The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America

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The Supreme Court's 5-4 decision in *Grutter v. Bollinger*[1] makes clear that affirmative action policies in the United States are not going to disappear anytime soon. At the same time, the legal arguments defended in the case reflect a significant evolution in how the law understands affirmative action and, more broadly, the use of race in selection processes. Initially, federal judges viewed race-conscious affirmative action as both a realistic political response to civil rights inequities and as an effective remedy for a long history of legal discrimination.[2] Today, while this traditional defense of the policy continues to have many supporters,[3] affirmative action is increasingly being justified not as a remedy to historical discrimination and inequality, but as an instrumentally rational strategy used to achieve the positive effects of racial and gender diversity in modern society.[4]

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[1] 123 S. Ct. 2325 (2003).

[2] For a broader discussion of these ideas, see JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 161-75 (1996).

[3] *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2443-46 (2003) (Ginsburg, J. dissenting). *See generally* Richard Delgado, *Why Universities are Morally Obligated to Strive for Diversity: Restoring the Remedial Rational for Affirmative Action*, 68 U. COLO. L. REV. 1165, 1165-66 (1997); Amy Guttman, *Responding to Racial Injustice, in* K. ANTHONY APPIAH & AMY GUTTMAN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 106 (1998); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997);.

[4] For a similar claim in its evolution, see Kingsley R. Browne, *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 12 LAB. LAW. 451, 451-54 (Winter/Spring 1997) (exploring the faulty assumptions on which rest the Department of Justice's nonremedial justifications for its preferential hiring practices); Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 20 (discussing recent

Elite universities were the first to openly and proudly propound an instrumental rationale for affirmative action, and Justice Powell's famous *Regents of University of California v. Bakke* decision affirmed their vision. Powell rejected a defense of affirmative action based on discrimination or inequality of groups[5] while proclaiming a compelling state interest in maintaining diversity in higher education.[6] Justice O'Connor embraced this rationale in *Grutter*, saying little about rectifying past wrongs and promoting greater equities and instead emphasizing the importance of diversity for higher education and for the broader United States society, particularly for our national security and business.[7] Relying on amicus briefs from Fortune 500 companies and retired military leaders, O'Connor defended diversity as a compelling state interest in part on the grounds that it "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. . . . [T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[8]

There are a number of possible reasons for the legal shift towards this more instrumental and forward-looking approach to defending affirmative action. Perhaps it is just another example of what Derrick Bell has called "interest-convergence"—that civil rights progress occurs only in moments when it benefits white elites, whether for economic profit or national security.[9] Just as *Brown v. Board of Education*'s historic prohibition of segregation came in a context of the United States military promoting diversity on behalf of national security, here again in the wake of terrorist attacks—a new national crisis—the Court appears to be paying attention to the views of retired military leaders and powerful business forces that claim affirmative action protects their interests.[10] Or perhaps the emphasis reflects a strategic move by affirmative action proponents in response to the Supreme

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developments in formulating justifications for affirmative action); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?* 52 FLA. L. REV. 861, 885-88 (2000) (exploring reasons for employing affirmative action programs in the realm of higher education in the United States).

[5] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306-11 (1978).

[6] *Id.* at 311-14.

[7] Grutter v. Bollinger, 123 S. Ct. 2325, 2339-41 (2003).

[8] *Id.* at 2340.

[9] Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528-33 (1980).

[10] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 111 (2000) ("The Justice Department had argued that segregation had to be abandoned because of its use in Soviet propaganda."); PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 234-38 (1999) (discussing the amicus brief filed by the Department of Justice in *Brown v. Board of Education* and the contention that desegregated schools are good for foreign policy); John D. Skrentny, *The Effect of the Cold War on African-American Civil Rights: America and the World Audience, 1945-1968*, 27 THEORY AND SOC'Y 237, 237 (1998) (stressing "the contributing importance of America's Cold War struggle with the Soviet Union in the development of black civil rights").

Court's narrowing of the policy over the last two decades.[11] Responding to the Court's decision in *Wygant v. Jackson Board of Education,* both Kathleen Sullivan and Randall Kennedy proposed instrumental reasons to maintain a diverse workforce, providing such examples as "improving . . . services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force . . . ."[12] A decade later, in response to the *Adarand Constructors, Inc. v. Pena* decision, more legal academics promoted alternative rationales for legitimizing affirmative action,[13] while the Justice Department promoted expanding the use of "operational needs" and "forward looking" programs.[14] In defending affirmative action in 2003, the University of Michigan's lawyers made a similar choice: As Eric Foner wrote shortly after the decision, "Partly because they assumed, correctly, that Justice Sandra Day O'Connor, a strong critic of the idea of 'societal racism,' would turn out to be the swing vote in a 5-to-4 decision, Michigan's lawyers decided to emphasize not persistent racial inequality but the educational value of racial diversity."[15]

Although these arguments certainly represent part of this change in legitimating affirmative action, the new diversity emphasis also builds on wide-spread practices in society. Public and private employers have long used instrumental reasons to defend race-conscious hiring in the areas of education, community safety, national security, and business.[16] In many instances, employers believe, rightly or wrongly, that hiring persons of a

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[11] The Court narrowed the use of affirmative action in a series of cases during the 1980s and 90s, most notably in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-39 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989); and *Wygant v. Jackson Board of Education*, 476 US 267, 276 (1986).

[12] Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986) (describing the benefits of affirmative action for African-Americans which include: "the accumulation of valuable experience, the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations, the eradication of debilitating stereotypes, and the inclusion of black participants in making consequential decisions affecting black interests").

[13] *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 79 (2003) (defending affirmative action for its ability to integrate the workforce and promote "international cooperation, trust, and solidarity, and thus (help) the workplace perform its crucial mediating functions"); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1022-34 (1996) (promoting new strategies [in response to the failure of moral claims to achieve civil rights victories in the courtroom], including a "functional theory of diversity," which emphasizes the positive benefits of diversity in politics, schools, and the workplace).

[14] Browne, *supra* note 4, at 453.

[15] Eric Foner, *Diversity Over Justice*, NATION, July 14, 2003, at 4.

[16] *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003). *See generally* William G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (examining "the use of race as a factor in admitting students to selective colleges and professional schools").

particular racial or ethnic background is a bona-fide occupational qualification ("BFOQ") that is important in the provision of services or the making, marketing, and design of some product.[17] Usually, employers hire someone to interact with co-ethnic or co-racial clientele or to improve the internal efficiency of the organization by matching workers (who are often immigrants) with co-ethnics or co-racials. Immigration has provided more incentives for strategic race- or ethnicity-based hiring. In immigrant-rich metropolises and cities with large black populations, private businesses match employees with their clients' race or ethnic background. The notion of hiring for "diversity" because of the positive benefits of difference-conscious hiring has made the use of race BFOQs a business practice taken for granted.

Until recently, this form of race BFOQ has been widely considered illegal. Title VII of the Civil Rights Act, for instance, explicitly prohibits its use in employment.[18] Thus, the *Grutter* decision represents the most prominent court action in narrowing a long-standing disjuncture between law in practice and law on the books, furthering other federal court decisions that have increasingly allowed race BFOQs in employment. But the move to acknowledge the instrumental use of race in society has led to a new set of inconsistencies within the law. As we will show, race BFOQs have become accepted in certain areas of the law (especially higher education admissions and police and law enforcement hiring, and tacitly accepted in some business hiring, particularly in settings dominated by immigrant workers) and yet rejected in other areas (e.g., the hiring of teachers and the enabling of descriptive political representation under the Voting Rights Act). From our discussion, it seems clear that instrumental affirmative action is not limited to the First Amendment exception in higher education;[19] how far it expands under law, however, is quite unclear and remains a matter with no uniformity among federal judges.

Moreover, if the law is catching up with American society in terms of

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[17] The specific term "BFOQ" comes from Title VII of the Civil Rights Act and is discussed further in Section I. *See infra* notes 48-59 and accompanying text. Although not codified until 1964, its use is by no means new to the post-Civil Rights Era. *See* James R. Barrett & David Roediger, *Inbetween Peoples: Race, Nationality and the 'New Immigrant' Working Class*, 16 J. AM. ETHNIC HIST. 3 (1997). Moreover, Abercrombie and Fitch's recent defense of their hiring practices—they prefer to hire young people who look "all American"—shows that the BFOQ defense continues to be used in opposition to diversity as much as for it. Steven Greenhouse, *Going For the Look But Risking Discrimination*, N.Y. TIMES, July 13, 2003, at A12 ("Abercrombie's 'classic American' look, pervasive in its stores and catalogs and on its Web site, is blond, blue-eyed and preppy. Abercrombie finds such workers and models by concentrating its hiring on certain colleges, fraternities and sororities.").

[18] Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2000); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

[19] The Court in *Bakke* argued that universities have a unique goal of "paramount importance" to have "students who will contribute the most to the 'robust exchange of ideas.'" *Bakke*, 438 U.S. at 313 (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950)); *see also Grutter*, 123 S. Ct. at 2339.

race consciousness, we need to ask whether this is a good move. The legal evolution raises two significant points about the alliance between affirmative action law and societal use of race as a BFOQ in the United States. First, this instrumental form of affirmative action appears to be replacing the more traditional affirmative action model that was designed to rectify historical or prevent current discrimination. Early affirmative action decisions legitimated the policy's use to overcome discrimination and inequality by improving opportunities for African-Americans and other minorities.[20] Instrumental affirmative action based on the BFOQ or an instrumental use of ethno-racial difference has a very different quality. It recognizes ethno-racial pluralism as a good thing, but for reasons that are more likely to emphasize economics, community and social stability.[21] And unlike traditional affirmative action law, its logic is based on considerations of the present or future, ignoring historical discrimination and in turn, ignoring structural power differences.[22]

Second, by embracing the BFOQ logic, the Court seems to have forgotten why judges and legislators were initially reluctant to have any form of race-based BFOQ and why they consistently argued for an extremely narrow reading of the law in areas where an exception to employment discrimination is allowed (e.g., gender, disability, and age).[23] Courts traditionally restricted the use of BFOQs because they believed it rested in deeply-seated stereotypes that are harmful to the targeted group.[24] The BFOQ rests on the belief that there is something essential about the behav-

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[20] *See infra* notes 34-37 and accompanying text. For a broader explanation of the foundations of anti-discrimination law, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

[21] For a discussion of diversity's benefits to the workplace, see Estlund, *supra* note 13, at 4, 5; Sturm & Guinier, *supra* note 13, at 1022-34.

[22] While we argue that there is a shift in the logic to instrumental forms of affirmative action, others disagree. Deborah Malamud, for example, argues that a different logic is at work:

> [W]hen judges embrace the "operational needs" defense of race-based hiring, the message is that the cultural differences that separate the white and black communities (resulting largely from historical and present segregation) are so great that they cannot be bridged by proper training. If that is what we believe, it is no accident that ethnic niches are not challenged more frequently and that the challenges are not more successfully brought.

Deborah C. Malamud, *Affirmative Action and Ethnic Niches: A Legal Afterward*, *in* COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 313, 334 (John David Skrentny ed., 2001). However, we would hasten to point out that there is still a significant difference. In instrumental affirmative action, historical discrimination is at best symbolic or implicit. This implicit logic is not precise enough or conscious enough to enable the kind of political and legal justification affirmative action policies need. In fact, as we show below, many advocates of instrumental affirmative action are explicit in their future orientation.

[23] *See* discussion *infra* Part II.

[24] *See infra* notes 54-59 and accompanying text.

ior (or, as K. Anthony Appiah has termed, a "script"[25]) of the demographic group. Race theorists have long dismissed this argument: Race consciousness needs to be recognized, and either defended or critiqued, with the understanding that it is premised in historical context and is shaped by social-political forces, not biology.[26] We will show that many of the new arguments about instrumental affirmative action deviate from the old understandings of race in law as a politically, legally, and historically constructed concept and instead discuss the concept uncritically in biological terms. Moreover, judges ought to be wary that the current use of instrumental affirmative action and race BFOQs can continue to limit as much as it can create opportunity, trapping groups into certain positions and hierarchical categories. At the least, judges and legal scholars need to start asking what the underlying foundations of anti-discrimination and affirmative action law should be and how these foundations are best addressed.[27]

What does this shift to instrumental affirmative action mean for the comparative study of civil rights law? For comparative analysis, this shift is significant because it is a shift from affirmative action based on specific facts of American history (centuries of slavery followed by the Jim Crow system of apartheid, as well as widespread discrimination against groups both native and migrating to the United States) and the specifics of American law (the Civil Rights Act of 1964 and the Fourteenth Amendment) to perceived organizational imperatives rooted in racial differences. Instrumental affirmative action can work and be understood in the same way in any national context where there are perceived differences between group cultures, especially where there is group segregation and hierarchy.

We begin with a brief discussion of the historical background of affirmative action and the BFOQ. In Section II, we show the extensive use of race BFOQs in society and increasingly in law, focusing on policing,

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[25] K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE, *supra* note 3, at 30, 97.

[26] *See generally* ANATOMY OF RACISM (David Theo Goldberg ed., 1990); PAUL GILROY, 'THERE AIN'T NO BLACK IN THE UNION JACK': CULTURAL POLITICS OF RACE AND NATION (1987); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 54-55 (1994); Stuart Hall, *The Question of Cultural Identity*, *in* MODERNITY, AN INTRODUCTION TO MODERN SOCIETIES (Stuart Hall et al., eds., 1996) ("[R]ace is not a biological or genetic category with any scientific validity . . . ."). Within the legal academic community, critical race theorists have both accepted and debated the meaning of race as socially constructed. *See* Robert S. Chang, *Critiquing 'Race' and its Uses: Critical Race Theory's Uncompleted Argument*, *in* FRANCISCO VALDES ET AL., CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87-96 (2002); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN L. REV. 747 (1994) (arguing that Appiah ignores how biological or essentialist understandings of race can and should still matter in current society); Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

[27] For good starts at this, see Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?* 91 CAL. L. REV. 1149 (2003) (reviewing ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002)); Post, *supra* note 20, at 1-2.

education, business, and voting rights. In the conclusion, we return to the questions raised here.

I. THE FUNDAMENTALS OF ANTI-DISCRIMINATION LAW—COLOR-BLINDNESS, AFFIRMATIVE ACTION, AND A VERY NARROW EXCEPTION FOR BFOQS

American policymakers designed Title VII of the Civil Rights Act of 1964 to combat discrimination on the basis of race, national origin, sex, and religion.[28] The Supreme Court has stated that Congress passed Title VII because "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[29] Based on a "color-blind" model of workplace justice, Title VII's enforcement mechanisms were not self-executing. Individuals who believed they had suffered discrimination were to bring complaints to the Equal Employment Opportunity Commission ("EEOC"), created by the new law to investigate discrimination complaints. The EEOC was to determine if discrimination had in fact occurred, and if so, to attempt conciliation with the employer. If it failed, it could ask the Justice Department to take the employer to court.

The Johnson administration pursued a parallel strategy with Executive Order 11246, declaring that federal government contractors could not discriminate on the basis of race, religion or national origin.[30] Though not as far-reaching as Title VII, this regulation had more teeth, as it required an undefined "affirmative action" to win contracts, and carried the threat of contract termination or debarment.[31] The executive order assigned enforcement responsibility to the Labor Department's new Office of Federal Contract Compliance ("OFCC").[32]

Soon after its passage, administrators in both the EEOC and OFCC and judges quickly saw a need for color-conscious means to enforce Title VII and Executive Order 11246. The EEOC ordered firms and unions covered by the Act to report to the government the number of government-designated minorities on their payrolls, and at what positions.[33] The EEOC and federal courts later concluded that any practice leading to a disparate impact on the hiring or promotion or firing of minorities was discriminatory,[34] and some courts ordered the use of racial quotas as a remedy for past discrimination.[35] The executive efforts also moved to race-

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[28] Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2000).

[29] Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

[30] Exec. Order 11, 246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

[31] *Id.*

[32] *Id.*; SKRENTNY, *supra* note 2, at 133.

[33] SKRENTNY, *supra* note 2, at 127-33.

[34] *See* Griggs v. Duke Power Co., 401 U. S. 424, 429 (1971).

[35] SKRENTNY, *supra* note 2, at 161-70.

consciousness, as administrators interpreted the "affirmative action" section of Johnson's 1965 order to require counting and monitoring contractor workforces according to ethno-racial backgrounds (white, black, Hispanic, Asian/Pacific Islander, and Native American, including Eskimos and Aleuts).[36] Private industries and labor unions quickly made use of affirmative action as well, doing so voluntarily, when ordered by courts, or through consent decrees.[37]

Since the Nixon Administration, employment affirmative action has referred to a combination of pro-active, sometimes difference-blind efforts to assemble a pool of job applicants that includes members of various minority groups. These efforts include such things as posting a message promising equal opportunity in job ads and advertising widely, including in areas where minorities and women can be reached. The more controversial affirmative action, and one demanded of government contractors since 1970, involves the setting of minority and women hiring "goals" and "timetables" outlining when these goals are to be achieved. By the end of Richard Nixon's first term, there were many legally-sanctioned race-conscious practices. The EEOC was asking employers to monitor the racial composition of the workforces and remedy underutilization of designated minority groups. In the Equal Employment Opportunity Act of 1972, the Commission gained the power to sue those employers where there were complaints and whose employment numbers showed underutilization.[38] It arrived at these practices pragmatically, in pursuit of its mandate to prevent discrimination in the workplace.[39]

The meaning of affirmative action, then, was embedded within discrimination law, and it maintained the concept of a traditional legal remedy, even if the government contractor had not been specifically found to commit the act of discrimination. Affirmative action was designed to do two things, declared the initial court decisions: eliminate "the effects of past racial discriminatory practices and . . . mak[e] meaningful in the immediate future the constitutional guarantees against racial discrimination . . . ."[40] When a contractor challenged the executive order program, arguing that it required race preferences and violated Title VII, one court rebuffed the challenge, explaining that Title VII

> provides a remedy for a long-continued denial of vital rights

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[36] *Id.* at 127-33.

[37] *See* United Steelworkers v. Weber, 443 U.S. 193 (1979); Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483 (2003).

[38] HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-72, 443-45 (1990).

[39] SKRENTNY, *supra* note 2, at 127-33.

[40] Carter v. Gallagher, 452 F.2d. 315, 331 (8th Cir. 1971).

> of minorities and of every American—the right to equality before the law—the right in every walk of life in a land whose philosophy is that 'all men are created equal,' to an equal chance of employment in keeping with his ability . . . . There has, as the evidence here shows, come a time when firmness must be used against *all* who do not feel able or inclined to cooperate in the equal employment effort. The statute and the Executive Order (11246) implementing it are in full keeping with the constitutional guarantee of the rights of all citizens.[41]

In *Contractors Ass'n v. Secretary of Labor*,[42] the first case to uphold the Philadelphia Plan, an affirmative action program designed to integrate construction industries in the city of Philadelphia, the court argued that the purpose of the executive order was to promote "remedial action under other authority designed to overcome existing evils . . . . [D]iscriminatory practices exclude available minority manpower from the labor pool . . . . 'Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.'"[43] In *Associated General Contractors, Inc. v. Altshuler*,[44] the court described affirmative action as "a 'covenant for present performance' which will hopefully have the effect of abolishing the results of past discriminations in the construction industry regardless of who was at fault in the past."[45] Meanwhile, in the first decision decided by a high court, the Supreme Court of Washington held affirmative action to be constitutional at the University of Washington Law School in order "to prevent the perpetuation of discrimination and to undo the effects of past segregation."[46] Finally, in *United Steelworkers v. Weber*,[47] the Supreme Court emphatically demanded for compliance with Title VII a backward-looking, compensatory or remedial rationale for affirmative action programs. It upheld an employment affirmative action program under Title VII if it was temporary, did not unnecessarily harm white workers, and was "designed to break down old patterns of racial segregation and hierarchy."[48]

The BFOQ, meanwhile, was not a method used to respond to racial discrimination, but a narrow exception to discrimination law and arguably one of the many loopholes added to Title VII to enable its passage with the

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[41] Weiner v. Cuyahoga Cmty. Coll., 238 N.E.2d. 839, 844 (Ohio 1968).

[42] 442 F.2d 159 (3d Cir. 1971).

[43] *Id.* at 173 (citing Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1967)).

[44] 361 F. Supp. 1293 (D. Mass. 1973).

[45] *Id.* at 1299.

[46] DeFunis v. Odegaard, 507 P.2d.1169, 1180 (Wash. 1973).

[47] 443 U.S. 193 (1979).

[48] *Id.* at 208.

support of moderates and conservative Republicans.[49] Title VII of the Civil Rights Act allows an exception to the prohibition of discrimination in the workplace "on the basis of 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 . . . ."[50] The notion of the BFOQ, unlike traditional affirmative action policies designed to remedy past discrimination, means that there are certain employment situations in which a person's sex, religion, or national origin is itself an important job requirement.[51]

Congress explicitly excluded race from the statutory definition of a BFOQ. Senator Joseph Clark, in fact, gave a broad interpretation of the BFOQ provision that the EEOC and federal courts later ignored, favoring instead a much narrower approach. However, though vague and loose in their understanding of the BFOQ concept, members of Congress in both houses were clear in their rejection of a BFOQ for race. Southern members of Congress offered an amendment to add a race BFOQ, arguing that the lack of a race BFOQ would hurt black-owned businesses in the South. These businesses should have been able to maintain an identity as a black business, they argued, because some sold black products, such as "hair straightener" and "skin whitener." One member brought up the Harlem Globetrotters basketball team, and another mentioned the need for a black actor for performances of Shakespeare's "Othello." Congress rejected the amendment, but without a clear explanation. The majority apparently believed the Southerners were being disingenuous and actually wanted to create a loophole for whites to prefer whites.[52]

Whatever the reason, Congress was obviously acting in a specific historical context; the goal of eliminating race from hiring decisions was so

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[49] GRAHAM, *supra* note 38, at 215-16; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

[50] Civil Rights Act of 1964 § 703(e), 42 U.S.C. § 2000e-2(e) (2000).

[51] In their "Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark And Senator Clifford P. Case, Floor Managers," Clark and his colleague argued that "[e]xamples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." 110 CONG. REC. 7213 (1964).

[52] Emmanuel Celler (D-NY) said, "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." 110 CONG. REC. 2550 (1964). Another senator said, "20 million Negroes are willing to take their chances on this bill." *Id.* Defenders of the bill, in a letter addressing Senate minority leader Everett Dirksen's (R-IL) question about the Harlem Globetrotters or film makers doing a movie about Africa, explained that film makers should not demand a black person but only someone that looked black. And the Harlem Globetrotters, the defenders argued, had too few employees to be covered by the bill. 110 CONG. REC. 7217 (1964).

dominant and taken-for-granted that the majority saw excluding race from BFOQ exceptions as self-evidently correct. In contrast, they allowed the BFOQ exception in situations where Congress was clearly less concerned about discrimination.[53] The inclusion of sex into Title VII, for example, was only introduced as a strategic maneuver by opponents to kill the bill, not as part of a broader consensus among legislators.[54]

Federal courts soon made moves to limit the extent of this potential loophole. Congressional double-standards on gender matters quickly came under attack at the EEOC and later by the federal courts as the most famous cases on the matter have involved gender stereotypes in the hiring of airline flight attendants and criminal justice officers.[55] The Supreme Court would eventually hold that the test is whether the proposed BFOQ relates "to the 'essence' . . . or to the 'central mission of the employer's business.'"[56] Since then, courts have consistently struck down BFOQs in gender cases because they believed it implied that gender stereotypes were involved. Employers, for instance, attempted to defend the hiring of women as airline attendants because the job required someone who was both maternal and sexy. In *Wilson v. Southwest Airlines Co.*,[57] the court did not dispute evidence that Southwest's unique, feminized image that emphasized "love" and flight attendants in hot-pants "played and continues to play an important role in the airline's success."[58] Nonetheless, the court rejected women-only flight attendants because Southwest Airlines' "primary function is to transport passengers safely and quickly from one point to another," rather than to sell "vicarious sex entertainment."[59]

When confronted directly with the Title VII statute, courts have consistently overturned race BFOQs, even when they offer additional dicta to

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[53] *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) ("We are persuaded . . . that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.").

[54] *See* JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 96-100 (2002).

[55] *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d. 385 (5th Cir. 1971).

[56] Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991) (citing *Dothard*, 433 U.S. at 333; Western Airlines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)). *But see* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 212 (2004) (arguing that courts have not used business essence consistently in gender BFOQ cases).

[57] 517 F. Supp. 292 (N. D. Tex. 1981).

[58] *Id.* at 294-95.

[59] *Id* at 302-04. Courts have not been entirely consistent in guarding against sex stereotyping. In *Craft v. Metromedia, Inc.*, 766 F.2d. 1205 (8th Cir. 1985), a case in which an anchorwoman claimed she was fired for her appearance in a manner different than her male counterparts, the court accepted as a fact that the television station "required both male and female on-air personnel to maintain professional, businesslike appearances." *Id.* at 1209. The court found legitimate that the station told the plaintiff to "purchase more blouses with 'feminine touches,' such as bows and ruffles, because many of her clothes were 'too masculine' [because these concerns] were 'obviously critical' to the [station's] 'economic well-being.'" *Id.* at 1214 n.11.

suggest their general support of the idea.[60] Nonetheless, as we will show in the next section, federal courts have increasingly allowed what amount to race BFOQs, either by resting on the Fourteenth Amendment instead of Title VII or by just avoiding the legal specifics entirely. Justice O'Connor's decision in *Grutter*, then, is only the latest to effectively combine the spirit of the race BFOQ with affirmative action law. This reflects what has long been happening with public and private employers, who use it either as a response to public demand or unrest, with the backing of explicit government reports, or in everyday business activity. This activity and the ways in which federal courts have responded to it is the subject of Section II.

II. RACE BFOQS IN PRACTICE AND LAW

A. *Police and Law Enforcement*

Police departments have used racial criteria in hiring minority police officers for more than a century. As in other spheres of society, race was initially used to discriminate against African-Americans. In the nineteenth century, police jobs were patronage jobs, and although some blacks became police officers as rewards for party loyalty, as officers they often faced violence from citizens and white police officers alike.[61] In response, many of those police departments that continued to hire blacks became segregated.[62] W. Marvin Dulaney explains, "Most departments controlled the hostility in a number of ways: assigning African-American police officers to plainclothes, restricting them to beats or assignments in African-American neighborhoods, prohibiting them from arresting whites, and having other officers support them against public violence."[63] Many departments also believed that black police were better qualified to enforce the law in black neighborhoods.[64]

In the 1960s, there began various efforts at change and increased ef-

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[60] *See* Knight v. Nassau County Civil Serv. Comm'n, 649 F.2d 157, 159-62 (2d Cir. 1981) (holding no BFOQ for race); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 653 (5th Cir. 1980) (disallowing a race BFOQ but suggesting in dicta that it might be appropriate for police departments); Patrolmen's Benevolent Ass'n v. City of New York, 74 F. Supp.2d 321, 338 (S.D.N.Y. 1999) (granting motion to preclude use of race BFOQ argument on statutory grounds, but accepting the argument under Fourteenth Amendment grounds).

[61] *See* W. MARVIN DULANEY, BLACK POLICE IN AMERICA 20 (1996).

[62] *See* Baker v. City of St. Petersburg, 400 F.2d 294, 294-97 (5th Cir. 1968) (describing the segregation of black and white police officers into different routes and job duties).

[63] DULANEY, *supra* note 61, at 20-21; *see also* Eric H. Monkkonen, *History of Urban Police*, *in* 15 MODERN POLICING 547, 560-61 (Michael Tonry & Norval Morris eds., 1992).

[64] STEPHEN LEINEN, BLACK POLICE, WHITE SOCIETY 13-14 (1984).

forts to integrate police forces.[65] The impetus for this change, however, was less the civil rights movement and the broader spirit of nondiscrimination than the police departments' fear of violence in their communities. Violence and protest swept across America's cities, sometimes erupting into huge, bloody riots, most often in black neighborhoods. Young black males burned and looted stores owned by whites and fought with local police. In most instances, the triggering event of the violence was the perception of an unjust arrest or police brutality committed by white police against black citizens. To manage the crisis, policymakers hastily considered reforms. Following the Watts riot in Los Angeles, for example, Office of Economic Opportunity Director Sargent Shriver admonished the Los Angeles police department for its terrible police-community relations and especially the alienation of blacks from their local police forces.[66] A federal task force found that a serious commitment to community relations offices existed in only thirty-eight percent of cities with populations over 100,000, and at many of those, the offices were obscure or poorly-staffed afterthoughts.[67] This report also assumed the wisdom of race as a BFOQ for community relations, commenting that "[t]he community must be willing also to have a genuinely integrated policy force . . . ."[68]

After a riot in Newark, a White House aide told Vice President Hubert Humphrey of a need for more black police officers there to lessen hostility, and Attorney General Ramsey Clark reported to President Johnson of the related problem of trying to quell violence with an all-white National Guard. He explained that "the deployment of military forces composed almost entirely of whites heightened the tension and anger in the Newark riot area," and added, "Undoubtedly, a visible Negro presence would have made it easier for peaceably inclined persons to support the Guard's efforts and would have had a general moderating effect on the residents of the area."[69] A government report on a riot in Detroit also urged that more blacks be hired in the police and National Guard, and before The National Advisory Commission on Civil Disorders, also known as the Kerner Commission, even finished its hearings, it communicated to Johnson the urgent need for blacks in the National Guard, adding that "[t]he Commission believes strongly that this deficiency must be corrected as soon as

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[65] *See Baker*, 400 F.2d at 295, 301; JAMES A. GAZELL, A STUDY OF PROBLEMS AND METHODS OF POLICE RECRUITMENT FROM DISADVANTAGED MINORITIES 29 (1971); LEINEN, *supra* note 64, at 21.

[66] SKRENTNY, *supra* note 2, at 84.

[67] PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE ON POLICE, TASK FORCE REPORT: THE POLICE 150 (1967).

[68] *Id.*

[69] SKRENTNY, *supra* note 2, at 88.

possible."[70]

The Commission, created by President Johnson to recommend policies to combat the riots, added its own recommendations for race-conscious hiring in its final report. It argued that police that are mostly white "can serve as a dangerous irritant; a feeling may develop that the community is not being policed to maintain civil peace but to maintain the status quo."[71] Moreover:

> contact with Negro officers can help to avoid stereotypes and prejudices in the minds of white officers. Negro officers also can increase departmental insight into ghetto problems, and provide information necessary for early anticipation of the tensions and grievances that can lead to disorders . . . [and] [t]here is evidence that Negro officers also can be particularly effective in controlling any disorders that do break out.[72]

The report urged more efforts to recruit more African Americans, and those officers "should be so assigned as to ensure that the police department is fully and visibly integrated."[73]

A 1973 report by the National Advisory Commission on Criminal Justice Standards and Goals was far more elaborate and set up the basic approach of police departments today: race is a BFOQ, departments should have racial goals in hiring to match the demographics of the community, but should not take the race of an individual applicant into account when making any particular hiring decision. Labeled as "Standard 13.3" the report was clear—"[w]hen a substantial ethnic minority population resides within the jurisdiction, the policy agency should take affirmative action to achieve a ratio of minority group employees in approximate proportion to the makeup of the population."[74] Urging moves beyond African-Americans, the report stated its instrumental logic to minority hiring: "Whenever there is a substantial ethnic minority population in any jurisdiction, no matter what the ethnic group may be, the police service can be improved by employing qualified members of that group."[75] This was because:

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[70] Letter from Otto Kerner, Governor of Illinois, and John V. Lindsay, Mayor of New York City, to President Lyndon Johnson (August 10, 1967), *microformed on* CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION, 1963-1969 (Steve F. Lawson, ed. 1984).

[71] NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 165 (1968) [hereinafter REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS].

[72] *Id.*

[73] *Id.* at 166.

[74] NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, POLICE: A REPORT 329 (1973) [hereinafter POLICE: A REPORT].

[75] *Id.* at 330.

> to police a minority community with only white police officers can be misinterpreted as an attempt to maintain an unpopular status quo rather than to maintain the civil peace . . . [m]inority officers can break down prejudice and stereotypes in the minds of majority officers, and . . . minority officers are better able to police a minority community because of their familiarity with the culture.[76]

To hire a more diverse workforce, the commission advocated eliminating all qualifications that were not specifically necessary for police work. Perceived deficiencies of height, weight, or vision could be compensated for by other skills, such as language. But even the recruiting methods had race-conscious, instrumental aspects. There was a race BFOQ for recruiters since "[m]inority recruiters can establish rapport with the audience and demonstrate that police agencies want and need minority personnel. The minority recruiters are more familiar with minority community attitudes; this facilitates communication."[77] Use of minorities as recruiters was successful in Phoenix, Washington, Kansas City, New York and Detroit.[78] Other suggested techniques for recruitment included using minority community leaders for recruitment and use of depictions of minority officers on television, billboards, and newspaper advertisements. In terms of retention, the guidelines stated discrimination and opportunities for advancement should be eliminated and that minorities "should be deployed in minority neighborhoods but not restricted to working there."[79]

These concerns were not temporary. The perception that blacks would be needed on the police force for effective law enforcement became entrenched and widespread. Police practices in the following decades showed a few innovations but mostly held true to the uneasy race BFOQ vision of the late 1960s-early 1970s commissions. They maintained the effort to achieve an effective, racially proportional force. One analysis of police reforms in the 1980s, for example, described the problem of a new white police chief in Oakland, a city with a large black population. The chief "acknowledged that he simply had to hire blacks and minorities."[80] He succeeded. By 1983, Oakland's finest went from fifteen percent minority to forty percent.[81]

In the 1980s, the Houston police department began to try to improve

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[76] *Id.* at 329-30; PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 99-102 (1967).

[77] POLICE: A REPORT, *supra* note 74, at 331.

[78] *Id.*

[79] *Id.* at 332.

[80] JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES 152-53 (1986).

[81] *Id.*

community relations by instituting programs of cultural training, increasing contacts of police with minorities, police attendance of community meetings, classes in conversational Spanish, and classes in black culture to learn how African-Americans "live and think."[82] To gain closer day-to-day contact and better relations, Houston and many other cities have set up police "storefronts" in different neighborhoods. Designed to fit in with the local community (some departments in our interviews refer to them as "multicultural storefronts"), they arose partly in response from public pressure to "do something visibly special" for minorities.[83]

In general, police departments have tried to diversify within the confines of the law, meaning that they have done so without explicitly hiring on the basis of race (with the exception of situations involving specified consent-decrees). Attempting to diversify without specifying explicitly the need for police officers of certain race and ethnic backgrounds has led departments to be creative in their hiring approaches. There are, however, limits to color-blind strategies. For example, non-Latino white officers can learn any language and be trained in any ethnic culture until they capture all of the nuances—but this does not guarantee that the locals will trust them. Jerome Skolnick and David Bayley reported that in some neighborhoods in Houston, all officers and aides were bilingual. Still, Skolnick and Bailey write that "Spanish-speaking people will sometimes wait for days until they see a police car driven by an Hispanic-looking officer before filing a complaint about a crime."[84]

Reports in the 1990s continue to cite the same commission reports from the late 1960s on the need for demographic matching; the urban riots live on in police practices.[85] The difference is that immigration shifts and declining non-Latino white population proportions have added a new urgency to the efforts.[86] The same recruiting techniques continue to be used, such as using co-racials for recruiting, using community leaders and organizations, and using cultural awareness training.[87]

Moves in any one department toward accommodation of cultural diversity can be driven by a variety of forces, either pressure from below or above, or changes in the organization itself. Frederick Lynch's account of reform in the Los Angeles Sheriff's Department shows some impetus for change coming first from a state law, 1989 AB 2680, that required the

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[82] *Id.* at 89.

[83] *Id.* at 108.

[84] *Id.* at 111.

[85] *See, e.g.*, AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT § 2 (1995), *available at* http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa02.html (last visited Feb. 15, 2004) (on file with the Connecticut Law Review)..

[86] ROBERT M. SHUSTA ET AL., MULTICULTURAL LAW ENFORCEMENT: STRATEGIES FOR PEACEKEEPING IN A DIVERSE SOCIETY 64-68 (1995).

[87] *Id.* at 69-78.

California Peace Officers Standards and Training Commission to develop training and guidelines for law enforcement officers on cultural differences and race.[88] A report in 1992 warned that the department had a racial and ethnic imbalance and did not correspond to the area adequately.[89] In the summer of 1994, Chief Sheriff Sherman Block decided, apparently on his own, that the department had to change to be more accommodating to cultural diversity and dispense with its old "one-size-fits all" approach.[90] According to Lynch, it was taken for granted that demographics were changing and the "department should mirror the population."[91]

In the courts, judges have struggled with the consistent push for race BFOQs for police. Because Title VII is explicit with regards to the exclusion of race as a category for a BFOQ, cases dealing with race as a BFOQ have generally upheld the statute. In *Detroit Police Officers Ass'n v. Young*,[92] the city defended an affirmative action program to hire black police officers in part by arguing that "blacks can communicate and cooperate better with blacks than can whites."[93] The court disagreed: An "operational needs" argument could not justify an exception to the BFOQ. But where the BFOQ has had more support under the law has been in matters involving not Title VII but the Fourteenth Amendment's Equal Protection clause. Equal Protection cases require that government laws which attempt to make distinctions on the basis of race or national origin be both "compelling" and "narrowly tailored." In fact, the Sixth Circuit overturned *Young* on exactly these grounds—it rejected the city's BFOQ argument but accepted it under the Equal Protection clause. Relying on many of the government taskforces cited above, the court wrote:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by defendants is a

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[88] FREDERICK R. LYNCH, THE DIVERSITY MACHINE: THE DRIVE TO CHANGE THE "WHITE MALE WORKPLACE" 210 (1997).

[89] *Id.* at 208.

[90] *Id.* at 209.

[91] *Id.* at 230.

[92] 446 F. Supp. 979 (E.D. Mich. 1978).

[93] *Id.* at 1001.

substantial one.[94]

Sometimes, this type of instrumental logic is simply offered as dicta to give further legitimacy to affirmative action efforts to remedy situations of extreme discrimination in police departments.[95] In others, the Fourteenth Amendment has been used to promote race BFOQs that fit around the statute's provisions. A series of decisions by Judge Posner of the Seventh Circuit has extended this argument even in the absence of discrimination. In *Wittmer v. Peters*,[96] for instance, Posner held that a county prison could hire a black officer for a boot camp:

> The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts—recognized experts in the field of prison administration—did not rely on generalities about racial balance or diversity; did not, for that matter, defend a goal of racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieu-

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[94] Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979).

[95] The United States Supreme Court offered just such dicta:

> Amici, the city of Birmingham, the city of Detroit, the city of Los Angeles, and the District of Columbia, state that the operations of police departments are crippled by the lingering effects of past discrimination. They believe that race-conscious relief in hiring and promotion restores community trust in the fairness of law enforcement and facilitates effective police service by encouraging citizen cooperation.

United States v. Paradise, 480 U.S. 149, 167 n.18 (1986). Dissenting in *Wygant*, Justice Stevens wrote:

> [R]ace is not always irrelevant to sound governmental decisionmaking. To take the most obvious example, in law enforcement . . . in a city with recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

Wygant, 476 U.S. at 314. The Fifth Circuit has similarly written:

> It is also significant that the hiring qualifications defined by the DPS will not have been compromised pending the contemplated validation studies: "Finally, but perhaps the most crucial consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment."

NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) (quoting Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973) (approving hiring quotas for minority police officers on grounds of past discrimination and noting that "visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement")).

[96] 87 F.3d 916, 920 (7th Cir. 1996).

tenant slots.[97]

In *Reynolds v. City of Chicago*,[98] Posner responded to race-specific employment decisions by the city that they defended as justifiable

> not . . . as a remedy against past discrimination against Hispanics—the disparity between the percentage of Hispanic policemen and the percentage of Hispanic Chicagoans in 1990 was due largely to the rapid growth of the city's Hispanic population in the 1980s—but that it was justifiable in order to make the police force more effective in performing its duties.[99]

Further, Posner argued:

> Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of that community and that they are more likely to have it if they have 'ambassadors' to the community of the same ethnicity. . . .
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> . . . .
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> . . . Especially in a period of heightened public concern with the dangers posed by international terrorism, effective police work must be reckoned a national priority that justifies some sacrifice of competing interests. If it is indeed the case that promoting one Hispanic police sergeant out of order is important to the effectiveness of the Chicago police in protecting the people of the city from crime, the fact that this out-of-order promotion technically is "racial discrimination," though its impact, incidence, and motivation are remote from the impact, incidence, and motivation that have shaped the current legal view of racial discrimination, does not strike us as an impressive counter-weight.[100]

Posner is not alone in promoting the legality of instrumental uses of race. In *Talbert v. City of Richmond*,[101] the Fourth Circuit reviewed a claim by the city to use race as a factor in promoting minorities to the top ranks

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[97] *Id.*

[98] 296 F.3d 524 (7th Cir. 2002).

[99] *Id.* at 529.

[100] *Id.* at 530. In *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir. 1998), Posner did not extend this compelling interest to a situation where the city had argued that white firefighters would lack credibility and be denied cooperation in minority neighborhoods. Posner argued that the city had offered only conjecture and not evidence for this proposition. *Id.* at 1222.

[101] 648 F.2d 925 (4th Cir. 1981).

of the police department in order to "advance the operational needs of the police department by achieving diversity . . . . It viewed such diversity as important to effective law enforcement in a city whose population was approximately 50% black."[102] The court agreed, relying on Justice Powell's analysis in *Bakke* (despite the tight connection of Powell's argument and the educational context), and reversed a district court's finding that a police department's consideration of race in denying promotion to a white officer violated the equal protection clause.[103] In *Patrolmen's Benevolent Ass'n v. City of New York*,[104] a federal district court held that using race-specific hiring measures in response to the threat of racial unrest was a compelling interest of effective law enforcement. This case involved the police commissioner of New York attempting to move Haitian and black police officers into Haitian neighborhoods to quell the threat of riots following the brutal beating by white police officers of Abner Louima.[105] The court argued that "in order to carry out its mission, 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."[106] Most recently, in *Petit v. City of Chicago*,[107] the Seventh Circuit relied on *Grutter* to defend "a compelling operational need for a diverse police department . . . 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."[108]

In the Louima case, black officers objected to being moved to these neighborhoods. They argued that their status was lowered, that they lost promotion opportunities, and that their new precinct was "hostile and difficult[,] . . . [leading some of the officers to fear] for the safety of themselves and their families."[109] Similar situations occurred in *Bridgeport Guardians, Inc. v. Delmonte*,[110] where black police officers complained of being placed in high crime, high risk areas,[111] and in *Perez v. FBI*,[112] where Latino officers complained of being segmented into jobs that led to fewer promotions and employment opportunities.[113] Moreover, in *Perez*, like the Louima case, a closer examination would have found the supposed BFOQ to be questionable. Here, the defense attempted to introduce evidence that

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[102] *Id.* at 928.

[103] *Id.* at 928, 931-32.

[104] 74 F. Supp 2d 321 (S.D.N.Y. 1999).

[105] *Id.* at 326.

[106] *Id.* at 329.

[107] 352 F.3d 1111 (7th Cir. 2003).

[108] *Id.* at 1114-15.

[109] *Patrolmen's Benevolent Ass'n*, 74 F. Supp 2d at 335-36.

[110] 553 F. Supp. 601 (D. Conn. 1983).

[111] *Id.* at 610.

[112] 707 F. Supp. 891 (W.D. Tex. 1988).

[113] *Id.* at 909.

> current assignment rosters reflect that Spanish speaking agents, both Anglo and Hispanic, are similarly available and assigned to these wiretaps. However, not one Anglo agent appeared and testified that his Spanish language skills have been used in a similar manner on Title III wiretap duty. On the contrary, Hispanic agent after agent testified they *have never seen an Anglo Spanish speaker on a Title III wiretap assignment in their career.* Class members testified to the existence of a widely recognized "Taco Circuit" or "Tortilla Circuit" whereby Hispanic Spanish speaking agents were regularly chosen for 30 to 90 day assignments doing wiretap duty. They shared this duty with other Hispanic Spanish speaking agents. They saw the same faces and conspicuously did not see Anglo Spanish speakers. Some witnesses had performed 20 to 25 wiretaps lasting a minimum of 30 days each never observing one non-Hispanic sharing similar duty. Hispanic agents who qualified under the accountant and lawyer programs are not immune from assignment to wiretaps for significant periods at significant frequency. Agents testified that a widely used aphorism in the Bureau is "[other than Hispanic language specialist Special Agents,] only Hispanic accountants and only Hispanic lawyers sit on wiretaps."[114]

This type of stereotyping is similar to that which courts have denounced in the gender BFOQ cases. In the gender context as noted above, courts regularly show awareness of the danger of stereotypes underlying BFOQs. This problem highlights a major difference between instrumental affirmative action and the older affirmative action based on remedial rationales. The former can be used to limit opportunities for minorities, slotting them into jobs where employers believe they are best suited, while reserving often more desirable jobs for other groups.

Perez also brings up a potentially significant anomaly. Although sometimes treated as a racial group in *Reynolds*, courts arguably could be treating "Latino" as a national origin category. When they do so, they can more easily take advantage of Title VII's national origin BFOQ exception. But if the case law develops in this way, we could end up in a situation where police departments, or an employer, can freely hire and employ Latinos in certain jobs, such as policing Latino neighborhoods, while being prohibited from hiring African-Americans in an analogous way. This potential anomaly highlights the specific historical context of Title VII's origin where severe Jim Crow discrimination was the primary concern and other types of discrimination were secondary or afterthoughts.

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[114] *Id.* (emphasis in original).

B. *Teaching and Education*

As with police work, race BFOQs in teaching developed in response to the late 1960s rioting. This was not the first discussion of a teacher's race as relevant to the effectiveness of the teaching—W.E.B. DuBois, for instance, was suspicious of the NAACP's effort to desegregate Southern schools because he believed that black teachers could better understand black children, would be more sensitive to their needs, and would therefore be better teachers.[115] It was only in the aftermath of the riots and violent strikes over school curriculum in many urban areas that such thinking became widespread and to some extent accepted.[116] But whereas courts have been increasingly inclined to accept race BFOQs for policing, they have sent mixed signals on the legality of race BFOQs in teaching. This inconsistency is further compounded with the Supreme Court's decisions on university admissions. Courts tend to find compelling interests for instrumental affirmative action in some areas, while refusing to find it in others.

For example, a New York case, *In re Council of Supervisory Assns. v. Board of Education*,[117] concerned the New York City Board of Education's decision to create a new position, Principal of a new Demonstration Elementary School. The board declared this position would be temporary and experimental, and it made appointments thereto on the basis of the applicant's "knowledge and relationship with disadvantaged communities, and of the cultural level there, etc."[118] The court held that the

> position could not lawfully be filled on the basis of race; but experience with the race problem in relation to education should become an essential and objectively measured standard for the position. The fact that some proponents of experimental changes argued this would mean selection only from members of the ethnic groups themselves, as this record suggests, is not decisive.[119]

At the same time, one federal district court approved of a race BFOQ on constitutional grounds, though it did not recognize explicitly that this is what it was doing. The case, *Porcelli v. Titus*,[120] involved the school system in the city of Newark, New Jersey, which had been the site of some of 1967's worst rioting. Franklyn Titus, the Superintendent of Schools, had

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[115] W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935).

[116] See AMY J. BINDER, CONTENTIOUS CURRICULA: AFROCENTRISM AND CREATIONISM IN AMERICAN PUBLIC SCHOOLS 53-135 (2002), for an overview of Afrocentric movements in public schools in Atlanta, Washington, D.C., and New York.

[117] 245 N.E.2d 204 (N.Y. 1969).

[118] *Id.* at 210.

[119] *Id.* at 209.

[120] 302 F. Supp. 726 (D.N.J. 1969).

urged the School Board to suspend the normal procedure of promoting teachers to administrative level jobs, which had involved promotion lists based on an examination procedure. The move, which was accepted by the School Board, would allow more blacks to move to these administrative positions. In Titus's testimony, cited in the opinion, he explained that in the more than two decades since the old promotion procedure was developed, "the conditions in the City had changed, educational philosophy had changed. There was a high (sic) premium on sensitivity than had existed hitherto."[121] Titus continued:

> Sensitivity, as I see it, is that element of a person's personality which makes him aware of the problems of the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitive to the educational needs that go (sic) out of the deprived conditions in many of our—most of our neighborhoods . . . . As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand.[122]

Titus also explained, with support from other witnesses, that suspension of the promotion lists was the right move because the lists "didn't represent the kinds of racial mix that I feel is most important in accomplishing an educational program in the City of Newark."[123]

Various educational experts, arguing that an "educational crisis" existed in Newark, also testified in the case. This was supported with evidence of reading levels which were consistently below the national median at all levels. Dr. Robert Trent, an urban education professor at Brooklyn College, testified that "if you want significant change in the school performance of the ghetto population, it is highly advisable to involve as much as you can competent black professionals."[124] Trent argued that blacks could serve as inspiring role models, would be better at disciplining black children, and would be better at bringing black parents into the educational process.[125] Though not acknowledging its support for a race BFOQ, the court used instrumental logic: "[D]espite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified to suit the needs of the Newark school system."[126] The plaintiffs appealed and lost.[127]

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[121] *Id.* at 732.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 733.
[125] *Id.*
[126] *Id.*

Race BFOQs for teachers developed on a parallel track for Latinos. In this case, the issue was not riot control but cultural compatibility. When the National Education Association began to advocate bilingual education in 1966, it emphasized that teachers should know the local colloquial constructions and cultural background of the students. It strongly recommended that "Spanish teachers for native speakers of Spanish be themselves native speakers of Spanish. As much as possible, these persons should have a background similar to that of the students whom they are to teach."[128] When Senator Ralph Yarborough submitted the first version of his bill that was to become the Bilingual Education Act, he argued it would offer federal financial assistance for local bilingual education programs that taught Latino students Spanish and English as a second language, foster "knowledge of and pride in their ancestral culture and language," and attract teachers of "Mexican or Puerto Rican descent."[129] This explicit ethno-racial targeting, however, was taken out of the bill at the urging of the Johnson administration. As with the case of the police, the emphasis in teacher hiring is usually on cultural and linguistic training, a universalist approach that does not make race a BFOQ. This approach, however, is always one step away from instrumental affirmative action: Who would better understand minority children or provide a role model than a minority teacher?

Therefore, race as a BFOQ is today usually implicit, and sometimes explicit, in discussion of teacher hiring for minority students. Education scholars Philip C. Chinn and Gay Yuen Wong explain the logic for the case of Asian and Pacific American ("APA") students:

> APA educators are needed in our schools to serve a number of functions. As with other ethnic minority teachers, APA teachers serve as role models for APA children, as well as for children of other ethnic groups. The absence of APA teachers distorts social reality and is detrimental to both students and teachers of all ethnic groups. The entire educational system suffers from the underrepresentation of teachers from APA and other ethnic groups. Minority teachers enrich their classrooms by contributing unique cultural characteristics.[130]

Other work by education scholars celebrates the ability of minority teach-

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[127] Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970).

[128] DEP'T OF RURAL EDUC., NEA, THE INVISIBLE MINORITY: REPORT OF THE NEA-TUCSON SURVEY ON THE TEACHING OF SPANISH TO THE SPANISH-SPEAKING 32 (1966).

[129] 113 CONG. REC. 599 (1967).

[130] Philip C. Chinn & Gay Yuen Wong, *Recruiting and Retaining Asian/Pacific American Teachers, in* DIVERSITY IN TEACHER EDUCATION: NEW EXPECTATIONS 126 (Mary E. Dilworth ed., 1992); *see also* P.C. Chinn, *The Ethnic Minority Educator: Near Extinction?* 4 TEACHER EDUC. & PRACTICE 15 (1988).

ers to use their cultural solidarity with co-racial students. They can use familiar cultural patterns and culturally compatible communication styles to successfully bring student experiences into their teaching methods.[131]

Texas's Education Agency makes these ideas a matter of policy. A 1994 agency report stated openly that its goal was to make teachers reflect the demographics of the state. Race was a BFOQ because minority teachers were good for both minority students and non-minority teachers. For the students, minority teachers are role models who signal that the students can aspire to teaching careers, and these minority teachers can also provide "more successful" interaction. For example, studies showed that non-Latino teachers were more likely to assign Latino students to special education classes than were Latino teachers.[132] White teachers, the agency maintained, would benefit from greater knowledge and understanding of different cultures.[133] In California, a 1988 law, the Community College Reform Act (Assembly Bill 1725), announced a long-term mandate that the staff of this school system should mirror California's ethno-racial diversity by 2005 and put in place various hiring goals along the way.[134] Although the logic of the racial BFOQ was not always explicit, it was understood as part of the state adapting to a more multicultural citizen base. The hiring goals varied, with some places aiming for thirty percent minorities, and others, such as San Diego, seeking a fifty percent minority faculty.[135]

Courts have also been ambivalent about the role of race in education, and the opinions over the past few decades have carved out incongruous positions. For example, instrumental affirmative action is acceptable for the selection of students, but not (with the exception of *Porcelli*) teachers. This is surprising because the logic used to justify instrumental affirmative action for students, in what amounts to a race BFOQ preference or instrumental affirmative action, can easily be applied to teachers. (Indeed, as discussed above, one court used *Bakke* and another *Grutter* to justify a race BFOQ for police officers.)

In *Wygant*, for instance, Justice Powell explicitly rejected the notion supported today by the state of Texas and many education scholars that minorities are necessary as role models.[136] Staying within the old model of affirmative action, Powell argued that the role model theory had no logical stopping point, would allow race preferences beyond any remedial pur-

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[131] Michele Foster, *Effective Black Teachers: A Literature Review*, *in* TEACHING DIVERSE POPULATIONS: FORMULATING A KNOWLEDGE BASE 225, 229, 232-37 (Etta R. Hollins, et al. eds., 1994).

[132] TEX. EDUC. AGENCY, TEXAS TEACHER DIVERSITY AND RECRUITMENT 2 (1994), *available at* http://www.tea.state.tx.us/research/abs2.htm#Policy (last visited Feb. 15, 2004) (on file with the Connecticut Law Review).

[133] *Id.*

[134] LYNCH, *supra* note 88, at 239.

[135] *Id.* at 241-42.

[136] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

pose,[137] and

> because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. . . . 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*.[138]

More recently, in *Taxman v. Board of Education*,[139] the Third Circuit rejected the diversity argument in the laying off of a white teacher and the retention of an African-American, further elaborating the emerging position that, though the Constitution might allow instrumental affirmative action, equal opportunity under Title VII must be backward-looking and based on discrimination.[140] Relying on *Weber*, the opinion explicitly rejected any instrumental rationale for Title VII cases, including a diversity rationale for race preferences for school teachers, stating that "[the court was] convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute."[141]

At the same time, courts, and most notably the Supreme Court in *Bakke* and now *Grutter*, have upheld instrumental affirmative action for students in higher education. Again, it was the spirit of instrumental affirmative action used as a compelling interest under the Fourteenth Amendment that did the trick. In *Bakke*, Justice Powell rejected the University of California's professed interest in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" as an unlawful interest in racial balancing.[142] He also rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[143] Only student diversity was a compelling goal because the "'nation's future depends upon

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[137] *Id.* at 275.

[138] *Id.* at 276 (citations omitted). In a concurring opinion, Justice O'Connor suggested the possibility that race-based faculty hiring might be acceptable if justified on the grounds of promoting faculty racial diversity. *Id.* at 286. Justice Marshall's dissent, joined by Justices Brennan and Blackmun, stated that a diversity goal would be constitutionally permissible. *Id.* at 306.

[139] 91 F.3d 1547 (3d Cir. 1996).

[140] *Id.* at 1560.

[141] *Id.* at 1557.

[142] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306-07 (1978).

[143] *Id* at 310.

leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[144] The Court did not explain why this "wide exposure" should not also extend to teachers.

As mentioned earlier, the use of instrumental goals for affirmative action is perhaps most striking in the recent amicus curae brief by retired military leaders defending the University of Michigan in the *Grutter* case.[145] The brief begins with the claim that "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principle mission to provide national security."[146] Relying extensively on *Wittmer*, the brief emphasizes that the compelling interest in diversifying the military is not so much about past discrimination, but rather "an effective military."[147] The value on diversity came from a "practical recognition that the military's need for manpower and its efficient, effective deployment required integration."[148] Even to the degree that the brief recognized ongoing discrimination, it did not use it to justify affirmative action directly; the brief argues instead that "perceptions" of discrimination "led to low morale and heightened racial tension."[149] Efficiency, productiveness, and national security are the key terms used throughout the brief. "Doing affirmative action the right way is deadly serious for us," they cite from a President's Report, because "people's lives depend on it."[150] Briefs from higher education elites are little different. The brief from elite universities stated that

> highly selective universities have long defined as one of their central missions the training of the nation's business, government, academic, and professional leaders. By creating a broadly diverse class, *amici*'s admissions policies help to assure that their graduates are well prepared to succeed in an increasingly complex and multi-racial society.[151]

They make clear that the issue is not discrimination: "the educational diversity interest is contextually limited by its link to the teaching mission of

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[144] *Id.* at 313.

[145] Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241, 02-516), *available at* 2003 WL 1787554.

[146] *Id.* at 5.

[147] *Id.*

[148] *Id.* at 6.

[149] *Id.*

[150] *Id.* at 13.

[151] Brief of Harvard University et al. as Amici Curiae Supporting Respondents at 3, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241, 02-516), *available at* 2003 WL 399220.

the university in a way that an interest in remedying societal discrimination never could be."[152]

C. *Businesses, Large and Small*

Instrumental affirmative action in business hiring has been running on two different tracks since the late 1960s. There is "diversity" hiring in mainstream, large corporations which is sometimes accompanied by public relations fanfare. There is also a messier and hidden BFOQ hiring occurring in small businesses and ethnic niche operations. Both had their start, as did the police and school race BFOQs, in the aftermath of the riots of the 1960s. By 1967 and 1968, business elites were increasingly advocating race-based hiring, not to remedy past or present discrimination, but to buy urban peace. An article in the *Harvard Business Review* urged businesses to target hiring urban blacks to prevent more rioting. Businesses required a peaceful plant, store, or office environment, so special help for blacks was sound business practice. This leading business publication thus advocated special attempts at recruitment, elimination of traditional job testing and qualifications, and special treatment and training programs.[153] Similarly, the Ad Council, a group of advertising executives and businessmen producing public service announcements, swung into action in 1968 with a "Crisis Series" of advertising promotions. The Council and the National Alliance of Businessmen produced a campaign which implored business, according to one observer, "to give jobs to ghetto blacks before their businesses burned down."[154] The campaign received the largest amount of support of the Council's endeavors, with the business press contributing 306 full advertising pages.[155]

The instrumental logic became widespread—black violence was to be controlled by hiring black Americans. *U.S. News & World Report* described a series of business moves demonstrating this sentiment, such as Jersey Bell hiring black high school dropouts who failed the normal application tests or Standard Oil hiring black employees with arrest records for work at service stations. The article explained, "The aim would be to ease discontent that has brought violence and destruction to many of America's big cities in recent summers."[156] Several other prominent businesses and scholars noted the importance of black employment to manage violence. Prudential Insurance began to aid inner-city businesses

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[152] *Id.* at 14.

[153] Alfonso J. Cervantes, *To Prevent a Chain of Super-Watts*, HARV. BUS. REV., Sept.-Oct. 1967, at 55, 60-61.

[154] Glenn K. Hirsch, *Only You Can Prevent Ideological Hegemony: The Advertising Council and Its Place in the American Power Structure*, 5 INSURGENT SOCIOLOGIST 64, 76 (1975).

[155] *Id.*

[156] *A Business Attack on Poverty—Training the "Untrainable,"* U.S. NEWS & WORLD REP., Mar. 18, 1968, at 61, 61.

and hire more blacks after a riot in their home city of Newark. Paul Gorman, president of Bell System's Western Electric Company, told the *Wall Street Journal*, "If the cities continue to deteriorate, our investments will inevitably deteriorate with them."[157] Wharton School professor Herbert Northrup argued, "The more educated, the more experienced and more integrated the Negro labor force becomes, the less tension and the fewer problems we'll have in this country."[158] He advocated lowering hiring standards to increase minority employment, warning, "Industry in this country cannot survive with an unintegrated, angry minority."[159] Ford Motor Company and seventeen other firms promised several thousand jobs to employ inner-city residents and actually hired 55,000 persons.[160] Ford also established two employment offices in inner-city Detroit.[161] In personally organizing the National Alliance of Business, created to secure promises of job openings from private businesses, President Johnson explained why race mattered in hiring and race-conscious hiring was good for business: "You can put these people to work and you won't have a revolution because they've been left out. If they're working, they won't be throwing bombs in your homes and plants. Keep them busy and they won't have time to burn your cars."[162]

From these beginnings the regulations of affirmative action were born; race targeting to manage the crisis in the cities merged with discrimination law. For the legal regulations, civil rights administrators dropped any reference to the instrumental logic then being uttered by so many in politics and business. But instrumental arguments for employment affirmative action made a comeback in the 1980s. Erin Kelly and Frank Dobbin document the changes that took place in businesses in response to the changes in the legal environment.[163] Beginning in the early 1970s, large business (especially those with government contracts, which required them to have affirmative action plans) began to establish Equal Employment Opportunity and Affirmative Action Offices within their organizational structure. These offices initiated a variety of practices, including targeted recruitment and training of minorities, as well as a variety of color-blind

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[157] ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY 190 (1969).

[158] *On Hiring Hard-core Jobless: Interview with Leading Authority*, U.S. NEWS & WORLD REP., Oct. 14, 1968, at 82, 83.

[159] *Id.* at 83.

[160] REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 71, at 152.

[161] *Id.*

[162] JOSEPH A. CALIFANO, JR., THE TRIUMPH AND TRAGEDY OF LYNDON JOHNSON: THE WHITE HOUSE YEARS 226 (1991).

[163] Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Anti-discrimination Law, 1961-1996*, *in* COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA, *supra* note 22, at 87, 87-117.

efforts to cast a wide net and bring equal opportunity to company employment practices. However, in the 1980s, the Reagan administration began to weaken enforcement of both Title VII and affirmative action regulations.[164] Too politically timid to end affirmative action or change the regulations, the EEOC and Labor Department simply stopped enforcing the law with any rigor.[165] Larger businesses also reduced their efforts to use affirmative action to hire and promote more minorities. Kelly and Dobbin's analysis of the professional writings of human resource and personnel professionals shows how they reinvented themselves in order to justify their continued existence in the climate of weak law enforcement.[166] Rather than a role based on compliance with the then weakly enforced law, they began to argue that affirmative action was good for companies regardless of whether or not the government demanded it. Using the language of 'diversity' that had begun in the context of higher education, they unintentionally and implicitly fashioned a new BFOQ rationale for race-based hiring and promotion. They asserted, with increasing confidence to a receptive corporate audience, that Ethno-racial diversity (understood as white, black, Latino, and Asian) was good business and therefore padded the profit margin.[167] Diversity brought in fresh ideas and allowed better understanding of minority client bases. This effort received a significant boost when President Reagan's Department of Labor issued a report, *Workforce 2000*, which warned of demographic changes in the nation's labor supply involving growing numbers of minorities who were being frozen out of jobs.[168] As part of adoptions to these changes, as well as a more global marketplace, instrumental affirmative action gained significant new support.

Journalists noticed the surprising attachment of "Big Business" to affirmative action. In 1982, OFCCP director Ellen Shong told an incredulous *Fortune* writer that business does indeed like the affirmative action system, even if they have not discriminated against minorities or women.[169] When news of some members of the Reagan Justice Department's proposed changes to Executive Order 11246 reached Merck Corporation chairman John L. Hulck, he said, "We will continue goals and timetables

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[164] *Id.* at 95-96.

[165] For example, the Labor Department engaged in drastically reduced compliance reviews during the 1980s. *See* Hugh Davis Graham, *The Politics of Clientele Capture: Civil Rights Policy and the Reagan Administration, in* REDEFINING EQUALITY 106 (Neal Devins & Davison Douglas, eds., 1998) (describing the Reagan administration's success in curbing civil rights regulation).

[166] Kelly & Dobbin, *supra* note 163, at 89.

[167] *Id.* at 105.

[168] WILLIAM B. JOHNSTON & ARNOLD H. PACKER, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 95-96 (1987).

[169] Daniel Seligman, *Affirmative Action is Here to Stay*, FORTUNE, Apr. 19, 1982, at 143, 160.

no matter what the government does . . . . They are part of our culture and corporate procedures."[170] John M. Stafford, head of Pillsbury, declared, "It has become clear to us that an aggressive affirmative action program makes a lot of sense. So if the executive order is [rescinded], it wouldn't affect us."[171]

These views were not uncommon. A survey of CEOs of large corporations gathered 127 responses to a question regarding affirmative action procedures, and more than ninety percent said that "numerical objectives" in hiring goals were used partly to achieve "corporate objectives unrelated to government regulations."[172] One hundred twenty-two of 128 said they would continue to use numerical goals to track progress of women and minorities in the corporation even if the government stopped requiring it.[173] Big Business support continued through the 1990s. In 1995, a spokesperson for the Business Roundtable's Washington office said, "We feel diversity is critical" and explained that "CEOs think it's the right thing to do and it only makes sense."[174]

In 2003, the amicus brief in the Michigan cases from a group of big businesses showed full conversion to the idea of diversity and instrumental affirmative action/race BFOQ. Briefs by Fortune 500 companies such as 3M and General Motors emphasized that the skills for today's increasingly global economy necessitate exposure to widely diverse people, cultures, ideas, and viewpoints.[175] Boeing, for instance, pointed out that they sell seventy percent of their products to international customers.[176] MTV emphasized that diversity was "essential to the continual innovation required for success in the industry . . . ."[177] MTV added, "It seems self-evident that a person from a Puerto-Rican community, who speaks Spanish, and grew

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[170] Anne B. Fisher, *Businessmen Like to Hire by the Numbers*, FORTUNE, Sept. 16, 1985, at 26, 28.

[171] *Id.*

[172] *Id.*

[173] *Id.* For a discussion of business's fascination with race- and gender-conscious hiring, see LYNCH, *supra* note 88, at 8-10 (describing the diversity machine within business entities); Kelly & Dobbin, *supra* note 163, at 87-88 (explaining the movement of United States organizations to include diversity management practices); Alan Wolfe, *Affirmative Action, Inc.*, NEW YORKER, Nov. 25, 1996, at 106, 106-115 (describing businesses have embraced racial preferences in their hiring practices).

[174] Holly Idelson, *Pressure Builds for Retreat on Affirmative Action*, CONG. Q., June 3, 1995, at 1578.

[175] Brief of Amici Curiae 65 Leading American Businesses in Support of Respondents at 5, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003), *available at* 2003 WL 399056 [hereinafter Brief of 65 Leading American Businesses]; Brief of Gen. Motors Corp. as Amicus Curiae in Support of Respondents at 3-4, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003), *available at* 2003 WL 399096.

[176] Brief of 65 Leading American Businesses, *supra* note 175, at 6-7.

[177] Motion for Leave to File Brief Amicus Curiae out of Time & Brief of MTV Networks in Support of Respondents at 6, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003), *available at* 2003 WL 1785765.

up listening to Puerto-Rican influenced music likely will add value to the process of developing authentic programming and effective marketing to the 'Latin' niche."[178]

The other source of business support for race BFOQs is small urban employers, including those owned by both the native-born and immigrants. The race BFOQ at this level comes in different versions. The first is basically old-fashioned discrimination; employers believe certain racial groups make the best employees. In research of small business hiring in Los Angeles, Roger Waldinger and Michael Lichter found that for low-skilled jobs, employers put an emphasis on "attitude," especially regarding willingness to do low-status work at low wages.[179] Another quality is the ability to get along with others in a team.[180] Since these are both hard to measure, employers look for objective indicators of a worker's attitude.[181] Race is an obvious marker, and one that employers believe strongly correlates with attitude.[182] They believe that some workers tend to be more submissive and compliant and others more assertive and troublesome.[183] More specifically, many managers prefer Latinos and Asians over whites and blacks because of a perception of superior work ethic, and then tend to praise Latinos especially for their loyalty toward the company.[184] When attitude is important for a job, blacks are perceived at the bottom; race becomes a *dis*-qualification.[185] Other studies examining other cities, including Atlanta, Boston, Chicago, Detroit, and New York, have found a similar preference for immigrants over native-born, and an aversion to blacks.[186]

The emphasis on teamwork interacts with another factor that pushes

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[178] *Id.* at 7.

[179] ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 58-59 (2003).

[180] *Id.* at 47.

[181] *Id.* at 45-62. For a discussion of the importance of these "soft skills," see PHILIP MOSS & CHRIS TILLY, STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA 59 (2001).

[182] *See* Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203-04 (Christopher Jencks & Paul E. Peterson eds., 1991) (stating that "[r]ace is an important factor in hiring decisions").

[183] WALDINGER & LICHTER, *supra* note 179, at 152.

[184] *See* HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 93 (1996); WALDINGER & LICHTER, *supra* note 179, at 158.

[185] WALDINGER & LICHTER, *supra* note 179, at 158, 166.

[186] *See* HOLZER, *supra* note 184, at 93; MOSS & TILLY, *supra* note 181, at 97. For Latinos and Asians, employers' positive comments outweigh their negative comments. *Id.* at 114. Latinos and Asians have high motivation. *Id.* at 117; *see also* JENNIFER LEE, CIVILITY IN THE CITY (2002) (showing immigrant preferences in New York); KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 242 (1999) (discussing employer preferences for immigrants over native-born blacks); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 112 (1996) (same); Nelson Lim, *On the Backs of Blacks? Immigrants and the Fortunes of African Americans*, *in* STRANGERS AT THE GATES: NEW IMMIGRANTS IN URBAN AMERICA 200 (Roger Waldinger ed., 2001).

employers toward a race BFOQ. Though courts have usually found word-of-mouth or referral-based recruitment to be illegal when used by whites with a mostly white workforce,[187] numerous studies find that small employers continue to strongly rely on it.[188] In Waldinger and Lichter's survey of Los Angeles area restaurants, hotels, printers, furniture manufacturers, department stores, and hospitals, ninety-three percent used referrals.[189] A majority used referrals as the primary method of recruitment.[190] Other survey data, from Atlanta, Boston, Detroit, and Los Angeles, shows much lower numbers (about twenty-five percent), yet referrals are still named among the most commonly used methods of recruitment, trailing only newspaper ads by a few percentage points.[191]

This referral hiring is attractive for two reasons. First, it is cheap. Second, it brings in good workers who are perceived by employers as easily able to fit in. As Lichter and Waldinger explain, referral hires tend to be copies of the current workforce, and referrals therefore minimize uncertainty and risk.[192] If the enterprise is immigrant owned and operated, it is not surprising to find use of a co-ethnic workforce,[193] though in many instances, there are not enough co-ethnics to work for the entrepreneur, as is sometimes the case for Korean entrepreneurs.[194] Relying on these networks also minimizes conflict. Referral hiring reproduces ethnic or racial patterns in the workforce,[195] and ethnic or racial homogeneity minimizes conflict.[196] Employers who have mostly Latino workforces, for example, have trouble retaining non-Latino whites or black workers.[197] For most employers, language compatibility is also a factor in fitting in and thus also for hiring.[198]

The legality of word-of-mouth hiring appears to be in flux. Courts have shown disapproval in the past, when whites used it to benefit other

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[187] *See* NAACP v. Evergreen, 693 F.2d 1367, 1369 (11th Cir. 1982) (finding "that the lack of any system of advertising job vacancies other than by word of mouth 'undoubtedly operated to the benefit of white applicants and to reduce the number of black applicants' by excluding blacks from access to such information"); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975) (finding word-of-mouth hiring discriminatory because of tendency to perpetuate all-white work force).

[188] Lim, *supra* note 186, at 198.

[189] WALDINGER & LICHTER, *supra* note 179, at 44, 123.

[190] *Id.* at 123

[191] HOLZER, *supra* note 184, at 52.

[192] WALDINGER & LICHTER, *supra* note 179, at 104-05. *See generally* Kirschenman & Neckerman, *supra* note 182 (exploring how race factors into hiring decisions).

[193] THOMAS MULLER, IMMIGRANTS AND THE AMERICAN CITY 193 (1993).

[194] Roger Waldinger & Claudia Der-Martirosian, *The Immigrant Niche: Pervasive, Persistent, Diverse*, *in* STRANGERS AT THE GATES 228, 235 (Roger Waldinger ed., 2001).

[195] MOSS & TILLY, *supra* note 181, at 226.

[196] WALDINGER & LICHTER, *supra* note 179, at 187.

[197] *Id.* at 191-93, 214; MOSS & TILLY, *supra* note 181, at 107.

[198] WALDINGER & LICHTER, *supra* note 179, at 56.

whites, because it was racially discriminatory against blacks. But in more recent decisions that deal with referral hiring bringing in Latinos or Asians, though the practice is still discriminating against blacks (indeed, this racial effect is part of its appeal) they have approved it. In the late 1980s, the EEOC targeted small businesses that had hired many immigrants in Chicago. The giant Midwestern metropolis exhibited immigration patterns similar to those in New York and Los Angeles, as large numbers of immigrants, including many from Latin America, Asia, and Eastern Europe came to seek employment along with a large population base of African-Americans and whites. The EEOC brought suit against firms that employed more Latinos, Asian-Americans and immigrant Euro-Americans than African-Americans and relied on word-of-mouth hiring to bring in these workers. In a judicial climate somewhat less accommodating to discrimination charges than had existed in the 1970s and early 1980s,[199] the results of those decisions show the courts more willing to tolerate word-of-mouth hiring, at least in cases where non-white immigrants benefit.

In *EEOC v. Chicago Miniature Lamp Works*,[200] the EEOC lost its case against a small manufacturer of light bulbs, located in a mostly Latino and Asian neighborhood on Chicago's North Side. Entry-level jobs were low paying, required little education, skills or English ability. They were light manufacturing jobs requiring only some basic manual dexterity. Between 1970 and 1981, the percentage of black workers had increased from four and one half to six and one half percent, while Latinos increased from forty to sixty-six percent and Asians from zero to sixteen and one half percent. Latinos and Asians told their friends of the jobs and Miniature Lamp hired on the basis of these employee referrals. The court threw out the EEOC case, arguing that the EEOC's hiring statistics did not properly take into account the effects of commuting distance and the extra desire of immigrants to pursue jobs where English fluency was not required.[201] Though African-Americans were excluded from the co-ethnic networks, the court ruled that Miniature Lamp only *passively* relied on the word-of-mouth recruitment that the mostly immigrant employees used, without encouragement or direction from the employers.[202]

Another Chicago case, *EEOC v. Consolidated Service Systems*,[203] involved a Korean American-owned custodial service company. Consoli-

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[199] In the 1980s, the EEOC was able to use a rather lenient interpretation of the "disparate impact" theory of discrimination. Rather than having to show discriminatory intent (or "disparate treatment"), the EEOC could present statistics showing that *something* that an employer was doing was leading to an adverse impact on the numbers of African-Americans hired. The burden was on the employer to explain the disparity.

[200] 947 F.2d 292 (7th Cir. 1991).

[201] *Id.* at 305.

[202] *Id.*

[203] 989 F.2d 233 (7th Cir. 1993).

dated hired a lot of Koreans: though less than one percent of the Cook County workforce was Korean and barely more than this was in the janitor business, in the first four years the owner was in control of Consolidated, seventy-three percent of applicants for jobs and eighty-one percent of the people hired were Korean. Less than twenty percent of the workforce was non-Korean. The court did not disclose the makeup of this group, only referring to them as "non-Koreans." Consolidated's owner relied almost totally on word-of-mouth hiring. He once advertised in the *Chicago Tribune*, the *Chicago Sun-Times*, and in a Korean newspaper for jobs, but never hired anyone from this method. The Seventh Circuit held for Consolidated. As in the Miniature Lamp case, the court ruled that Consolidated's passive stance was acceptable, and indeed the sensible course, as it brought in good workers and was "the cheapest method of recruitment."[204] The EEOC argued that Consolidated admitted discrimination when its expert witness, sociologist William Liu, explained that it was "natural" for a recent immigrant from Korea to hire other Koreans, since they share a common culture, and this would produce a disproportionately Korean workforce.[205] The court rejected the notion that this was discrimination: "Well, of course. People who share a common culture tend to work together as well as marry together and socialize together. That is not evidence of illegal discrimination."[206] The court further cautioned that if the firm had hired no "non-Koreans," then "this would support, perhaps decisively, an inference of discrimination."[207]

Beside one hundred percent racial exclusivity, there are limits to courts allowing referral hiring. The EEOC finally had a successful case when it sued O&G Spring and Wire Forms Specialty Company,[208] a Chicago light manufacturer owned by an immigrant from Poland named Ted Gryezkiewicz. O&G employed about fifty persons, with thirty-five of them in low-skilled jobs where English-speaking ability was not a requirement. O&G relied on word-of-mouth hiring, but occasionally on walk-in applications as well. The workforce consisted mainly of Polish immigrants and Latinos, and the workers often spoke Polish and Spanish on the job. This time, the EEOC focused on the composition of workers. Instead of simply saying "non-Polish" (of which there were many Latinos), the EEOC highlighted the fact that there were *no* African-Americans.[209] The EEOC won. The crucial differences in the O&G case seemed to be the occasional use of walk-in applications (that could go beyond the immigrant networks in hir-

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[204] *Id.* at 236.

[205] *Id.* at 237.

[206] *Id.*

[207] *Id.* at 236-37.

[208] EEOC v. O&G Spring & Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994).

[209] *Id.* at 877.

ing), the EEOC decision to separate African-Americans from the other groups in its statistical analysis, and the fact that O&G hired zero African-Americans. Perhaps also the court saw the case differently because the firm was white-owned and hiring practices benefited white ethnic groups. But it seemed clear that the case involved extraordinary circumstances, and that immigrants' use of their networks to fill in workforces in ways that excluded African-Americans would be legal. In fact, had O&G relied *only* on (passive) immigrant networks, as had the Korean-owned company that was more racially exclusive, the case would have likely failed. In Judge Manion's dissent in the O&G case, he cited dicta from Judge Posner's opinion in *Consolidated* that expressed approval for immigrant hiring:

> In a nation of immigrants, this must be reckoned an ominous case despite its outcome. The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses—grocery stores, furniture stores, cleaning services, restaurants, gas stations—have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring.[210]

Yet another race BFOQ is based on customer tastes. In this case, the rationale is widespread in the business world, but unlitigated when it amounts to instrumental affirmative action for minorities. Though courts have ruled that customer tastes cannot be used to justify race BFOQs for whites,[211] the desire to match minority workers to the ethnicity or race of the client base is mostly unchallenged in urban America. Moss and Tilly's

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[210] *Id.* at 893 (Manion, J., dissenting), quoting *Consol. Serv. Sys.*, 989 F. 2d at 237-38. It may be that the courts will view the costly systems of hiring that *Consolidated* mentions as intended only for Euro-American employers. "There is equal danger to small black-run businesses in our central cities. Must such businesses undertake in the name of nondiscrimination costly measures to recruit nonblack employees?" *Id.* at 238.

[211] EEOC v. Olsen's Dairy Queens, Inc. 989 F.2d 165, 169 (5th Cir. 1993); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981).

study of Atlanta, Boston, Detroit, and Los Angeles found that seventy percent of retailers admit to race matching for their client base.[212] Twenty percent of retailers say customers or employees prefer co-ethnic workers.[213] Sometimes the issue is mostly language, but it can also be simply ethnicity or race, as Waldinger and Lichter explain:

> The changing clientele leads the retailers to conclude that "the employee base has to reflect the customer base." In one instance, that employee base may be "white, because it matches the demographics of the area," but in another, "to match our store to the people who come to the store," managers "try hard to have Spanish-speaking people and the Middle Eastern language group—Persians, Iranians, Afghans, Armenian." "We do have associates who speak to customers in Spanish, Farsi, et cetera, if the customer feels more comfortable that way," noted a manager of a mainline department store. A discounter, "catering to a high degree of an ethnic background" and trying to "hire from the community," felt that persons with "strong Spanish accents or whatever" could easily fit into the store.[214]

In their study, they found race or ethnicity matching to be common in hospitals and in department stores, that for larger organizations there is "a premium on a workforce mirroring the composition of the neighborhoods served," and that it was a matter of customer preferences.[215]

Though there are no Supreme Court cases assessing instrumental affirmative action in the business world, there is one line of business where we would expect the Court to be especially sympathetic—news organizations. As with police and school teachers, the racial violence of the late 1960s and, specifically, the report of the Kerner Commission, precipitated the perception that the hiring of minority journalists would have instrumental benefits and was perhaps even necessary to cover minority news and minority problems. The Kerner report noted the extreme underrepresentation of blacks on newspaper staffs and argued that "[t]he media report and write from the standpoint of a white man's world."[216] The report therefore argued that more black reporters would yield benefits. "We believe that the news media themselves, their audiences and the country will profit from these undertakings" to recruit more blacks, the Commission explained, adding "[i]f the media are to report with understanding, wisdom

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[212] MOSS & TILLY, *supra* note 181, at 105.

[213] *Id.* at 94.

[214] WALDINGER & LICHTER, *supra* note 179, at 73.

[215] *Id.* at 132-33, 199.

[216] REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 71, at 366.

and sympathy on the problems of the cities and the problems of the black man . . . they must employ, promote and listen to Negro journalists."[217] Since the late 1960s, other commentators have affirmed this argument.[218]

Though not examining the question of race preferences for employment of journalists, the Supreme Court touched on these issues in *Metro Broadcasting, Inc. v. FCC*[219] and indicated a special consideration for race preferences where First Amendment issues are at stake. The case involved a FCC policy of giving a plus to minority-owned firm applicants for new radio and television licenses and a privileged position to obtain licenses transferred from existing broadcasters.[220] The FCC provided an instrumental rationale for its race preference:

> [W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.[221]

Noting that the FCC's actions were a response to congressional directives, the Court used intermediate review and approved broadcast diversity as an important purpose.[222] Justice Stevens's concurring opinion showed the strongest support for instrumental affirmative action in broadcast licensing and other areas: "The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school—is in my view unquestionably legitimate."[223]

D. *Voting Rights and Descriptive Representation: Resisting the Instrumental Use of Race*

While we have detailed the proliferation of instrumental affirmative ac-

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[217] *Id.* at 385.

[218] *See* JOAN SHORENSTEIN, CENTER ON THE PRESS, POLITICS AND PUBLIC POLICY, IMPLEMENTATION OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN PRESS 20 (1996); Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2268 (1993) (discussing the need for African-American communicators in real-life reporting).

[219] 497 U.S. 547 (1990).

[220] *Id.* at 557-58.

[221] *Id.* at 556 (citation omitted).

[222] *Id.* at 566.

[223] *Id.* at 601-02 (citation omitted) (Stevens, J., concurring).

tion by employers and policy makers in a wide range of sectors, and increasingly by the courts in recognizing and legitimating its use, the legality of this approach has not been extended to all arenas. One of the most interesting contrasts to the expanding use of race BFOQs under the law has been the Supreme Court's recent retraction in the area of voting rights. This is perhaps ironic since there are few areas in American life where the spirit of using race as a BFOQ is as widely used by both politicians and voters. Large portions of the public have long used and continue to seemingly use a race BFOQ in their decisions as to who should represent them in public office.[224] The historical record of politicians playing up their racial qualifications as a BFOQ during their campaigns is similarly extensive.[225] This is in many ways both the intent and direct result of the Ameri-

[224] *See* RODOLFO O. DE LA GARZA ET AL., LATINO VOICES: MEXICAN, PUERTO RICAN, AND CUBAN PERSPECTIVES ON AMERICAN POLITICS 138 (1992) (noting that Latinos support voting for Latino candidates); KEITH REEVES, VOTING HOPES OR FEARS: WHITE VOTERS, BLACK CANDIDATES, AND RACIAL POLITICS IN AMERICA 9-10 (1997) (finding that white voters remain opposed to voting for black candidates); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1402 (2001) (finding that ninety-eight percent of black voters in southern congressional elections in the 1990s voted for the black candidate); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1854-55 (1992) (providing evidence of racial bloc voting); Pei-te Lien et al., *A Summary Report of the Pilot Study of the National Asian American Political Survey in 2001-02*, *in* NAT'L ASIAN PAC. AM. POL. ALMANAC 81 (2001-02) (noting that Asian Americans support voting for Asian American candidates); Judy Yu & Grace T. Yuan, *Lessons Learned From the 'Locke For Governor' Campaign*, *in* ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS 359-62 (Gordon H. Chang ed., 2001) (stating that Asian-Americans provide financial support to Asian-American candidates). This use of BFOQs in politics, of course, is not limited to racial appeals. For example, women's leaders promoted their credibility for the right to vote during the suffrage battles by arguing that when the government "took upon itself any form of educative, charitable, or personally helpful work, it entered the area of distinctive feminine training and power, and therefore became in need of the service of woman." SARA M. EVANS, BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA 153 (1989) (quoting Reverend Anna Garlin Spencer speaking at the National American Woman Suffrage Association in 1898); *see also* VIRGINIA SAPIRO, THE POLITICAL INTEGRATION OF WOMEN: ROLES, SOCIALIZATION, AND POLITICS 2-10 (1983) (demonstrating connections between women's private and political roles and how this affects the form and substance of political behavior and attitudes); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 321-72 (1992) (discussing maternalist social policy breakthroughs resulting from the politically active women's movements).

[225] *See* PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 4-5 (1999) (providing examples of white politicians playing up their race to white voters by distancing themselves from black politicians); DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 252 (1996) (politicians used racial codewords to appeal to white voters in the 1988 election); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 37-38 (1974) (analyzing the connection between partisanship and race as demonstrated by campaign rhetoric during the Reconstruction Era); TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY, at xi-xii (2001) (analyzing the way racial issues shape the American party system); ADOLPH L. REED, JR., THE JESSE JACKSON PHENOMENON: THE CRISIS OF PURPOSE IN AFRO-AMERICAN POLITICS 2 (1986) ("[Jesse] Jackson's claim to legitimacy as a contender for the Democratic nomination was from the first connected with his assertion of authenticity as a spokesman for black interests."); Claire Jean Kim, *Managing the Racial Breach: Clinton, Black-*

can representative process. The United States political system is one that divides voters into small geographic spheres that emphasize "communities of interest," whether racial, economic, religious, or other.[226] Because of this, politicians regardless of race tend to practice "home style" approaches to representation that emphasize a connection to voters based on a single and often demographic attribute.[227] As Katherine Tate points out, "Blacks are not alone in their strong appreciation of being descriptively represented; all Americans place a strong value on it as a component of political representation continuously stressed by members of those elected to the U.S. Congress."[228] It should not be surprising, then, that studies find newly elected black, Latino, and Asian-American representatives behaving similarly in a race-conscious fashion.[229]

Since the passage of voting rights reforms in 1982, however, there has been a fierce debate over whether "descriptive representation," the idea that the representative should have the same socio-economic background

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White Polarization, and the Race Initiative, 117 POL. SCI. Q. 55 (2002) (discussing President Clinton's race initiative that attempted to play to both white and black audiences during his presidency).

[226] "Communities of interest" is a phrase from WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 135 (1995). This dates back to the Founders. *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 190-93 (1972). In the late 1800s and early 1900s, it was used extensively by southern whites as a way of denying representation to African-Americans. *See* KOUSSER, *supra* note 225, at 5-9, 39 (describing the theories behind the denial of representation to African Americans and the restrictive measures employed). For more recent examples that emphasize the extrinsic nature of representation through descriptive characteristics, see RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978) (analyzing the relationship between members of the House of Representatives and their constituents and concluding that their home styles within a district are the most important means for securing political support); CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (1993) (discussing the differences between descriptive and substantive representation and ways of ensuring that black interests are effectively represented); KATHERINE C. TATE, BLACK FACES IN THE MIRROR: AFRICAN AMERICANS AND THEIR REPRESENTATIVES IN THE U.S. CONGRESS (2003) (assessing the value of descriptive representation for African-Americans); Theodore J. Lowi, *Party, Policy, and Constitution in America*, *in* THE AMERICAN PARTY SYSTEMS: STAGES OF POLITICAL DEVELOPMENT 238, 238-76 (William Nisbet Chambers & Walter Dean Burnham eds., 1967) (stating that the American party system is comprised of hundreds of electorates with many identifications and groupings and that politicians reify these differences through homestyle-type appeals).

[227] The term "home style" is from FENNO, *supra* note 226, at 210-11.

[228] TATE, *supra* note 226, at 6.

[229] *See* Luis R. Fraga, *Latino Political Incorporation and the Voting Rights Act*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, 278, 278-79 (Bernard Grofman & Chandler Davidson eds., 1992) ("The appeal of cultural distinctiveness has been used by Latino politicians to increase popular political mobilization, establish candidate credibility, and even question assimilation as an unexamined goal in politics. So, paradoxically, as the Latino community struggles toward assimilation, its political leaders often trade on the community's distinctiveness to rally it behind political causes."); REED, *supra* note 225, at 35 (Jackson's nomination campaign in 1984 was based on "a premise of unmediated representation of a uniform racial totality"); SWAIN, *supra* note 226, at 27 (describing how race-consciousness has historically been involved in African American campaigning); TATE, *supra* note 226, at 17-18 (discussing that politicians represent their constituencies substantively, symbolically, and descriptively).

or demographic characteristics as the people he or she is representing, should be legislated into the drawing of congressional and state electoral districts. On the one hand, there is general unanimity for the broad concept of a racially diverse set of legislators. Even Abigail Thernstrom, a prominent critic of race-conscious measures, defends the importance of racial diversity among elected officials: "Whether on a city council, on a county commission, or in the state legislature, blacks inhibit the expression of prejudice, act as spokesmen for black interests, dispense patronage, and often facilitate the discussion of topics (such as black crime) that whites are reluctant to raise."[230] Moreover, voting rights legislation is particularly race conscious in its design. As Pamela Karlan points out, "Unlike other pieces of American antidiscrimination doctrine, voting-rights law entertains the possibility that geographic and political separation may remain facts of life, and it responds with the second-best solution of adjusting political rules to this unfortunate reality."[231]

The recognition by scholars and in the law that race matters in voting has led scholars to debate whether black voters are able to elect candidates of their choice (regardless of race) in districts where they are a numerical minority in the electoral arena.[232] Early court decisions responded to arguments that racial minorities could not elect candidates of their choosing, and thus were not represented, by authorizing the use of majority-minority districts.[233] But this segment of the debate, as it is framed, is not about an instrumental use of race per se, and instead dovetails nicely with traditional arguments that defend affirmative action—all it asks is that in the process of designing electoral districts, politicians and judges need to be cognizant of the ways in which this process both historically and currently discrimi-

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[230] ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 239 (1987).

[231] Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 84.

[232] *See* Grofman et al., *supra* note 224, at 1390-93 (analyzing the continuing political science debate as to "the minority population percentage needed to provide minority voters with the equal opportunity to elect candidates of choice"); David Lublin, *Racial Redistricting and African-American Representation: A Critique of 'Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?'*, 93 AM. POL. SCI. REV. 183, 186 (1999) (arguing that racial redistricting is essential to the election of African American representatives); Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1537-39 (2002) (discussing recent social-scientific data which indicates that black-majority districts may not be necessary to overcome polarized voting).

[233] The most notable case is *Thornburg v. Gingles*, 478 U.S. 30 (1986). For compelling arguments as to why this was needed, see LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 117-18 (1994) (arguing that "interest representation favors allowing voters of the same interests to join together in voting for candidates of choice, regardless of where the voters live in the jurisdiction[,] . . . [and] strives to ensure that groups are politically cohesive, sufficiently numerous, and strategically mobilized").

nates against African-Americans and other people of color.[234] Similar to other forms of affirmative action, this approach has been recently restricted by the Supreme Court as it has made levels of proof of discrimination far more difficult to find.[235]

However, instrumental approaches to electing racial minorities to office—in this case the value of descriptive representation—have not received much fanfare in their stead. After the protests and civil uprisings in the 1960s, there were calls (as we have seen in other venues) for placing blacks, women, and other minority groups in representative positions. The Democratic Party's McGovern-Fraser reforms were particularly notable as they created race and gender quotas for party delegates.[236] On occasion, the Supreme Court was similarly cognizant of descriptive representation's place in the electoral process.[237] Since then, some scholars have found empirical evidence demonstrating the positive impact of descriptive representation,[238] and at least a few political theorists have promoted not only a greater recognition and politicization of race-consciousness, but also a specific emphasis on the importance of descriptive representation and the opportunity of groups to be represented on grounds of their race, sex, and ethnicity.[239] Policy-makers consistently use race as a proxy for voting be-

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[234] *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 1-11 (1999) (arguing that history demonstrates the need for governmental protection of minority groups from ongoing economic, social, and political discrimination).

[235] The most notable case is *Shaw v. Reno*, 509 U.S. 630, 641-43, 646-49 (1993).

[236] *See* FRYMER, *supra* note 225, at 107.

[237] *See* United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 166 (1977).

[238] *See* RUFUS P. BROWNING, ET AL., PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS 141 (1984) ("[M]inority council members were important in linking minorities to city hall, in providing role models, and in sensitizing white colleagues to minority concerns."); DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 199-200 (1999) (finding connection between numbers of black members of Congress and the passage of legislation of concern for African Americans); FRYMER, *supra* note 225, at 176-77 (noting that increased numbers of African-Americans in Congress provided greater visibility and a more powerful role for the Congressional Black Caucus); TATE, *supra* note 226, at 123-25 (concluding that "Blacks express greater satisfaction when represented by Blacks"); KENNY J. WHITBY, THE COLOR OF REPRESENTATION: CONGRESSIONAL BEHAVIOR AND BLACK INTERESTS 91-97 (1997) (examining the roll call voting behavior of House members over a twenty-year period and concluding that "race significantly impacts the behavior of House members in a positive direction"); Zoltan L. Hajnal, *White Residents, Black Incumbents, and a Declining Racial Divide*, 95 AM. POL. SCI. REV. 603, 603 (2001) (stating that black representatives have a positive impact on white voter attitudes toward race and civil rights); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI LEGAL F. 241, 278-80 (stating that the election of black representative led to tangible policy victories and increased nominations of black administrative officials, as well as intangible benefits to African American civic identity and empowerment). *But see* Claudine Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 AM. POL. SCI. REV. 589, 589 (2001) (Black representatives lead to decrease in white voter participation and minimal increase in participation of black voters).

[239] *See generally* ANNE PHILLIPS, THE POLITICS OF PRESENCE 114 (1995) (arguing that both ideas and descriptive representation are necessary to respond to inequality in minority representation);

havior, one that is quite understandable given the high levels with which black and Mexican-American voters identify with the Democratic Party.[240]

But while the instrumental model may exist in societal practice, it has few supporters in the academic and legal community. Most scholars, including those who promote descriptive representation, are careful to avoid arguing that there is something essential or instrumental about race itself.[241] As Jane Mansbridge writes:

> The primary function of representative democracy is to represent, through both deliberation and aggregation, the substantive interests of the represented. Descriptive representation should be judged primarily on this criterion. When non-descriptive representatives have, for various reasons, greater ability to represent the substantive interests of their constituents, this is a major argument against descriptive representation.[242]

Instead, these scholars emphasize the historic consequences of discrimination and the need to provide representation to remedy the inequalities that have resulted from systemic prejudice.[243] Best known for this argument is Lani Guinier, who has criticized the emphasis in voting rights law of secur-

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MELISSA S. WILLIAMS, VOICE, TRUST AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION 9 (1998) (offering a theory of fair representation that justifies group representation as a response to chronic under-representation of women and minorities); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 9 (1990) (stating that group politics are real and inequalities need to be addressed with a recognition of these group identities).

[240] For examples of policy-makers using race as a proxy for electoral districting, see *Abrams v. Johnson*, 521 U.S. 74 (1997) (upholding a redistricting plan that created a voting district in which the majority of voters were African-American). *See also* Bush v. Vera, 517 U.S. 952 (1996) (holding that three new Texas congressional districts, in which the majority of voters were African-American and Hispanic, were not narrowly tailored to serve a compelling state interest). For an examination of African-American voting trends, see KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS (1993).

[241] *See* PHILLIPS, *supra* note 239, at 167 ("[T]he politics of presence is not about locking people into pre-given, essentialized identities; nor is it just a new way of defining the interest groups that should jostle for attention. The point, rather, is to enable those now excluded from politics to engage more directly in political debate and decision."); KYMLICKA, *supra* note 226, at 139-140 (stating that the general idea of mirror representation is untenable); WILLIAMS, *supra* note 239, at 6 ("No defensible claim for group representation can rest on assertions of the essential identity of women or minorities; such assertions do violence to the empirical facts of diversity as well as to the agency of individuals to define the meaning of their social and biological traits. Yet these groupings do have a social significance which stands independently of the meanings of their members to voluntarily attach to them . . . . [T]he social positions of group members are sufficiently similar that there are good reasons to believe that members of marginalized groups, *on average*, are more likely to represent the concerns and interests of citizens from those groups than are nonmembers"); Keith J. Bybee, *Splitting the Difference: The Representation of Ideas and Identity in Modern Democracy*, 22 LAW & SOC. INQUIRY 389, 398-99 (1997) ("Group representation is important, but it is untenable in its strict form.").

[242] Jane Mansbridge, *What Does a Representative Do?* 99, 102-03, *in* CITIZENSHIP IN DIVERSE SOCIETIES (Will Kymlicka & Wayne Norman eds., 2000).

[243] *See* KYMLICKA, *supra* note 226, at 141-42 ("Society should seek to remove the oppression and disadvantage, thereby eliminating the need for these rights.").

ing more black elected officials on the grounds that it essentializes race by assuming that black politicians are representative on the virtue of their race.[244] If black politicians are assumed authentic simply on the basis of their race, she argues, they are relieved of developing appropriate agendas or articulating community demands.[245]

Perhaps the reluctance to use the BFOQ model in voting rights is because we are dealing with political theorists who deal specifically with the constructed nature of race, not policy makers who are more pragmatic and crude in their understandings and use of race.[246] Perhaps it is also because of the failures of the Democratic Party after the enactment of majority-minority districts in the early 1990s that instrumental arguments for race have been curtailed. Not only did the Democrats, and hence the roughly ninety percent of African-Americans who vote for the Democratic Party, lose political power during this decade, but there is a wealth of academic evidence that argues that minority representation is improved with "influence" districts as opposed to majoritarian districts.[247]

But there is also seemingly something else going on with the majority of the Supreme Court's vehement opposition to descriptive representation. After all, it is not just Justice Thomas and others on the far right side of the Court who oppose descriptive representation,[248] but Justice O'Connor who has not only found instrumental affirmative action applicable in higher education but has also, in dicta, stated her support for race BFOQs in policing and potentially other areas. The Court has long applied a particular emphasis on individual rights in voting.[249] In the civil rights era case, *Anderson v. Martin*,[250] the Supreme Court famously struck down on Equal Protection grounds a statute that required the designation of the candidate's race on the ballot: "[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines."[251] O'Connor, writing the majority opinion in *Shaw*, was ada-

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[244] *See generally* GUINIER, *supra* note 233.

[245] Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Success*, 89 MICH. L. REV. 1077, 1104 (1991).

[246] For a discussion of policy-maker pragmatism towards the use of race, see SKRENTNY, *supra* note 2, at 111-44.

[247] Georgia v. Ashcroft, 123 S. Ct. 2498, 2512-13 (2003).

[248] Holder v. Hall, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) (stating that race-conscious districting "systematically divid[es] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid'") (citation omitted).

[249] Baker v. Carr, 369 U.S. 186 (1962).

[250] 375 U.S. 399 (1964).

[251] *Id.* at 402.

mant in her opposition to race-conscious redistricting:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.
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> . . . .
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> . . . [This] is altogether antithetical to our system of representative democracy.[252]

For our purposes, what is interesting here is the discrepancy. Why the seeming matter-of-fact acceptance of instrumental forms of race in certain areas of law and its disavowal in others? A more careful assessment of how and why race is used in certain contexts is necessary. Without guiding principles, the Court has forgotten why race matters, and should matter in certain contexts, and why it does not and should not in others.

III. CONCLUSION: COMPARATIVE ANALYSIS AND AN ASSESSMENT

Affirmative action in the United States has been cut loose from its moorings in the nation's tragic history of racial oppression and the law that developed to remedy that oppression. Increasingly, it is rooted in strategies to maximize the performance of institutions. The experience of the United States shows that a history of racial oppression may not be necessary for a country to develop widespread practices and a supporting legal regime for race-based employment. Any country with perceived group differences might develop practices and laws similar to what has occurred in the United States.

Not surprisingly, we already see instrumental rationales for affirmative action in other nations. Marc Galanter describes a list of several rationales for affirmative action in India, including "integration," or the promotion of feelings of belonging; "integrity," or the promotion of pride and self-

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[252] Shaw v. Reno, 509 U.S. 630, 647-48 (1993) (citation omitted). For helpful discussion of O'Connor and the Court's view of race in the political process, see Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209 (2003); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); Karlan, *supra* note 231.

respect that allows all members of Indian society to contribute, and "incubation," or the promotion of skills needed to seize opportunities (this last rationale most resembling those used in the United States when discussing why diversity is valuable).[253] Britain's discrimination law is similar to that in the United States in that it allows job related exceptions to the prohibition of discrimination—in this case, it is called a "genuine occupational qualification."[254] Like the United States, Britain has also had problems of police discrimination against minority citizens; like other countries in Europe, it seems a candidate for instrumental affirmative action in the police departments and other positions in law enforcement.[255]

The possible global spread of instrumental affirmative action makes it even more important that we ask: Is the move from the traditional affirmative action model to a BFOQ model appropriate in today's increasingly multi-ethnic societies? For the case of the United States, perhaps not. It is quite arguable that when affirmative action is understood in the historical/remedial model, it is most appropriately limited in use for African-Americans and other groups in society that have experienced systematic and severe forms of discrimination sponsored by the national government. African-American exceptionalism remains real and meaningful to this day; a point that is increasingly lost in debates on the increasing diversity in American society.[256] Instrumental affirmative action is much more expansive in its notion of diversity—potentially moving well beyond the few groups now included, potentially including in some contexts even WASP males. But it affirms and sometimes celebrates ethnic, racial, and sex difference in a manner that is devoid of history and power. As a result, we argue that there have been unintended costs to policy and court-based efforts over the last few decades to expanding affirmative action to include notions of diversity and the BFOQ model. It has allowed some forms of diversity to prosper, but in the process, it has weakened the legitimacy of affirmative action to remedy historic discrimination against those most in need. Most importantly, instrumental affirmative action may limit opportunities for minorities in ways that remedial affirmative action does not. If blacks or any group are said to be best at a certain task, there is a good pos-

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[253] MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 188-89 (1989).

[254] ERIK BLEICH, RACE POLITICS IN BRITAIN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960S, at 106 (2003).

[255] *Id.* at 198-99; Steven M. Teles, *Positive Action or Affirmative Action? The Persistence of Britain's Anti-Discrimination Regime*, *in* COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA, *supra* note 22, at 246, 263-64.

[256] *See generally* CLAIRE JEAN KIM, BITTER FRUIT: THE POLITICS OF BLACK-KOREAN CONFLICT IN NEW YORK CITY (1999) (discussing affirmative action in the context of the Black-Korean conflict in New York City); STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA (1981); Barbara J. Fields, *Whiteness, Racism, and Identity*, 60 INT'L LAB. & WORKING-CLASS HIST. 48 (2001) (discussing differences in how African and Caribbean immigrants acquire racial status in America and how this experience differs from that of European immigrants).

sibility that employers will see the group as good at only that task, in effect trapping them in a racial script or role. Moreover, if the logic of instrumental affirmative action carries over to the dominant group—if employers believe whites are best at certain jobs, or dealing with white clients—opportunities for racial minorities may be even more limited.

The *Grutter* decision, then, leaves us with as many questions as answers. The case recognizes the ways in which race now shapes and dominates societal relations. But the decision remains inadequate in its unwillingness to recognize that race-consciousness must be understood in a manner that connects it to the historical discrimination and power dimensions to which race in America has always been linked. We can come to a legal framework that effectively responds to our multi-cultural society in an increasingly inter-connected world only when race is understood as being deeply intertwined with both historical and current societal hierarchies.