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Have We Moved Beyond the Civil Rights Revolution?

ABSTRACT. Bruce Ackerman's account of the Civil Rights Revolution stresses the importance of popular sovereignty and the separation of powers as the basis of constitutional significance. In this view, key spokespersons, including Martin Luther King, Jr. and Lyndon Johnson, served to provide leadership in the effort to eliminate "institutionalized humiliation" based on racial discrimination. But how well does this account explain the current state of employment civil rights in the U.S.? This essay explores the rise of "racial realism" in American employment relations, where employers see race as a real and significant part of worker identity. Employers see racial difference as something useful that can affect the effectiveness of their organizations. This has two variants: racial abilities, referring to perceptions that workers differ in ability based on their race, and racial signaling, where employers perceive that worker race can signal different things to customers or members of the public. I explore the use and advocacy of racial realism in a variety of spheres of private and public employment, including at high- and low-skilled levels, and argue that racial realism is a significant departure from Ackerman's vision because—despite its prominence—it lacks national spokespersons, lacks statutory basis and has very little court authorization, can harm nonwhites, and has never been debated in a public, deliberative forum.

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ESSAY CONTENTS

INTRODUCTION	3004
I. ACKERMAN'S <i>WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION</i>	3005
II. STRATEGIES FOR MANAGING EMPLOYMENT IN THE 2000S	3007
III. THE PEOPLE AND RACIAL REALISM, PART I: GOVERNMENTS AND THE PROMOTION OF RACIAL REALISM	3020
A. Racial Realism in the Schools	3022
B. Racial Realism in Law Enforcement	3025
IV. THE PEOPLE AND RACIAL REALISM, PART II: THE PRIVATE SECTOR AND THE RACIAL REALIST STRATEGY	3026
V. IS RACIAL REALISM THE PEOPLE'S AMENDMENT TO THE CIVIL RIGHTS REVOLUTION?	3032

INTRODUCTION

The constitutional significance of the Civil Rights Revolution, according to Bruce Ackerman's new book, lies not in a series of court cases, but in popular sovereignty and the separation of powers.¹ He identifies Martin Luther King, Jr., Lyndon Johnson, Hubert Humphrey, and Everett Dirksen as key spokespersons² for the revolution that had at its heart the elimination of "institutionalized humiliation" based on racial discrimination.³

My purpose here is to assess current race relations in America, focusing on employment, in light of Ackerman's argument. My emphasis is not on the current state of employment discrimination,⁴ but on what employers or other advocates say they *want* to be the case in the management of racial difference in workplaces. I argue that the current employer focus on managing racial differences for organizational effectiveness and profit making—a strategy of management that I call "racial realism"—is a significant departure from Ackerman's vision of the Civil Rights Revolution in several respects.

First, though racial realism is prominent in business, the professions, government employment, and media and entertainment, this strategy of managing racial difference has no national spokespersons comparable to King and Johnson. Second, though officials of the executive branch and local governments sometimes practice racial realism when making appointments, racial realism has surprisingly little legal authorization from the courts and no statutory basis. Third, racial realism can harm the interests of nonwhites in ways that sometimes may lead to the kinds of humiliation that Ackerman claims civil rights laws were designed to prevent. Fourth, while some employers and other advocates have used or promoted the benefits of racial realism, this is not the same as the "We the People" popular sovereignty that Ackerman identifies as the foundation for the civil rights developments of the 1960s. While these employers and other advocates are indeed "The People" in a direct sense, they are not popularly elected, and the strategy of racial realism in

1. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 4 (2014).

2. *Id.* at 7.

3. *Id.* at 13.

4. The research here shows that discrimination and workplace segregation have not steadily improved and continue to be significant problems. KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, *DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT* (2012).

employment has not been meaningfully debated in any public, deliberative forum.

In my title, I ask whether we are beyond civil rights. What I mean is that there is considerable advocacy for practices occurring in a context of—at best—legal ambiguity. These practices were not a part of the Civil Rights Revolution, and without proper legal guidance, they can violate the values of that revolution, and even result in the kind of institutionalized humiliation that Ackerman argues the revolution was designed to eliminate.

I. ACKERMAN'S *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION*

It is impossible to summarize Ackerman's magisterial achievement in these pages. I will instead focus on key parts of his argument that have inspired my own thoughts here. The most important of these is the notion that popular sovereignty provides a quasi-constitutional foundation for the Civil Rights Revolution.

By "Civil Rights Revolution" (capitalized), Ackerman is referring only to the American establishment of racial equality in the twentieth century,⁵ but this nevertheless refers to something quite broad. He is interested in the key court decisions, the key statutes (the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Civil Rights Act of 1968), and these statutes' various implementing regulations.⁶ He is interested in federal efforts to prohibit private discrimination in employment, public accommodations, and housing, as well as prohibitions on laws that limit voting rights or choices to marry across racial lines.⁷

Ackerman specifies that these efforts to stop discrimination were not motivated by an anti-classification perspective—by moral beliefs or ideologies that deem racial classifications to be wrong in any circumstances.⁸ The goal was to eliminate what Ackerman refers to as "institutionalized humiliation."⁹ In his view, the landmark statutes of the 1960s built on the logic of the *Brown v. Board of Education* opinion, which struck down segregated schools because of the "feelings of inferiority" that they created in black children, inhibiting their

5. 3 ACKERMAN, *supra* note 1, at 1.

6. *Id.* at 5, 14.

7. *Id.* at 15, 306.

8. *Id.* at 128.

9. *Id.*

ability to learn.¹⁰ Similarly—but in a significant extension beyond *Brown*'s limitations on public schooling—exclusions in accommodations, employment, and private housing created humiliation and feelings of inferiority that the government had an affirmative duty to prevent.¹¹ The moral affront of these systematic exclusions was great enough that the federal government moved to a New Deal standard operating practice, what Ackerman calls “government by numbers,” or a rationalized commitment to achieving demonstrable results of the statutory aspirations.¹²

The Equal Employment Opportunity Commission's (EEOC) late 1960s focus on counting the numbers of minorities and women actually being hired (as opposed to a focus on simply investigating individual complaints of discrimination)¹³ is therefore not a departure from the Civil Rights Revolution. It is part of it. To complain about affirmative action as a violation of civil rights principles would be wrong, in Ackerman's account. It would be like the nation committing to the principle of highway safety and then complaining about speed limits.

In Ackerman's view, then, the Civil Rights Revolution was a majoritarian action, even if it required a determined and violently repressed social movement to force the momentum toward reform. Unelected federal administrators and judges played key roles, to be sure, but their actions were only fulfilling the will of the elected representatives of the people. There were several individuals who acted as “spokesmen”—Martin Luther King, Jr., Lyndon Johnson, Hubert Humphrey, and Everett Dirksen¹⁴—who did not lead public opinion. They reflected it. For example, Congress protected employment civil rights with Title VII of the Civil Rights Act of 1964 at the height of public opinion support for equal employment opportunity.¹⁵ This is what Ackerman means when he emphasizes the popular sovereignty that gave power to the Civil Rights Revolution.¹⁶ It was the will of We the People—henceforth capitalized to emphasize this specific meaning of popular sovereignty.

10. *Id.* at 13.

11. *Id.*

12. *Id.* at 14.

13. *Id.* at 180-83.

14. *Id.* at 7.

15. PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* 55 (1985).

16. 3 ACKERMAN, *supra* note 1, at 5.

II. STRATEGIES FOR MANAGING EMPLOYMENT IN THE 2000S

Ackerman's survey of the grand sweep of the Civil Rights Revolution from the New Deal to the 1970s affords us the opportunity to take stock of what the protection of civil rights looks like today. My focus here is on the context of employment, a key part of the Civil Rights Act of 1964 since it involves opportunities to pursue a livelihood. Specifically, I am interested in the perspectives of employers and their efforts to manage their workplaces, which were to be constrained by Title VII.

When we take this employer perspective, we can see complexity in twenty-first century American employment relations. Specifically, there are variations in approaches to racial differences in employment. First, we can see that Title VII's guarantees of nondiscrimination and the "government by numbers" approach of affirmative action appear to be quite distinct, even if they are related and focused on the same goal. We can also see a separate approach to managing racial difference in the workplace that would appear to involve some discrimination, but not always the systematic humiliation that Ackerman argues Congress intended Title VII to prevent.

In the United States in the 2000s, then, there are three distinct strategies of managing racial difference in workplaces. We can understand their distinctions when we consider what meaning or significance they give to race, when we identify their goals, and also when we consider what basis or authorization they have in law.

As I have detailed elsewhere,¹⁷ the most prominent strategy for managing racial difference in the workplace is what we may call *classical liberalism*. In this strategy, employers are to ignore race entirely: racial differences have no meaning or significance for employers for any reason. The goal of classical liberalism is equal opportunity and justice. (Ackerman would argue that it is designed to prevent humiliation.)

Classical liberalism has a strong legal basis in Title VII of the Civil Rights Act of 1964, which states simply that employers are to ignore racial and other employee traits when managing their workplaces. Title VII flatly prohibits employment discrimination:

It shall be an unlawful employment practice for an employer –
 (1) to fail or refuse to hire or to discharge any individual, or otherwise

17. JOHN D. SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2014).

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.¹⁸

The message here appears quite clear: racial differences must not factor into employment decisions.

Title VII was not the first legal intervention mandating a classically liberal strategy in employment. As Ackerman notes, efforts from the Reconstruction era came alive in the Civil Rights Revolution.¹⁹ For example, Congress passed the Civil Rights Act of 1866, regulating economic relations. It stated that “[a]ll persons . . . shall have the same right . . . to make and enforce contracts”²⁰ as is enjoyed by white citizens. This statute could reach employment contracts, and it decreed that opportunities in contracting must in no way be impacted by racial differences.

Affecting specifically government employment, the Fourteenth Amendment's Equal Protection Clause²¹ also became a force for classical liberalism after the Supreme Court's *Brown v. Board of Education* decision in 1954. That decision stated that racial segregation in the public education context was a violation of the equal protection of the laws, and therefore unconstitutional.²² While explicitly limited to education, the unanimous decision provided a foundation for the civil rights statutes of the 1960s, including Title VII, that banned differential treatment based on race.²³

A second strategy of managing racial difference in employment can be called *affirmative-action liberalism*. In this strategy, employers might consider racial differences when making employment decisions, and therefore, racial differences have some meaning and significance, but only in a very limited way. Racial differences have significance only insofar as consideration of race

18. 42 U.S.C. § 2000e-2(a) (2006).

19. 3 ACKERMAN, *supra* note 1, at 211-15.

20. 42 U.S.C. § 1981.

21. U.S. CONST. amend. XIV, § 1.

22. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23. 3 ACKERMAN, *supra* note 1, at 128-29.

can help achieve the goals of affirmative-action liberalism, which happen to be the same as the goals of classical liberalism: equal opportunity and justice.²⁴

Ackerman folds affirmative-action liberalism into classical liberalism since “government by numbers” (affirmative-action liberalism) shares with Title VII the goals of equal opportunity and justice, or the elimination of the systematic humiliation created by widespread employment discrimination. But from the perspective of the employer, and how she or he must view workers, they are quite different. Affirmative-action liberalism requires employers to manage their workforces by categorizing and counting on the basis of government racial categories, and ensuring minorities’ equal participation and opportunity in the workplace. Thus, the intent is the same, but the means are different.

Title VII does not require that employers use affirmative action of any type, but it does allow it. Affirmative-action liberalism has legal authorization in regulations and guidelines created by the EEOC, Title VII’s implementing agency.²⁵ Moreover, in 1965, Executive Order 11,246 required affirmative action by government contractors.²⁶ Various statutes and regulations have used affirmative-action liberalism in spheres outside of employment, such as racial “set asides” in government procurement,²⁷ the Small Business Administration’s special help for minority-owned small firms,²⁸ and the Civil Rights Act of 1991, which has elements that reaffirm the affirmative-action-liberal parts of the disparate-impact-discrimination doctrine that the Supreme Court had weakened in its *Wards Cove Packing v. Atonio* decision.²⁹

24. SKRENTNY, *supra* note 17, at 6.

25. 29 C.F.R. § 1608 (1979); U.S. EEOC, COMPLIANCE MANUAL § 15-IV(C) (2006) [hereinafter EEOC COMPLIANCE MANUAL], <http://www.eeoc.gov/policy/docs/race-color.pdf>.

26. Exec. Order No. 11,246, 41 C.F.R. § 60 (1965).

27. John D. Skrentny, *Republican Efforts to End Affirmative Action: Walking a Fine Line*, in *SEEKING THE CENTER: POLITICS AND POLICYMAKING AT THE NEW CENTURY* 132, 152 (Martin A. Levin et al. eds., 2001).

28. George R. La Noue & John C. Sullivan, *Deconstructing Affirmative Action Categories*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 214 (John David Skrentny ed., 2001).

29. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100 (codified as amended in scattered sections of 42 U.S.C.); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). President George H.W. Bush vetoed an earlier version of the Act in 1990, calling it a “quota bill.” See Steven A. Holmes, *President Vetoes Bill on Job Rights; Showdown Is Set*, N.Y. TIMES, Oct. 23, 1990, <http://www.nytimes.com/1990/10/23/us/president-vetoes-bill-on-job-rights-showdown-is-set.html>.

The Supreme Court has also explicitly stated the rules for employers, private and public, choosing to manage their workforces using affirmative-action liberalism. In *United Steelworkers v. Weber*³⁰ and *Johnson v. Transportation Agency*,³¹ the Supreme Court upheld employers' voluntary plans for the consideration of race as long as they followed at least three rules: (1) the plan had to have the goal of remedying an imbalance in the employer's workforce; (2) the plan could not unnecessarily limit opportunities for whites or males; and (3) the plan had to be temporary, and could not be used as a long-term strategy for maintaining any preferred percentages of racial groups in the workforce.³²

Similarly, the EEOC defines "affirmative action" as "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity."³³ Courts can also order affirmative action in cases where employers were found to have discriminated in the past, and affirmative action plans can be included in consent decrees.³⁴

A third strategy of managing racial difference is what I call *racial realism*. With this strategy, employers perceive race as something real and relevant to the functioning of their workplaces, and believe the effective management of racial difference can improve organizational operations and (for private employers) potentially increase profits.³⁵ My use of the term "realism" here is meant to emphasize employer perception of the ontological reality of race, rather than the jurisprudential tradition of legal realism.³⁶

30. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

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

32. *See id.* at 630-31.

33. 29 C.F.R. § 1608.1(c) (1979).

34. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 448-49 (1986).

35. Legal scholar Nancy Leong has developed a similar concept focusing on the instrumental use of racial differences. She calls this "racial capitalism," though her concept is broader than what I discuss here, and includes any or most situations where the race of nonwhites has exchange value for whites. For example, she includes a firm using race to symbolize compliance with civil rights law as an example of racial capitalism. By contrast, I consider only uses of race designed to improve the effectiveness of organizations, where race becomes a qualification for a job, as examples of racial realism, because these uses give race meaning but are not geared toward satisfying the justice goals of civil rights and affirmative action law. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013).

36. My use of racial realism therefore has little in common with that of Derrick Bell, who used the same phrase to refer to a philosophy or mentality that saw racial equality as an unattainable goal in the United States. Bell argued for acknowledgement of the subordinate status for people of color and skepticism toward civil rights laws and policies. Derrick Bell,

Employers managing their workforces using racial realism share with those using affirmative-action liberalism a focus on racial difference, and also similar to affirmative-action liberalism, racial realism will not, or will only very rarely, explicitly and openly benefit whites and males.³⁷ The key difference is the motive for the significance of race in the employment process. Instead of a focus on the lives of minority *workers*, race has significance for racial realists because it is consequential for the *organization's* future functioning.³⁸ The goal of racial realists is not equal opportunity or justice, but organizational effectiveness.³⁹

Employers use racial realism in at least two main variants. One of these we can call *racial abilities*. This refers to employer perceptions that workers of different races will vary in their aptitudes, but racial abilities can be found in different modes.⁴⁰ In some cases, employers believe that racial diversity leads to more innovative ideas and more dynamic work environments.⁴¹ Here, employers do not link racial differences to any specific job, but race is nevertheless linked to ability—the ability to think differently than those of other races—and racial difference becomes a qualification for a job based on predictions of future performance in ways that cannot occur with affirmative-action liberalism.⁴² In other cases, employers believe that members of minority groups have special abilities to understand or deliver services to members of their respective groups that nonmembers are so likely to lack that race becomes a qualification for certain jobs. Perceptions that Latinos are best at designing marketing campaigns for Latino consumers, or that African American teachers are best at teaching African American students, are examples of these racial abilities.⁴³

A third mode of racial abilities is found in low-skilled employment, such as manufacturing, service jobs, agriculture, and the like. Here, employers will similarly perceive aptitude to vary with racial backgrounds, but in these jobs,

Racial Realism, 24 CONN. L. REV. 363, 373-74 (1992).

37. SKRENTNY, *supra* note 17, at 34.

38. *Id.* at 10.

39. *Id.* at 4.

40. *Id.* at 11.

41. *Id.*

42. *Id.*

43. The employers who use this strategy focus on race because they believe that race is an indicator of the abilities that they seek. They may or may not believe, or care, that those abilities derive from experiences that persons of any race may have.

they perceive variations in qualities they prize, such as abilities to work long, hard, and without complaint while doing dirty, boring, and/or dangerous manual work.⁴⁴ At times, these employers will view the abilities as inhering in immigrant status as well as racial or national origin backgrounds.⁴⁵ We might call this “immigrant realism,” as the foreign-born status is perceived as real and relevant to employment decisions.

The other main variant of racial realism, contrasting with racial abilities, is *racial signaling*. Employers using this strategy do not believe that workers vary in their ability to perform tasks, but racial differences can nevertheless become qualifications for a job because employers believe that certain populations will respond more positively to some races than others.⁴⁶ The benefits to the organization come from leveraging racial difference or sameness to produce desired reactions in clients, citizens, or residents of communities.

It is important to stress that, by definition, employers use racial realist strategies to benefit their *organizations*, not the members of minority groups, and any benefits to equal opportunity that may occur would be purely incidental to their organizational goals. However, different racial realist strategies vary in their congruence with the goals of the Civil Rights Revolution. For instance, when hiring to leverage a diversity of racial abilities, employers are *not* seeking to break down stereotypes, which was one of the goals of diversity in university admissions approved in the *Grutter v. Bollinger* decision.⁴⁷ Rather, they may be said to be hiring on the basis of the racial stereotype that different races think differently.⁴⁸ Still, this racial realism strategy is less pernicious than the others because it does not lock any racial groups into particular jobs. The form of racial realism that links the race of employees to the race of clients or citizens they may serve may be more in conflict with the goals of the Civil Rights Revolution, because it links groups to specific jobs, possibly limiting opportunities to these specific jobs and thereby stunting careers.⁴⁹ Racial signaling has a different conflict with the goals of the

44. SKRENTNY, *supra* note 17, at 218.

45. *Id.*

46. *Id.* at 13.

47. 539 U.S. 306, 333 (2003).

48. For an insightful discussion of the linkage of racial identities to expectations that people act according to specific racial “scripts,” see K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 98–99 (1998).

49. SHARON M. COLLINS, *BLACK CORPORATE EXECUTIVES: THE MAKING AND BREAKING OF A BLACK MIDDLE CLASS* 77–78 (1997).

Civil Rights Revolution: because racial signaling can be accomplished in some cases with only token hiring, an employer can signal a commitment to diversity even though an organization's overall workforce is in fact not diverse.⁵⁰ Finally, because racial realism in low-skilled jobs puts groups into hierarchies (typically with Latinos and Asians ranked above whites and blacks)⁵¹ and can lead to total exclusion, it is the most pernicious and furthest from the goals of the Civil Rights Revolution, and may come closest to the kinds of racialized humiliation that Ackerman discusses.⁵²

Is racial realism really totally different from affirmative-action liberalism? The matter is confused in public discourse and in law, mainly because what many call "affirmative action" in the context of university admissions is analytically distinct from what the Supreme Court considers to be affirmative action in employment, and is subject to different legal rules.⁵³ Justice Powell's decision in *Bakke* argued that race was a permissible consideration in university admissions because diversity could improve the educational mission of the university.⁵⁴ Powell thus replaced the justice and equal opportunity goals of traditional affirmative action with a new organizational effectiveness goal. Universities, journalists, and jurists continue to refer to this practice as "affirmative action."⁵⁵ I believe this is unfortunate, as it obscures the fact that the purpose of the approach has changed.⁵⁶ Moreover, the Supreme Court's

50. See Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1053 (2011).

51. SKRENTNY, *supra* note 17, at 222-27.

52. One might argue that any of the modes of using racial abilities are less pernicious than racial signaling, because the abilities prized by employers can (at least in theory) be taught to anyone through training. On the importance of keeping jobs open to persons of all racial backgrounds, see *id.* at 270-72.

53. See *supra* notes 30-31.

54. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

55. The more recent *Grutter v. Bollinger* opinion makes no distinction between the University of Michigan Law School's racial preferences for diversity goals and affirmative action. For example, Justice Ginsburg and Justice Breyer's concurring opinion states, "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring).

56. For a discussion, see RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW 196-97 (2013). See also Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 940 (1997) (arguing that "the diversity rationale is most persuasive when it is augmented by the view that past and present race-based economic inequality is the reason we cannot achieve meaningful levels of integration

rules for permissible affirmative action in employment require that it have a remedial intent—repairing an imbalance in the workforce—and that it must be temporary.⁵⁷ A racial realist intent is not remedial, and it is not temporary.

In practice, it is possible to have affirmative action programs while using the term “diversity” when the programs seek equal opportunity goals and better utilization of the available human resources to repair workforce imbalances.⁵⁸ If they have explicit goals focused on forward-looking rationales of organizational effectiveness, they are analytically distinct from affirmative action, and they may face legal trouble. As Stephen Rich explains, “Unless those [diversity] initiatives are bona fide affirmative action plans—that is, court-ordered remedial plans or those plans that satisfy the requirements of *Weber-Johnson*—such initiatives have an ambiguous legal status.”⁵⁹

This is because Title VII appears to specifically *prohibit* the use of race for organizational goals. The law makes allowances for discrimination on the basis of all of the traits listed in the law except for race in what came to be known as the bona fide occupational qualification exception, or BFOQ.⁶⁰ Specifically, the statute states that

it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] 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.⁶¹

without using affirmative action”).

57. See *supra* notes 30–31.

58. This appears to be the case with President Barack Obama’s 2011 Executive Order 13,583. The purpose of the order was to “Establish[] a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce.” Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011). The order’s statement of policy uses racial realist discourse (for example, “our greatest accomplishments are achieved when diverse perspectives are brought to bear to overcome our greatest challenges”), but the substance of the order is affirmative-action liberalism and emphasizes goals of justice and equal opportunity: “The Government-wide Plan shall highlight comprehensive strategies for agencies to identify and remove barriers to equal employment opportunity that may exist in the Federal Government’s recruitment, hiring, promotion, retention, professional development, and training policies and practices.” *Id.*

59. Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 74 (2011).

60. 42 U.S.C. § 2000e–2(e)(1) (2006).

61. *Id.*

There was little discussion in Congress regarding whether or not race should be allowed as a BFOQ. When Southern members of the House of Representatives sought an amendment to allow a race BFOQ, supporters of the law resisted. Emanuel Celler (D-NY) offered only this as an explanation: “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.”⁶² While that provides little in the way of a rationale, it appears that the representatives of The People did not want race treated as something real that employers could manipulate for their own purposes.⁶³

The EEOC’s *Compliance Manual* is therefore notably circumspect when it discusses racial realism. It explains that “[d]iversity and affirmative action are related concepts, but the terms have different origins and legal connotations,” because diversity is a “business management concept” and its antidiscrimination effects are incidental to organizational goals.⁶⁴ The EEOC explains that “[m]any employers . . . implement diversity initiatives for competitive reasons rather than in response to discrimination, although such initiatives may also help to avoid discrimination.”⁶⁵ In the very next sentence, the EEOC emphasizes only that the equal opportunity and justice intents of affirmative-action liberalism are acceptable: “Title VII permits diversity efforts designed to open up opportunities to everyone.”⁶⁶ The *Compliance Manual* then goes on to give examples of acceptable actions, none of which use race for “competitive reasons.”⁶⁷ It closes with language that would likely give pause to employers seeking to use racial realism, explaining that “employers are cautioned that very careful implementation of affirmative action and diversity

62. 110 CONG. REC. 2550 (1964) (statement of Rep. Celler). Representative Adam Clayton Powell, Jr. (D-NY) also said, “20 million Negroes are willing to take their chances on this bill.” *Id.* (statement of Rep. Powell). Senator Clark (D-PA) explained in response to Senate Minority Leader Everett Dirksen (R-IL), who had asked about the Harlem Globetrotters or filmmakers doing a movie about Africa, that filmmakers could not demand a black person but only someone who looked black. 110 CONG. REC. 7217 (1964) (statement of Sen. Clark).

63. Even if there was a BFOQ defense available for racial discrimination, it is not likely it would inoculate racial realism from legal challenge because courts have greatly limited BFOQ defenses in contexts where the statute allows it. See SKRENTNY, *supra* note 17, at 16-17.

64. EEOC COMPLIANCE MANUAL, *supra* note 25, § 15-VI(C).

65. *Id.*

66. *Id.*

67. *Id.*

programs is recommended to avoid the potential for running afoul of the law.”⁶⁸

The EEOC is wise to urge caution. Indeed, its own compliance manual appears to rule out the use of race for competitive reasons, including the entire racial signaling strategy, because by definition racial signaling is catering to customer preferences. The EEOC explains, “Title VII also does not permit racially motivated decisions driven by business concerns—for example, concerns about the effect on employee relations, or the negative reaction of clients or customers.”⁶⁹

Not surprisingly, where private employers have been challenged in court for racial realist goals, courts have ruled the racial realist strategies to be impermissible.⁷⁰ For example, a firm called The Parker Group made money as a contractor for election campaigns, and used workers to call potential voters to urge them to vote for particular candidates.⁷¹ The firm segregated white and black workers, and used black employees to call black voters when clients believed that this racial realist strategy would be more effective at winning votes.⁷² An African American woman was let go following a campaign in Alabama, and she sued under Section 1981 for both the termination and the

68. *Id.*

69. *Id.* § 15-V(A) (footnotes omitted).

70. SKRENTNY, *supra* note 17, at 80–88, 245–64. There have been some cases where employers have had their diversity policies challenged, but the courts were not confronted with a claim that the diversity would boost organizational effectiveness. In these cases, diversity simply meant more representative use of minorities, and thus these were affirmative action rather than racial realism cases. *See, e.g.*, Reed v. Agilent Techs., Inc., 174 F. Supp. 2d 176, 185 (D. Del. 2001); Blanke v. Rochester Tel. Corp., 36 F. Supp. 2d 589, 598 (W.D.N.Y. 1999); Harel v. Rutgers, 5 F. Supp. 2d 246, 259 (D.N.J. 1998). Another case involved an employer memo that made a racial realist claim regarding organizational benefits of diversity, but the issue in the case was whether or not that memo could be evidence of discrimination against a particular white male individual, with the court concluding that the memo was not enough to constitute a prima facie case, but that it could be relevant to a disparate treatment claim. *See* Iadimarco v. Runyon, 190 F.3d 151, 155, 164 (3d Cir. 1999). For further discussion, see Rich, *supra* note 59, at 78 n.388. In other cases, the employer withdrew any defenses based on diversity goals as the case proceeded through the courts. *See, e.g.*, Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 721 (7th Cir. 2005). The City of New Haven in *Ricci v. DeStefano*, 557 U.S. 557 (2009), also abandoned a diversity rationale as a defense for throwing out the results of an ability test when it did not produce an adequate number of nonwhite passing scores. *See* Rich, *supra* note 59, at 78 n.386.

71. *Ferrill v. Parker Grp., Inc.*, 967 F. Supp. 472, 473 (N.D. Ala. 1997).

72. *Id.*

racial realist segregation.⁷³ The Parker Group won on the termination claim, but its racial realism lost at both the district and circuit court levels.⁷⁴ The district court argued that the firm used “stereotyped assumptions” to manage the worker’s placement, and this was an “obvious violation of the law” because “‘practicability’ . . . is not a defense to racial discrimination.”⁷⁵ The Court of Appeals for the Eleventh Circuit framed the legal question as whether an employer “who acts with no racial animus but makes job assignments on the basis of race can be held liable for intentional discrimination under § 1981.”⁷⁶ The court of appeals noted that there is no BFOQ for race,⁷⁷ and there was no affirmative action strategy in place because the firm was not trying to repair a racial imbalance.⁷⁸ It therefore ruled against The Parker Group because the firm’s employment practices were based on racial stereotypes, and with no legal defenses available, were clearly in violation of the law.⁷⁹

Another area where racial realism is prominent is in the executive appointment of government officials and judges. This is not prohibited, but neither is it explicitly authorized as with affirmative action. Since 1972, Title VII has covered government employment, but it does not reach positions that are filled through elections or through executive appointment:

[T]he term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.⁸⁰

For presidents, the appointment process is governed by the Constitution, though this only means that a president’s appointment powers are limited by the consent of the Senate, and the point of that limitation was to avoid

73. *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 471-72 (11th Cir. 1999).

74. *Id.* at 472, 477.

75. *Ferrill*, 967 F. Supp. at 475.

76. *Ferrill*, 168 F.3d at 473.

77. *Id.*

78. *Id.* at 474.

79. *Id.* at 475.

80. 42 U.S.C. § 2000e(f) (2006).

corruption.⁸¹ Nothing is said either prohibiting or authorizing the use of race in making appointments.

Some courts have interpreted the Fourteenth Amendment as authorizing racial realism in employment,⁸² but this has only occurred in very limited contexts, and the Supreme Court has never ruled that racial realism in employment is constitutional. It has, however, explicitly prohibited one use of racial signaling in the educational context. The Jackson County, Michigan Board of Education had used hiring preferences for African American teachers—a practice that a Michigan district court found permissible based on a belief that their skin color signaled something positive to students, and thus African American teachers served as valuable role models for African American students.⁸³ The Court overruled the lower courts, and disallowed this use of racial realism because “the role model theory employed by the District Court has no logical stopping point” and “allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.”⁸⁴ The Court saw this as not only unconstitutional, but the opposite of the intentions of the Civil Rights Revolution: “Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*.”⁸⁵

Racial realism found widespread lower court approval only in the limited context of law enforcement. Courts have approved both claims of racial abilities (minority police officers are able to work more effectively in minority neighborhoods than white officers) and racial signaling (minority residents perceive minority police officers as having more legitimacy than white officers).⁸⁶ In doing so, these courts have seen a compelling interest in using

81. Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J. L. & PUB. POL'Y 467, 475 (1998).

82. SKRENTNY, *supra* note 17, at 135-42. Notably, regarding racial preferences for the purpose of affirmative action, the opposite holds true, and courts may find greater “leeway” under Title VII than under the Constitution. Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 2964, 2969 (2014).

83. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982).

84. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986).

85. *Id.* at 276.

86. See, e.g., *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974); *Bridgeport*

race as part of the law enforcement organizations' "operational needs." For example, after New York City placed a large number of black officers in a predominately black neighborhood following a highly publicized and shocking incident of police brutality there (the beating and torture of Abner Louima), a New York district court upheld the racial realist strategy of officer assignment:

In order to carry out its mission effectively, a police force must appear to be unbiased, must be respected by the community it serves and must be able to communicate with the public. Thus, a police department's "operational needs" can be a compelling state interest which might justify race-based decision making.⁸⁷

Another case took the Supreme Court's decision in *Grutter v. Bollinger*,⁸⁸ which found a compelling interest in the University of Michigan Law School's use of race to achieve diverse student enrollment, as a precedent for Chicago's use of race in hiring and placing police officers. The Seventh Circuit stated:

All in all, we find that, as did the University of Michigan, the Chicago Police Department had a compelling interest in diversity. Specifically, the [Chicago Police Department] had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.⁸⁹

It is important to emphasize racial realism in policing is not distinguished from other contexts on the basis of overwhelming social science evidence in support of the strategy. One authoritative review of the literature on the impact of police officer race and policing found that the evidence is mixed and inconclusive.⁹⁰

Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973).

87. Patrolmen's Benevolent Ass'n v. City of New York, 74 F. Supp. 2d 321, 329 (S.D.N.Y. 1999).

88. 539 U.S. 306 (2003).

89. *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003).

90. David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1229 (2006).

III. THE PEOPLE AND RACIAL REALISM, PART I: GOVERNMENTS AND THE PROMOTION OF RACIAL REALISM

By the measure of statutes passed by elected representatives, The People do not support racial realism the way they supported the Civil Rights Revolution. As discussed above, neither are there broad decisions by the Supreme Court authorizing racial realism in the employment context.

Yet there are other ways that we might say that racial realism has the support of the American people and is an act of popular sovereignty. Though there are no statutes authorizing its use, racial realism is a key strategy that elected officials sometimes use for filling jobs in government.⁹¹ This derives in part from a combination of the willingness of political actors (including voters) to consider racial abilities and/or signaling,⁹² and the especially painful histories of particular governmental institutions, specifically schools⁹³ and police departments.⁹⁴

First, The People themselves appear to use racial realism when voting for elected officials, or at the very least, they respond positively to elected officials of their own race. This is suggested by the fact that the geographical areas most likely to be represented by nonwhites are those areas where nonwhites have formed majorities.⁹⁵ Whites tend to elect whites, and nonwhites elect nonwhites.⁹⁶ Hawaii, the only state with an Asian American plurality in the electorate, is also the only the state that regularly sends nonwhites (specifically Asian Americans) to the Senate.⁹⁷ Moreover, a large number of social science studies have shown that Americans prefer elected officials to be of the same race as themselves, and respond in positive ways to same-race officials.⁹⁸

Presidents have anticipated or responded to Americans' racial realist proclivities, and have made appointments based on a strategy of racial

91. SKRENTNY, *supra* note 17, at 90.

92. *Id.* at 92.

93. *Id.* at 121-29.

94. *Id.* at 112-16.

95. DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* 23 (1999).

96. *Id.*

97. PEI-TE LIEN, *THE MAKING OF ASIAN AMERICA THROUGH POLITICAL PARTICIPATION* 90-93 (2001).

98. For a review of relevant literature, see Vincent L. Hutchings & Nicholas A. Valentino, *The Centrality of Race in American Politics*, 7 ANN. REV. POL. SCI. 383 (2004).

signaling. President Franklin Delano Roosevelt did the most to establish this pattern, though it was not until black civil rights leaders pressured him to create a position to oversee the treatment of blacks in his administration.⁹⁹ After Roosevelt appointed a white southerner to that position, Roy Wilkins of the NAACP told Roosevelt that African Americans “bitterly resent having a white man designated by the government to advise them of their welfare.”¹⁰⁰ Roosevelt then appointed Robert C. Weaver, an economist with a PhD from Harvard, to serve with the white southerner.¹⁰¹

President Lyndon Johnson would appoint the first African American to a cabinet position – also Robert C. Weaver – not following a classical-liberalism strategy (where Weaver’s race was irrelevant), or following an affirmative-action-liberalism strategy (where Weaver’s race was relevant only because Johnson was remedying past discrimination or imbalances), but a racial realist strategy, where Johnson sought organizational objectives by displaying Weaver’s race.¹⁰² The opportunity came when Congress created the new Department of Housing and Urban Development, which required the appointment of a secretary. Black civil rights groups and the black press demanded that an African American, and specifically Weaver, be appointed, using various racial realist arguments emphasizing forward-looking rationales.¹⁰³ Johnson would end up appointing Weaver for his racial signaling value to African Americans, saying that a white appointment would disappoint “little Negro boys in Podunk, Mississippi,”¹⁰⁴ but that a white official was needed to work with Congress. He explained to his attorney general, Nicholas Katzenbach, “We’ve got to get a super man for [the] number two place, and then send this fellow [Weaver] all around policy touring and let this second fella do the work with the Congress and with the President and with all the other people.”¹⁰⁵ Thus, while serving as a major force for the Civil Rights Revolution, Johnson was also employing a racial realist strategy when making political appointments.

99. HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 77-78* (1978).

100. *Id.*

101. *Id.*

102. SKRENTNY, *supra* note 17, at 95-96.

103. WENDELL E. PRITCHETT, *ROBERT CLIFTON WEAVER AND THE AMERICAN CITY: THE LIFE AND TIMES OF AN URBAN REFORMER 273-74* (2008).

104. *Id.* at 268.

105. *Id.* at 274.

Democratic presidents still use racial realism when making appointments, from Bill Clinton's efforts to have a cabinet that "looks like America"¹⁰⁶ to Barack Obama's strategic appointment of Sonia Sotomayor to the Supreme Court.¹⁰⁷ Yet Republican presidents use racial realism as well, though they use it somewhat differently. If Democrats—who in 2012 received majorities of African American, Latino, and Asian American votes¹⁰⁸—have typically used racial realism to keep their supporters happy, Republicans have used it to signal to all Americans that they are not racists.¹⁰⁹ While Republican Party leaders may oppose affirmative-action liberalism, their actions indicate support for racial realism, and a long line of nonwhite conservatives have enjoyed rapid elevation to prominence in the party, including Clarence Thomas, J.C. Watts, Michael Steele, Bobby Jindal, Susana Martinez, and Marco Rubio.¹¹⁰ Republicans have sometimes been quite explicit about this strategy: consider an op-ed by Representative Lamar Smith (R-TX) in the *Washington Post*, where he argued that Republicans could win Latino votes while opposing legalization or amnesty of undocumented immigrants if they maintained their social conservatism and ran Latino candidates in elections.¹¹¹

A. Racial Realism in the Schools

Another government use of racial realism is in the employment of teachers. Though receiving little support in federal courts, there is a long tradition of support for the racial matching of teachers and students due to beliefs in racial abilities, racial signaling, or both.¹¹²

106. Claire Jean Kim, *Managing the Racial Breach: Clinton, Black-White Polarization, and the Race Initiative*, 117 POL. SCI. Q. 55, 68 (2002).

107. Peter Baker & Adam Nagourney, *Sotomayor Pick a Product of Lessons from Past Battles*, N.Y. TIMES, May 28, 2009, <http://www.nytimes.com/2009/05/28/us/politics/28select.html>.

108. See *Changing Face of America Helps Assure Obama Victory*, PEW RES. CTR. FOR PEOPLE & PRESS (Nov. 7, 2012), <http://www.people-press.org/2012/11/07/changing-face-of-america-helps-assure-obama-victory>; *How Groups Voted*, ROPER CTR., http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html (last visited Mar. 26, 2014).

109. TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 7, 15 (2001).

110. For a discussion of this strategy, see SKRENTNY, *supra* note 17, at 96-105.

111. Lamar Smith, *The GOP's Other Election Day Victory*, WASH. POST, Nov. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/19/AR2010111905213.html>.

112. SKRENTNY, *supra* note 17, at 121-29.

In 1935, decades before the Civil Rights Revolution, social scientist W.E.B. DuBois argued for racial realist strategies for staffing schools, maintaining that white teachers lacked the ability to adequately teach black students.¹¹³ But even at the height of that revolution for classical liberalism in the 1950s and 1960s, prominent advocates in Detroit, Milwaukee, and New York City were arguing for the placement of black and Latino teachers so they could use their racial abilities to teach black and Latino students.¹¹⁴ A director of personnel in New York City agreed that

because of the kind of society we have had, unfortunately, it may be that a Negro teacher, generally, may have a greater likelihood of developing rapport, and if this is an important characteristic, then we ought to try to tap it to the extent possible in getting this characteristic into our schools.¹¹⁵

From the 1980s and 1990s—around the time that the Supreme Court was denying the validity of the role model theory for hiring and placing teachers¹¹⁶—through the 2010s, various individuals and groups argued for racial realist strategies in employing teachers, emphasizing abilities or signaling or both. These included the Carnegie Corporation of New York’s Carnegie Forum on Education and the Economy,¹¹⁷ the dean of the Harvard Graduate School of Education,¹¹⁸ the National Education Association,¹¹⁹ the National

113. W.E.B. DuBois, *Does the Negro Need Separate Schools?*, in *BROWN v. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS* 91, 91-100 (Waldo E. Martin, Jr. ed., 1998); W.E.B. DuBois, *The Students of Lincoln*, in *THE EMERGING THOUGHT OF W.E.B. DuBOIS: ESSAYS AND EDITORIALS FROM THE CRISIS WITH AN INTRODUCTION, COMMENTARIES AND A PERSONAL MEMOIR BY HENRY LEE MOON* 138-40 (Henry Lee Moon ed., 1972).

114. See CHRISTINA COLLINS, “ETHNICALLY QUALIFIED”: RACE, MERIT, AND THE SELECTION OF URBAN TEACHERS, 1920-1980, at 109-11 (2011).

115. *Id.* at 235-36.

116. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

117. TASK FORCE ON TEACHING AS A PROFESSION, CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, *A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY* 79-84 (1986).

118. Patricia Albjerg Graham, *Black Teachers: A Drastically Scarce Resource*, 68 PHI DELTA KAPPAN 598, 599 (1987).

119. Livingston Alexander & John W. Miller, *The Recruitment, Incentive, and Retention Programs for Minority Preservice Teachers*, in *TEACHER RECRUITMENT AND RETENTION WITH A SPECIAL FOCUS ON MINORITY TEACHERS* 45 (Antoine M. Garibaldi ed., 1989); Jody Daughtry, *Recruiting and Retaining Minority Teachers: What Teacher Educators Can Do*, in *TEACHER RECRUITMENT AND RETENTION WITH A SPECIAL FOCUS ON MINORITY TEACHERS*, *supra*, at 25.

Commission on Teaching and America's Future,¹²⁰ the Education Commission of the States,¹²¹ and Teach for America.¹²²

State governments also supported racial realism in the employment of teachers. California passed a law stating that nonwhite teachers had abilities and signaling that benefited both nonwhites and whites, stating:

It is educationally sound for the minority student attending a racially impacted school to have available to him or her the positive image provided by minority classified and certificated employees. It is likewise educationally sound for the child from the majority group to have positive experiences with minority people, that can be provided, in part, by having minority classified and certificated employees at schools where the enrollment is largely made up of majority group students.¹²³

The Texas Education Agency issued a report in 1994 that argued for increased nonwhite presence in the teacher corps due to nonwhite teachers' importance as role models, their abilities to "interact more successfully with students who have culturally similar backgrounds to their own," and their abilities to increase the skills of white teachers to teach nonwhite students.¹²⁴ At the federal level, Bill Clinton's Secretary of Education, Richard W. Riley, used racial realist arguments to justify increased diversity among the nation's teachers:

We need teachers who can relate to the lives of diverse students, and who can connect those students to larger worlds and greater possibilities Children need role models—they need to see themselves in the faces of their teachers [T]eachers of color help fight the tyranny of low expectations—the pernicious voices that whisper into young ears, "You can't do it. Don't even try."¹²⁵

120. NATIONAL COMMISSION ON TEACHING AND AMERICA'S FUTURE, WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE 8 (1996).

121. Arthur Dorman, *Recruiting and Retaining Minority Teachers: A National Perspective*, POLICY BRIEFS, no. 8, 1990, at 5; Barbara J. Holmes, *Guest Commentary: New Strategies Are Needed to Produce Minority Teachers*, POLICY BRIEFS, *supra*, at 8.

122. *The Importance of Diversity*, TEACH FOR AM., <http://www.teachforamerica.org/why-teach-for-america/who-we-look-for/the-importance-of-diversity> (last visited Apr. 22, 2014).

123. CAL. EDUC. CODE § 44100(a)(2) (2004).

124. Nancy Stevens, *Texas Teacher Diversity and Recruitment*, TEX. EDUC. AGENCY 2-4 (1994), http://www.tea.state.tx.us/acctres/Spec_PRR_4_1994.pdf.

125. Richard W. Riley, *Our Teachers Should Be Excellent, and They Should Look Like America*, 31

B. Racial Realism in Law Enforcement

The other major area of government support for racial realism is, as described above, law enforcement, especially policing. As with teaching, the strategy of racial realism in policing had advocates as early as the 1930s, as can be seen in the 1931 report of the National Commission on Law Observance and Enforcement, which argued that ethnically diverse police officers would be beneficial in policing.¹²⁶

But the most forceful and consistent advocacy of racial realism in this context began in the late 1960s, after the nation's cities began combusting in racial violence.¹²⁷ In response, New York City began to recruit black and Latino officers with the belief that their presence would mitigate the rioting and rebellions.¹²⁸

In the late 1960s and early 1970s, a series of government commissions issued reports urging racial realist strategies in the hiring and employment of police officers, based on racial abilities or signaling or both. These include the President's Commission on Law Enforcement and the Administration of Justice in 1967,¹²⁹ the National Advisory Commission on Civil Disorders (also known as the Kerner Commission) in 1968,¹³⁰ and the National Advisory Commission on Criminal Justice Standards and Goals in 1973.¹³¹ A special counsel who studied the Los Angeles County Sheriff's Department after rioting there in 1992 made similar arguments,¹³² as did a 2001 report of the U.S. Justice Department.¹³³

EDUC. & URB. SOC'Y 18, 19-20 (1998).

126. THOMAS A. JOHNSON ET AL., *THE POLICE AND SOCIETY: AN ENVIRONMENT FOR COLLABORATION AND CONFRONTATION* 107 (1981).

127. SKRENTNY, *supra* note 17, at 113.

128. *Id.*

129. *The Challenge of Crime in a Free Society*, PRESIDENT'S COMM'N ON L. ENFORCEMENT & ADMIN. JUST. 101-02, 107 (Feb. 1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

130. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 165-66 (1968).

131. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *POLICE* 329-30 (1973).

132. James G. Kolts et al., *The Los Angeles County Sheriff's Department*, L.A. CNTY. 197-216 (July 1992), http://www.parc.info/client_files/Special%20Reports/3%20-%20Kolts%20Report%20-%20LASD.pdf.

133. *Principles for Promoting Police Integrity: Examples of Promising Police Practices and Policies*, U.S. DEP'T JUST. 18 (Jan. 2001), <https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf>.

This kind of advocacy has not only come from appointees of elected officials, but also from some groups representing people of color. For example, while fighting for classical liberalism and affirmative-action liberalism, some local civil rights groups have supported integration of police departments with racial realist intents.¹³⁴

Though it is not clear how often hiring occurs with racial realist motivations, it is clear that the hiring of nonwhite officers rose dramatically following the 1960s' racial violence and the strong advocacy of racial realist hiring and placement. Specifically, in the years between 1967 and 2000, minority employment increased in several police forces, including those in New York City (from 5% to 35%); Chicago (20% to 40%); Philadelphia (20% to 40%); Detroit (5% to 65%); and San Francisco (5% to 40%).¹³⁵

IV. THE PEOPLE AND RACIAL REALISM, PART II: THE PRIVATE SECTOR AND THE RACIAL REALIST STRATEGY

In the private sector, it might be said that The People acted on their own: racial realism appears to be just as entrenched as in government employment. It is a prominent strategy and is often advocated in several fields, including medicine, business (especially marketing), and entertainment. It may be a part of any business that has some interaction with diverse populations, and where employers may perceive that racial abilities help them understand customers or use racial signaling to make customers feel a sense of trust.¹³⁶

Medicine is an especially compelling sector for racial realism because the stakes are so high. Here, there was some vague statutory acknowledgement of

134. NICHOLAS ALEX, *BLACK IN BLUE: A STUDY OF THE NEGRO POLICEMAN* 28-29 (1969); LEONARD MOORE, *BLACK RAGE IN NEW ORLEANS* (2010).

135. Sklansky, *supra* note 90, at 1214.

136. See the discussion of how minorities can provide "access and legitimacy" to businesses dealing with diverse populations in David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, 74 HARV. BUS. REV. 79, 83 (1996). For a sense of how widespread employer use of racial realism may be, consider the findings of sociologists Eric Grodsky and Devah Pager, who observed that African Americans may earn opportunities but lower pay than whites in occupations when their clients are also black. Black clients are, on average, poorer than nonblack clients, and this depresses income when employers place blacks with same-race clients based on their perceived racial abilities or signaling. Grodsky and Pager find that there are fewer racial disparities in earnings when customer relations are not a measure of productivity, as in the case of bus drivers. Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542, 561 (2001).

the value of physicians' varying racial abilities. The Minority Health and Health Disparities Research and Education Act of 2000 contains provisions to encourage the training and hiring of nonwhite physicians,¹³⁷ and Senator Edward Kennedy (D-MA) argued for the bill to his colleagues with racial realist arguments emphasizing white physicians' inability to give the same treatment to African American patients that they give to white patients.¹³⁸

There has been considerable action on this outside of government as well. A vice president of a Boston HMO, Harvard Pilgrim Health Care, explained very clearly a racial realist hiring rationale when she told *Fortune* magazine that the company had a "diversity imperative" because "[m]any of these [minority] customers demand health care workers who aren't judgmental—and we have to make sure we provide them."¹³⁹ Various foundations, commissions, and professional organizations have also promoted racial realism in the employment of physicians and other health workers, including the Commonwealth Fund,¹⁴⁰ the Kellogg Foundation's Commission on Diversity in the Healthcare Workforce (headed by George H.W. Bush's Health and Human Services Secretary, Louis W. Sullivan),¹⁴¹ the American Medical Student Association,¹⁴² the Institute of Medicine's Committee on Institutional and Policy-Level Strategies for Increasing the Diversity of the U.S. Health Care Work Force,¹⁴³ the American Hospital Association,¹⁴⁴ and the American College

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137. Minority Health and Health Disparities Research and Education Act of 2000, Pub. L. No. 106-525, 114 Stat. 2495 (codified at 42 U.S.C. § 287c-32 (2006)).
138. 145 CONG. REC. S14,288 (daily ed. Nov. 8, 1999) (statement of Sen. Kennedy).
139. Kenneth Labich & Joyce E. Davis, *Making Diversity Pay*, FORTUNE, Sept. 9, 1996, http://money.cnn.com/magazines/fortune/fortune_archive/1996/09/09/216617/index.htm.
140. JOSEPH R. BETANCOURT ET AL., *Cultural Competence in Health Care: Emerging Frameworks and Practical Approaches*, COMMONWEALTH FUND 17 (Oct. 2002), http://www.commonwealthfund.org/usr_doc/betancourt_culturalcompetence_576.pdf.
141. *Missing Persons: Minorities in the Health Professions*, SULLIVAN COMM'N ON DIVERSITY HEALTHCARE WORKFORCE 18-25 (Sept. 2004), http://health-equity.pitt.edu/40/1/Sullivan_Final_Report_000.pdf.
142. Chris Rauber, *Shortage of Minority Doctors Proves Hard to Cure*, S.F. BUS. TIMES, Mar. 19, 2004, <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2004/03/22/focus2.html>.
143. INST. OF MED., *IN THE NATION'S COMPELLING INTEREST: ENSURING DIVERSITY IN THE HEALTH-CARE WORKFORCE* (Brian D. Smedley et al. eds., 2004), http://www.nap.edu/openbook.php?record_id=10885.
144. EMILY FRIEDMAN, *WHITE COATS AND MANY COLORS: POPULATION DIVERSITY AND ITS IMPLICATIONS FOR HEALTH CARE: AN ISSUE BRIEFING PREPARED FOR THE AMERICAN HOSPITAL ASSOCIATION* 40-42 (2005), http://www.scha.org/files/documents/WhiteCoatsManyColors_o.pdf.

of Physicians.¹⁴⁵ In the *Grutter v. Bollinger* Supreme Court case regarding racial preferences in law school admissions, thirty different groups (including the American Medical Association and associations representing dentists, pharmacists, and nurses) signed on to an amicus brief that used racial realist rationales for physician employment.¹⁴⁶ According to a 2006 report of the Department of Health and Human Services,

[G]reater health professions diversity will likely lead to improved public health by increasing access to care for underserved populations, and by increasing opportunities for minority patients to see practitioners with whom they share a common race, ethnicity or language. Race, ethnicity, and language concordance, which is associated with better patient-practitioner relationships and communication, may increase patients' likelihood of receiving and accepting appropriate medical care.¹⁴⁷

Racial realism is also a prominent strategy in marketing. Nonwhite marketing professionals have promoted their own racial abilities to reach racially concordant consumers since the middle years of the twentieth century; in 1953, African American marketers formed their own association, the National Association of Market Developers, to promote the use of blacks to market to blacks.¹⁴⁸ Firms dominated by whites have also seen the hiring of nonwhites to market to nonwhites as smart business strategy.¹⁴⁹ This was becoming common by the 1990s, and so it was unremarkable for *Fortune* magazine to state in 1996, "a company with a diverse work force will have an easier time serving markets that themselves are becoming more

145. AM. COLL. OF PHYSICIANS, RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, UPDATED 2010, 13-14 (2010), http://www.acponline.org/advocacy/current_policy_papers/assets/racial_disparities.pdf.

146. Brief of the Ass'n of Am. Med. Colls. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

147. Bureau of Health Professions, *The Rationale for Diversity in the Health Professions: A Review of the Evidence*, U.S. DEP'T HEALTH & HUM. SERVS. 3 (2006), <http://bhpr.hrsa.gov/healthworkforce/reports/diversityreviewevidence.pdf>.

148. JASON CHAMBERS, MADISON AVENUE AND THE COLOR LINE: AFRICAN AMERICANS IN THE ADVERTISING INDUSTRY 66 (2009).

149. SKRENTNY, *supra* note 17, at 63-65.

multicultural.”¹⁵⁰ The notion of racial abilities extends beyond marketing strategy to customer relations in general.¹⁵¹

In sociologist William Bielby’s analysis of a major finance firm, the practice of matching African American financial advisors with African American clients was described in a 2005 internal report as something that occurred “always.” It led to frustrations among the clients, who resented the higher turnover among the African American financial advisors. The report stated:

Advisors and managers criticized always trying to fit an African American client with an African American advisor, especially when an advisor leaves the business. Because of the high turnover of African American advisors, this often results in a client being paired with 2 or 3 advisors just because they are African Americans. Ultimately, this “shuffling” results in the client becoming frustrated and requesting a white advisor, because they feel they will provide a more stable relationship.¹⁵²

Racial realist arguments were made explicit in a legal context in the amicus brief of the Fortune 500 companies in the 2003 *Grutter v. Bollinger* case.¹⁵³ That brief argued that firms with many nonwhite employees “are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to these consumers” and “a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world.”¹⁵⁴

Another prominent racial realist strategy in the business sector is to leverage racial abilities for the innovation and dynamism that “diversity” is thought to confer to any phase of the business operation.¹⁵⁵ As explained by a personnel executive of the Cummins Engine Company in 1986, “differences

150. Labich & Davis, *supra* note 139.

151. Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 244 (2001).

152. William T. Bielby, *Minority Vulnerability in Privileged Occupations: Why Do African American Financial Advisers Earn Less than Whites in a Large Financial Services Firm?*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 24 (2012).

153. 539 U.S. 306 (2003).

154. Brief for 3M et al. as Amici Curiae in Support of Defendants-Appellants at 10, *Grutter*, 539 U.S. 306 (No. 01-1447).

155. SKRENTNY, *supra* note 17, at 71-74.

among people of various racial, ethnic, and cultural backgrounds generate creativity and innovation as well as energy in our work force.”¹⁵⁶

Firms made similar arguments in amicus briefs for the *Grutter* case. MTV Networks submitted a brief that stated, “[t]he continual innovation required for success in the industry depends on heterogeneity in MTV’s creative work-teams.”¹⁵⁷ The Fortune 500 companies’ brief stated, “a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives.”¹⁵⁸ More recently, Fortune 100 corporations submitted a brief in the *Fisher v. University of Texas* case making a more vague but nevertheless racial realist argument, stating that “[f]or amici to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures and economic backgrounds.”¹⁵⁹

Perhaps nowhere is racial realism more openly practiced than in the advertising and entertainment sectors. Here, employers seek to cater to customer tastes by deploying racial signaling, typically seeking to appeal to different consumers by using models or actors of concordant racial phenotypes.¹⁶⁰ When I say it is openly practiced, I am referring to the still-common practice of specifying race in casting calls, or “breakdowns,” where race is frequently specified as a way to achieve organizational goals (optimal audience reaction) rather than opportunity or justice goals for models and actors.¹⁶¹

It took several decades and much pressure from civil rights groups for advertisers to begin to cast nonwhites with regularity,¹⁶² but by the 1990s it became commonplace. For example, a study of 813 morning and daytime

156. BUREAU OF NAT’L AFFAIRS, AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS 93 (1986).

157. Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of MTV Networks in Support of Respondents at 6, *Grutter*, 539 U.S. 306 (Nos. 02-241 & 02-516).

158. Brief for 3M et al., *supra* note 154, at 10.

159. Brief for Fortune-100 and Other Leading American Businesses as Amici Curiae Supporting Respondents at 2, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). This brief also emphasized a less racial realist argument, stressing at several points that these firms wanted employees, presumably of any race, who had been educated in a racially diverse environment.

160. SKRENTNY, *supra* note 17, at 158-59.

161. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 10 (2007).

162. SKRENTNY, *supra* note 17, at 158.

children's television commercials in 1997 found that African Americans appeared in about 51% of all commercials, Asian Americans appeared in 9%, and Latinos in about 9%.¹⁶³ Advertisers appear unwilling to risk making whites feel unwelcome, however, as this group appeared in 99% of the ads.¹⁶⁴

This suggests another feature of racial realism in media and entertainment: it is in this sector that racial realism for *whites* is most prominent.¹⁶⁵ Movie studios are afraid of casting too many nonwhites in a film, and this leads to the common practice of a black *and* a white actor sharing lead roles.¹⁶⁶ The *Los Angeles Times* appeared unaware that it might be discussing a violation of classical liberalism's ban on catering to customer discrimination when it reported, "[s]tudios are more comfortable casting actors of color, such as Jennifer Lopez and Will Smith, despite their popularity, when they include a white star to ensure 'mainstream' appeal."¹⁶⁷

In the low-skilled sector—in jobs in construction, manufacturing, food service, and other fields—a racial and often immigrant realist strategy may be admitted in interviews with social scientists or journalists.¹⁶⁸ Employers in these fields state that Latinos and Asians make the best workers, often or especially when they are foreign-born, because they have abilities that other groups lack.¹⁶⁹ Typically, the most prized quality is the ability to work long and hard despite poor working conditions and low pay.¹⁷⁰ Though racial realism in this sector uses the perceived abilities of nonwhites, as in the other sectors, it is the least defensible because it reproduces the same hierarchies in nearly all jobs (Asians and Latinos above whites and especially above blacks, and immigrants above American-born workers), and it might even be said (following

163. Hae-Kyong Bang & Bonnie B. Reece, *Minorities in Children's Television Commercials: New, Improved, and Stereotyped*, 37 J. CONSUMER AFF. 42, 55 (2003).

164. *Id.*

165. Some use of race in casting may be based on artistic considerations related to historical authenticity, and though Title VII does not appear to authorize racial realism in this context, it is unlikely to be challenged. I thank Christine Jolls for emphasizing this point to me. On the complexity of "social geography" and how this may lead to selective enforcement of discrimination law, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 25 (2000).

166. SKRENTNY, *supra* note 17, at 168.

167. Robinson, *supra* note 161, at 19 n.74 (describing the implication of the *Los Angeles Times* article).

168. SKRENTNY, *supra* note 17, at 222-27.

169. *Id.*

170. *Id.*

Ackerman) to humiliate not only the excluded, but also the preferred, who are often exploited, especially when they are migrants. Because of the EEOC's recent efforts to challenge racial realism in low-skilled employment, there is a growing list of successful cases and settlements against employers using racial realist preferences for Asian and Latino immigrants.¹⁷¹

V. IS RACIAL REALISM THE PEOPLE'S AMENDMENT TO THE CIVIL RIGHTS REVOLUTION?

Ackerman argues that the Civil Rights Revolution was a movement of the American people to remake the foundational legal framework of the nation. It resulted in statutes, administrative regulations, and court rulings that worked toward the ends of justice, and it achieved justice by eliminating systematic, race-based humiliation of minority groups, as well as humiliation of persons marked by sex, national origin, and religious differences.

Is the movement toward racial realism similarly a movement of The People? And how are we to assess its fit with the Civil Rights Revolution?

First, as stated above, federal, state, and local governments have through their actions and/or words shown at least some support for racial realism. They have done so in their use of appointments to executive, judicial, and party leadership posts, and in the hiring of law enforcement officers and teachers. Government use of racial realist strategies, especially by elected officials, at least implies the support of The People.

In other ways, racial realism appears to be a movement of The People. Specifically, employers are part of The People, as are advocates, activists, members of professional organizations, and others affiliated with medicine, business, and media and entertainment, and they have in various ways shown their support for racial realism.

When the government and private organizations and employers have used racial realist strategies—or advocated for their usage—objection, criticism, and controversy is typically limited to specific instances of hiring and placement, at least since the 1980s. Supporters of racial realism in skilled and professional

171. See, e.g., *EEOC v. Paramount Staffing, Inc.*, No. 2:06-cv-2624 (W.D. Tenn. Aug. 19, 2010); *EEOC v. Propak Logistics, Inc.*, No. 1:09-cv-311, 2010 WL 3081339 (W.D.N.C. Aug. 6, 2010); *EEOC v. Little River Golf, Inc.*, No. 1:08-cv-546 (M.D.N.C. Aug. 6, 2009); *EEOC v. E & T Foods, L.L.C.*, No. 3:06-cv-318 (W.D.N.C. Jan. 28, 2008). For a discussion of racial realism in the low-skilled sector and legal challenges to it, see SKRENTNY, *supra* note 17, at 216-64.

jobs typically are proud of what they are doing, and appear to expect to be praised rather than criticized.

Yet there are reasons to question the constitutional equivalence of racial realism and the Civil Rights Revolution. First, there are no government spokespersons clearly articulating why the nation should be moving toward racial realism. Presidents or members of Congress may mention it in passing, but there are no speeches comparable to those of Martin Luther King, Jr., Lyndon Johnson, or Hubert Humphrey that show how racial realism fits with American traditions and why it is the right thing for employers to be doing. It has happened slowly, in a piecemeal fashion, mostly in the background, until it has become commonplace while rarely being acknowledged.

Second, and relatedly, racial realism lacks an authorizing statute. Racial realism has come up in Congress, such as when Senator Kennedy argued for the Minority Health and Health Disparities Research and Education Act of 2000, but no senator recognized its distinctiveness from classical liberalism or affirmative-action liberalism at that time. The wisdom or justice of racial realism has never really been debated in Congress or any public venue that I am aware of, nor has its fit with the Civil Rights Revolution.

Moreover, in addition to the lack of an official, acknowledged “green light” for racial realism, there appear to be red lights ordering it to stop, or warning lights suggesting this strategy of management is not a good idea. There are court decisions denying its legality or constitutionality, including at the Supreme Court level. The EEOC guidelines at best suggest “caution” when using racial realism¹⁷²—and at some points appear to deny the legality of racial realism altogether.¹⁷³

There is a third way that racial realism is distinct from the Civil Rights Revolution. If Ackerman is correct that a goal of that revolution was to end institutionalized humiliation of minority groups, then it is very much a problem that some nonwhites have resisted some racial realist strategies. While I have thus far emphasized the humiliation that comes about from the practice of racial realism in the low-skilled employment sector, the humiliation of people of color is also apparent in some studies of business and professional employees. Some complain poignantly of being “dead ended” in jobs that are intended to leverage racial abilities or signaling but have little direct connection

172. EEOC COMPLIANCE MANUAL, *supra* note 25, § 15.

173. *Id.*

to profit generation and thus lack promotion possibilities.¹⁷⁴ Racial realism can also be used in strategic ways that nevertheless do not lead to hiring of nonwhites beyond token levels.¹⁷⁵ Most importantly, some nonwhites have challenged their racial realist work assignments in court—a dynamic that is apparently quite rare (or nonexistent) when employers use classical liberal or affirmative-action liberal strategies to hire and place workers.¹⁷⁶

Finally, while private employers are themselves members of The People, it is difficult to argue that they are acting with the same kind of authorization and spokesperson status that the leaders of the Civil Rights Revolution had. These employers and various civil society advocates are unelected, and they are accountable to shareholders, funders, or to no one. When employers and other elites are creating their own version of employment law,¹⁷⁷ it at least suggests that we have moved beyond the Civil Rights Revolution, but it also suggests that perhaps we should not have made this move. At the very least, the phenomenon needs to be acknowledged, and brought in line with the justice and opportunity goals that are still widely embraced.

174. COLLINS, *supra* note 49, at 77.

175. See Shin & Gulati, *supra* note 50, at 1053; David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1594 (2004) (“My interviews are replete with examples of black lawyers who have been trotted out to impress a black politician or corporate counsel and then trotted back into the oblivion from whence they came, never to see the work that their diversity helped to procure.”).

176. This was the case with *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999), discussed above. For a challenge by nonwhites to a racial realist policing strategy, see *Patrolmen’s Benevolent Ass’n v. City of New York*, 74 F. Supp 2d 321, 329 (S.D.N.Y. 1999). The Walgreens drugstore chain had a strong record of hiring African American store managers and placing them in African American neighborhoods, but this practice was challenged by some African American managers, and the EEOC took up the case. Walgreens settled out of court, agreeing to pay 10,000 black employees a total of \$24 million. Press Release, EEOC, Final Decree Entered with Walgreens for \$24 Million in Landmark Race Discrimination Suit by EEOC (Mar. 25, 2008), <http://www.eeoc.gov/eeoc/newsroom/release/3-25-08.cfm>; Press Release, EEOC, Walgreens Sued for Job Bias Against Blacks (Mar. 7, 2007), <http://www.eeoc.gov/eeoc/newsroom/release/3-7-07.cfm>.

177. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 138–58 (2009).