360 NYS2d 937, 938–39 (NY App Div 1974) (applying state law; finding that sex was not a BFOQ for employment in a hotel restaurant and also finding inconclusive proffered evidence that tended to show an increase in sales after the change from waiters to waitresses). But see id at 939–40 (Reynolds concurring) (arguing that employment in the restaurant, which tried to emulate the Playboy Club, should be governed by the same standards as the Playboy Club and questioning whether Playboy’s immense wealth should make a difference in judicial determination of BFOQ defenses).


\(4\) 653 F2d 1273 (9th Cir 1981).
not a BFOQ for a corporate vice-president position even though the position required interacting with Latin American clients who react negatively to women executives. However, the court's statements about the BFOQ defense were in dicta. The merits of the defense did not need to be reached — the plaintiff failed to show a prima facie case of sex discrimination because she could not demonstrate that she was qualified for the job. The court reasoned that sex was not a BFOQ because there was "no factual basis for linking sex with job performance" and thus hiring women would not "destroy the essence" of the business.

The most famous, and perhaps most illustrative, customer preference BFOQ decisions involve sex-based BFOQ claims for the position of airline attendant. The issue was first considered in *Diaz v Pan American World Airways, Inc.* In *Diaz* the defendants asserted, with the support of expert testimony, that women airline attendants are better at performing the non-mechanical aspects of the job, such as reassuring anxious passengers. The court found that sex was not a BFOQ for the position of airline attendant because "the primary function of an airline is to transport passengers safely from one point to another" and thus the non-mechanical aspects of the job were not "reasonably necessary to the normal operation" of defendant's airline. In coming to this conclusion, the court noted that the BFOQ exception of Title VII was carefully drafted to prevent employers from being able to discriminate against a group based solely on the preferences of customers.

Ten years after *Diaz*, a district court examined Southwest Airlines' female-only flight attendant policy and found that it violated Title VII because sex was not a BFOQ for the position.

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94 Id at 1276–77.
95 Id at 1275–76.
96 Id at 1276. In cases where the factual basis for a BFOQ defense cannot be established, *Torres v Wisconsin Dept of Health and Social Services*, 859 F2d 1523, 1532 (7th Cir 1988), holds that the court should look at the "totality of the circumstances" contained in the record to evaluate an employer's BFOQ defense.
97 653 F2d at 1276; but see *Avigliano v Sumitomo Shoji America, Inc*, 638 F2d 552, 559 (2d Cir 1981) (holding that wholly owned Japanese subsidiary incorporated in the United States was not exempt from Title VII and more evidence was needed to determine whether male gender was a BFOQ for employment in management positions based on, among other things, "acceptability to those persons with whom the company or branch does business"), vacated on other grounds, 457 US 176 (1982).
98 442 F2d 385 (5th Cir 1971).
99 Id at 387.
100 Id at 388.
101 Id at 389.
Southwest attempted to distinguish its situation from the earlier claim against Pan American by showing that Southwest used sex to market its airline:

Unabashed allusions to love and sex pervade all aspects of Southwest's public image. Its TV commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love. On board, attendants in hot-pants (skirts are now optional) serve "love bites" (toasted almonds) and "love potions" (cocktails). Even Southwest's ticketing system features a "quickie machine" to provide "instant gratification."^103

Ultimately, the court found that, like Pan American, Southwest's primary function was to transport passengers safely.\^104 Where sex might be useful for attracting customers but is not necessary to the essential functions of the business, no BFOQ exists.\^105

Undoubtedly, the correlation between sex and the position of flight attendant was stronger in Southwest than in Diaz, yet the Southwest court still found that sex was not a BFOQ for employment because sex was not an essential function of the airline's business.\^106 Southwest failed to prove that the "customer preference for females [was] so strong" that the airline would lose its customers without its female-only hiring policies.\^107 The court recognized that sex allure may have increased Southwest's profitability\^108 and that sex may even have become Southwest's trademark.\^109 However, the airline failed to demonstrate that it needed the female-only policy to attract customers and to participate in the market.\^110

[^103]: Id at 294 n 4.
[^104]: Id at 302.
[^105]: Id at 304.
[^106]: 517 F Supp at 302.
[^107]: Id at 303. It seems that Southwest's female-only hiring policy was based on an inaccurate measure of consumer preferences, perhaps really equivalent to employer preferences masked as consumer preferences. Consider Witt v Secretary of Labor, 397 F Supp 673, 678-79 (D Me 1975) (holding that male sex is not a BFOQ for the position of hairdresser because neither customer preferences nor employer preferences are an appropriate basis for establishing a BFOQ).
[^108]: Southwest, 517 F Supp at 302 n 25.
[^109]: Id at 303-04.
[^110]: Id at 303. In fact, in a survey of Southwest customers, "courteous and attentive hostesses" ranked only fifth in importance behind airline features such as on time depa-
Although the court's decision in *Southwest* does not speak in terms of maximizing social value, the court's reasoning and decision reflects a desire to do so. The purpose of Title VII is to prevent discrimination in employment and achievement of this goal increases social welfare. However, this goal must be balanced against a business's legitimate goal of competing in the market. Thus, if sex is essential to the business, a BFOQ based on sex is justified. But if sex is used merely to increase profitability, as with Southwest's employment practices, then sex is not essential to the business and permitting a sex-based BFOQ thwarts the purpose of Title VII\textsuperscript{111} and reduces social welfare.

II. THE ECONOMICS OF THE BFOQ EXCEPTION\textsuperscript{112}

Ultimately, all BFOQ defenses are based on consumer preferences. As discussed above, this includes those BFOQ defenses found valid by various courts. Arguably, Title VII is meant to change consumer preferences for certain employee characteristics (such as sex) when such characteristics are not essential to the product offered.\textsuperscript{113} However, by its mere existence, the BFOQ exception demonstrates that the law was not meant to change all consumer preferences. In certain instances, employers are permitted to discriminate between employees.

The BFOQ exception allows Title VII to respond to consumer preferences and thereby maximizes social welfare. Discrimination in employment inflicts a social loss: it restricts the employee's occupational opportunities and imposes an externality on other members of society. On the other hand, discrimination in employment sometimes increases social welfare by meeting consumer preferences, for instance, by providing female nurses to elderly women. Title VII maximizes social welfare when it permits employers to discriminate between employees when the social value of meeting consumer preferences outweighs the social loss of permitting discrimination in employment. Similarly, Title VII maximizes social welfare when it permits social losses, in the

\textsuperscript{111} 517 F Supp at 303. See also *Weeks v Southern Bell Telephone & Telegraph Co*, 408 F2d 228, 234–35 (5th Cir 1969) (disapproving of an interpretation of the BFOQ exception which would allow sex-based BFOQs where sex was "rationally related to an end which (the employer) has a right to achieve production, profit, or business reputation").

\textsuperscript{112} For an in-depth economic analysis of the relationship between preferences ("tastes") and discrimination, see Gary S. Becker, *The Economics of Discrimination* (Chicago 1957).

\textsuperscript{113} *See Diaz v Pan American World Airways, Inc*, 442 F2d 385, 389 (5th Cir 1971).
form of unmet consumer preferences, when the value of meeting those preferences is outweighed by the value of maintaining a discrimination-free work environment. Finally, because the essence of the business test evaluates the strength of the consumer preference at issue, it helps identify those cases where the losses inflicted by unmet preferences likely outweigh the benefits gained by prohibiting the externalities of discrimination.

Conceptually, when consumers express a sufficiently strong preference for sex, sex should no longer be looked at as a way to discriminate among people, but as a product itself. Thus, a consumer’s strong preference for sex is a preference for a certain product, and not a way to discriminate between people. For example, it does not discriminate against an apple to buy an orange.

III. THE MARKET INQUIRY: DEFINING THE PRODUCT

When a Title VII claim is brought against a business that entails sex plus something else, evaluation of an employer’s BFOQ defense will be difficult without an in-depth inquiry into the market in which the employer competes. A market definition inquiry helps evaluate the “essence of the business” and the corresponding strength of the consumer preference for sex. As discussed above, the different tests for evaluating BFOQ defenses can be reconciled by an understanding that when sex defines the product — and thus the market — of the business in question, sex is a BFOQ for employment. Sometimes determining whether sex plays a defining role in the market is intuitive, as with strip clubs. Other times, determining whether sex plays a defining role is complicated, particularly when the business combines sex plus something else (sex as sexuality), as with the airline attendant cases or Hooters. In the difficult cases, economics and antitrust law can help determine the relevant product markets.

114 Id.

While we recognize that the public’s expectations of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.

115 The author finds that the phrase the “essence of the business” best captures the reconciliation of the different court tests. Throughout the rest of this Comment, the “essence of the business” test will be used to refer to the general legal rule regarding evaluation of employer BFOQ defenses. See Part I C.
A. Price Information: What Is in a Price?

The price of a product conveys information about that product. Consequently, as a first approach to determining the character of the products offered by a business allegedly violating Title VII, an inquiry should be made into the pricing structure of the products. What costs to consumers does the price reflect? For what are consumers willing to pay? If consumers are willing to pay more for a product that is sex plus the usual product, then it seems that the legal rule should not prohibit hiring based on consumer preferences. When consumers are willing to pay to fulfill their preferences, and therefore choose specific markets based on their preferences (as opposed to choose competitors within a single market based on their preferences), consumer preferences equate to market demand.

For example, in Southwest the court noted that the defendant effectively used sex to market its product but found that sex was not part of the product; that is, sex was not the “essence of the business.” However, the court did not analyze Southwest Airline’s pricing structure or properly define the market in which Southwest competed. It would be interesting to find out if Southwest, before the lawsuit, charged relatively more than other airlines. If consumers did pay more to fly Southwest, then the higher price may have reflected a charge for the sex of the attendants in addition to the regular charge for travel. Moreover, if the change in Southwest’s employment practices caused a drop in prices, the drop may have reflected the fact that Southwest could no longer offer, and thus could no longer charge a fee for, sex.

Similarly, if one were to try to determine whether sex is part of the Hooters product, one should first determine what the price of a trip to Hooters reflects. If Hooters’s prices are equal to or less than those for a comparable meal at another restaurant, then arguably Hooters’s prices do not reflect a charge for sex. However, if Hooters’s prices are higher for comparable food, then their price may well reflect a charge for sex.

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116 For instance, a consumer considering purchasing a stereo for $5 is informed by the price that the stereo is (probably) either (1) stolen or (2) of low quality.

117 Wilson v Southwest Airlines Co, 517 F Supp 292, 302 (N D Tex 1981) (“[T]hese non-mechanical, sex-linked job functions are only ‘tangential’ to the essence of the occupations and business involved. Southwest is not a business where vicarious sex entertainment is the primary source provided.”).
B. Cross-Elasticities of Demand — Defining the Competition

The price inquiry is relatively easy and cheap to conduct, yet it may ultimately convey imperfect information because it does not factor in the elasticity of demand for the product in question. For example, it may be that no matter how much a restaurant such as Hooters — which offers sex plus something else — charges, consumers will never substitute away to other restaurants unless those restaurants also offer sex plus something else. If consumers will never substitute away to other restaurants, then comparing Hooters's prices for food to a regular restaurant's prices for food gives little useful information about what the Hooters price entails.

Although the price analysis is flawed, it is a reasonable first inquiry into determining whether sex is a BFOQ for employment. If the price of the product does not reflect a charge for sex then the defendant should have to show that cross-elasticities of demand demonstrate that sex defines the relevant product market. If sex defines the product, then sex is the essence of the business, and the employer can make employment decisions based on sex without violating Title VII.

1. The Supreme Court's Market Definition Analysis.

The Supreme Court, through its consideration of claims under the various antitrust statutes, has announced guidelines for defining the product market in which a particular business participates. The Court explained that the reasonable interchangeability of use between products, or the “cross-elasticity of demand” between the product and substitutes for that product, de-

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118 In basic terms, the elasticity of demand is a measure of consumer response to change in price. For instance, if the price of an item changes by a very small amount and consumers respond to the price change by buying a lot less of that product or buying a different product, then consumer response is highly elastic. Similarly, if the price of an item is doubled, but consumers continue to buy the same amount of that item, then consumer response is inelastic. For a basic introduction to economics and the concept of elasticity of demand, see Hal R. Varian, Intermediate Microeconomics: A Modern Approach, 265–68 (Norton 4th ed 1996).

119 One could argue that the price analysis is further flawed because, if an employer knows that she might be charged with violating Title VII and that an inquiry into the price of her product may be conducted, she has an incentive to charge more in order to show that the price reflects a charge for sex. Of course, if she charges more and does not compete in a market in which sex is essential to the product, consumers will substitute from her product to a competitor's product.

120 As discussed below, in Part III B 1, the “cross-elasticity of demand” between products is defined as “the extent to which consumers will change their consumption of one product in response to a price change in another.” Eastman Kodak v Image Technical Services, Inc, 504 US 451, 469 (1992).
fines the boundaries of a product's market. The "cross-elasticity of demand" between products is "the extent to which consumers will change their consumption of one product in response to a price change in another."


The United States Department of Justice and the Federal Trade Commission also offer useful guidelines for defining relevant product markets. Like the Supreme Court's market definition analysis, the Guidelines are based on an analysis of the cross-elasticities of demand between products. The Guidelines define a market by trying iteratively to create a hypothetical monopoly. They do this by focusing on demand substitution factors, that is, consumer responses to change.

The Guidelines define a market by determining whether imposing a price increase, not necessarily reflective of a cost increase, is profitable to a firm. If such a price increase is profitable then that firm enjoys a monopoly in its product market. The analysis centers around a basic question: if a firm imposes a "small but significant and nontransitory" price increase, for example five percent, will consumers respond by switching to another product? If consumers respond by substituting (or switching) to another product, then that product should be included in the hypothetical monopoly sphere. Next, the price increase question should be asked again of all participants in the hypothetical monopoly sphere: if the monopoly participants impose a price increase, will consumers substitute away? If consumers substitute, add the substitutes to the monopoly sphere and start over. This process continues until consumers do not respond to price increases by substituting to a different product. Once

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123 ABA Antitrust Section, United States Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines § 1 ("Market Definition, Measurement and Concentration") (ABA 1992) ("Guidelines"). Although the Guidelines do not bind courts, courts do look to them for guidance. See, for example, FTC v Staples, Inc, 970 F Supp 1066, 1076 n 8 (D DC 1997); HTI Health Services, Inc v Quorum Health Group, Inc, 960 F Supp 1104, 1127 (S D Miss 1997) (citing Guidelines).
124 See Guidelines at § 1.0.
125 Id.
126 Id.
consumers do not substitute in response to a price increase, the boundaries of the market are defined.

The Guidelines can help evaluate an employer's BFOQ defense because they facilitate an evaluation of the "essence of the business" by determining market participants. The market participants are those businesses that offer products that compete with each other's products. Once the market participants are known — by determining whether every market participant capitalizes on sex in some manner — an evaluation can be made as to whether sex is the essence of the business, or whether sex is merely a marketing gimmick.\textsuperscript{127} If sex is not an element of all of the products in the market, then sex is not the "essence of the business" and cannot be a BFOQ for employment.\textsuperscript{128}

3. An Example: Applying Cross-Elasticities of Demand.

In \textit{FTC v Staples, Inc},\textsuperscript{129} the court used a cross-elasticity of demand analysis\textsuperscript{130} to grant a preliminary injunction that prevented a merger between Office Depot and Staples.\textsuperscript{131} The analysis proved that office superstores, such as Office Depot, Staples, and OfficeMax (the only office superstores at the time), participated in their own relevant product market.\textsuperscript{132} This narrow market was determined, in part, because the evidence showed a low cross-elasticity of demand between office products sold by office superstores and office products sold by other retailers of such products, such as Wal-Mart.\textsuperscript{133} In other words, consumers do not readily substitute office supplies bought at Wal-Mart for ones bought at an office superstore. The evidence further showed that in markets where only one office superstore existed, the office superstore enjoyed a local monopoly and therefore could charge

\textsuperscript{127} See, for example, \textit{Wilson v Southwest Airlines Co}, 517 F Supp 292, 303 (N D Tex 1981) (explaining that sex is not a BFOQ when used as a marketing tool).

\textsuperscript{128} It should be noted that Title VII does not, on its face, aim for the most economically efficient outcome. For instance, even if sex is not part of the product being sold, sex may, as the court in \textit{Southwest} noted, be an efficient gimmick which attracts consumers and increases a business's market share. Title VII prohibits exploiting sex solely for the purpose of attracting business, thus Title VII may result in social loss since it decreases overall market productivity. However, the legislators who enacted Title VII implicitly judged that this social loss would be outweighed by the social gain obtained in maintaining a discrimination free employment market.

\textsuperscript{129} 970 F Supp 1066 (D DC 1997).

\textsuperscript{130} Id at 1074.

\textsuperscript{131} Id at 1093.

\textsuperscript{132} Id at 1079–80.

\textsuperscript{133} 970 F Supp at 1080. One witness testified that internal Wal-Mart studies showed that where an office superstore existed in the same region as a Wal-Mart but no other office superstore, the office superstore prices were higher than when another office superstore was present. Id at 1077.
higher prices without consumers substituting to office supplies sold by other types of retailers.\textsuperscript{134}

The Staples case shows that a business which seems to be part of a larger market because of the product it offers may actually be part of an entirely different market, evidenced by the elasticity of demand to other products.\textsuperscript{135} For example, Hooters serves food and seems to participate in the restaurant market, but perhaps the cross-elasticity of demand between Hooters and other restaurants is low. If Hooters raises its prices by five percent but its clients do not switch to a neighboring Applebee’s, the indication is that Hooters and Applebee’s are not participants in the same market. Similarly, if Hooters reduces its prices to five percent below the neighboring Applebee’s yet Hooters fails to attract additional clientele, the indication is that the two restaurants do not compete in the same market.\textsuperscript{136}

C. Criticisms of the Market Approach

Although the market analysis offers a coherent method for evaluating the essence of the business test in difficult situations where the market combines sex plus something else, this approach is subject to some criticisms. Arguably, just because sex defines the market in which a product competes does not mean that sex is the “essence” of the business. Courts construe the BFOQ exception to Title VII narrowly.\textsuperscript{127} It follows that sex should be required to constitute a large portion of a business before it justifies a BFOQ exception.\textsuperscript{138} On the other hand, if sex

\textsuperscript{134} For example, in markets where only Staples competed, Staples’s prices were up to 13 percent higher than in markets where Staples competed with Office Depot and OfficeMax. Id at 1075–76. Similarly, Office Depot prices were over 5 percent higher in markets where Office Depot was the only competitor as compared to in markets where all three office superstores were present. Id at 1076.

\textsuperscript{135} Indeed, before examining the cross-elasticities of demand, Office Depot and Staples seemed to be a small part of the larger office supply retail market. Combined, they accounted for 5.5 percent of total North American office supplies sales. 970 F Supp at 1073.

\textsuperscript{136} Since cross-elasticities of demand are difficult to determine, their evaluation often requires assessing other relevant information. For example, in Staples the court looked at office superstore pricing when other firms were present in the geographic market and when other firms were not present. See notes 131–32 and accompanying text. Similarly, evaluating the relevant product market for Hooters might entail assessing whether a Hooters located near other restaurants sets prices differently from a Hooters not located near other restaurants. An inquiry could also be made into whether the presence of businesses offering sex as a product, such as strip bars, affects Hooters’s pricing.

\textsuperscript{127} See note 38.

\textsuperscript{138} See, for example, Diaz v Pan American World Airways, Inc, 442 F2d 385, 388 (5th Cir 1971) (requiring that sex be the “primary function” of the business in order to find an employer’s sex-based BFOQ defense valid).
really defines the market in which a business competes, then it must be the "essence" of the business. For instance, hypothetically, if Hooters does not compete in the same market as other restaurants it is precisely because Hooters sells sex. Thus, sex separates Hooters from other businesses that serve food (even if food service constitutes a larger portion of the business than sex) and sex is the "essence" of the business. If Hooters were required to quit selling sex, it would only be able to continue doing business by switching to a different market. Some may advocate an interpretation of Title VII that allows courts to reject sex-based BFOQs — even when sex defines the market in which the employer competes — so long as the employer can switch to another market. Arguably, the "spirit" of Title VII requires this result. However, this position is supported neither by the plain language of Title VII, nor by existing court interpretations of the BFOQ exception.

A second criticism of the market analysis inquiry is that it denies the normative function of Title VII by mirroring existing consumer preferences rather than by changing consumer preferences. By this reasoning, if Title VII is not enforced in a manner that works to change consumer preferences for specific gender employees, then the goal of Title VII is thwarted. Yet, as discussed previously, all BFOQ defenses are based on consumer preferences because consumer preferences determine market participation. Baseless consumer preferences (such as an alleged consumer preference for male waitstaff in fancy restaurants) are subtly differentiated from consumer preferences that rise to the level of market demand (such as consumer preferences for topless female dancers). The language and legislative history of the BFOQ exception to Title VII demonstrate that Title VII is not meant to eliminate all consideration of sex in employment.

139 Of course, it is difficult to assess whether a business can switch to another market. For instance, what if a market to which a business can feasibly switch, given its existing technology, is saturated?

140 See Wilson v Southwest Airlines Co, 517 F Supp 292, 301 n 21 (N D Tex 1981) (citing Diaz in support of the proposition that Title VII aims to change stereotypes about the relative occupational abilities of different genders — a purpose that would be thwarted by allowing consumer expectations and preferences to determine the validity of Title VII claims).

141 See notes 89–91 and accompanying text.

142 See Southwest, 517 F Supp at 301 ("[I]n jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer, the job automatically calls for one sex exclusively; the employee’s sex and the service provided are inseparable.").

143 See Part I A.
Court applications of the exception further show that when consumer preferences rise to the level of market demand, the consumer preferences at issue determine market participation, define the "essence of the business," and justify a BFOQ for employment. Although Title VII aims to abolish inequality among sexes in the employment market, it does not aim to destroy markets in sex. This is left for another rule.

CONCLUSION

Title VII can effectively be applied to maximize social welfare when sex defines the market in which the business participates. The legal rule, as applied by the courts, follows this principle by allowing sex-based BFOQs when sex is the "essence of the business." However, when the "essence of the business" is unclear, as when the business is a combination of sex plus something else, a more focused analysis is necessary to determine the relevant market in which the business in question participates. Courts and litigants can look to antitrust law and the principles of economics to define relevant markets. First, an inquiry should be made into the defendant's pricing structure to see if the defendant's prices reflect a charge for sex. Then, the defendant should be required to show that the cross-elasticities of demand demonstrate that sex defines the relevant market; such a showing would prove that sex is essential to the business in question and thus sex is a BFOQ for employment.