

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).