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Managing Race in the American Workplace

What role should racial differences play in American life? Americans have debated this question for decades. In fact, if the question is understood broadly, they have been debating it for centuries. Yet the America of the 2000s is very different from the nation at its founding. It is quite different also from the America that existed, now a half-century in the past, when our civil rights laws first took shape. Civil rights law is, of course, the primary tool we use to authorize and enact our visions and plans for how race should or should not matter. Can civil rights laws made a half-century ago still adequately govern race relations in today's America? Do they reflect our current practices and goals?

There are several civil rights laws, but my focus is on the venerable, celebrated Civil Rights Act of 1964. Could it be that *this* law—which legal scholars have called a "superstatute"[1] or "landmark statute"[2] because of its constitution-like importance in American law—is in some ways out of sync or anachronistic in today's America? The point here is not that the Civil Rights Act may out of sync because it has failed to stop discrimination, which studies show is still common.[3] That only suggests that (as with almost all laws) the job of the Civil Rights Act is not yet done. The point is, rather, that the assumptions and the world that created the Civil Rights Act may no longer be true or exist, and that it may well be time to rethink the law and what we as Americans want it to do. Put another way, we may have entered a period *after civil rights*—a stage in American history when we can constructively and productively manage racial differences with a focus that goes beyond the protection of rights.

Consider that American racial demography has changed greatly from the period when our current civil rights laws were born. In place of the focus on the black/white divide that dominated congressional debates in 1964, controversies about immigration and the growing Latino population

have taken center stage in American racial politics. Meanwhile, as I describe below, the economy has been transformed by globalization and technological changes, remaking the workplaces that the Civil Rights Act was intended to regulate.

The way Americans talk about race and what pragmatic and progressive voices say that they want has changed as well. Never before has such a wide variety of employers, advocates, activists, and government leaders in American society discussed the benefits of racial diversity and the utility of racial difference in such a broad range of contexts.[4] Having employees of different races, we are told by these elites, is good for businesses, the government, schools, police departments, marketers, medical practitioners, and many other institutions. When managed properly, racial differences make organizations work better, or make Americans feel better, or both. In short, race can be a qualification for employment.

It is less discussed, but we see an analogous dynamic at the low end of the job market as well, where employers of low-skilled workers also consider the race, as well as immigrant status, of potential employees. These employers, the most willing to talk, tell both journalists and social scientists that they prefer Latinos and Asians as workers, and especially immigrant Latinos and Asians, because they work harder, better, and longer than others, including white and black Americans. These perceptions have helped to fuel the great waves of migration that have transformed America since the 1980s.

What we have not come to terms with, however, is that the lauding of racial differences as beneficial for organizations suggests a new strategy for thinking about and managing race in America. It does not fit (certainly not in any obvious way), with traditional conceptions of equal rights and citizenship. It is an issue quite apart from, and perhaps beyond, civil rights. And yet the country is mostly flying blind. We put into practice our new conceptions of race in ever wider realms and contexts, while holding on to more traditional ways of thinking about race and civil rights, and we do this with little awareness of what is going on. Our laws and conversations enact multiple strategies and multiple goals in an incoherent jumble. Significant opportunities and values are lost in the shuffle.

The purpose of this book is to provide a picture of the racial dynamics of the American workplace. I aim to show how race matters, the perceptions employers and others openly express when they talk about race, and especially how current practices fit with the Civil Rights Act. I argue that since 1964, there have been three main strategies for managing race in employment. These vary greatly both in how they conceive of race, and

also in how much support they have in law. The most important point is this: the strategy of using membership in a racial group as a qualification, what I will call *racial realism*, has prominent support in society but surprisingly little in law.

Another purpose of this book is to call for debate. Legal scholar Bruce Ackerman has emphasized that the civil rights era, the "Second Reconstruction," was a great constitutional moment and an elaborately deliberated creation of "We the People."[5] But the current era is evolving with little awareness let alone debate in Congress, the courts, or the public sphere. My point is not to criticize any particular strategy, but to argue that we should be mindful of the gap between everyday practice and the law, and that we should consider reforming the law to bring the two into sync, so as to ensure that we act in accordance with our most fundamental values. The task is complex: we must balance or manage employment opportunities and restrictions to Americans of all racial affiliations, as well as to immigrants. Given this country's violent history, we should keep our eyes wide open when institutionalizing practices on matters of race.

If we do not know what we are doing, we are likely to do it badly. If we tacitly allow racial meanings to figure in the workplace, without thinking through how this should be done, we will—and already have, as I will show—sacrifice the consensus goal of equal opportunity. Moreover, too great of a disjuncture between law and everyday practice diminishes respect for the law and invites arbitrariness in its enforcement.

Strategies for Managing Race in Employment, Law, and Politics

Since 1964, there have been three dominant strategies, or cultural models,[6] for managing how race matters in the workplace, all variously supported by employers, politicians, civil rights groups, workers and judges. Current employment practices and employment civil rights laws are a mixed bag of these three competing strategies: classical liberalism, affirmative-action liberalism, and racial realism. The key point here are that these strategies vary in both the significance as well as utility or usefulness that they attribute to racial distinctions, and in their organizational goals (these are summarized in table 1). They also vary in their political support and in their degree of legal authorization.

Table 1
Strategies for Managing Race in the Workplace

	Classical liberalism	*Affirmative-action liberalism*	*Racial realism*
Significance of race	No	Yes	Yes
Usefulness of race	No	No	Yes
Strategic goal	Justice	Justice	Organizational effectiveness

Before discussing their differences, it is important to acknowledge that these strategies do have one thing in common: they are not based on rigorous thinking about what "race" is, but rather on cultural or folk understandings that are usually quite intuitive to Americans but can be utterly inscrutable to outsiders. We can see this in the attitudes of employers, who may discriminate against or prefer certain people based on perceptions of physical differences in skin color, hair or facial features, and on their beliefs about traits associated with regional or national origin. Notably, none of the statutes governing employment discrimination *define* race, an issue I discuss below.

The Classical Liberal Strategy: A Color-Blind Workplace

The classical liberal strategy of how race should factor in employment can be stated simply: in order to achieve justice, race should have no significance and thus no utility, or usefulness, in the workplace. This strategy is rooted in the Enlightenment view of individuals as rights-bearing entities of equal dignity. Opportunities should be allocated based on ability and actions. In the classical liberal view, which has intellectual roots perhaps most prominently in John Locke's political philosophy, immutable differences such as race or ancestry should not determine opportunities or outcomes.

The classical liberal strategy for managing race is solidly institutionalized in American civil rights law. It is the guiding vision behind the primary statute regulating the meaning of race in the workplace: Title VII of the Civil Rights Act of 1964. Title VII states:

> 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.[7]

The message here on the relevance of race to employment seems clear: there isn't any. When employers do any of the things that employers normally do—when they make everyday decisions regarding whom to hire, fire, or promote; what their workers should be doing; with whom they should be working; and how much they should be earning—they must not have race (or any of the various other qualities mentioned in Title VII, or identified in other laws, including immigration status and disability) in their minds at all.

Congress founded the law on this vision in part as a response to the reality of race in America, and in particular in the Deep South, where the brutal caste system known as "Jim Crow" held sway. Through both law and norms, life in the Southern states was thoroughly and openly based on a hierarchy in which whites were the dominant race. At work, this meant that employers typically excluded African-Americans from the better jobs, that they did so openly, and that, typically, workplaces were segregated.[8] Though discrimination was rampant in the North as well,[9] civil rights leaders fought against these Southern practices in particular. Congress therefore designed Title VII with a classical liberal vision: Jim Crow–style intentional discrimination was finally made illegal.[10]

Title VII was not the first classical liberal intervention in federal law that governed employment. In a similar response to racial discrimination in the South, Congress passed Section 1981 of the Civil Rights Act of 1866. It states "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."[11] Though it remained dormant for decades after the failure of Reconstruction, Section 1981 today is often a part of court decisions on employment discrimination because it allows plaintiffs to sue for compensatory and punitive damages. The Fourteenth Amendment's guarantee of "equal protection of the laws" can also justify classically liberal nondiscrimination in the specific context of government employment.

Considerable evidence indicates that Title VII and these other laws have contributed much to the goal of equal opportunity. Most obviously, the kind of open exclusion of African-Americans and preference for whites that was common in 1964 is no more. Many scholars focus now on more subtle but nevertheless powerful kinds of discrimination that are deeply, almost invisibly institutionalized in employment practices or the result of unconscious bias.[12]

Given its successes, and its fit with foundational documents in American history such as the Declaration of Independence, the Constitution, and specifically the equal-protection clause of the Fourteenth Amendment, the classical liberal strategy for managing race remains dominant in American politics. Its basic premise—that race should have no meaning or significance in employment—is the official view of the mainstream of the Republican Party.[13] Republicans tend to emphasize that discrimination is wrong and should be prohibited by law no matter whom it benefits. For example, the Republican platform in 2012 stated, "We consider discrimination based on sex, race, age, religion, creed, disability, or national origin unacceptable and immoral," and added, "We will strongly enforce anti-discrimination statutes." At the same time, social policies that target racial minorities in order to boost their opportunities, in the Republican view, violated the principle of merit: "We reject preferences, quotas, and set-asides as the best or sole methods through which fairness can be achieved, whether in government, education, or corporate boardrooms. . . . Merit, ability, aptitude, and results should be the factors that determine advancement in our society." In the GOP view, race should have no bearing on law or life chances, and the elimination of racial discrimination requires a commitment to colorblindness.[14] Legal scholars often call the Republicans' strict interpretation of classical liberalism the "anticlassification" view of race and law.[15]

Affirmative-Action Liberalism: Seeing Race to Get beyond Race

An alternative strategy for managing race in employment, what I will call here "affirmative-action liberalism," grants significance to race, but asserts that it should not have usefulness for an organization. That is, race has meaning for employers, but only to ensure the goal of justice (and specifically, equal opportunity). It should not carry any messages about a given worker's usefulness to the day-to-day functioning or effectiveness of a business or government employer.

This strategy has coexisted with the classical liberal vision, though it is always subordinate in political discourse and in the way employers talk about their hiring. It is also less prominent in law, as it is not enshrined in a statute, let alone a landmark or superstatute. Yet affirmative-action liberalism is certainly institutionalized in the federal regulations and guidelines that implement Title VII,[16] as well as in a presidential order, Labor Department regulations,[17] and several Supreme Court rulings.

What is affirmative-action liberalism? While activists at the grass roots fought for jobs across America in the 1960s, Washington policy elites—civil rights administrators, judges, and White House officials—gave legal shape to this new vision of race in employment.[18] Shortly after Title VII went into effect, administrators at the new Equal Employment Opportunity Commission (EEOC), the agency created by Title VII to enforce the law, concluded that race should have some significance. In their view, it was important to monitor the hiring of different racial groups to learn whether or not employers were using race in their decision-making. They began to require large employers (those with at least one hundred workers) to count the number of workers on their payroll, categorize them by the nature of work they performed and their race and sex, and report that those data annually to the agency. This meant that every year, employers looked over their entire workforce and categorized all workers according to their race. It marked the rise of affirmative-action liberalism: The administrators made counting race a tool for measuring equal opportunity.

There followed other developments in civil rights law that infused racial differences with significance. In 1971, the Supreme Court created a new understanding of discrimination in *Griggs v. Duke Power*.[19] The court declared, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited"[20] and "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[21] This meant that employers had to pay attention to the racial impact of whatever means they used to select and place employees. Those that had a "disparate impact" on minorities and women would be illegal unless they could be justified by business necessity.

Another important factor was the Labor Department's development of affirmative-action regulations to implement Lyndon Johnson's Executive Order 11246. This 1965 order had stated only that government contractors needed to promise not to discriminate in employment, and also to take some undefined "affirmative action" to ensure equal opportunity. It

took several years, but by 1970, Labor Department regulations explained that "affirmative action" meant that the contractors must promise to hire certain percentage ranges of racial minority workers at various job levels by specified time periods.[22]

Firms that did not have government contracts also began to implement their own affirmative-action employment programs, either voluntarily or in agreement with labor unions or civil rights groups. They typically used the same racial hiring goals and timetables as were set out in the federal affirmative-action regulations. In two key decisions in the 1980s, the Supreme Court created the legal rules for these voluntary efforts. An employer's plan was in compliance with Title VII only if certain conditions were met: 1) it had the goal of remedying an imbalance in the organization's workforce; 2) there were no unnecessary limits on opportunities for whites/males (in practice, this meant there should be no outright bans on the hiring of whites or males, and that whites or males should not be terminated to achieve the plan's goals); and 3) the plan was a temporary fix and could not be used to maintain the desired racial proportions.[23]

These developments infused race with significance, but not usefulness, in the minds of conscientious employers. Race would communicate nothing about an employee's ability, suitability for a particular job, or about the kind of person they would be in offices, meeting rooms, or on the assembly line. Employers were to pay attention to nonwhite races *only* because of their importance for legal compliance and equal opportunity. Employers also learned that a good way to avoid a lawsuit was to make sure that the percentages of different races in their workforces roughly approximated the percentages of qualified workers in their applicant pools. Getting racial proportions reasonably right was to have utility only insofar as it was an indicator that the largest racial group—white Euro-Americans—was not abusing its economic and political power.

Affirmative-action liberalism found most of its defenders on the American Left, especially in the Democratic Party, though their support for the strategy was far more muted than the Republicans' embrace of classical liberalism.[24] For Democrats, affirmative action was an addition to classical liberalism, and not a replacement—or a contradiction. The 2012 Democratic Party platform declared a commitment to antidiscrimination laws and affirmed the classical liberal vision, but also added: "To enhance access and equity in employment, education, and business opportunities, we encourage initiatives to remove barriers to equal opportunity that still exist in America."[25] This was a muting of more explicit language in the 2008 platform, which stated emphatically: "We support affirmative

action, including in federal contracting and higher education, to make sure that those locked out of the doors of opportunity will be able to walk through those doors in the future."[26]

In most defenses of affirmative-action liberalism, advocates send the message that while classical liberalism is best for America, practical considerations coupled with a commitment to justice point to the need for affirmative-action liberalism. Due mainly to a past history of racial discrimination and the difficulties of enforcing classical liberalism, race must be acknowledged and affirmative action institutionalized in law so that equality and justice can be achieved.

Perhaps the most eloquent political statement of affirmative-action liberalism and the way it may work in concert with classical liberalism, came not from a Democratic political leader, but from Supreme Court Justice (and appointee of Republican president Richard Nixon) Harry Blackmun. Defending a minority preference program for admission at the University of California at Davis Medical School from a legal challenge, Blackmun wrote, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[27]

Other Supreme Court opinions show varying justifications for affirmative-action liberalism. In the early years, Justices William Brennan and Thurgood Marshall saw racial preferences as justified to compensate for past discrimination anywhere in society.[28] Since the late 1980s, however, the Supreme Court has stressed that discrimination must be identifiable in the past practices of the specific organization using the affirmative-action preferences.[29]

The basic concept of what I am calling "affirmative-action liberalism" has a long pedigree in legal scholarship, and it has been called by many names. Perhaps most prominent in recent years is the term "antisubordination principle," but Owen Fiss described what he called the "group-disadvantaging principle,"[30] Laurence Tribe spoke of an "antisubjugation" principle,[31] Cass Sunstein titled an article "The Anticaste Principle,"[32] Derrick Bell provocatively used imaginary narratives to explore the same idea regarding racial inequality,[33] and Catharine MacKinnon made analogous points regarding gender equality.[34]

The common notion in all of these discussions is that true equality is about more than treating individuals equally. It is about attending to the fact that individuals are members of groups, that these groups vary in power and wealth, and that an honest appraisal of the state of American society reveals hierarchies (many scholars tend to focus on race and sex,

but there are others).[35] In this view, institutional structures in society often work to maintain or worsen the subordinated positions of individuals in nonwhite groups. Moreover, just and responsible lawmaking and judging interprets the Fourteenth Amendment's guarantee of the "equal protection of the laws" as requiring that these institutional hierarchies be recognized and that attempts to break them up be undertaken.

Not surprisingly, judges appointed by Democrats tend to favor the antisubordination principle and judges appointed by Republicans the anticlassification principle. Given that a Republican has occupied the White House for twenty-eight of the fifty years since the Civil Rights Act, that presidents tend to appoint judges who fit the ideological profile of their party, and that five of the nine current Supreme Court justices were appointed by Republicans, it is not surprising that the anticlassification principle has been in ascendance.[36] Chief Justice John Roberts has even offered his own pithy rebuttal to Justice Blackmun's claim about the need for affirmative-action liberalism: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[37]

Yet legal scholars Jack Balkin and Reva Siegel persuasively argue that, though analytically distinct, both principles continue to coexist in American law. Which principle is dominant at any particular time depends upon political pressures, and both may shape the same judicial opinion.[38]

Racial Realism: Race Has Significance and It Has Usefulness

There is yet another strategy for managing race in employment that has attracted pragmatic thinkers of both major parties, as well as leaders in business, science, government, and the arts. In the "racial-realist" strategy, race has both significance and usefulness in the workplace—and this is true irrespective of government policy or lofty concerns about equality and justice.[39] Unlike the affirmative-action liberals' hopes and dreams for a future of fairness, or for compensations to remedy past injustice, the racial-realism strategy makes a frank assessment of the utility of race for organizational goals. For racial realists, race is a key part of worker identity, and businesses and government institutions can and should use racial differences to their advantage. Given its emphasis on instrumental market logics and employer discretion, along with its downplaying of rights and justice, racial realism is an apt strategy for managing race in the "neoliberal" era.[40]

Table 2
Racial Realism in Employer Perceptions

	Racial abilities	*Racial signaling*
	Special ability in dealing with same-race clients or citizens	Convey openness, care, or legitimacy to specific racial audiences
	Diverse employees will bring new ideas/better functionality to an organization in any job Attitude/work ethic in low-skill jobs	Convey openness, "modernity," lack of racism to wide audience

In racial realism, race has two different types of usefulness for employers (see table 2).[41] The first is what I will call "racial abilities." This refers to perceptions that employees of some races are better able to perform some tasks than employees of other races due to their aptitude or know-how. Racial abilities come in a variety of forms. Sometimes employers link them to specific jobs. In the more high-skilled and professional jobs, there is a common pattern of racial matching based on employers' convictions that employees of particular races have superior abilities, mainly through superior understanding, when it comes to dealing with clients or citizens of the concordant race. In occupations as diverse as advertising/marketing, medicine, teaching, journalism, and policing, employers see value in matching the race of the employee to the race of the clients or citizens he or she serves. Employers at the high end of the labor market are sometimes supported or encouraged in such perceptions by government commissions, task force reports, official statements, advocacy bodies, and civil rights groups.

Employers seeking to fill high-skilled jobs also sometimes evince a desire for racial abilities that are not linked to specific jobs. As I show in Chapter 2, employers may perceive racial diversity as a benefit for the *overall* performance of their organization, linking it to no particular job or client or citizen base. In this view, a racially diverse workforce will generate more ideas and thus more innovation, more productivity, and better overall performance. Employees of difference races (or sexes, or other bases of difference) bring new ideas into the mix because people of different backgrounds, including racial backgrounds, tend to think differently; these new ideas in turn force everyone to be more creative and to move their thinking "outside the box." If an organization has become too dominated by a particular race (usually whites), then the employer

may perceive utility in an applicant who brings to the table experience or credentials—*and* a different race. In short, race becomes a qualification for the job.

When it comes to skilled jobs, there is sometimes an effort to understand the basis of racial abilities. Employers may understand that there is no genetic key to racial abilities, and that performance differences simply reflect the influences of the environment and of socialization processes. They will, consequently, acknowledge that members of one race can be taught what amount to the "racial abilities" of other groups, particularly the ability to understand or be sensitive to the needs and preferences of particular populations. At the same time, they may find it far more efficient simply to use race to get the ability benefits and ensuing boosts in performance that they desire.

Racial abilities take on a different look in the low-skilled sector. In basic manufacturing and services, employers want workers who can perform uncomplicated, repetitious tasks for long periods of time without complaining. In short, they require a good attitude or "work ethic." As I will show in Chapter 5, employers across the country frequently identify Latino and Asian workers, and especially Latino and Asian *immigrant* workers, as possessing these traits that fit them for otherwise low-skilled jobs. Here, a kind of "immigrant realism" strategy also comes into play, as employers seek to utilize the special abilities of persons born abroad in ways that classical liberalism and affirmative-action liberalism would ignore. There may even be an "undocumented-immigrant realism" in play when employers perceive that they are leveraging the abilities (especially work ethic) of workers who are not authorized to be in the U.S.

Typically, employers of low-skilled workers do not think often or deeply about what their strategy means; they just "know" that Latinos and Asians are members of groups that are at least on average better workers than both white and black Americans. They may prefer foreign-born workers over native-born workers, but they usually do so in racialized terms, counterposing immigrants with "blacks" and "whites." They also may link the immigrants' race with ability to perform specific jobs or even specific tasks—for example, a particular action on a meatpacking processing line. While the current racial hierarchy of desirability is new, this kind of racial-abilities hiring has existed in America for more than a hundred years—and perhaps it has always existed.

At first glance, it may appear that employer perceptions of racial abilities in low-skilled jobs are so different from their perceptions of abilities in high-skilled jobs as to warrant a completely separate categorization.

After all, the kinds of preferences that employers show for low-skilled workers of particular backgrounds appear to be very similar to the kinds of practices that Title VII was designed to prevent: stereotypes that deem some workers as undesirable, with African-Americans once again at the bottom.[42] But I group low- and high-skilled racial realism together in this book—and I do so for three reasons. First, in many of these cases, there is the common perception that the ability to do a specific job or at least a specific class of jobs varies, at least to some extent, by race. Second, at all skill levels, these perceptions shaping hiring and placement are based on stereotypes or what we might more generously call oversimplified predictions of race-patterned behavior.[43] Third, unlike discrimination in the American South in 1964, both the low- and high-skilled racial realism of the 2000s benefits nonwhites in many circumstances.

The other strand of racial realism in employment is "racial signaling."[44] Racial signaling refers to situations where employers seek to gain a favorable response from an audience through the strategic deployment of an employee's race. There is no assumption here that the employee possesses any special aptitude; the idea is rather to cater to the tastes of a group of clients or citizens. Employers use the racial signaling strategy almost exclusively in the context of skilled jobs, because the majority of low-skilled workers toil behind the scenes (the exception being those employed in retail or food service customer relations).

It is racial signaling when the owner of a drugstore hires a black manager for a store in a black neighborhood because he or she believes the community prefers it, or when a mayor appoints a Latino police chief because there is evidence that the Latino community does not trust the current white leadership of the police, or when a company installs some white employees in fundraising jobs because the company believes that white venture capitalists might feel more comfortable dealing with companies run by whites. In education, when a school hires a nonwhite teacher to serve as a role model for students of the same race, this too constitutes racial signaling.

In most cases of racial signaling, there is a pattern of matching employee race with that of the customers or public, and an assumption by employers that those customers or members of the public will respond more favorably to a person of their own race than to a similar person of a different race. At other times, employers mean to send the racial signal to everyone. Private or government employers, for example, sometimes use racial signaling to encourage all clients or citizens to perceive their organizations as diverse, modern, and open to all. Like the value of racial

diversity in organizations, this kind of racial signaling is a phenomenon of recent vintage: a mono-racial workforce now looks old-fashioned.

This is especially true in politics—the racial signaling strategy has made "lily-white" a pejorative in many contexts and produces presidential administrations composed of different colors as well as different genders. Thus, Democrats may make appointments of African-Americans, Latinos, or Asian-Americans as part of a targeted racial signaling strategy because they want to appeal to specific groups of nonwhites, for example, and to reward them for their support at the ballot box. Republicans, meanwhile, concerned about charges of racism or of being behind-the-times, may appoint nonwhites in order to let everyone know that their opposition to certain policies favored by nonwhites does not mean that they are racist.

Racial signaling is absolutely crucial in the entertainment industry, as well as in advertising. No one seems to seriously believe that different races have different abilities when it comes to acting, but it is a widespread belief in the industry that audiences will respond differently to different races. In Hollywood films, television shows, advertisements, and even professional sports, decisions regarding whom to place in front of the "eyeballs" of audiences (as marketers sometime put it), or how to attract those eyeballs, regularly take into account the economic impact of racial signaling.

Unlike classical liberalism and affirmative-action liberalism, racial realism has very little authorization in law.[45] As I show throughout this book, Title VII appears flatly to forbid it, it is difficult to find EEOC regulations that support it, and court opinions authorizing it are rare (the same can be said of immigrant realism). Political elites, especially presidents, seem to support racial realism (as I describe in Chapter 3), and one might argue that this is a sort of quasi-legal endorsement of the strategy. But racial-realist political appointments, while important, are not covered by statutes or the Constitution, and have no explicitly legal authorization.[46]

Instead, racial realism's primary legal peg is a series of court cases that rely on the Fourteenth Amendment. The precedents are thus limited to government hiring, though courts have restricted this potentially expansive opening for racial realism specifically to the hiring and placement of police officers and other law enforcement officials. Several legal scholars argue that the courts could and/or should apply to employment a key 2003 Supreme Court decision, *Grutter v. Bollinger*, that used the Fourteenth Amendment to authorize the use, in some circumstances, of racial preferences to achieve diversity in university admissions.[47] As I show in Chapters 2 and 3, except for a case regarding police officers, this did not

happen, and the Supreme Court's 2013 ruling in *Fisher v. University of Texas* has made this even less likely.

The primary legal problem for racial realism is that Title VII so strictly limits the usefulness that race can have for employers. Where it permits group differences to have some usefulness for the operation of a firm, it does not do so for race, and where it allows for the consideration of race, it does not do so in a racial-realist way.

Title VII, as described above, would seem to make all uses of race for an organization illegal: its goal is to prevent discrimination and thus create equal opportunities for employment and for participation in workplaces. Classical liberalism speaks most directly to the first half of this, while affirmative-action liberalism speaks to the second half. But there is one provision of the law that takes a very different view of group differences. It states that various characteristics that the law otherwise bans from employer consideration when hiring, placing, promoting, or firing workers *can* be taken into account in some employment decisions. Specifically, employers can consider national origin, sex, or religion when, for a particular job, they are a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[48] This has come to be known as the "BFOQ" exception.

This sounds like obscure legalese, but Senators Joseph S. Clark (D-PA) and Clifford P. Case (R-NJ) together authored an "interpretive memorandum" explaining how the BFOQ provision was to be put into practice. Their reasoning sounds a lot like the employer logic analyzed throughout this book. "Examples of such legitimate discrimination," Clark and Case wrote, "would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion."[49]

However, there are two problems with the BFOQ as a statutory basis for racial realism. The most critical is that Congress explicitly did not allow a BFOQ defense for racial discrimination.[50] The law allowed it for everything *but* racial discrimination. Why that exclusion? The fact that white, Southern members of Congress—opponents of the entire law—suggested the creation of a race BFOQ provides a clue. Imagine these supporters of Jim Crow segregation and discrimination in the House of Representatives explaining, as they in fact did, their concern for the rights and freedoms of black-owned businesses to hire unhindered by anti-discrimination regulations. They argued that these businesses should be able to maintain a black identity. Some sold products used only by

persons of African ancestry, they maintained, such as "hair straightener" and "skin whitener." One brought up the Harlem Globetrotters basketball team. Could Congress force a team from Harlem to hire white people? Another mentioned the need for someone of African ancestry to perform in Shakespeare's *Othello*.[51]

Without debate, the pro-Title VII majority defeated the race BFOQ amendment offered by these enemies of any civil rights legislation. They did not explain their reasoning (though they did point out that the Harlem Globetrotters had too few employees to be covered by the bill). Emmanuel Celler (D-NY) explained simply: "We did not include the word 'race' because we felt that race or color would not be a bona fide qualification, as would be 'national origin'. That was left out. It should be left out."[52]

It appears the defenders of Title VII feared that *any* loophole in a blanket prohibition on race discrimination would be stretched and expanded until the law was rendered meaningless, as happened with Reconstruction-era laws, such as that guaranteeing equal rights to vote. A white restaurant employer, for instance, might claim that his white customers do not like being waited on by a black person, and that being white was therefore a qualification for working in that particular restaurant.[53]

The second problem is that even if Congress were to amend Title VII to include a race BFOQ, it would not likely cover the racial realism described in this book. Despite the early discussions by Senators Case and Clark that suggested the BFOQ exceptions for sex, national origin, and religion could be quite expansive and used to defend discrimination catering to customer preferences, courts have since greatly narrowed the use of the BFOQ to defend sex, religion and national origin discrimination. The statute required that the defense be accepted only when discrimination was reasonably necessary to the normal operation of the enterprise in question—but the courts interpreted "reasonably" very strictly, and created a rule stipulating that a valid business necessity was one that related to the "essence of the business" in question.

For example, consider the attempts by airlines to make female sex a qualification for the position of flight attendant.[54] Airlines claimed that female flight attendants (then called "stewardesses") were more skilled than men at comforting anxious passengers,[55] or that they had the desired sexy image to appeal to a mostly-male business clientele.[56] The federal courts rejected these arguments on grounds that the essence of an airline was to transport passengers safely and not to cater to presumed customer preferences about what would feel comforting (or titillating). The only area where courts have allowed customer preferences to justify

discrimination is in sex discrimination cases based on concerns for privacy or, to be more precise, sexual modesty (see Chapter 4).

This means that even if there were a race BFOQ in Title VII—which there isn't—it would be very difficult to use it to defend hiring decisions based on perceived racial abilities and racial signaling. It would be difficult to show that the racial background of employees is critical to the essence of any business. An employer wishing to use a BFOQ for national origin to defend a practice (specifying, for example, people of Mexican ancestry for a particular job) would also find great difficulty doing so within the current legal rules.

The lack of a race BFOQ is not, however, the only legal problem for racial realism. An additional obstacle is that where Title VII does allow race to be taken into account—in applying affirmative action—courts have not allowed race to have any usefulness for employers. The current set of rules for affirmative action requires that race have almost no meaning, relevance, or consequences for the functioning of the organization itself. Intention is everything. Firms need to show that they are only taking an affirmative action in order to repair some imbalance, and included in the notion of race-consciousness-as-repair is the idea that the racial consideration is only temporary. The legal rationale for taking account of race disappears when the imbalance is repaired. This is not the logic of racial realism. As one authoritative essay sums up the trend in employment discrimination, "Under current legal doctrine, judges and other legal actors often treat actions that seem to be race- or gender-neutral as evidence of a lack of discrimination. Likewise, they consider conscious treatment of race in decision making to be evidence of discrimination."[57]

Open support for racial realism in the treatment of nonwhites began at different times in different contexts.[58] Throughout American history, it was not uncommon to find employers professing a belief that racial and immigrant identity was related to aptitude for low-skilled jobs. Political leaders making appointments have considered racial signaling in a taken-for-granted way for whites since the founding of the republic, and for nonwhites at least since African-Americans began to migrate north in the early part of the twentieth century. Racially matching African-American sales and marketing professionals with African-American customers became established practice in the 1930s and 1940s. The sociologist and civil rights leader W.E.B. DuBois argued for the racial abilities and signaling of African-American teachers in the 1930s, and while racial realism was eclipsed by classical liberalism in the 1950s and 1960s, strong advocates for racially matched teaching for Latino and African-American

teachers and students emerged again in the late 1960s. The racial violence of the late 60s gave racial realism a significant boost in a variety of sectors, especially when the influential report of the National Advisory Commission on Civil Disorders (the Kerner Report) strongly advocated for the racial abilities and signaling of African-American police officers and journalists. Hollywood and advertisers moved to use racial signaling for nonwhites around this time as well. In the 1980s, racial "diversity" came to the fore as a corporate value. A desire for the racial abilities and signaling for nonwhite medical doctors became a priority in the 1990s. In that decade, the Clinton administration helped set the tone by boasting that Clinton's government "looked like America." What is "new" about the American workplace of today is that these forces have all come together at the same time and in a context of unprecedented diversity. In the early twenty-first century, racial realism is now either entrenched or strongly supported in all of these spheres, though it awaits explicit legal authorization in almost all of them.

When We Talk about "Law," What Do We Mean?

A major focus of this book is the gap or disjuncture between employment civil rights law as it is written and the management strategy many employers and advocates want. The notion of a separation between written law and lived reality is one of the oldest ideas in the study of law as an institution.[59] Its pedigree reaches back more than one hundred years to pioneering analyses by legal theorists on both sides of the Atlantic.

In the U.S., scholars identify the idea with Roscoe Pound, especially with his essay "Law in Books and Law in Action." For Pound, the law in books is what the legislators write. The law in action refers to what enforcers of the law actually do. The law in books is relatively straightforward: it is what the words say. Pound was much more interested in law as the enforcers enforced it, and in the size of the gap between the two.[60]

The Austrian legal theorist Eugen Ehrlich also made an influential distinction, though somewhat different from Pound's. Ehrlich noted that there was a set of norms that guided both the law-writing of legislators and the law-interpreting of judges. Ehrlich distinguished this from "living law," which was "the law that dominates life itself, even though it has not been posited in legal propositions."[61] More than Pound, Ehrlich was interested in social customs and how regular, everyday citizens treated the

law. Thus, while Pound concentrated on the distinction between those who wrote law and those who enforced it, Ehrlich was concerned with the distinction between legal elites and regular folks.[62]

Social scientists in the later decades of the twentieth century moved away from the hoary law-on-books vs. law-in-practice dichotomy, focusing instead either on law as a system of behavior or a set of institutions with no reality outside of the social, for example, or examining variations in "legal consciousness."[63] As legal scholar Susan Silbey has put it, "For most of the twentieth century, legal scholars had treated law and society as if they were two empirically distinct spheres, as if the two were conceptually as well as materially separate and singular. They are not. The law is a construct of human ingenuity; laws are material phenomena."[64] In this view, Title VII is constituted by social relations. It has no reality in itself, and thus it makes little sense to say that Title VII exists as ink on paper—or pixels arranged on an electronic screen. The ink or pixels, the "law in books," must be interpreted for it to have any reality.[65]

The members of Congress who wrote Title VII may have had their own ideas of what their words meant, but judges' fiction of a "legislative intent" does not get us very far in understanding the purpose of a law, because (even if we have a record of the authors' thoughts on a particular bill) different legislators had different ideas in mind when the law passed.[66] Indeed, some may have had nothing in mind—they may have voted for a statute because a president or party leader or some interest group asked them to do so.[67] In the case of Title VII, some legislators were most focused on the persistently high black unemployment rate.[68] Others sought means to achieve equal opportunity and or to avoid burdening employers or limiting the rights of white workers.[69] Still others were more focused not on black workers, or Latinos or Asians, but women of all races, national origins and creeds.[70]

Administrators at the EEOC then interpreted the law, looking for a way to enforce it with demonstrable success and in an efficient manner.[71] Business owners, human resources professionals, and employees—black, white, Asian, Latino, male, female, etc.—also had different senses of what the words of Title VII meant (if they knew about the law at all).[72] The notion that we can determine whether or not an organization is complying with a statute "suggests that the statute has a single, clear, and unimpeachable meaning, so that we can easily judge compliant and noncompliant behavior," when in fact, "legal texts are notoriously indeterminate."[73]

Thus, the closer we look, the more the distinction between law on the books and law in action or "living law" seems to break down, because there is no one "law on the books"—for Title VII or any other law. Different people see different meanings in the law due to their institutional position (e.g., as administrators of the law), but even similarly situated people will see different meanings (consider the views of liberal legislators and judges vs. conservative legislators and judges). Moreover, individuals and organized groups actively contest established meanings of Title VII and seek to establish new meanings—as is the case with the meaning of most statutes and regulations, and indeed of the Constitution itself. This is made clear by the regularity of split decisions when a panel of judges—the supposed experts on the meaning of law on the books—interpret legislation.[74]

While all of this may be true, it does not mean that anything goes. Actors in positions of authority, whether judges or employers, can't do whatever they wish.[75] While judges and administrators have a great deal of freedom, they must operate within boundaries of legitimacy, and they typically agree on most of these boundaries.[76]

In many instances, these shared legal understandings can be quite at variance with everyday practices. The social scientist Kitty Calavita, for example, has highlighted many of these persistent gaps between common legal understandings and everyday practices in a wide variety of areas.[77] She argues that we should seek to explain the gaps between law as it is understood by legal elites and the practical application of law in everyday life, because this can "provide us with clues not just about the workings of law but about the workings of society itself."[78] I would add that understanding and reducing the gap between civil rights law and employment practices is important to prevent arbitrary enforcement of the law (which is an injustice in itself, and at best confusing to employers and employees) and to ensure that racial realism is not practiced in a way that denies basic equal opportunities (more on this below).

Moreover, the widespread advocacy of racial realism suggests a dynamic different from that identified in most research on the relationship between law and society. Regarding today's workplace, employers and policy elites regularly advocate for racial realism, while the courts and the EEOC promote classical liberalism and affirmative-action liberalism (see table 3). This is quite different from what we see in many law/practice gaps, where elites are not involved in advocacy (for example, mainstream elites do not promote the widespread use of officially illegal

Table 3
Society, Elites, and Law

	Is the practice common?	*Do elites promote it?*	*Do courts/ agencies affirm?*
"Victimless crime" (drugs, prostitution)	Yes	No	No
Organizations' symbolic civil rights compliance measures	Yes	Yes	Yes
Racial realism in employment	Yes	Yes	No or rarely

prostitution or recreational drugs). In other cases, nonlegal actors make *de facto* law, establishing new norms that fill in spaces of ambiguity, and then (eventually) law as written in statues, regulations, or court decisions catches up.[79] For instance, a vision of law may emerge in corporate practices—and then the EEOC or the courts or both affirm that practice, giving it the imprimatur of "the law." We can see this in the ways that organizations have developed symbolic forms of compliance with classical liberalism or affirmative-action liberalism.[80]

By contrast, when it comes to racial realism, employers are not making *de facto* law. They may be constructing "legality,"[81] and establishing practices that many believe are legal, but these practices do not fit with the law as the legal establishment defines it, and in some cases, they flatly contradict recent court decisions, including those by the Supreme Court. What's more, this is occurring not in the shadows, but often openly and loudly, in broad daylight. It may be that the courts will get around to affirming racial realism in employment, but that has not happened yet.

What's at Stake? Why Should We Care?

Should we care about how well law fits the racial realism of American workplaces? I think so. I believe this is an important matter for several reasons.

First, we should care because the greatest conflicts in American history have been, in fundamental ways, about race.[82] The nation's founding documents expressed aspirations for equal opportunity and equal

rights, but at the same time the brutal domination and genocide of the indigenous population of North America and the early introduction of slavery were realities.[83] The French social theorist Alexis de Tocqueville predicted as far back as the early 1800s that white Americans would struggle violently with racial difference, and that they would likely seek to exterminate the indigenous population (he was right about that) and would one day replace slavery with another system of racial domination (right again).[84] We now seem far from the days of mass racial bloodshed, but the past serves as a warning of the high stakes involved when race is at issue. The country almost fell apart over the question of slavery in the Civil War, which takes second place to World War II in the number of American war dead, but in terms of percentage of the population killed was more than five times as devastating.[85] The civil rights movement and the racial violence of the late 1960s brought another period of bloodshed and national soul-searching. As recently as 1992, the city of Los Angeles burned for four days in another round of racial violence.[86] The U.S. recently has enjoyed a few decades of racial calm, but a growing body of comparative research shows that while racial or ethnic diversity does not invariably lead to conflict, the ways that governments manage this diversity can mean the difference between cooperation and civil war.[87] Put simply and perhaps somewhat dramatically, rule of law on racial issues is a matter of life and death.

Also at stake is the proper role of government regarding its citizens, an issue that is anything but straightforward. Economists and demographers regularly show that mass immigration is a net positive for the nation, though the benefits may be small, and both benefits and costs fall unevenly on different groups.[88] In an era of economic restructuring and mass immigration, there are many potential goals for policy, many possible ways to benefit the country, and as these ideas are put into practice there may be winners and losers. The clearest example is in the widespread preferences that employers show for hiring immigrants over American workers for low-skilled jobs. As I show in Chapter 5, there is considerable evidence that America now has a declining supply of capable low-skilled workers in a variety of occupations: agriculture, food service, cleaning, and manufacturing. Yet it is also true that millions of Americans are unemployed or underemployed. Should policymakers be helping citizens and ensuring everyone has the right or opportunity for a job, or should they focus on increasing economic growth—and expect those who lose out to simply find their own way?

A third issue at stake is more abstract: respect for the rule of law. It is common for there to be a great discrepancy between the law on the books and what is practiced, but that does not mean we should not be worried about it. The Supreme Court has, in fact, evinced concern regarding a comparable gap between law and practice in another context. When the Court struck down laws banning sodomy in 2003, it cited the argument of the American Law Institute that having laws on the books that forbid practices that were actually quite common undermines respect for law and leads to arbitrary enforcement.[89] The widespread practice of racial realism may similarly undermine respect for the law, lead to arbitrary enforcement, and create an unpredictable litigation environment.

Finally, America's commitment to equal opportunity is at stake. It may seem to be a win-win situation when employers utilize the racial abilities and signaling of employees, as it provides opportunities for nonwhites that may not otherwise exist and may benefit clients and citizens. The problem is that racial realism can also limit an employee's opportunities for transfer or promotion: Why move a nonwhite employee to a position where race provides no extra benefits? In effect, racial realism can provide both a "golden door" of opportunity and a "glass ceiling" limiting mobility.[90]

Thus, how policymakers respond to racial realism will determine whether it is possible for employment regulations to recognize race in a nonhierarchical way that still provides for equal opportunity. Legal and political theorists have debated this issue intensely. For example, Deborah Malamud has noted that equality problems can even arise when employers pursue racial diversity for overall organizational dynamism, which is probably the most benign form of racial realism because it does not pigeonhole or ghettoize nonwhites. But, Malamud points out, nonwhites will often be expected to do the jobs that whites do while *also* contributing their racial abilities, with the result that they do more work than whites.[91] Martha Minow critiques what I am calling here racial realism from an equality perspective when she describes the "dilemma of difference": "When does treating people differently emphasize their differences and stigmatize or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?"[92] Peter Schuck emphasizes the importance of finding the right balance: law should protect existing diversities from discrimination, but should not compel diversity, because when it does so, it renders diversity "illegitimate" and "inauthentic."[93] There are

no easy answers to these questions, and this is why it is essential that we have a clear and comprehensive picture of how employers manage racial difference in the twenty-first century.

Why Is There Racial Realism? A Brief Look at Causes

The purpose of this book is to show that there are advocates for a racial-realist strategy of employment, to identify racial-realist employment practices, to identify the relationship of that vision to law, and to suggest possibilities for reform. Though the purpose here is not to explain the factors that brought about the rise of racial realism, a summary of that story will help to frame the empirical and legal chapters that follow. Race has mattered to American employers since the beginning of the Republic, but some recent and very big changes have added new complexity.

The first causal factor is *demographic*. Simply put, America is more racially diverse than ever before. By the late twentieth century, America was beginning to receive immigrants not just from a variety of countries, but from different *continents*. Today America is more Asian than ever before, and it is also more African, Caribbean, and Latin American. A few years after the Civil Rights Act passed, African-Americans made up about 11 percent of the U.S. population, while Latinos were only 5 percent and Asians 1 percent. By 2010, the percentage of black Americans had increased slightly to 13 percent, but the percentage of Latinos had more than tripled, to 16 percent, and Asians numbered 5 percent of the population.[94] Moreover, the geography of immigration has changed, transforming nearly all parts of the country in the last few decades rather than just a few states.[95]

These demographic changes were themselves the result of several forces. Perhaps the most obvious force was the Immigration and Nationality Act of 1965, which ended national origin discrimination in American immigration law and made family reunification the largest visa category.[96] This ended the almost total exclusion of Asians from the U.S. Though the act put quotas on each country's number of immigrants and also established overall quotas for immigration, it allowed American citizens and permanent residents to sponsor family members for visas—and immediate family members were exempt from quotas. Moreover, the law gave some preference to immigrants with skills, a provision that benefited Asians, many of whom had education but no family connections

in America. These provisions set off vigorous chain migrations, as green-card holders could sponsor spouses and unmarried children under twenty-one, while naturalized citizens could also sponsor parents and siblings. Even this was not enough to satisfy labor demand, however, and millions of immigrants crossed the border without authorization. Eventually, about eleven million immigrants, or one-third of America's total immigrant population, were undocumented.[97] Whatever their legal status, these new immigrants created new markets for firms to exploit and new populations for governments to service.

The movement toward immigrant-dominated sectors of the low-skilled workforce on a national scale came about as a result of another kind of demographic change. As I show in Chapter 2, many unskilled jobs, especially outside of urban areas, used to attract young people. Today, however, families have fewer children, and so there are simply fewer nonimmigrant white bodies for many of these jobs. For example, jobs on dairy farms, large and small, now sometimes rely heavily on immigrant labor rather than on the local workers who supplied the needed hands for generations.[98] There is nothing particularly surprising about this pattern, which can be seen all over the world. As women become more educated and develop careers, the desire for large families declines.[99] The American fertility rate declined from a high of almost 3.8 children per mother in the 1950s to 1.7 in the 1970s, though it has now rebounded to 1.9.[100]

What is more, all Americans (not just women) are on average better educated than they used to be, which further drains the pool of workers available for dirty, boring and/or difficult jobs. The percentage of Americans with the educational profile to match these jobs has shrunk quite dramatically.[101] Demographer Frank Bean and his colleagues have shown that the percentage of Americans over the age of twenty-five (that is, of prime working age) with a bachelor's degree was only about 5 percent in 1950. By 2010, it was closer to 30 percent. Looked at another way, Bean and his colleagues show that in 1950, nearly 80 percent of the U.S. workforce over 25 had less than a high school education. By 2010, that percentage had fallen to about 10 percent.[102] These demographic changes created a demand for low-skilled immigrant labor, creating the conditions where employers would valorize the abilities of Latino and Asian immigrants especially. By 2000, immigrants were already filling a significant part of the secondary labor market workforce: one in five low-wage workers was foreign born, and two in five workers with less than a high school degree was foreign born.[103]

The second causal force for the rise of racial (and immigrant) realism was *economic*. Though scholars and other observers debate the origins of the trend, it is clear that by the latter half of twentieth century, a "deindustrialization of America" was underway. As the economists Barry Bluestone and Bennett Harrison described this process, profits in the formerly stable and unionized manufacturing sector of the economy began to shrink in the late 1960s and worsened in the 1970s as the nation faced unprecedented international competition in the manufacture of electronics, automobiles, and other durable goods. To maintain profits, American firms turned on their unionized workers, threatening to move their operations in search of cheaper labor unless the unions agreed to limits on wages. Developments in the 1980s in technology, especially in the use of computers, allowed operations to be spread out over the country, which gave firms more leverage to say "take it or leave it" to their workers. They could also play different struggling localities against one another, as suitors for new plants offered tax breaks or help with infrastructure development in order to attract a new plant. The most attractive locations were typically in low-wage, nonunionized sections of the South. If conditions could not be found in the U.S., firms simply moved production offshore.[104]

As sociologist William Julius Wilson has noted, these developments decimated the manufacturing base of the U.S. Between 1967 and 1987, Philadelphia, Chicago, Detroit, and New York City all lost between 51 and 64 percent of their manufacturing jobs. There were new jobs for those without a college education, but they were mostly in the "secondary labor market"—in small, seasonal manufacturing jobs, or in the growing service and retail sectors—and these were far less likely to pay a living wage.[105] Consider the explosive growth in the low-wage restaurant sector: the National Restaurant Association projected 2010 sales at $580 billion—about 13 times greater than 1970's $43 billion. Restaurants now employ 9 percent of the U.S. workforce.[106]

These economic changes contributed to a voracious demand for low-skilled immigrant labor, and immigrants, some legal and some illegal, arrived ready to fill this demand. They found employers who were happy to hire them—as was also the case in the previous wave of immigration, a century earlier. In diverse manufacturing and service sectors, employers perceived Latinos and Asians as the best low-skilled workers. Sociologists and economists, as I show in Chapter 5, have amply documented the racial hierarchy that governed employers' preferences for filling dirty, difficult, and dangerous jobs. Employers ranked Latinos (from Central and

South America rather than Puerto Rico or the Dominican Republic) and Asians above American blacks, and often above whites as well. Increasingly, employers behave according to market principles: they find the best worker for the cheapest price, and endlessly repeat whatever hiring strategy they think works best.

Like the ripples made by a stone thrown into a pond, the demographic and economic changes at the low end of the job market then impacted the more skilled jobs. The explosive growth in the numbers of nonwhites created new consumer markets for countless firms, and also created new populations to be policed, schooled, cared for, entertained, informed, and courted for votes.

In high-skilled and many professional jobs, a third contributing factor was *organizational*. Part of this story relates to a change that occurred in corporate America. As sociologists such as Frank Dobbin, Erin Kelly, and Lauren Edelman and her colleagues have shown, big businesses across America began to comply with the new civil rights and affirmative-action legal regimes in the 1970s. However, following the Reagan administration's relaxing of the enforcement of Title VII and affirmative-action regulations, personnel and human resources professionals in large companies—many of whom worked in "equal employment opportunity" (EEO) offices created to coordinate legal compliance—developed a rationale for their role that no longer hinged on federal enforcement efforts. By the late 1980s, along with consultants and academics, they developed the theory of "diversity management," which held that racial, gender, and other forms of diversity could be a net positive for an organization if correctly managed.[107] What was significant about this development for racial realism, as I show in Chapter 2, is that these efforts infused race with usefulness: diversity management was now important in part because different races brought productivity-enhancing new ideas and new perspectives to organizations.

A fourth factor in the creation of modern racial realism was *political*. As I show in Chapters 2 to 4, in a variety highly skilled employment sectors, change came about as a result of political pressure. Civil rights groups were active in the fields of medicine, education, policing, and media and entertainment. A tremendously powerful motive force was the threat of increasing racial violence in the wake of the widespread racial riots and rebellions of the 1960s. In some specialized occupations, such as medicine, advocates and activists used evidence culled from the social sciences to encourage efforts to match professionals with the clients (or patients) they served.

Also, as I show in Chapter 3, leaders of both political parties—though slow to catch on—ultimately saw that strategically managing the race of their appointments and party spokespersons was in their electoral interests. They set a tone at the top, proudly proclaiming that racial diversity was a good thing for America as they showed off the different racial backgrounds of their various appointees.

Other factors in the political story relate to strategic decisions *not* to act. First, despite past conflict on immigration issues and some evidence that many African-Americans believe immigration limits black opportunity,[108] civil rights organizations, as Rodney Hero and Robert Preuhs have shown, have largely supported the immigration priorities of Latino organizations in recent years.[109] The other key example of political non-action is conservative organizations' decision not to target racial realism in employment in their litigation strategies (more on this below).

A final set of factors is *legal*, stemming from actions in the federal courts, which are of course closely bound to the political factors. The courts' role in the rise of racial realism is complex, and in some ways quite subtle, because there is no evidence of a fully developed legal doctrine for racial realism behind the courts' rulings.

We should first recognize that a key reason why the courts played a role in racial realism was that, while both parties talked about the benefits of racial diversity and made racially strategic appointments, neither political party offered *policy* leadership on the issue, in effect ceding the whole issue to the courts.[110] Since the mid-1970s, Democrats have avoided progressive stands on civil rights issues for fear of losing working-class white votes.[111] Republicans welcomed the white Southern and working-class voters, but other than practicing a rhetorical politics of racial resentment, they have taken little action to retrench civil rights policies, primarily due to a fear of appearing racist and alienating moderate voters. Instead, Republicans have appointed conservatives to the federal courts, most prominently the Supreme Court, so that judges can do the retrenching while the national party itself avoids blame.[112]

So what did the Supreme Court do in its role as civil rights policymaker? First, in a series of cases over the past few decades (all 5-to-4 decisions), the Supreme Court has, as Republican presidents intended, slowly curtailed the use of affirmative-action liberalism in a variety of contexts. Two key rulings focused on government contracting preferences for firms owned by minorities. The Court ruled that governments wishing to use affirmative action in this way had to pass "strict scrutiny" in order to do so—that is, they had to demonstrate that the preferences

were necessary to achieve a compelling purpose. For the Court, that compelling purpose had to be compensating for past discrimination by the specific government institution practicing the affirmative action.[113] While the aforementioned *Grutter v. Bollinger* decision, stating that some types of racial preferences were constitutional in university admissions when implemented to achieve a diverse student body, would seem to stand as an important counter-example, the Court has applied strict scrutiny to limit affirmative-action liberalism in other education cases, and therefore limited the impact of *Grutter*. For example, in a 2007 case regarding disputes in Seattle and Louisville school districts, the Court's majority ruled that the school districts did not demonstrate that their methods of assigning students to schools on the basis of their race was necessary to achieve a compelling interest.[114] In the words of one legal scholar, the ruling "stifled" the expansive possibilities of the Court's decision in *Grutter* by likely confining it to the higher education context.[115] More recently, the Supreme Court ruled on another admissions case, and appeared to limit the use of race even in the context of higher education admissions. This time a seven-justice majority insisted that universities using racial preferences must be able to demonstrate to courts not only that their goal is diversity, but that there are no workable race-neutral policies that would lead to the same educational benefits.[116]

Another case, this one focused on employment, was significant because it also limited affirmative-action liberalism. More specifically, it narrowed the use of disparate impact law to justify considering race in employment. The case involved the New Haven, Connecticut fire department, which, fearing a lawsuit from African-Americans, sought to throw out the results of an ability test when no African-Americans scored high enough for promotion. The Court ruled that the fire department lacked a strong basis in evidence for fearing a legal challenge, and therefore its "express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[117]

There is reason to think that the Supreme Court's increasing constraints on the use of affirmative action actually encourage racial-realist strategies in the nation's workplaces.[118] However, in its only ruling on racial realism in employment, the Supreme Court was also mostly negative. That case, *Wygant v. Jackson Board of Education*,[119] discussed in detail in Chapter 3, focused on racial signaling in the employment of teachers. It stated unequivocally that teachers cannot be hired to be racial

role models. There remains some amount of ambiguity for racial realism, however, because of the narrow focus of that ruling on teaching.

Why is there so much ruling on education, and so little guidance from the Supreme Court on racial realism in employment, and especially private employment? There are, I believe, two main reasons. First, the Court can only rule on the cases that come to it, and there have been relatively few challenges to employment racial realism. Though I explore the legal rules derived from a great many lower-court cases in the pages that follow, these cases are close to the entire universe of court rulings on employment racial realism, and there are no obvious disputes between circuits that cry out for Supreme Court adjudication. Thus, though there are countless employment rulings on various technical issues related to the use of evidence, who has standing to litigate, what counts as an adverse employment action, etc.,[120] the prominence in the national discourse and the nation's workplaces of racial realism has not translated into a flurry of grass roots, individual legal challenges. The result is that both the practice of racial realism and its advocacy have space to continue—even in teaching, where the Supreme Court has said they must stop.

The second reason for the lack of Supreme Court action on racial realism in employment is that conservative legal organizations have not made it a target in their litigation strategy similar to what they have done with university admissions. This inaction itself stems from two main causes. The first is ideological. Two of the key organizations fighting race preferences in the courts, the Center for Individual Rights (CIR) and the Cato Institute, have (unlike the Republican Party) a libertarian focus and so have concentrated on discrimination by public institutions. For example, CIR, which describes its mission as "the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments,"[121] has litigated against preferences in twenty-four cases, but only four were specifically about employment, all targeting the government and none of them involving racial realism. They have supported litigation challenging racial realism in university admissions instead. Cato is similarly uninterested in challenging private employment practices, believing instead that employers should have discretion to do what they please.[122]

The other factor preventing conservative legal organizations from taking on employment racial realism is practical. CIR was originally focused on constitutional law, because, in the words of CIR founder, Michael Greve, "On any other issue, the regulatory state will eat you alive."[123] CIR instead used its limited resources to go after universities on free speech

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