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RADICAL RECONSTRUCTION: (RE) EMBRACING AFFIRMATIVE ACTION IN PRIVATE EMPLOYMENT

Hina B. Shah[*]

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.[1]

I. INTRODUCTION

The history of employment in this country is the history of racism.[2] Using public and private mechanisms as well as violence to devise and enforce segregation and preferential treatment, the white male institutionalized an unprecedented advantage in the labor market.[3] Yet this is rarely acknowledged as a factor in the current widening economic disparity between whites and blacks.[4] Today, many white Americans, cloaked in the myth of colorblindness and meritocracy, refuse to see the persistence of racial prejudice, disadvantage and discrimination in the labor market.[5]

Racial discrimination against blacks has a singular, unique history in this country, which continues to shape their economic progress and

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1. Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), *reprinted in* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-AMERICA 174 (2005).
2. *See infra* notes 7–10 and accompanying text.
3. *See infra* notes 7–10 and accompanying text.
4. While there are disagreements on whether to capitalize "black" or "white," I will follow the majority of journalism-style guides and not capitalize either term. *See* Merill Perlman, *Black and White: Why Capitalization Matters*, COLUM. JOURNALISM REV. (June 23, 2015), https://www.cjr.org/analysis/language_corner_1.php.
5. *See infra* notes 15–16 and accompanying text.

opportunities.[6] For close to three centuries, whites systematically and rationally created an exclusionary system, enforced by the state and through violence, that disadvantaged and excluded blacks and other nonwhites to confer benefit on whites.[7] Even after a bloody Civil War resulted in dismantling the 246-year-old American institution of slavery, racial exclusion and preferential treatment of whites persisted, including in employment.[8] White men had access to the entire labor market, and the most desirable jobs were exclusively theirs, cocooned from competition.[9] While the Civil Rights Act of 1964, outlawing discrimination in employment, education, and public accommodation, dismantled many of the "formal barriers and symbolic manifestations of subordination," racism persisted and remains a permanent feature of American society.[10] Today, race discrimination in employment, while subtler, is still the norm and blacks are discriminated against "at a distressingly uniform rate."[11] A large body of empirical evidence demonstrates the pervasiveness of unconscious or implicit bias and discriminatory behavior.[12] Race discrimination and segregation

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6. *See infra* notes 7–10 and accompanying text.
7. DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 20 (1993); KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT 7 (2012); ROBERT HIGGS, *Black Progress and the Persistence of Racial Economic Inequalities, 1865-1940*, *in* THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET 23 (Steven Shulman & William Darity, Jr. eds., 1989); Johnson, *supra* note 1, at 177.
8. MASSEY & DENTON, *supra* note 7, at 20; STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 7; HIGGS, *supra* note 7, at 23.
9. *See generally* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7 (referencing general background information on post-Civil Rights Act employment in America).
10. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 2–3 (1992).
11. Lincoln Quillian et al., *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 PROC. NAT'L ACAD. SCI. 10870 (Oct. 10, 2017), http://www.pnas.org/content/pnas/114/41/10870.full.pdf.
12. Devah Pager et al., *Discrimination in the Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 777–78 (2009) (providing relevant background information on implicit bias against minorities in the workforce); Quillian et al., *supra* note 11, at 10874; ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS, NEXTIONS YELLOW PAPER SERIES 2, 6 (2014), http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf (explaining a study which unpacked implicit racial bias in a legal employment setting); Marianne Bertrand &

continue to persist in the labor force, choking off opportunity to stable, life-long employment.[13] Today's widening disparity between black and white economic progress can be traced, in some measure, to "ancient brutality, past injustice and present prejudice."[14]

In the contemporary discourse, nondiscrimination and affirmative action are juxtaposed as contradictory doctrines.[15] The argument that one cannot be colorblind and ensure equal opportunity while using race preferences is filtered through a majoritarian lens that discounts the long history of preferential treatment for whites.[16]

By excluding blacks from a sizeable segment of the labor market for centuries, whites gained a systemic, locked-in advantage that continues to benefit them.[17] Affirmative action provides a preference to blacks and other nonwhites as a counterweight to this historical advantage.[18] Furthermore, affirmative action is a tool to combat the existence of current implicit bias in the labor market.[19] By inserting race into conscious decision-making, it disrupts the subconscious biases that results in discriminatory decisions.[20]

Historically, affirmative action was embraced as a means towards nondiscrimination.[21] Civil rights leaders in the early twentieth century and during the Civil Rights Movement mounted direct action campaigns targeting employers to proportionally hire blacks.[22]

Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–93 (2004) (giving relevant background information on inequality and discriminatory employment practices).

13. Quillian et al., *supra* note 11, at 10874.
14. Johnson, *supra* note 1, at 177; *see also* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 102–03 (2003); LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 69–70 (12th ed. 2012).
15. *See* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 14–15 (2013).
16. *See* Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 734 (2000) (discussing the systemic advantages that have been afforded to white workers thanks to well over a century of monopolistic discriminatory policies and practices in the American job market).
17. *Id.*
18. KENNEDY, *supra* note 15, at 11.
19. *See* discussion *infra* Section II.B.2.
20. *See* Roithmayr, *supra* note 16, at 736.
21. *See* David Oppenheimer, *Dr. King's Dream of Affirmative Action*, 21 HARV. LATINX L. REV. 55, 56–57 (2018).
22. *See id.* at 60; David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1120 (2011); Gregory Hanson, *The Affirmative Action Requirement of Executive Order 11246 and Its Effects on Government Contractors,*

Affirmative action has long accompanied the government's efforts towards nondiscrimination.[23] From the Freedman's Bureau during Reconstruction to the executive orders mandating affirmative action in federal agencies and federal contracting, the federal government recognized affirmative action and nondiscrimination as compatible mechanisms to achieve equality.[24] After the passage of the Civil Rights Act of 1964, this country robustly engaged in forging a new path towards equality, rooting out systemic discrimination and promoting affirmative action based on race.[25] Both public and private sector employers along with the judiciary embraced race-conscious affirmative action programs that included timetables and numerical goals to increase the proportional representation of nonwhites in the workforce.[26] These programs opened up the labor market for blacks to more skilled and higher paying occupations and had a direct impact on black economic progress.[27]

The experiment was short lived however, as Ronald Reagan's Administration unleashed a full scale retrenchment in both enforcement and commitment to affirmative action.[28] Notably, while the Administration was bombastic about dismantling affirmative action, much of the federal affirmative action policies and programs survived, albeit narrower in scope.[29] Nonetheless, the rhetorical assault on affirmative action successfully shifted the public dialogue

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Unions and Minority Workers, 32 MONT. L. REV. 249, 249 (1971); HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW 178–79 (1977); HORACE CAYTON, LONG OLD ROAD: BACK TO BLACK METROPOLIS 237 (1965).

23. *See, e.g.*, HILL, *supra* note 22, at 66–67; *see also* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 551–52 (1998).
24. HILL, *supra* note 22, at 66–67; Siegel, *supra* note 23, at 551–52.
25. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 142–44.
26. *See* discussion *infra* Section III.A.
27. JOHN BOUND & RICHARD B. FREEMAN, *Black Economic Progress: Erosion of the Post-1965 Gains in the 1980s?*, *in* THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET 34–35 (Steven Shulman & William Darity, Jr. eds., 1989); RICHARD B. FREEMAN, *Black Economic Progress After 1964: Who has Gained and Why?*, *in* STUDIES IN LABOR MARKETS 249 (Sherwin Rosen ed., 1981).
28. Elizabeth Bartholet, *The Radical Nature of the Reagan Administration's Assault on Affirmative Action, Commentary*, 3 HARV. BLACKLETTER L.J. 37, 39–40 (1986).
29. *See* Claudia Withers & Judith A. Winston, *Equal Employment Opportunity*, *in* THE CITIZENS' COMMISSION ON CIVIL RIGHTS, ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S 198 (Reginald C. Govan & William L. Taylor eds., 1989).

and the private sector's appetite for such programs.[30] Today, affirmative action in private-sector employment is brushed aside as an untenable remedy, surely to be struck down by the United States Supreme Court.[31] At first glance, the Supreme Court's constitutional analysis of the validity of affirmative action programs under the Equal Protection Clauses is marred by historical amnesia and ideological instability.[32] Many of these decisions are fractured and doctrinally unstable, resting on political ideology rather than grounded in historical and contemporaneous reality.[33] But a close examination of affirmative action cases provides guidance in structuring viable race-based affirmative action programs that can withstand constitutional challenges.[34] While the Supreme Court has narrowly and often inconsistently interpreted the scope of the Fourteenth Amendment's tolerance for race-conscious remedies, it has not shut its door on affirmative action.[35] The Court has consistently acknowledged that affirmative action remains a constitutionally viable remedy.[36] The Supreme Court has also upheld affirmative action programs challenged under Title VII of the Civil Rights Act, which prohibits discrimination in employment based on, among other things, race.[37]

Although the Supreme Court's many plurality and 5–4 majority opinions fail to provide a coherent doctrinal thesis,[38] some clear answers emerge:

> 1) Schools and universities can use race as a factor in furtherance of diversity;[39]

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30. STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 155; Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104(2) AM. J. SOC. 441, 455 (1998).
31. STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 167–69.
32. *See* Arthur J. Marinelli, *Affirmative Action: A Divided Supreme Court*, 22 J. MARSHALL L. REV. 99, 99–100 (1988).
33. *See* Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CALIF. L. REV. 1179, 1179 (1996).
34. *See id.* at 1191–92.
35. *See id.* at 1198–99.
36. Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2210–11 (2016); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 314 (2013); Gratz v. Bollinger, 539 U.S. 244, 270–72 (2003); Grutter v. Bollinger, 539 U.S. 306, 339 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 301, 314 (1978) (plurality opinion).
37. Johnson v. Transp. Agency, 480 U.S. 616, 635 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 (1979).
38. *See* Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 758 (1980).

2) Private employer can use race as a factor in designing voluntary affirmative action programs, subject to certain limitations;[40]

3) Local governments can use race as a factor in hiring and contracting if a clear record is established of a history or ongoing practice of discrimination;[41]

4) Federal government can require contractors to have affirmative action plans for hiring and subcontracting, subject to certain limitations;[42]

5) Public employers may take affirmative race-based actions where there is strong basis in evidence of disparate impact liability;[43] and

6) Courts may order affirmative action that includes racial quotas where discrimination has been established.[44]

Today, the nascent progress on employment equality has stalled.[45] Race discrimination and segregated workforces are just as much a reality today as they were for much of this country's history, contributing to widening economic disparity between whites and blacks.[46] The time is ripe to lay the political and social groundwork to re-embrace affirmative action in private employment.[47] It has been an effective remedy to integrate the workplace and increase black economic progress.[48] Re-embracing affirmative action in private employment will require a recommitment by civil rights leaders, politicians, employers, unions, and workers to prioritize and reframe affirmative action as an antidote to discrimination and a counterweight to centuries of preferential treatment of whites.

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39. *Fisher II*, 136 S. Ct. at 2210; *Fisher I*, 570 U.S. at 310; *Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 342–43; *Bakke*, 438 U.S. at 372–73 (plurality opinion).
40. *Johnson*, 480 U.S. at 641–42; *Weber*, 443 U.S. at 197.
41. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511–12 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277–79, 283 (1986) (plurality opinion).
42. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995); Fullilove v. Klutznick, 448 U.S. 448, 453 (1980) (plurality opinion).
43. Ricci v. DeStefano, 557 U.S. 557, 586–87 (2009).
44. *See* United States v. Paradise, 480 U.S. 149 (1987) (plurality opinion).
45. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 167.
46. *See* Judith Hellerstein & David Neumark, *Workplace Segregation in the United States: Race, Ethnicity and Skill*, 90(3) REV. ECON. STAT. 475–76 (2008).
47. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 172–73, 176–77.
48. *See, e.g.*, BOUND & FREEMAN, *supra* note 27, at 34–35; FREEMAN, *supra* note 27, at 249; Withers & Winston, *supra* note 29, at 208.

A shift in the public discourse is feasible today thanks in large part to an already vital ongoing civil rights dialogue.[49] Movements such as #BlackLivesMatter[50] and #MeToo[51] have profoundly shifted the frames used to discuss police brutality and sexual assault on women.[52] Another movement, #Occupy[53] has essentialized income inequality between the 1% and the 99%.[54] When gay civil rights leaders embraced a new framing for gay marriage, it led to greater public acceptance and a legal revolution.[55] Sustained public messaging defeated an anti-affirmative action ballot measure in Colorado.[56] Public pressure can be the "spur or catalyst" for employers, unions and politicians to "eliminate . . . the last vestiges of an unfortunate and ignominious page in this country's history."[57]

In the past, robust federal enforcement of nondiscrimination and affirmative action oversight were a critical force on employers to integrate their workforce.[58] Today, that environmental pressure will need to come from companies that are leaders in their industry and unions.[59] Large employers already are champions of affirmative action in education and understand the value of a diverse

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49. *See* S.M., *Black Lives Matter Broadens Its Scope*, ECONOMIST (Aug. 4, 2016), https://www.economist.com/democracy-in-america/2016/08/04/black-lives-matter-broadens-its-scope.
50. *See What We Believe*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/what-we-believe/ (last visited Dec. 20, 2018).
51. *See* ME TOO., https://metoomvmt.org (last visited Dec. 20, 2018).
52. *See id.*; S.M., *supra* note 49.
53. *See About*, OCCUPY WALL STREET, http://occupywallst.org/about/ (last visited Dec. 20, 2018).
54. *See id.*
55. Carrie Wofford, *Why Equality is Winning: Two Factors Caused Public Opinion on Gay Rights to Shift So Quickly*, U.S. NEWS & WORLD REP. (Mar. 26, 2014), https://www.usnews.com/opinion/blogs/carrie-wofford/2014/03/26/how-did-public-opinion-on-gay-marriage-shift-so-quickly.
56. MICHELE S. MOSES ET AL., UNIV. OF COLO. AT BOULDER, INVESTIGATING THE DEFEAT OF COLORADO'S AMENDMENT 46: AN ANALYSIS OF THE TRENDS AND PRINCIPAL FACTORS INFLUENCING VOTER BEHAVIORS 1–2 (2010), http://archives.civilrights.org/publications/colorado-46/2010-11-12-defeat-of-amendment46-report-final.pdf.
57. United Steelworkers of Am. v. Weber, 443 U.S. 193, 204 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).
58. *See, e.g.*, BOUND & FREEMAN *supra* note 27, at 35, 46; FREEMAN, *supra* note 27, at 249; Withers & Winston, *supra* note 29, at 208.
59. *See Labor Commission on Racial and Economic Justice*, AM. FED'N L. CONGRESS INDUS. ORGS. (Feb. 25, 2015), https://aflcio.org/about/leadership/statements/labor-commission-racial-and-economic-justice.

workforce.[60] The Supreme Court, as well as federal and state affirmative action mandates for government contractors, already provide a road map for employers to voluntary adopt affirmative action plans, including race-conscious decision-making.[61] Unions, who rely on black membership for their survival, have begun tackling racial equity within their movements.[62] They can play a central role in including affirmative action plans in their collective bargaining agreement as well as moving the Democratic Party to re-embrace affirmative action.[63]

This article is a call for a radical reconstruction of the private labor market through re-embracing affirmative action as an effective tool to achieve equality. Part II traces the growing income and wealth disparity between blacks and whites and links the history of segregation and implicit bias in the labor market as a factor contributing to economic disparity.[64] Part III is a historical account of the movement for racial equality, tracing the alliance between nondiscrimination and affirmative action and the triumph of equal opportunity (formal equality) over equality of outcomes (substantive equality).[65] Part IV examines the legal justification and viability of affirmative action programs under the Fourteenth Amendment and Title VII.[66] Part V is a roadmap for how we can re-embrace affirmative action in the private employment sector, from reframing the dialogue to grassroots pressure on large employers and unions to adopt affirmative action plans that include race-conscious decision-making.[67]

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60. *See, e.g.*, Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, Grutter v. Bollinger, No. 02-241, 2003 WL 399056, at *8–9; Brief for Amici Curiae Fortune-100 and Other Leading American Businesses in Support of Respondents, Fisher v. Univ. of Tex. (*Fisher I*), No. 11-345, 2012 WL 3418831, at *4–12; Brief for Amici Curiae Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, Fisher v. Univ. of Tex. (*Fisher II*), 570 U.S. 297 (2013) (No. 14-981), 2015 WL 6735839, at *5–7.
61. *See infra* Part IV.
62. *See, e.g.*, Jake Rosenfeld & Meredith Kleykamp, *Organized Labor and Wage Inequality in the United States*, 117 AM. J. SOC. 1460, 1461–63 (2012); AM. FED'N L. CONGRESS INDUS. ORGS., *supra* note 59; U.S.D.L. News Release USDL-18-0080 (Jan. 19, 2018); Mary K. O'Melveny, Achieving Diversity Within Unions 519, 527–32 (2006) (unpublished manuscript), http://apps.americanbar.org/labor/lel-aba-annual/papers/2006/27.pdf.
63. *See* Rosenfeld & Kleykamp, *supra* note 62, at 1466.
64. *See infra* Part II.
65. *See infra* Part III.
66. *See infra* Part IV.
67. *See infra* Part V.

While it seems quixotic to advocate for affirmative action in the midst of rising white supremacy and its imprimatur through state action,[68] it is important to lay the groundwork for a radical reconstruction. The fight over equality must include a demand for affirmative steps to combat discrimination.[69] Lyndon Johnson provides a beacon of light on this issue; for the first twenty years as a Senator from Texas, Johnson voted against every civil rights measure that came up for a vote, including a bill to stop lynching.[70] Yet, by the time he was president, he spearheaded the passage of the Civil Rights Act and forcefully advocated for affirmative action:

> We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.[71]

II. THE PERSISTENCE OF RACIAL DISCRIMINATION IN AMERICA

Growing economic disparity between blacks and whites and the resurgence of racially homogenous workplaces has been well documented.[72] While many are cautious to draw a direct link between widening income and wealth disparity to the existence of racial discrimination in the workplace, the history of slavery and segregation illustrate the preferences bestowed on white men in the labor market.[73] Furthermore, a wealth of cognitive empirical research has aptly demonstrated how implicit bias forecloses employment opportunities based on race.[74] The legacy of white preference and discrimination in the labor market is the economic chasm between the races.[75]

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68. *See* Sarah Begley, *White Supremacist and Black Nationalist Groups Both Grew During Trump's First Year as President*, TIME (Feb. 21, 2018), http://time.com/5168677/donald-trump-hate-groups-splc/.
69. *See* discussion *infra* Section III.A
70. W. Gardner Selby, *Lyndon Johnson Opposed Every Civil Rights Proposal Considered in His First 20 Years as Lawmaker*, POLITIFACT TEX. (Apr. 14, 2014), https://www.politifact.com/texas/statements/2014/apr/14/barack-obama/lyndon-johnson-opposed-every-civil-rights-proposal/.
71. Johnson, *supra* note 1, at 175.
72. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 250–51.
73. *See* discussion *infra* Section II.A.1.
74. *See* discussion *infra* Section II.B.2.
75. *See* discussion *infra* Section II.B.1.

A. Growing Income and Wealth Disparity Between Blacks and Whites

"In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope."[76]

To measure inequality, economists look at a variety of factors. Income,[77] mobility,[78] and wealth[79] provide a prescient lens to understand disparities in employment and employment opportunities. By these three measures, there is a colossal divide between black and white families.[80] The disparity between blacks and whites has been fluid, influenced in part by government policy and enforcement around discrimination.[81]

1. Income Gap Historically Wide

If blacks were fully integrated into the economic mainstream and racial discrimination declined, black incomes would be on par with whites.[82] While exact historical figures are not available to capture income from the end of slavery to the beginning of World War II, blacks did make great strides in earning an income, accumulating wealth and to some extent upward mobility.[83] However, the gulf between black and white economic progress remained large during this period.[84] Under the best of circumstances, blacks would have needed to increase their income elevenfold by World War I to close the economic divide.[85] With almost half of blacks out of work, the Great Depression decimated what little progress blacks had made, harkening to the economic prospects that blacks had at the end of Reconstruction.[86]

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76. Johnson, *supra* note 1, at 174.
77. *Income*, BLACK'S LAW DICTIONARY (10th ed. 2014). Income is money received through work and investment. *See id.*
78. *Mobility*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1996). Mobility is the likelihood of moving up or down the distribution of income. *See id.*
79. *Wealth*, BLACK'S LAW DICTIONARY (10th ed. 2014). Wealth is the sum of assets minus liabilities (family bank account balances, stock holdings, retirement funds) minus mortgages, credit card balances, outstanding medical bills, student loans, other debts, at a point in time. *See id.*
80. *See* BROWN ET AL., *supra* note 14, at 13.
81. *See id.* at 77–79.
82. *Id.* at 69.
83. *See* HIGGS, *supra* note 7, at 16.
84. *See id.* at 12.
85. *Id.*
86. *See* KATZNELSON, *supra* note 1, at 13; *see also* HILL, *supra* note 22, at 175.

From 1945 to 1972, black women were moving out of domestic services and farming to clerical, factories, and professional employment; black men were making inroads in professional and skilled crafts as well in the managerial ranks.[87] While considerable gains were made by blacks in income after World War II, they still lagged behind whites.[88] During this time, black family income was approximately half of white family income.[89]

The passage of the Civil Rights Act of 1964 resulted in blacks making rapid gains in education and accessing more diverse employment opportunities.[90] As a result, the median black family income rose from 55% of white family income in 1965 to 62% by 1970.[91] Currently, black household income is stagnant, at 61% of white household income.[92]

Income is in large part determined by continuous employment.[93] Blacks have more cyclical employment and higher rates of unemployment than whites.[94] The unemployment gap between black and white males has expanded.[95] In 1948, the white-black male employment gap was only four percentage points.[96] From 1979 to 2016, unemployment rates for black workers in the labor force were

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87. RICHARD B. FREEMAN, *Changes in the Labor Market for Black Americans, 1948-72*, 1973 BROOKING PAPERS ON ECON. ACTIVITY 67, 86 (1973); *see* BROWN ET AL., *supra* note 14, at 70.
88. DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 10 (2010).
89. BUREAU OF CENSUS, U.S. DEP'T. OF COMMERCE, SERIES P-60, CURRENT POPULATION REPORTS, INCOME IN 1965 OF FAMILIES AND PERSONS IN THE UNITED STATES 3 (1967); MISHEL ET AL., *supra* note 14, at 68–69.
90. BOUND & FREEMAN, *supra* note 27, at 32; MISHEL ET AL., *supra* note 14, at 68.
91. BUREAU OF CENSUS, U.S. DEP'T. OF COMMERCE, SERIES P-60, CURRENT POPULATION REPORTS, INCOME IN 1965 OF FAMILIES AND PERSONS IN THE UNITED STATES 3 (1967); *see* BUREAU OF CENSUS, U.S. DEP'T. OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 2001 15–17 (2002).
92. *See* BUREAU OF CENSUS, U.S. DEP'T. OF COMMERCE, CURRENT POPULATION REPORTS, INCOME AND POVERTY IN THE UNITED STATES: 2016 7 (2017); *see also Racial Gaps in Household Income Persists*, PEW RES. CTR. (June 21, 2016), http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/st_2016-06-27_race-inequality-overview-05/.
93. *See* Tomaz Cajner et al., *Racial Gaps in Labor Market Outcomes in the Last Four Decades over the Business Cycle*, FIN. & ECON. DISCUSSION SERIES 2017-071 1, 1–4 (2017).
94. *Id.* at 4.
95. Samuel Cohn & Mark Fossett, *Why Racial Employment Inequality is Greater in Northern Labor Markets: Regional Differences in White-Black Employment Differentials*, 74 SOC. FORCES 511, 512 (1995).
96. *Id.*

6.4 percentage points higher than for whites during market expansion and 6.9 percentage points higher during recession.[97] This gap cannot be explained by age, education or experience.[98]

While blacks and whites in the late nineteenth and twentieth century earned the same wages for unskilled labor, the earning gap widened between low-income blacks and whites in the 1980s.[99] The disproportionate concentration of blacks in these occupations also greatly hampered their earning capacity.[100] Currently, 53% of blacks make less than fifteen dollars an hour.[101] Although most whites eventually leave low-wage jobs as they age, close to half of blacks over thirty-five are still employed in low-wage industries.[102]

Wage differential also contributes to income disparity.[103] Blacks earn less than they did in the 1970s and the gap has expanded the most between college-educated blacks and whites.[104] In a recent study evaluating the earnings and demographic data of all Americans from 1989–2015, black men consistently earned less than white men in 99% of Census tracts, even when raised in similar socioeconomic backgrounds.[105] Black men's average hourly wages were 22.2% lower than those of white men in 1979 and that gap widened by 2015 to 31%.[106] The gap has also widened among women.[107] Black women were catching up to white women in 1979, earning 95% of

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97. *See* MARY C. DALY ET AL., DISAPPOINTING FACTS ABOUT THE BLACK-WHITE WAGE GAP 1 (Anita Todd ed., 2017), https://www.frbsf.org/economic-research/files/el2017-26.pdf.
98. *Id.* In fact, college-educated black men in the 1980s were almost three times more likely to be unemployed as college-educated whites. BROWN ET AL., *supra* note 14, at 80–81.
99. BROWN ET AL., *supra* note 14, at 82.
100. HIGGS, *supra* note 7, at 19–20.
101. ECON. POLICY INST., FEW REWARDS: AN AGENDA TO GIVE AMERICA'S WORKING POOR A RAISE 6 (2016), https://www.oxfamamerica.org/static/media/files/Few_Rewards_Report_2016_web.pdf.
102. Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L.J. 61, 71 (2016).
103. *See* DALY ET AL., *supra* note 97, at 3.
104. *See id.* at 1, 4.
105. RAJ CHETTY ET AL., RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE 1–2, 6 (The Equal. of Opportunity Project ed., 2018), http://www.equality-of-opportunity.org/assets/documents/race_paper.pdf; Emily Badger et al., *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html.
106. VALERIE WILSON & WILLIAM M. RODGERS III, BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY 3 (Econ. Pol'y Inst. ed., 2016), https://www.epi.org/files/pdf/101972.pdf.
107. *Id.*

the average white woman.[108] But by 2015, the wages of black women declined to 82% of the average white woman.[109]

2. Wealth Inequality Flagrantly Pronounced

After the Civil War, "blacks owned themselves, but the whites still owned virtually all the tangible wealth."[110] At the time of the Emancipation Proclamation, blacks owned 0.5% of the total wealth in this country, and by 1990 that number had doubled to a meager one percent.[111] Although whites had very little wealth accumulation in the nineteenth and early twentieth century, the wealth disparity became flagrant due to federal policies that increased whites' access to assets.[112] Home ownership is a prime mode of wealth accumulation for most families.[113] Thanks in large part to the federal government's housing policies and the Servicemen's Readjustment Act of 1944—commonly known as the GI Bill—whites substantially increased their wealth after World War II.[114] A median white family had assets worth more than fifteen times what a median black family had.[115]

In 1984, the median white household had a net worth of $39,135, compared to $3,397 for black households (9% of white households).[116] By 2010, the median net worth of whites was $97,000 (a 60% increase) compared to $4,900 for black households

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108. *See id.*
109. *See id.*
110. HIGGS, *supra* note 7, at 16.
111. CONLEY, *supra* note 88, at 25.
112. *See id.*
113. *See id.* at 42.
114. In 1933, the federal government established the Home Owner's Loan Corporation (HOLC) to help families refinance their mortgages in default to avoid foreclosures. CONLEY, *supra* note 88, at 36–37. HOLC institutionalized "redlining" in predominately black neighborhoods as too risky and ineligible for HOLC-sponsored loans. *Id.* at 36. Thus, many blacks were left without means to refinance during the Depression resulting in a loss of their homes. *Id.* After World War II, the Federal Housing Authority along with the Veterans Administration, through the GI Bill, provided low-interest, long-term loans for first time home buyers. *Id.* at 37. Fewer than one percentage of mortgages were issued to blacks, while whites overwhelmingly benefitted from the program. *Id.* *See also* KATZNELSON, *supra* note 1, at 164 (showing the resulting home value disparity between blacks and whites in the 1980s); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF OUR GOVERNMENT SEGREGATED AMERICA (2017) (outlining a comprehensive account of government housing policies that intentionally segregated blacks and whites).
115. CONLEY, *supra* note 88, at 1.
116. KATZNELSON, *supra* note 1, at 164.

(5% of white households).[117] Racial inequality in wealth is far greater than the disparity that exists in wages and incomes.[118]

This leads to generational poverty.[119] One in four black households live in poverty today, double the rate of poverty among whites.[120] More than two-thirds of black boys are raised by poor or lower-middle class families, while more than half of white boys are raised by rich or upper-middle class families.[121] Almost 11% of white children who grew up in the bottom quintile rose to the top quintile while only 2.5% of black children in the bottom quintile did.[122] Not being white also increases the chance of falling into poverty.[123] There is significant backsliding by upper and middle-income black children. Of children born to parents in the top quintile, only 18% of black children remain in the top, compared to 41.1% of white children.[124]

B. Discrimination as a Factor in Racial Disparity

Economists have not been able to explain the large gap between black and white earnings with easily measured characteristics such as education, age, and experience.[125] Some have explained that discrimination plays a factor in the black-white gap, especially in the persistent differential in unemployment rates, although others caution that additional unmeasurable forces may contribute to the divide.[126]

Despite the caution of some economists, historical and current empirical evidence point to the existence of race discrimination in the labor market.[127] Blacks in this country have been free for less time

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117. MISHEL ET AL., *supra* note 14, at 376.
118. *Id.* at 385.
119. *Id.* at 375.
120. CURRENT POPULATION REPORTS, INCOME AND POVERTY IN THE UNITED STATES, *supra* note 92, at 12–13, tbl. 3; LINDA BURTON ET AL., *State of the Union 2017: Poverty*, PATHWAYS (SPECIAL ISSUE) 9 (2017).
121. Badger et al., *supra* note 105.
122. CHETTY ET AL., *supra* note 105, at 18; Badger et al., *supra* note 105; *see also* MISHEL ET AL., *supra* note 14, at 155, fig. 3K.
123. MISHEL ET AL., *supra* note 14, at 420.
124. CHETTY ET AL., *supra* note 105, at 18; Badger et al., *supra* note 105; *see also* MISHEL ET AL., *supra* note 14, at 140 (showing that 63% of black children in the bottom fourth income distribution remained there as adults, while only 32.3% of white children remained in the same bracket they found themselves in as children).
125. DALY ET AL., *supra* note 97.
126. ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAWS PERPETUATE INEQUALITY 17 (2017); Cajner et al., *supra* note 93, at 7; DALY ET AL., *supra* note 97; CHETTY ET AL., *supra* note 105, at 6–7.
127. *See infra* notes 212–13 and accompanying text.

than they were enslaved.[128] Most black Americans are only two to three generations away from slavery and only seven-tenths of a lifetime away from segregated workplaces, public transit, restaurants, and schools.[129] While segregation was at its ugliest in the South, whites overwhelmingly supported racial segregation throughout the country.[130] Social customs and norms, backed by the full force of the state's police powers, enforced the separation of the races in every institution and space in America.[131] The legacy of slavery and segregation coupled with existing discrimination has profoundly impacted income, upward mobility, and wealth accumulation for blacks.[132]

1. White Preference and Systemic Segregation in Employment

Racial segregation and affirmative action for whites has been the backbone of this country, "stamped from the beginning."[133] Jefferson Davis, the future president of the Confederacy, stated on the floor of the U.S. Senate on April 12, 1860, that "[t]his Government was not formed by negroes nor for negroes" but "by white men for white men."[134]

The history of systemic, institutional discriminatory policies in employment begins with slavery. Slavery was a lucrative financial system, where blacks were worth more as property than as free men.[135] In the North, the treatment of blacks was better, but still

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128. In 1619, the first recorded slave ship landed in Jamestown, culminating in the purchase of twenty Africans by the Governor of Virginia. IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 38 (2016). Slavery was outlawed by the Thirteenth Amendment in 1865. U.S. CONST. amend. XIII.

129. Diana Ramey Berry, *Slavery in America: Back in the Headlines*, CONVERSATION (Oct. 21, 2014, 5:54 AM), https://www.theconversation.com/slavery-in-america-back-in-the-headlines-33004.

130. *See infra* Section II.B.1.

131. *See id.*

132. *Id.*

133. This phrase is from a speech given by Jefferson Davis in the U.S. Senate where he said that the inequality of the white and black races was "stamped from the beginning." KENDI, *supra* note 128, at 3.

134. *Id.*

135. *See* GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 19 (1986). The average slave owner held nearly two-thirds of his wealth in the form of slaves, and the value of slaves in Alabama, Georgia, Louisiana, Mississippi, and South Carolina (cotton states) comprised nearly 60% of all agricultural wealth. *Id.* at 19–20.

discriminatory.[136] Northern legislators traded the shackles of slavery for the shackles of overt discrimination.[137]

From the end of slavery until the passage of the Civil Rights Act, segregation in employment was "nearly absolute."[138] Every former Confederate state immediately instituted Black Codes which required blacks to sign yearly contracts for employment that resembled slavery.[139] Legislation restricting the employment of blacks in certain industries, coupled with strikes and violence over black hiring in skilled jobs, resulted in racial occupational segregation in the South for another 99 years.[140] Whites routinely engaged in mob violence and individual assaults of blacks, against the threat of black labor competition or strikebreaking.[141]

In the North, unions played a major role in carving out the workplace, reserving the most desirable jobs for white men.[142] Black workers were relegated to mostly unskilled blue collar jobs, which were the hardest, dirtiest and lowest-paid jobs and were systematically denied white-collar or supervisory jobs.[143] From the 1880s to World War II, labor unions, though growing in power, remained stridently anti-black, and kept black workers out of their ranks and barred black employment in skilled trades as well as most non-manual employment.[144] Blacks were excluded until 1930 from

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136. *See* KENDI, *supra* note 128, at 120.
137. *Id.*
138. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 7.
139. ERIC FORNER, THE SECOND AMERICAN REVOLUTION: IN CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE 105–06 (Jonathan Birnbaum & Clarence Taylor eds., 2000).
140. *See, e.g.*, HILL, *supra* note 22, at 11–16; STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 7; WRIGHT, *supra* note 135, at 68–70; HIGGS, *supra* note 7, at 22.
141. STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 57 (1995); Cornelius Christian, *Lynchings, Labour and Cotton in the US South: A Reappraisal of Tolnay and Beck*, 66 EXPLORATIONS IN ECON. HIST. 106, 109 (2017) (indicating that violence was also inspired by the psychosexual motivation to keep white women pure).
142. HIGGS, *supra* note 7, at 23.
143. BROWN ET AL., *supra* note 14, at 70. Segregation greatly limited earning capacity. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971) (showing that blacks at Duke Power Co. were only employed in the Labor Department, where the highest paying jobs paid less than the lowest paying jobs in the other four departments, where only whites were employed).
144. HILL, *supra* note 22, at 16, 20 (1977); MASSEY & DENTON, *supra* note 7, at 28 (explaining that some have attributed union racism to the fact that blacks were often recruited as strikebreaker, but unlike blacks, unions actively recruited and absorbed each new set of European immigrant even though they were also used as strikebreakers by employers); Crenshaw, *supra* note 10, at 1375.

most skilled craft unions in the American Federation of Labor.[145] With a more leftist and inclusionary leadership, the Congress of Industrial Organizations (CIO) was a countervailing force, with participation rates of blacks almost double that of AFL membership by the beginning of World War II.[146] But even the CIO had segregated locals in the South.[147] Unions only began to fully integrate and end overt discriminatory practices as a result of the Civil Rights Act of 1964.[148]

Most employers and unions throughout this country legitimated and enforced white male preferences, including the federal government, which created a segregated workforce under the tacit auspices of Woodrow Wilson.[149] Prior to the Wilson Administration, employment in the federal government meant advancement and social power for blacks.[150] More than four hundred blacks worked as white-collar clerks, including supervisory positions, in the federal government before Wilson.[151]

Championed first by Wilson's Postmaster General, many federal government departments became segregated after Wilson took office.[152] Blacks were downgraded to lower positions and obtaining a civil service job became more difficult.[153] The color line was maintained thoroughly, from separate workstations to separate toilets and eating areas.[154] Advancement for blacks summarily ended, and they were downsized to custodial, menial, and junior clerical positions.[155]

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145. DESMOND S. KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT 8 (Oxford Univ. Press 1995); MASSEY & DENTON, *supra* note 7, at 28.
146. Rosenfeld & Kleykamp, *supra* note 62, at 1466.
147. MASSEY & DENTON, *supra* note 7, at 28.
148. Rosenfeld & Kleykamp, *supra* note 62, at 1466.
149. STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 7; Tom Shoop, *When Woodrow Wilson Segregated the Federal Workforce*, GOV'T EXEC. (Nov. 20, 2015), https://www.govexec.com/federal-news/fedblog/2015/11/when-woodrow-wilson-segregated-federal-workforce/123913/.
150. ERIC S. YELLIN, RACISM IN THE NATION'S SERVICE: GOVERNMENT WORKERS AND THE COLOR LINE IN WOODROW WILSON'S AMERICA 4 (2013) (ebook).
151. *Id.*
152. KING, *supra* note 145, at 4; Deaana Boyd & Kendra Chen, *The History and Experience of African Americans in America's Postal Service*, SMITHSONIAN NAT'L POSTAL MUSEUM, https://postalmuseum.si.edu/AfricanAmericanHistory/p5.html (last visited Dec. 20, 2018).
153. KING, *supra* note 145, at 4.
154. *See id.* at 29.
155. *See id.* at 4.

Government policies of the 1930s and 1940s were structured either explicitly or through their implementation to advantage white males in the labor market.[156] In the 1930s, northern and southern Congressmen joined forces to pass sweeping legislation that expanded prosperity to millions of white Americans.[157] Several New Deal legislations excluded two main industries of black employment: agricultural workers and domestic servants.[158] During this time, three in four blacks lived in the South.[159] Further, 40% of laborers in the agricultural industry in the South were black and 55% were sharecroppers.[160] In 1958, one third of nonwhite women were employed as domestics.[161] These workers did not reap the benefits of the Fair Labor Standards Act of 1938, which established a national floor for minimum wage and overtime premium pay, eliminated regional wage differences and treated most industries the same.[162] Similarly, the Social Security Act of 1935, which created a welfare safety net for old age, also excluded agricultural workers and domestic servants.[163] The Act initially excluded 65% of blacks, and as high as 80% in some parts of the South.[164] In its first twenty-five years, the Social Security Act was "characterized by a form of policy apartheid."[165]

The G.I. Bill, which provided education and training programs for returning veterans, exacerbated the economic and educational opportunities between blacks and whites after World War II.[166] One

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156. *See* KATZNELSON, *supra* note 1, at 53, 55.
157. *See id.* at 53–55.
158. *See, e.g.*, 29 U.S.C. § 152(3) (2012) (defining employees covered under the National Labor Relations Act); KATZNELSON, *supra* note 1, at 27; Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 63–64 (2000); Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. POL'Y HIST. 416, 419–20 (1995).
159. KATZNELSON, *supra* note 1, at 30.
160. *Id.*
161. Randy P. Albelda, *Occupational Segregation by Race and Gender, 1958-1981*, 39 INDUS. & LAB. REL. REV. 404, 406 (1986).
162. Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 424 (2011).
163. *See* KATZNELSON, *supra* note 1, at 42–43.
164. *Id.* at 43.
165. *Id.*
166. *See id.* at 84, 114. Close to one million black men served in segregated military units during World War II, most in the Army and Navy. Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, 63 J. ECON. HIST. 145, 147–48

in every twelve on-the-job training programs was open to blacks in the South.[167] Segregated public vocational schools in the South had limited spots and provided limited training in fields such as tailoring and dry cleaning.[168] Private vocational schools, which proliferated after the war, provided substandard training for blacks and were often exploitative.[169] Training in higher skill trades, such as radio and electrical work, machine shop, mechanics, and carpentry and woodwork, were entirely closed off to blacks.[170]

The United States Employment Services (USES) helped veterans find jobs and played an active role in the labor market.[171] In the South, USES job centers did not place any black veterans in skilled employment, despite their training and experience in the military.[172] USES job centers in the North channeled blacks into unskilled jobs as well.[173] Of the veterans that USES helped find non-farm jobs, 92% of unskilled positions were filled by blacks.[174]

Blatantly discriminatory hiring and compensation policies continued during the post-war manufacturing boom.[175] Immediately after the passage of the Civil Rights Act and peak government enforcement, segregation in the workplace declined strongly.[176] Black women worked in the same jobs as white women, making almost the same amount of money.[177] Both black men and black women made strong gains in professional jobs.[178] White men continued to dominate the managerial and skilled crafts jobs, but blacks did make inroads.[179] Thanks to the affirmative action mandate in federal contracting, black men made larger gains in professional,

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(2003); *see also* Siegel, *supra* note 23, at 551 (discussing segregation in the context of education and the military).

167. KATZNELSON, *supra* note 1, at 135.
168. *Id.* at 136–37.
169. *See id.* at 137.
170. *Id.* at 136–37.
171. *Id.* at 138.
172. *Id.*
173. *Id.*
174. *Id.*
175. *See* Albelda, *supra* note 161, at 407 (describing the vast occupational differences and indices between nonwhite and white women).
176. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 128.
177. *See id.* at 128 fig.4.4; *see also* WILSON & RODGERS, *supra* note 106, at 3. In 1958, black women were unlikely to be employed in the same occupations as white women. *See* Albelda, *supra* note 161, at 407.
178. STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 136.
179. *See id.* at 135–36.

managerial and craft jobs with federal contractors than in non-contracting firms.[180]

By the 1980s, black racial integration with white men came to a halt and re-segregation between white and black women increased, due to the Reagan Administration's weakened oversight and enforcement.[181] Sorting by race continues to exist in the labor market today.[182] A recent study of large private sector firms over a forty year period found that racial segregation is higher today than a generation ago.[183] Blacks, along with other nonwhites, are overrepresented in low-wage industries.[184] While 80% of people employed in managerial, professional and related professions are white, a high percentage of people employed as taxi or bus drivers, telemarketers, personal care aides, and barbers are black.[185]

Occupational race segregation cannot be explained away as a matter of preference, skill acquisition or even schooling.[186] Competitive threats increased preference for white men.[187] A 10% increase in the number of women or nonwhites in the labor pool resulted in a 30%–45% increase in white male representation in managerial positions.[188] A similar effect is seen in skilled craft jobs, where there is a dramatic increase in white male representation as the labor pool diversifies.[189]

2. Most Employers Harbor Implicit Bias

An extensive body of social science research has demonstrated the existence of unconscious or implicit cognition and how it influences human behavior.[190] All individuals harbor bias.[191] While some are

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180. *See id.* at 142–44.
181. *See id.* at 131, 146, 167.
182. *See* John-Paul Ferguson & Rembrand Koning, *Firm Turnover and the Return of Racial Establishment Segregation*, 83 AM. SOC. REV. 445, 446 (2018).
183. *Id.*
184. *See* BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES 11. EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 1, 5–6, 10 (2017), https://www.bls.gov/cps/cpsaat11.pdf.
185. *Id.*
186. *See* Hellerstein & Neumark, *supra* note 46, at 475.
187. *See* STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 208.
188. *Id.* at 198.
189. *Id.* at 199.
190. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010). For a more in-depth discussion of implicit bias, *see generally* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 PSYCHOL. REV. 4 (1995), which analyzes the interaction between implicit mode, and explicit mode to suggest social judgment and cognition.

overt and intentional, many of these biases are tucked away in our subconscious.[192] Implicit cognition creates preferences for groups (positive or negative) that often operate outside of conscious awareness and are based on attitudes, self-esteem, and stereotypes; these preferences develop early in life and strengthen over time.[193] Social scientists, through empirical research, have demonstrated that contemporary discrimination is a result of unconscious, in-group preferences and institutionalized in organizational routines rather than conscious, intentional, out-group animosity.[194]

A field experiment conducted in 2001 and 2002 sent out 5,000 resumes to 1,300 help-wanted ads for a whole host of jobs–from cashier to sales management–in the Chicago and Boston area.[195] The study randomly alternated between stereotypically "white-sounding" names, like Emily and Greg, and "African-American-sounding" names, like Lakisha and Jamal.[196] For each ad, the study sent a total of four resumes: two higher quality resumes with slightly better experience, fewer gaps in employment and other positive variables; and two lower quality resumes, assigning a higher quality and lower quality resume to each racial group.[197] Both sets of resumes had the same educational level, a college degree.[198]

The study found large racial disparity in callback rates.[199] It took twice as many mailings for Lakisha and Jamal to get a callback than Emily and Greg.[200] The callback ratio of a white-sounding name was equivalent to having eight additional years of experience.[201] The study also found that experience made no difference for black

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191. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–31 (2012).
192. *See id.*
193. *See e.g.*, *id.*; Gregory Mitchell, *An Implicit Bias Primer*, 25 VA. J. SOC. POL'Y & L. 27, 30 (2018); Greenwald & Banaji, *supra* note 190, at 4–5. Self-esteem is the positive attitude towards one's self and the objects or traits linked to one's self. *Id.* at 10. Stereotypes are socially shared sets of generalizations about members of a social category. *Id.* at 14. Attitudes are predisposed favorable or unfavorable dispositions towards objects. Kang & Lane, *supra* note 190, at 469. They are what we "like and dislike, favor and disfavor, approach and avoid." *Id.*
194. STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 164.
195. Bertrand & Mullainathan, *supra* note 12, at 991, 996.
196. *Id.* at 992.
197. *Id.*
198. *Id.* at 995.
199. *See id.* at 997–99.
200. *See id.* at 997–98, 1008 tbl.8.
201. *Id.* at 998.

employment opportunity.[202] While whites with higher quality resumes received 27% more callbacks than whites with lower quality resumes, higher quality resumes assigned black sounding names had an 8%–9% increase in callback rates compared to lower quality resumes of blacks–a statistically insignificant number.[203] The study concluded that racial discrimination plays an important role in the labor market and the level of discrimination is remarkably uniform across a variety of occupations and job requirements.[204]

Even in low-wage jobs, there is a clear racial hierarchy, with blacks the furthest down.[205] A field study conducted in New York City in 2004 sent out white, black and Latino male testers to apply for entry-level jobs over nine months.[206] The first cohort of testers had identical resumes as high school graduates with steady entry-level employment.[207] In this cohort, the white tester received a call back or job offer 31% of the time, compared to 15.2% for the black tester.[208] In the second cohort, the resumes were identical, but only the white tester had a felony and was out on parole.[209] The white testers with a criminal record still fared better (17.2% positive employer responses) than blacks without a criminal record (13% positive employer responses).[210] While there were only a few instances of overt racial animus or hostility towards the nonwhite testers, a qualitative analysis of the interactions between the testers and employers indicated that blacks were either categorically excluded from consideration, assessed as not having relevant experience, and/or channeled into lower-level jobs.[211]

A meta-analysis of twenty-four published and unpublished field experiments, similar to the Emily and Lakisha study, conducted over the last twenty-five years and representing over 54,318 applications for 25,517 positions showed hiring discrimination against blacks as a consistent and significant presence in the labor market.[212] In fact, the meta-analysis concluded that there has been no observable change in the level of hiring discrimination against blacks.[213]

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202. *See id.* at 1000–01.
203. *Id.*
204. *See id.* at 1010.
205. Pager et al., *supra* note 12, at 793.
206. *Id.* at 781.
207. *Id.*
208. *Id.* at 784.
209. *See id.* at 782.
210. *Id.* at 785.
211. *Id.* at 792–93.
212. Quillian et al., *supra* note 11, at 10871.
213. *Id.*

A study conducted in the legal profession found that evaluating an employee's work product is also infused with unconscious bias.[214] The study recruited firm partners to evaluate a memo written by a hypothetical third-year litigator.[215] All of the partners received the same memo, but half were told that the associate was a black male while the other half were told the associate was a white male.[216] The memo identified as written by a black associate received an average rating of 3.2 out of 5; the one identified as written by a white associate received a 4.1 out of 5 rating.[217] The comments were also more positive for the white associate than the black associate.[218] On the memo perceived to be written by a white male, the partners wrote "generally good writer, but needs to work on"; "good analytical skills"; and "has potential."[219] The memo perceived to be written by a black male received comments such as, "needs lots of work" and "can't believe he went to NYU."[220]

The pervasive and pernicious effect of implicit bias has categorically excluded blacks from a broad range of jobs in the labor market.[221] Even once they are hired, blacks continue to experience both explicit and implicit discrimination.[222] Racial discrimination in the labor market is still prominent.[223] In a nationwide survey of adult workers, 28% of blacks said they had been treated unfairly because of their race, compared to 6% of white workers.[224] With respect to promotions, 56% of black workers believed that they were passed over for a promotion based on race.[225] Discrimination against blacks is not disappearing or even gradually diminishing.[226]

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214. *See* REEVES, *supra* note 12, at 5.
215. *Id.* at 2.
216. *Id.*
217. *Id.* at 3.
218. *Id.*
219. *Id.*
220. *Id.*
221. *See* BERREY ET AL., *supra* note 126, at 32–33.
222. *See id.*
223. *See id.* at 32.
224. K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 11 (2002), http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/A_Workplace_Divided.pdf.
225. *Id.* at 15.
226. *See* Quillian et al., *supra* note 11, at 10874.

III. EQUAL OPPORTUNITY OUTWEIGHS EQUALITY OF OUTCOMES

"To this end equal opportunity is essential, but not enough, not enough."[227]

A. Affirmative Action as a Means Towards Nondiscrimination

Nondiscrimination and race-based affirmative action were and continue to be presented as diametrically opposed ideas.[228] In the early twentieth century, mainstream black civil rights organizations like the NAACP publicly opposed quota-based hiring in favor of fair employment.[229] The binary choice is between the complete prohibition of discrimination, on one hand, and preferential treatment based on race, on the other hand.[230] The argument in favor of one, in the often contentious public dialogue, cannot accommodate the other.[231] Yet this debate wipes away a historical record of the alliance between nondiscrimination and affirmative action.[232]

Nondiscrimination mandates that all persons have equal opportunity to be hired, promoted, compensated, and treated in the same manner.[233] The nondiscrimination jurisprudence has developed to define discrimination as an intentional, conscious, discrete act.[234] Discrimination then is about bad actors taking adverse actions consciously based on race.[235] Nondiscrimination, on the other hand, ensures a colorblind system of equal opportunity.[236] By outlawing discrimination, it assumes that a person starts on equal footing and that merit, rather than skin color, will determine employment competition.[237]

Conversely, affirmative action inserts race as a salient factor in employment decision-making.[238] It advantages those who have been historically disadvantaged and continue to be disadvantaged because

227. Johnson, *supra* note 1, at 175.
228. *See* KENNEDY, *supra* note 15, at 14–15; BERREY ET AL., *supra* note 126, at 36–37.
229. Engstrom, *supra* note 22, at 1125–26.
230. *See, e.g.*, Crenshaw, *supra* note 10, at 1337.
231. *See id.* at 1334, 1342–43.
232. *See, e.g.*, KATZNELSON, *supra* note 1, at 143, 145.
233. *E.g.*, 42 U.S.C. § 2000e-2(a) (2012).
234. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 91, 112 (2003) (describing disparate treatment theory as focusing on the state of mind of an individual at a discrete point in time).
235. *Id.*
236. *See* Crenshaw, *supra* note 10, at 1345–46.
237. *See id.*
238. BERREY ET AL., *supra* note 126, at 36.

of their race by giving them an equalizing preference in the employment setting.[239] Affirmative action inherently recognizes that those who have been excluded for centuries from equal opportunity and who currently face discrimination in the labor market do not have a fair chance without some limited assistance.[240]

This preference is negligible in the market because of the ongoing advantage that slavery, segregation, and present-day bias confer on whites.[241] Economists have demonstrated that historical events that produce even a slight advantage in the formation of an industry can have long-lasting effect on market outcomes.[242] The path dependence economic theory is equally useful in understanding how historical and current discrimination against blacks continues to shape lock-in advantage for whites in employment.[243] Slavery, segregation, and bias created positive feedback loops that produced monopolies in schools, housing, and employment.[244] While a concerted effort was expended after the Civil Rights Act to provide blacks with preferential treatment, the period was too brief to have a significant course correction for the lock-in effect of white dominance in the labor market.[245] Justice Blackmun recognized that the broad remedial purpose of Title VII supported voluntary affirmative action plans as a remedy to the lock-in effects of segregation for which Title VII provided no remedy.[246] Dominance in the market also leads to de facto dominant group norms.[247] White normative merit standards then became a barrier for entry for nonwhites, making white employment monopolies more durable.[248]

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239. *See id.*; *see also* KENNEDY, *supra* note 15, at 11 (discussing the racist mistreatment blacks have suffered "at the hands of the federal government, state governments, local governments, and private parties" which has continued "since at least the Civil War").
240. *See* KENNEDY, *supra* note 15, at 11.
241. *See* Roithmayr, *supra* note 16, at 754–55.
242. *See id.* at 742–43 (tracing the dominance of the QWERTY keyboard on historical trends).
243. *See id.* at 745–46.
244. *See id.*
245. *See id.* at 788.
246. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring).
247. *See* Roithmayr, *supra* note 16, at 736.
248. *See id.* at 775 ("A barrier to entry is 'defined as a cost . . . borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.'") (quoting GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY 67 (1970)); *see also* Crenshaw, *supra* note 10, at 1379 (discussing how the white normative standard has been used to cast blacks as lazy, ignorant, and lacking in strong work ethic to rationalize their economic subordination).

Thus, racial disparities are locked-in to the market even in the absence of intentional discrimination.[249] It is no surprise, then, that there are both continuing employment segregation and income differences based on race, even when controlling for education and skill.[250] Affirmative action is seen as a tool to adjust the systemic advantage that whites received throughout the history of this country.[251]

Affirmative action also neutralizes subtler forms of discrimination.[252] As Part II, *supra*, demonstrates, there is ample evidence to show that bias and stereotypes operate on an unconscious level and taint all interactions in the workplace.[253] By making race explicit, affirmative action short-circuits implicit bias, which the nondiscrimination jurisprudence has been ill-equipped to reach.[254]

From the onset, nondiscrimination and affirmative action have been intertwined to guarantee equality for former slaves.[255] The Reconstruction Congress saw no conflict espousing nondiscrimination and mandating preferential treatment for blacks.[256] The Bureau of Freedmen, Refugees and Abandoned Lands (Freedmen's Bureau), established in 1865 and renewed annually until 1872, was a massive federal assistance program in the South that protected blacks from economic exploitation.[257] The Freedmen's Bureau was seen as necessary to effectuate the rights granted by the Thirteenth Amendment, the Civil Rights Act of 1866, and other subsequent civil rights legislation.[258]

After this brief period, very little attention was paid to equality in employment.[259] Not until the eve of World War II and only under threat of a massive march on Washington did the federal government

249. Roithmayr, *supra* note 16, at 788.
250. *See id.*
251. *See id.* at 796.
252. *See id.* at 787–88, 793–96.
253. *See supra* Part II; *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001) ("The glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.").
254. *See* Roithmayr, *supra* note 16, at 730–32, 793–96.
255. *See* Siegel, *supra* note 23, at 556.
256. *See id.*
257. *See id.* at 558; HILL, *supra* note 22, at 66–67. The Freedmen's Bureau governed contractual terms including setting a fair price for labor. *Id.* at 67.
258. *Id.* at 69. The Civil Rights Act of 1866, among other things, forbade discrimination based on race and color in every state and territory of the United States. *Id.*
259. *See* Hanson, *supra* note 22, at 249.

act to prohibit discrimination in employment.[260] President Roosevelt issued Executive Order 8802 prohibiting discrimination by federal agencies in vocational and training programs for defense production and by private defense contractors.[261] Subsequent executive orders expanded the nondiscrimination coverage to all federal contractors and federal agencies.[262] President Kennedy made the first explicit mention of affirmative action in Executive Order No. 10925, which reaffirmed the prohibition of discrimination and mandated that federal contractors "take affirmative action."[263]

Soon after the passage of Title VII, President Johnson issued Executive Order 11246, reaffirming federal contractors' duty to not discriminate and to take "affirmative action" to ensure equal opportunity.[264] This affirmative action mandate remains intact today.[265] Federal contractors must adopt affirmative action plans with detailed statistical and narrative components, and "design 'goals, timetables and affirmative action commitments' to correct any identifiable deficiencies."[266] The federal government has long viewed affirmative action as a "management tool designed to ensure equal employment opportunity."[267] The central premise of the affirmative action mandate is to ensure nondiscrimination.[268] The affirmative action regulations specifically note that without discrimination, an employer's work force should reflect the proportional representation along race and gender of the available workforce.[269]

260. *Id.*; HILL, *supra* note 22, at 178–79. Blacks faced widespread discrimination in defense industries, outright exclusion in training programs, and a segregated armed force. *See* Hanson, *supra* note 22, at 249; *see also* Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).
261. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941); HILL, *supra* note 22, at 178–79; Hanson, *supra* note 22, at 249.
262. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943); HILL, *supra* note 22, at 179.
263. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (March 6, 1961).
264. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). Subsequent executive orders consolidated contract compliance under the Secretary of Labor. *E.g.*, Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (Oct. 5, 1978).
265. *See* Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (Oct. 5, 1978).
266. Hanson, *supra* note 22, at 255 (citing 41 C.F.R. § 60-2.10 (1970)).
267. *Compare* 41 C.F.R. § 60-2.10(a)(1) (1970) *with* 41 C.F.R. § 60-2.10(a)(1) (2018) (showing that the language used to describe the general purpose of federal affirmative action programs has not changed in nearly fifty years).
268. 41 C.F.R. § 60-2.10(a)(1) (2018).
269. *Id.*

In 1967, the federal government took an even bolder step.[270] To rectify the persistent discrimination of non-whites in trade unions in Philadelphia, the Department of Labor issued the Philadelphia Plan requiring affirmative action in government contracts in the city of Philadelphia.[271] Though it was limited in geographic scope and dealt with only a few trades, the Plan set hiring goals, after public hearings, for nonwhite workers at 4%–6% for the employer's 1970 work force, which increased to a high of 20% in each trade after four years.[272] A federal contractor had to make a good faith effort to broaden recruitment to meet the hiring goals.[273] The Nixon Administration lobbied vigorously for Congress to approve the plan, which it did in 1969.[274] The federal government instituted similar plans in other cities.[275] The courts overwhelmingly found these Philadelphia-type plans constitutional and consistent with the mandates of Title VII to ensure equal opportunity.[276] As one district court observed, "[i]t is equally clear that if this plan is properly administered, it will be a plan of inclusion rather than exclusion."[277]

Affirmative action in private employment was a court-ordered remedy where employers were found to discriminate under Title VII.[278] Courts ordered employers to hire minority employees up to 30% of the total workforce,[279] to hire one minority worker every time two white workers were hired,[280] and give black and Spanish-

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270. *See* Paul Marcus, Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 UCLA L. REV. 817, 819 (1970).
271. *Id.* at 817.
272. *Id.* at 819–20.
273. *Id.* at 821.
274. *See id.* at 821–24.
275. Hanson, *supra* note 22, at 257.
276. *See, e.g.*, Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (upholding the Illinois Plan); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (upholding the Newark Plan); Weiner v. Cuyahoga Cmty. Coll. Dist., 249 N.E.2d 907 (Ohio 1969) (upholding the Cleveland Plan); Contractors Ass'n of E. Pa. v. Sec'y of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir. 1971) (upholding the Philadelphia Plan); *see also* Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 11, 21 (1st Cir. 1973) (upholding a state plan requiring the hiring of 20% minorities on state contracts).
277. *Contractors Ass'n of E. Pa.*, 311 F. Supp. at 1010.
278. There are numerous consent decrees imposing affirmative obligations after a finding of discrimination and only a few are highlighted. *See, e.g.*, Stamps v. Detroit Edison Co., 365 F. Supp. 87, 92–93, 109–10, 118–22 (E.D. Mich. 1973), *rev'd*, Equal Emp't Opportunity Comm'n v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977).
279. *See id.* at 122.
280. *See* Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971).

speaking applicants for police positions priority in future hiring.[281] Where a promotion examination had a strong basis in evidence of disparate impact, a district court imposed as part of a consent decree the hiring of nonwhite employees who scored lower on the exam.[282] The Eleventh Circuit upheld a consent decree that created a special promotion list of qualified plaintiffs who had been discriminated against and the Air Force was required to alternate between the special list and a general list in making promotion decisions in 38 target positions.[283] The Supreme Court, in a 5–4 plurality, upheld a one to one hiring quota to promote blacks imposed by the federal district court after it found that the Alabama Department of Public Safety engaged in a "blatant and continuous pattern and practice of discrimination."[284]

Some economists have attributed the drastic improvement of blacks in the labor market in the 1960s and 1970s to a robust regulatory enforcement mechanism that prohibited discrimination and required affirmative action.[285] Specific studies of the federal mandate on affirmative action concluded that the program worked to increase black and female employment in contracting firms.[286] A comprehensive study of 100,000 large private-sector firms across all industries and regions from 1973 to 2003 concluded that blacks were among the main beneficiaries of federally mandated affirmative action programs.[287] Specifically, in the 1970s and early 1980s, blacks saw the fastest growth in employment shares with federal contractors relative to noncontracting firms.[288] Interestingly, white men also benefitted from the affirmative action mandate with an increase in representation in federal contracting firms in managerial positions.[289] Federal contractors continue to diversify their

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281. *See* Castro v. Beecher, 459 F.2d 725, 737 (1st Cir. 1972).
282. Paganucci v. City of New York, 785 F. Supp. 467, 477–78 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 310 (2d Cir. 1993).
283. Howard v. McLucas, 871 F.2d 1000, 1008, 1011 (11th Cir. 1989).
284. United States v. Paradise, 480 U.S. 149, 154 (1987) (plurality opinion).
285. *See, e.g.*, BOUND & FREEMAN, *supra* note 27, at 32; FREEMAN, *supra* note 27, at 247, 254, 269; Withers & Winston, *supra* note 29, at 208.
286. *See* Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439, 440 (1984); *see also* Withers & Winston, *supra* note 29, at 208 (discussing Leonard's study and a report by the Office of Federal Contract Compliance concluding the effectiveness of the federal affirmative action mandate).
287. *See* Fidan Ana Kurtulus, *The Impact of Affirmative Action on the Employment of Minorities and Women: A Longitudinal Analysis Using Three Decades of EEO-1 Filings*, 35 J. POL'Y ANALYSIS & MGMT. 34, 40, 48 (2016).
288. *See id.* at 48–50.
289. *See id.* at 49.

workforces even after their federal contracts have ended.[290] The study concluded that affirmative action mandates on federal contractors substantially contributed to diversifying the workforce.[291]

B. The Assault on Affirmative Action

Many who thought that the civil rights movement was steamrolling too fast overwhelmingly supported the dog whistle politics of Ronald Reagan.[292] Of those who believed that government should not make special efforts to help blacks, 71% voted for Reagan.[293] Reagan explicitly opposed racial quotas.[294] He popularized the notion that any attempt to provide preferential treatment was a form of reverse discrimination against whites.[295] Ascending to the presidency, he immediately began an assault on the federal government's civil rights infrastructure.[296]

Reagan's Justice Department worked tirelessly to oppose and dismantle affirmative action programs in the public sector and as a court-ordered remedy.[297] The Department, in Reagan's first term, undertook a review of all public employer cases and sought modifications of consent decrees to ensure relief was only provided to proven victims of discrimination.[298] The Department disavowed the use of quotas or other statistical numerical formulas as a remedy for systemic discrimination.[299] It also sought to reopen cases it had

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290. *See id.* at 55 tbl.6, 56.
291. *Id.* at 64.
292. *See* Jack White, *Lott, Reagan and Republican Racism*, TIME (Dec. 14, 2002), http://content.time.com/time/nation/article/0,8599,399921,00.html; Crenshaw, *supra* note 10, at 1376.
293. Ian Haney-Lopez, *The Racism at the Heart of the Reagan Presidency*, SALON (Jan. 11, 2014, 7:00 PM), https://www.salon.com/2014/01/11/the_racism_at_the_heart_of_the_reagan_presidency/.
294. President Ronald Reagan, Radio Address to the Nation on Civil Rights (June 15, 1985), *in* THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/260375.
295. *See id.*
296. *See* Howell Raines, *Reagan Dismisses Civil Rights Chief, Busing Supporter*, N.Y. TIMES (Nov. 17, 1981), https://www.nytimes.com/1981/11/17/us/reagan-dismisses-civil-rights-chief-busing-supporter.html.
297. *See* Bartholet, *supra* note 28, at 39–40.
298. *See id.* at 40.
299. Withers & Winston, *supra* note 29, at 196. In the 1970s, the Justice Department vigorously litigated and supported as amicus the use of numerical goals and timetables to rectify discrimination. *Id.* at 195.

settled to undo the affirmative action remedies.[300] The assistant attorney general of the civil rights division sent letters to all federal agencies to discourage compliance with affirmative action mandates for federal agencies.[301] In 1987, the Reagan Administration eliminated the numerical goal requirement for federal agencies and instructed them to devise flexible approaches to increasing representation of women and nonwhites in their workforces.[302] After the Reagan assault, the rate of blacks in the federal workforce remained stagnant between 1997 and 2006.[303]

Similarly, the Office of Federal Contract Compliance Programs (OFCCP), which enforces the equal opportunity mandates of federal contractors also deemphasized enforcement during the Reagan Administration.[304] OFCCP, twice without an agency director during the Administration, focused on voluntary compliance rather than vigorous enforcement.[305] Referrals to the Solicitor of Labor for enforcement declined from 269 cases in 1980 to 22 cases in 1986.[306] A "report by the Inspector General of the Department of Labor, in September 1988, concluded that the OFCCP failed to target for investigation contractors who had the highest likelihood of noncompliance and rarely evaluated contractors who did not comply with federal reporting requirements."[307] In fact, the agency adopted new regulations that would have exempted 75% of federal contractors from adopting affirmative action plans.[308]

The Equal Employment Opportunity Commission, under Clarence Thomas' leadership, also gutted enforcement.[309] From 1981 to 1982, there was a 70% decline in the number of cases it filed.[310] By 1985, the agency had all but abandoned systemic litigation on race and sex based discrimination against private employers and slashed its

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300. *Id.* at 196. In *United States v. Paradise*, the government switched sides to oppose the affirmative action consent decree and appealed arguing that it violated the Fourteenth Amendment. United States v. Paradise, 480 U.S. 149, 166 (1987).
301. Withers & Winston, *supra* note 29, at 199.
302. *See* 19 EQUAL EMP'T OPPORTUNITY COMM'N, DIG. EQUAL EMP'T OPPORTUNITY LAW 1 (2008), https://www.eeoc.gov/federal/digest/xix-1.cfm.
303. *See id.*
304. *See* Withers & Winston, *supra* note 29, at 208.
305. *See id.* at 208–09.
306. *Id.* at 210.
307. *Id.* at 18.
308. *Id.* at 208.
309. *See id.* at 183.
310. *Id.* at 14.

amicus brief filings.[311] The amicus briefs the agency filed were often for the employer, rather than the employee.[312] In addition, the EEOC doubled its determination of "no cause" findings (a finding that a complaint has no merit), from less than 30% in 1980 to almost 60% in 1987.[313]

Finally, the Reagan Administration attempted through an executive order to essentially remove the affirmative action requirement for federal contractors and to thwart voluntary efforts to adopt goals and timetables to improve employment opportunities of women and nonwhites.[314] This effort was ultimately derailed by a coalition of business groups, civil rights organizations and Democratic and Republican members of Congress.[315]

Business leaders substantially opposed Reagan's assault on affirmative action programs, yet at the same time, retooled and rebranded EEO policies as diversity management.[316] Human resource departments began touting diversity programs as a substitute for affirmative action.[317] Diversity was a bigger tent that brought people with varied skills and backgrounds together to increase business advantage.[318] Yet, diversity was a broad umbrella without a specific racial or gender lens and did little to increase black representation in the workplace.[319] In an empirical study of diversity policies covering the past forty years, the authors concluded that while businesses engage in many different types of diversity policies and strategies, most popular practices are largely ineffective, especially for blacks.[320]

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311. *Id.*
312. David B. Oppenheimer et al., *Be Careful What You Wish for: Ronald Reagan, Donald Trump, the Assault on Civil Rights, and the Surprising Story of How Title VII Got Its Private Right of Action*, 39 BERKELEY J. LAB. & EMP. L. 143, 147 (2019).
313. Withers & Winston, *supra* note 29, at 16.
314. *Id.* at 209.
315. *Id.*
316. STAINBACK & TOMASKOVIC-DEVEY, *supra* note 7, at 155; Dobbin & Sutton, *supra* note 30, at 455.
317. Dobbin & Sutton, *supra* note 30, at 456.
318. *Id.*
319. *See* David B. Oppenheimer, *The Disappearance of Voluntary Affirmative Action from the U.S. Workplace*, 10 J. POVERTY & SOC. JUST. 1, 9–10 (2016).
320. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 610 (2006); *see also* Tessa L. Dover, Brenda Major & Cheryl R. Kaiser, *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, HARV. BUS. REV. (Jan. 4, 2016), https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they-make-white-men-feel-threatened.

With affirmative action effectively hobbled, litigating nondiscrimination claims became the narrow vehicle to ensuring equal opportunity.[321] The subtle and diffused nature of discrimination can manifest itself in decisions or conditions that produce unequal outcomes even while adhering to formal equality of treatment.[322] It can encompass decisions or conditions that are formally fair but favor a dominant group.[323] It can also mask implicit stereotyping, race and gender policing and maintaining race/gender hierarchies.[324] Substantial legal scholarship has been devoted to reframing Title VII legal theories to reach these issues.[325] But, very few practitioners and courts have embraced such reframing.[326] Furthermore, employment discrimination litigation is substantially controlled by employers and helps to "legitimate growing substantive inequality in American society."[327] It is not surprising that in a survey of workers about their views on discrimination, only 3% of survey respondents sued for discrimination, even though 28% of black respondents, 22% of Hispanic respondents and 6% of white respondents said they had experienced unfair treatment.[328]

The triumph of equal opportunity over equality of outcomes has had devastating effects on the quest for equality. Racial progress has all but stalled after Reagan. While targeted outreach to minority candidates,[329] investment in the pipeline in certain industries to increase diverse candidates,[330] and mentoring programs[331] are part of the affirmative action infrastructure, they have not had the impact that affirmative preferential goals and timetables have had in increasing opportunity for blacks. Race-based hiring and promotion

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321. *See* BERREY ET AL., *supra* note 126, at 9–10, 35–38; *see also* Dobbin & Sutton, *supra* note 30, at 446–48.
322. Sturm, *supra* note 253, at 468–69, 471.
323. *Id.* at 473–74.
324. *See id.* at 474.
325. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 927–37 (2016) (surveying the scholarship proposing different methodologies for Title VII litigation).
326. *Id.* at 921–22.
327. BERREY ET AL., *supra* note 126, at 11, 280.
328. DIXON ET AL., *supra* note 224, at 11, 15.
329. *See* Dover et al., *infra* note 596 and accompanying text.
330. *See* Renwei Chung, *Stop Blaming the Pipeline for the Lack of Diversity in the Legal Profession and Start Investing in It*, ABOVE LAW (May 11, 2018, 3:15 PM), https://abovethelaw.com/2018/05/stop-blaming-the-pipeline-for-the-lack-of-diversity-in-the-legal-profession-and-start-investing-in-it/.
331. *See* Jean E. Girves et al., *Mentoring in a Post–Affirmative Action World*, 61 J. SOC. ISSUES 449, 450–51 (2005).

decisions need to be re-embraced to eliminate existing discrimination in the marketplace, fully integrate the workforce, and close the economic divide between whites and blacks.

IV. THE ENDURING LEGAL VALIDITY OF AFFIRMATIVE ACTION

With Justice Kennedy's retirement, a conservative majority on the Supreme Court, the Trump Administration's rescinding Obama-era affirmative action guidelines for educational institutions and recent decisions discarding long-standing precedent, it would not be preposterous to sound the death knell for affirmative action.[332] But it would be premature. Since the late 1970s, the Court has grappled with reconciling the pursuit of a colorblind society with the historical reality of race-based subjugation.[333] The decisions highlight the limited understanding that most of the justices have regarding discrimination, filtered through a majoritarian lens. Despite the ideological fluctuations of the Court and the fractured nature of most affirmative action decisions, the Supreme Court has allowed for affirmative action based on race under the Constitution and Title VII.[334] Today, affirmative action is a constitutionally legal and statutorily protected remedy, although the Supreme Court has continuously narrowed the parameters of what is constitutionally permissible.[335] Nonetheless, a close review of the decisions provides guidance on the contours of a theoretically valid affirmative action plan. Amidst the incoherence, the Court has upheld the use of race in the following instances:

1. Schools and universities can use race as a factor if the goal is to create diversity;[336]
2. Local government can use race as a factor in hiring and contracting if clear record established a history or ongoing practice of discrimination;[337]

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332. *Future of Affirmative Action in Jeopardy with New DOJ Order & Retirement of Anthony Kennedy*, DEMOCRACY NOW (July 6, 2018), https://www.democracynow.org/2018/7/6/future_of_affirmative_action_in_jeopardy.
333. *See infra* notes 388–94 and accompanying text.
334. *See* discussion *infra* Section IV.A–B.
335. *See infra* notes 452–55 and accompanying text.
336. Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2210–11 (2016); Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 314 (2013); Gratz v. Bollinger, 539 U.S. 244, 270–72 (2003); Grutter v. Bollinger, 539 U.S. 306, 339 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 301, 314 (1978) (plurality opinion).
337. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511–12 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277–79, 283 (1986) (plurality opinion).

3. Federal government can require contractors to adopt affirmative action plans for hiring and subcontracting, subject to some limits;[338]

4. Private employers can use race as a factor in designing voluntary affirmative action programs, subject to certain limitations;[339]

5. Public employers may take affirmative race-based actions where there is strong basis in evidence of disparate impact liability;[340] and

6. Courts may order race-based affirmative action, including racial quotas, where discrimination has been established.[341]

A. The Contours of Race Classifications Under the Fourteenth Amendment

The Supreme Court's first affirmative action case on the merits, *Regents of University of California v. Bakke*, challenged the University of California Davis' medical school admission policy.[342] The school reserved 16 spots out of 100 for minority applicants.[343] Plaintiff, a white man who was twice rejected from admissions, challenged the affirmative action plan as his numerical GPA, test scores, and benchmark scores exceeded those of the minority admittees.[344] A five-justice majority invalidated the quota set aside.[345] Four of those justices would have done so under Title VI of the Civil Rights Act, barring recipients of federal funds from discriminating, but Justice Powell's fifth vote was based on a violation of Equal Protection Clause of the Fourteenth Amendment.[346] However, Justice Powell also sided with the

338. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995); Fullilove v. Klutznick, 448 U.S. 448, 453 (1980) (plurality opinion).
339. Johnson v. Transp. Agency, 480 U.S. 616, 635 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 (1979).
340. *See* Ricci v. DeStefano, 557 U.S. 557, 586–87 (2009) (holding that remedial actions to avoid disparate-impact liability under Title VII are permissible only when "a strong basis in evidence" exists that the employer would be liable for discriminatory hiring practices).
341. *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion).
342. *Bakke*, 438 U.S. at 269.
343. *Id.* at 278–79, 289.
344. *Id.* at 276–77.
345. *Id.* at 271, 320.
346. *Id.* at 267.

remaining four justices to find constitutionally permissible the use of race as a factor in admissions criteria to promote diversity.[347]

One year later, the Supreme Court took up affirmative action in federal contracting.[348] Congress had legislated that at least 10% of federal funds for local public works projects be used to purchase services or supplies from minority business enterprises (MBEs).[349] The requirement could be waived if minority firms were unavailable and the agency had to ensure the funds were allocated to MBEs that had been disadvantaged by past discrimination.[350] The Supreme Court, following the lower courts, upheld the program in a 6–3 plurality opinion by Justice Burger in *Fullilove v. Klutznick*.[351]

In a series of employment cases between 1986 and 1990, the Supreme Court flip-flopped on the proper standard of review, swaying the results drastically.[352] In *Wygant v. Jackson Board of Education*, the Supreme Court was faced with the constitutional validity of preferential layoffs negotiated by the union and the board of education in its collective bargaining agreement (CBA).[353] The CBA had an exception to seniority-based layoffs where it would allow for the retention of less-senior minority teachers to maintain racial balance.[354] In a 5–4 plurality opinion by Justice Powell, the provision was struck down under the strict scrutiny standard.[355] The lower courts had not applied the strict scrutiny test but instead upheld the plan as constitutional based on a "reasonableness" test.[356] Rather than remanding to the district court to apply the higher standard of review, the Court held that the district court had made no findings of past discrimination by the school board.[357] Furthermore, the Court held that the plan was insufficiently narrow because it placed too great a burden on particular individuals to achieve racial equality.[358] Nonetheless, the Court recognized that remedying past discrimination

347. *Id.* at 225–26.
348. *See* Fullilove v. Klutznick, 448 U.S. 448, 453 (1980) (plurality opinion).
349. *Id.*
350. *Id.* at 448.
351. *Id.* at 448, 451.
352. *See infra* notes 353–68 and accompanying text.
353. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 267, 269–70 (1986) (plurality opinion).
354. *Id.* at 270.
355. *Id.* at 268, 273–74.
356. *Id.* at 272–73, 279.
357. *Id.* at 277–78.
358. *Id.* at 283–84.

was a compelling state interest and race-based remedies were constitutionally permissible.[359]

With Justice O'Connor at the helm, the Supreme Court issued a 6–3 majority opinion in *City of Richmond v. J.A. Croson Co.*, striking down a set-aside program for minority business enterprises (MBE) in city contracting.[360] The program was modeled after the federal program upheld in *Fullilove*, but required 30% MBE participation in subcontracts on city projects.[361] Applying strict scrutiny proved fatal to the city ordinance.[362] The majority found that the city had not made adequate findings of past discrimination and that the remedy was not closely tied to any existing discrimination.[363] Four of the justices, including Justice O'Connor, believed that the *Fullilove* plan was distinguishable because it was adopted by Congress, which had explicit authority under Section Five of the Fourteenth Amendment to craft race-conscious remedies.[364]

Within the year, the Supreme Court again abandoned strict scrutiny in reviewing the Federal Communication Commission's (FCC) minority preference policy.[365] In a 5–4 decision by Justice Brennan under the Fifth Amendment, the Supreme Court in *Metro Broadcasting Inc. v. FCC* upheld the FCC's policy to give preference to minority ownership bids for new radio or television broadcasting licenses and permitting "distress sales" to minority owned businesses only.[366] The majority treated the FCC plan as having been adopted by Congress.[367] Giving deference to Congress' institutional competence and the powers granted under Section Five of the Fourteenth Amendment, the majority found a sufficient nexus between the substantial government interest in promoting broadcast diversity and in the minority preference policy.[368]

359. *Id.* at 280.
360. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989).
361. *Id.* at 477–78.
362. *Id.* at 500–01.
363. *Id.* at 500–02.
364. *Id.* at 490–91. Another factor that contributed to the Justices's lack of deference to the city council was the majority status of blacks both in the City of Richmond and on the city council. *Id.* at 496. Clearly, the Justices were uncomfortable with the idea of a majority imposing a carve-out that benefitted the majority. *See id.*
365. Metro Broad., Inc. v. FCC, 497 U.S. 547, 566 (1990).
366. *Id.* at 577, 600–01.
367. *Id.* at 563.
368. *Id.* at 567–69.

The Supreme Court overturned *Metro Broadcasting, Inc.* five years later in *Adarand Constructors, Inc. v. Pena*.[369] In a 5–4 majority opinion, Justice O'Connor firmly articulated a strict scrutiny standard for all government classifications, eschewing a lesser standard for Congressional action or benign classifications, ignoring her own rationale in earlier opinions about Congress' special powers under the Fourteenth Amendment.[370] Disingenuously framing *Metro Broadcasting, Inc.* as a departure from the Court's earlier decisions and overruling it on the standard of review, Justice O'Connor took pains to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[371] She stated, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[372] The case was remanded to determine the validity of the federal Department of Transportation providing financial incentives to prime contractors to hire small businesses controlled by socially and economically disadvantaged individuals.[373]

More recently, the Supreme Court narrowly approved race-based affirmative action programs in higher education for the limited purpose of diversity.[374] In *Grutter v. Bollinger*, the Court in a 5–4 decision held that race can be a factor in admissions decisions at the University of Michigan law school.[375] On the same day, the Court in a 6–3 decision in *Gratz v. Bollinger* struck down the use of race in undergraduate admissions at the same university because it was not narrowly tailored.[376] The majority found the automatic awarding of twenty points (one-fifth of the points needed for admission) to every minority applicant removed individualized consideration and made race decisive for these applicants.[377] Thus, the admissions policy was not narrowly tailored.[378] Finally, in reviewing the undergraduate admissions policy at the University of Texas, the Supreme Court

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369. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995).
370. *Id.* at 236.
371. *Id.* at 237.
372. *Id.*
373. *Id.* at 239.
374. *See* Grutter v. Bollinger, 539 U.S. 306, 339 (2003).
375. *Id.*
376. Gratz v. Bollinger, 539 U.S. 244, 270–72 (2003).
377. *Id.*
378. *Id.* at 275.

reaffirmed the strict scrutiny standard and the diversity rationale, and upheld the policy as narrowly tailored.[379]

A close review of these cases illuminates a narrow and winding path to justifying the use of race-based affirmative action by the government.[380]

1. Race Classification Constitutionally Permissible

It is important to recognize at the outset that the Fourteenth Amendment Equal Protection Clause does allow for race-classification. The Supreme Court has consistently acknowledged that race-classification by the government is permissible under the Fourteenth Amendment.[381]

The Fourteenth Amendment does not espouse color-neutrality but prohibits hatred and subordination based on race.[382] The majority of Republicans who framed and ratified the Equal Protection Clause intended the clause to make unconstitutional state actions that singled out blacks in order to disadvantage them.[383] They sought to "bridg[e] the vast distance between members of the Negro race and the white 'majority.'"[384] Blacks were recognized as needing additional protection to rectify centuries of unequal and subordinate treatment.[385] Justice Harlan recognized this in his dissent in *Plessy*:

> Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of

379. *See* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2210–11 (2016); *see also* Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 314 (2013).
380. *See, e.g.*, *Fisher II*, 136 S. Ct. at 2210–11; *Fisher I*, 570 U.S. at 314; *Gratz*, 539 U.S. at 270–72; *Grutter*, 539 U.S. at 339; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995); Metro Broad., Inc. v. FCC, 497 U.S. 547, 563 (1990).
381. *See, e.g.*, *Fisher I*, 570 U.S. at 310; *Grutter*, 539 U.S. at 326; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280–81, 306, 313 (1986) (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448, 482–84, 517–19, 548 (1980) (plurality opinion); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 325–26 (1978) (plurality opinion).
382. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 269–70 (1997).
383. Saunders, *supra* note 382, at 292–93.
384. *Bakke*, 438 U.S. at 293 (citing The Slaughter-House Cases, 83 U.S. 36, 71 (1872)) (plurality opinion).
385. *The Slaughter-House Cases*, 83 U.S. at 71.

> all shall not permit the seeds of race hate to be planted under the sanction of law.[386]

Legal scholars along with lay observers on both sides of the political spectrum argue that the Civil Rights Amendments wiped away the original sin of a color-stratified Constitution and that our best intentions are to live in a society where race does not matter.[387] This color-blind narrative frames the Fourteenth Amendment as a universal equality doctrine.[388] Justice Harlan's dissent in *Plessy v. Ferguson* is often quoted to support this notion,[389] but his dissent cannot be unhinged from the reality of its time.[390] The crux of *Plessy* is the fight over integration, not equality.[391] Justice Harlan's dissent describes the problem for which he prescribes a color-blind approach:

> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? [392]

Justice Brennan in *Bakke* urged that the Constitution and Title VII not be used to "let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."[393] By not outright prohibiting the use of race-conscious classifications under the Fourteenth Amendment, the Supreme Court tacitly endorsed this purpose.[394]

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386. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).
387. *See* Cedric M. Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 231 (1997); Dennis Parker, *The 14th Amendment Was Intended to Achieve Racial Justice – And We Must Keep It That Way*, ACLU (July 9, 2018, 5:45 PM), https://www.aclu.org/blog/racial-justice/race-and-inequality-education/14th-amendment-was-intended-achieve-racial-justice.
388. *Bakke*, 438 U.S. at 320.
389. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).
390. *See id.* at 552–64.
391. *Id.* at 560.
392. *Id.*
393. *Bakke*, 438 U.S. at 327 (Brennan, J., concurring and dissenting).
394. *Id.* at 320 (plurality opinion).

2. All Race Classifications Subject to Strict Scrutiny

As discussed above, the Supreme Court grappled for decades on the proper standard of review to apply to race-based classifications. The debate centered on whether different standards of review should apply to classifications that are benign, or burdensome, to a "discrete and insular minority."[395]

The Supreme Court began its affirmative action jurisprudence by calling for strict scrutiny standard in the plurality opinion in *Bakke*.[396] Justice Powell, writing for the plurality, explained that when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[397] He rejected the notion of benign race classifications, even though all of the cases he relied on dealt with burdening a "discrete and insular minority."[398] Nonetheless, the plurality concluded that the Fourteenth Amendment afforded the white majority the same level of protection.[399] For support, Justice Powell relied on *McDonald v. Santa Fe Trail Transportation Co.*, a case under Title VII and Section 1981 of the Civil Rights Act.[400] But, the case dealt with whether these two statutory provisions banned discrimination against whites, not the proper constitutional standard of review.[401]

Nonetheless, Justice Powell used the case to justify the same standard of review for whether a law or policy burdens the majority white population or the minority.[402] *Bakke*, however, did not dispose

395. *Id.* at 287–88 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)) (plurality opinion).
396. *Id.* at 291.
397. *Id.* at 299.
398. *Id.* at 290–93 (quoting *Carolene*, 304 U.S. at 152 n.4).
399. *Id.* at 292–93.
400. *Id.* at 293; *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976).
401. *McDonald*, 427 U.S. at 296.
402. *Bakke*, 438 U.S. at 293. Even a cursory examination of the burdens lays bare that it is not the same burden placed on the majority, and the underlying facts in *Ricci v. DeStefano* illustrate the point. *See* Ricci v. DeStefano, 557 U.S. 557, 566, 590 (2009). On a promotion exam for the rank of lieutenant or captain, the examination yielded a list with only white applicants at the top. *Id.* at 566. Attempts by the city council to change the makeup of the list would have allowed for four blacks to be considered as opposed to zero. *Id.* at 590. However, the Court said that the remedy was not available to the city because it would be discriminatory under Title VII. *Id.* The remedy would have disadvantaged only four white individuals compared to the burden on blacks, which was a complete exclusion. *Id.*

of the standard of review question.[403] There was at least an alignment of five justices over the next decade to advocate for a less stringent review when the classification benefitted minority groups.[404] In *Metro Broadcasting*, Justice Brennan went further and advocated different levels of review based on whether Congress or state and local governments adopted the race-conscious classifications.[405]

As the makeup of the Court changed, the strict scrutiny standard had majority support.[406] Since 1995, the Supreme Court has consistently required strict scrutiny for all racial classifications.[407] Under strict scrutiny, the use of race must be narrowly tailored to achieve the state's compelling objective.[408]

3. Substantial State Interest Limited to Diversity and Remedying Past Discrimination

When the state uses race to distribute benefits or impose burdens, the state must demonstrate that the challenged race classification is narrowly tailored to promote a substantial state interest.[409] The Supreme Court has narrowly defined the state's interest in adopting race classifications.[410]

i. Education

In the educational context, the Supreme Court has approved of only one justification for adopting race-based affirmative action plans: diversity of the student body.[411] Institutions of higher learning seek to foster academic freedom, a right encompassed under the First Amendment.[412] The Supreme Court has deferred to the stated educational benefits that flow from a diverse student body, specifically enhanced classroom dialogue, destruction of stereotypes, reduction of racial isolation, promotion of cross-racial understanding,

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403. *See* Metro Broad. Inc. v. FCC, 497 U.S. 547, 563–65 (1990); *see also* Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980) (plurality opinion).
404. *See Fullilove*, 448 U.S. at 491–92; *see also Metro Broad. Inc.*, 497 U.S. at 565.
405. *Metro Broad. Inc.*, 497 U.S. at 565–66.
406. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
407. Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 310 (2013); Gratz v. Bollinger, 539 U.S. 244, 270 (2003); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *Adarand*, 515 U.S. at 236.
408. *Fisher I*, 570 U.S. at 306–07; *Grutter*, 539 U.S. at 327.
409. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (plurality opinion).
410. *Id.*
411. *Fisher I*, 570 U.S. at 314–15.
412. *Id.* at 308; *Bakke*, 438 U.S. at 312 (plurality opinion).

preparation for a diverse workforce and society, and cultivation of a set of leaders with legitimacy in the eyes of the citizenry.[413] The institution's judgment that such diversity is essential to its educational mission has not been second-guessed by the Court on First Amendment grounds.[414] The business of an educational institution is to create an "atmosphere which is most conducive to speculation, experiment, and creation" and hinges on who should be admitted to study.[415] Thus, a diverse student body is a constitutionally permissible goal, because it is at the heart of the school's institutional mission.[416]

The Court has embraced a much broader definition of diversity.[417] Thus, race and ethnic origin is a "single though important element" among a host of qualifications and characteristics that make an individual diverse.[418] Race cannot be the defining feature in the evaluation of the candidate.[419]

The Supreme Court has shown no deference to the other stated goal of race-based admissions plans: remedying past discrimination.[420] Instead, the Court has placed a heavy burden on justifying race-based affirmative action plans in education to remedy past discrimination.[421] The Supreme Court found educational institutions incapable of making a finding of constitutional or statutory violations.[422] Without a finding by a judicial, legislative, or administrative body of past discrimination at this particular institution, remedying the effects of past discrimination is not a substantiated interest.[423]

To be narrowly tailored, the Court has outright rejected a quota system, like the one in *Bakke*.[424] The idea of racial balancing is odious at least to the current majority on the Supreme Court.[425] Recently, in *Grutter*, the Court provided a road map to creating a

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413. *Fisher I*, 570 U.S. at 308; *Grutter*, 539 U.S. at 330.
414. *Fisher I*, 570 U.S. at 308; *Grutter*, 539 U.S. at 329; *Bakke*, 438 U.S. at 312.
415. *Fisher I*, 570 U.S. at 308 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).
416. *Grutter*, 539 U.S. at 329; *see also Bakke*, 438 U.S. at 311–12.
417. *Bakke*, 438 U.S. at 314.
418. *Id*. at 315.
419. *Grutter*, 539 U.S. at 336–37.
420. *See Bakke*, 438 U.S. at 307.
421. *Id.* at 307–09.
422. *Id.* at 309–10.
423. *Id.* at 307–10.
424. *See id.* at 289.
425. *See id.*; *see also* Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003).

narrowly tailored race-conscious admissions plan: no quotas; must be sufficiently flexible, limited in time, and adopted after "serious, good faith consideration of workable race-neutral alternatives."[426]

ii. Employment

The state's interest in race-based affirmative action plans in the employment context has been given wider breadth. Unlike in the educational arena, the Supreme Court has held "beyond dispute" that public entities have a compelling interest in remedying past discrimination and to ensure that it not serve to "finance the evil of private prejudice."[427] Through its Spending Powers and Commerce Clause, the Court has validated Congress' conditioning of federal funds to achieve congressional objectives.[428] Congress does not have to act in a "wholly 'color-blind' fashion."[429] Section Five of the Fourteenth Amendment is a "positive grant of legislative power" given to Congress to determine what legislation is needed to secure the guarantees of the Amendment.[430]

Congress can fashion race-based plans without compiling the same record as in a judicial or adjudicatory proceeding.[431] While the Court has required a more stringent evidentiary showing to justify such plans, it has not curtailed the exercise of congressional power to effectuate the Fourteenth Amendment.[432] However, a generalized assertion of past discrimination is insufficient.[433]

In *Fullilove*, Congress made several findings to support the 10% allotment for MBEs: 1) long history of disparity of minority business participation in the construction industry; 2) even in the absence of intentional discrimination, there was direct evidence that the pattern of disadvantage and discrimination existed at state and local construction contracting; and 3) the problem was national in scope.[434] Congress determined that a limited racial and ethnic preference was necessary to remedy past discrimination and crafted a narrowly tailored remedy that specified the "minimum level of minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an

426. *Grutter*, 539 U.S. at 334, 339, 342.
427. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).
428. Fullilove v. Klutznick, 448 U.S. 448, 474–75 (1980) (plurality opinion).
429. *Id.* at 482.
430. *Id.* at 476.
431. *Id.* at 478.
432. *Croson*, 488 U.S. at 504.
433. *Id.* at 498.
434. *Fullilove*, 448 U.S. at 477–78.

administrative waiver where application of the program was not feasible."[435] The Supreme Court, while not settling on a standard of review, concluded in plurality opinions that the set- aside would survive intermediate or strict scrutiny.[436]

The Court imposed a more exacting standard on the City of Richmond in *Croson*, finding that it must make something akin to a prima facie finding of systemic discrimination before it can act.[437] Justice O'Connor spent a lengthy paragraph affirming the city's ability to eradicate the effects of private discrimination if the city had become a "passive participant" in a racial exclusionary system practiced by private actors.[438] Yet, she found the history of both private and public discrimination contributing to lack of opportunities for blacks as insufficient evidence to support a race-based remedy.[439] The dissent, however, highlighted a compelling record of discrimination in the City.[440] Only 0.67% of prime contracts went to minority businesses.[441] The major construction trade associations in Richmond had virtually no minority members.[442] The Council also heard testimony about exclusionary history of the construction trade in the City, as well as findings by Congress of widespread discrimination nationally in the industry.[443]

The City compared this to the general population of minorities in the city to determine that there was a statistical disparity.[444] The majority rejected the City's analysis because the comparison was not to the total pool of qualified minority businesses in the city.[445] But, Justice O'Connor herself acknowledged that where past discrimination has resulted in exclusion of minorities from a particular industry, the proper comparator can be to the total percentage of minorities in the labor force.[446] As the dissent points out, if the government channels almost all its contracting funds to a white-dominated contracting community that is the product of past exclusionary systems, then the city has provided a "measurable

435. *Id.* at 468.
436. *See id.* at 492, 515, 521.
437. *See Croson*, 488 U.S. at 499–500.
438. *Id.* at 492.
439. *See id.* at 499.
440. *See id.* at 531–35 (Marshall, J., dissenting).
441. *Id.* at 534.
442. *Id.*
443. *Id.*
444. *Id.* at 501 (majority opinion).
445. *See id.* at 501–02.
446. *See id.* at 501; *see also* Johnson v. Transp. Agency, 480 U.S. 616, 651 (1987).

boost" to those entities who were allowed to participate in that community because of race.[447]

Rather than remanding the case to allow the parties to bolster the record with the proper comparator,[448] the majority invalidated the 30% set-aside, finding that there were other race-neutral means to increase MBE participation, such as simplifying the bidding process.[449] In *Croson*, the Court may have reached a different result had Congress enacted the set-aside, rather than the city council.[450]

After *Croson*, public employers needed to demonstrate that the relevant government unit had a "strong" basis in evidence that actual discrimination had occurred before adopting affirmative action plans.[451]

4. Burden Must Be Narrowly Tailored

The means chosen to accomplish the state's interest must be narrowly tailored and must be necessary to achieve the state's interest.[452] Thus, there must be a nexus between the racial-classification and the compelling state interest.[453] The Supreme Court provides no deference to the government in the means chosen to implement its compelling objective.[454] However, the government does not need to exhaust all race-neutral alternatives, but must demonstrate "serious, good faith consideration of workable race-neutral alternative."[455]

In some cases, the Supreme Court in evaluating this criteria focused heavily on the burdens placed on "innocent parties," while ignoring that the Fourteenth Amendment does permit burdening some individuals more than others to effectuate the purpose of the

447. *See Croson*, 488 U.S. at 538 (Marshall, J., dissenting).
448. The city did engage in sloppy legislating by not gathering the relevant data of the number of MBEs in the relevant market area that could qualify for prime or subcontracting work in public construction projects. *See id.* at 502–03 (majority opinion).
449. *Id.* at 509–10.
450. *Fullilove* is not dispositive here as this is not a case of congressional power under Section Five of the Fourteenth Amendment. *See id.* at 504–05.
451. *Id.* at 500.
452. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279 (1986) (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (plurality opinion).
453. *See Croson*, 488 U.S. at 499 (holding that the remedy was not tied to any injury because there was no record of prior discrimination).
454. Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 310–11 (2013); Grutter v. Bollinger, 539 U.S. 306, 333 (2003).
455. *Fisher I*, 570 U.S. at 312 (quoting *Grutter*, 539 U.S. at 339); *Grutter*, 539 U.S. at 340.

equal protection clause.[456] The inquiry should be whether the "sharing of the burden" is unduly burdensome.[457]

The Supreme Court in the employment arena has indicated its approval of quotas under certain circumstances.[458] In *Fullilove*, the court looked to the overall construction opportunities for whites and found that the burden of the program was relatively light and upheld the 10% set-aside.[459] In the *City of Richmond*, the Court had problems with the City's compelling reason, not the use of quotas.[460] The Court said that "generalized assertions" were not enough to justify "rigid" racial quotas for the awarding of public contracts.[461] In *Wygant*, three of the justices saw the layoffs as simply too heavy a burden to be imposed on "innocent parties."[462] At the same time, Justice Powell indicated that hiring goals would have been more appropriate to meet the state's compelling interest because it places a more diffused burden.[463] Justice Powell said "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."[464]

Since these employment cases have been decided, the Supreme Court has further developed its narrowness jurisprudence in the educational context.[465] The Court, in recent cases, has been more exacting on narrowness and the burden it places on "innocent parties."[466] The decisions require that individualized considerations must be part of the admissions decision-making (as opposed to mechanical or reserving of seats) and that race must be a plus factor and not the decisive factor in decision-making.[467] Where whites would be rejected outright because of quotas or rigid numerical spots that were reserved exclusively for nonwhites, the Supreme Court emphatically rejected it as unconstitutional racial balancing in

456. *Wygant*, 476 U.S. at 281–82; *Fullilove*, 448 U.S. at 484.
457. *Fullilove*, 448 U.S. at 484 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)); *Grutter*, 539 U.S. at 341.
458. *See, e.g.*, *Fullilove*, 448 U.S. at 454, 491–92.
459. *Id.* at 484 (plurality opinion).
460. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).
461. *Id.*
462. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281–84 (1986) (plurality opinion).
463. *Id.* at 282–83.
464. *Id.*
465. *See* Gratz v. Bollinger, 539 U.S. 244, 270–73 (2003).
466. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 317 (1978) (plurality opinion); *see also* Grutter v. Bollinger, 539 U.S. 306, 335 (2003); *see also* Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 311 (2013).
467. *See Gratz*, 539 U.S. at 270–74.

educational cases.[468] Goals which require good-faith effort to come within a range and permit each candidate to compete with all others, with race being a "plus" factor, are permissible.[469] The key is the flexible use of race to achieve a critical mass of underrepresented minorities, without exclusively rejecting whites on the basis of race.[470] It is likely that the Supreme Court would extend this analysis to the employment context as well.[471]

B. Not Prohibited by Title VII

During the Title VII debates, the plight of blacks in the economy was at the forefront of Congressional leaders' concern in prohibiting racial discrimination in private employment.[472] Similar to today, blacks were largely relegated to unskilled and semi-skilled jobs.[473] As automation reduced these jobs, black unemployment skyrocketed.[474] Congress acknowledged the worsening condition of blacks.[475] "In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher."[476] As one senator urged, "This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass."[477] The goal of the Civil Rights Act was to integrate blacks into the mainstream of American society, a goal that could not be achieved without the ability of blacks to "secure 'jobs which have a future.'"[478]

Yet, there existed a tension in the egalitarian purpose of the Act and the need to secure the votes from those who traditionally resisted federal regulation of private business.[479] While Congress debated the 1964 Civil Rights Act, the New York Human Rights Commission

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468. *See Fisher I*, 570 U.S. at 311, 314; *Grutter*, 539 U.S. at 335; *Bakke*, 438 U.S. at 307, 317.
469. *Grutter*, 539 U.S. at 335–37.
470. *See id.*; *Bakke*, 438 U.S. at 317–19.
471. *See supra* Section IV.A.3.ii.
472. *See, e.g.*, 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey); *see also* United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979) (noting Congress's rationale for Title VII through the usage of various senators's statements).
473. *See* 110 CONG. REC. 6547 (1964) (statement of Sen. Humphrey); Quillian et al., *supra* note 11.
474. *See* 110 CONG. REC. at 6547–48 (1964) (statement of Sen. Humphrey).
475. *See id.*
476. *Id.* at 6547; *Weber*, 443 U.S. at 202 (citation omitted).
477. *Weber*, 443 U.S. at 202 (quoting 110 CONG. REC. 7220 (1964) (statement of Sen. Clark)).
478. *Id.* at 202–03 (quoting 110 CONG. REC. 7204 (1964) (statement of Sen. Clark)).
479. *See* 110 CONG. REC. 7204, 7208–09 (1964) (statement of Sen. Clark).

and the Illinois Fair Employment Practices Commission issued decisions interpreting its state anti-discrimination laws to support a disparate impact theory of discrimination.[480] Some Congressional members were nervous about whether disparate impact liability called for the adoption of racial quotas.[481]

Section 703(j) was a compromise to allay these fears. The section stated that Title VII shall not be interpreted to

> require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State . . . or in the available work force in any community . . . .[482]

The section notably did not prohibit voluntary affirmative efforts to correct racial imbalance.[483]

In 1979, the Supreme Court in *United Steelworkers of America, AFL-CIO v. Weber*, explicitly recognized that "Congress did not intend to limit traditional business freedom to such degree as to prohibit all voluntary, race-conscious affirmative action."[484] In *Weber*, the company and the union implemented a voluntary affirmative action plan with hiring goals to increase the number of blacks in skilled craft positions for each plant equal to the percentage of blacks in the respective local labor force.[485] To meet these goals, the company and union established on-the job training programs.[486] Half of the training slots were reserved for blacks.[487] The Court, in a 5–2 majority opinion by Justice Brennan, upheld the plan as permissible under Title VII.[488] The Court concluded that the plain

480. Oppenheimer, *supra* note 319, at 40.
481. *Id.*
482. 42 U.S.C. § 2000e-2(j) (2012).
483. *Weber*, 443 U.S. at 204 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975)).
484. *Id.* at 207.
485. *Id.* at 198.
486. *Id.* at 197.
487. *Id.* at 198.
488. *Id.* at 209.

statutory language of Section 703(j) did not mandate affirmative action but it also did not prohibit it.[489]

The Court delineated the criteria for a bona fide affirmative action plan:

> 1) the purpose of the plan is to "break down old patterns of racial segregation and hierarchy" and open employment opportunities that were traditionally closed to them;
> 2) the plan must not "unnecessarily trammel the interests of [the] white employees" (e.g. requiring that they be discharged and replaced with black employees);
> 3) the plan must not create an absolute bar to the advancement of white employees; and
> 4) the plan must be temporary and intended not to maintain a racial balance but to eliminate a manifest racial imbalance.[490]

The affirmative action plan in *Weber* centered on temporary training programs which opened up opportunities for skilled craft work to both blacks and whites.[491] It did not foreclose opportunities for whites.[492] Furthermore, the employer does not need to show its own past discriminatory behavior or even an "arguable violation" to adopt a plan.[493] Statistical disparity would be sufficient to justify a voluntary affirmative action plan.[494]

In 1987, the Supreme Court had an opportunity to revisit its decision in *Weber* when it reviewed an affirmative action plan giving preferential treatment to women.[495] In *Johnson v. Transportation Agency, Santa Clara County, California*, the agency adopted an affirmative action plan, which among other things, considered the sex of an applicant as one factor in deciding promotion to positions that were traditionally segregated.[496] The long-term goal of the affirmative action plan was to achieve proportional representation of

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489. *Id.* at 205–06, 208.
490. *Id.* at 207–08.
491. *Id.* at 198.
492. *Id.*
493. *Id.* at 211 (Blackmun, J., concurring).
494. *Id.*
495. Johnson v. Transp. Agency, 480 U.S. 616, 635 (1987). While the plan was adopted by a public employer, no constitutional challenge was brought to the plan, and the Court decided the case solely under Title VII. *Id.* at 620 n.2.
496. *Id.* at 621–22.

minorities and women.[497] The Court reaffirmed its rationale in *Weber*.[498] It reiterated that statistical imbalance and not a prima facie case of discrimination was sufficient to justify a voluntary affirmative action plan.[499] In addition, sex is but one among numerous factors that must be considered in making the promotion decision.[500]

Weber and *Johnson* continue to be valid and provide guidance to private employers and unions to voluntarily adopt affirmative action plans.[501] Whether statistical comparison to the general labor pool let alone mere statistical disparity is still a valid yardstick is questionable but the underlying rationale and analysis of these cases under Title VII remain sound.[502]

Ricci v. DeStefano, while not an affirmative action case and involved a public employer, may have inadvertently strengthened the rationale of *Weber* and *Johnson* and provides yet another means to adopt voluntary affirmative action plans.[503] In *Ricci*, the City of New Haven, Connecticut, did not certify the results of two test results for promotion to the Lieutenant and Captain ranks in the New Haven fire department.[504] The City argued that had it certified the exams, it would have had a disparate impact on minority firefighters.[505] The top candidates eligible for immediate promotion to Lieutenant were all white, and for the Captain rank, seven were white and two were Hispanic.[506] The City was sued by those eligible for promotion arguing disparate treatment under Title VII.[507] The Supreme Court held that the City had not demonstrated a "strong basis in evidence" that had it not discarded the tests, it would have been liable under disparate impact under Title VII.[508] The City did meet the prima facie case of disparate impact liability but the City had not considered whether the tests were not job related and consistent with business necessity or whether equally valid less-discriminatory

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497. *Id.* at 621.
498. *See id.* at 635.
499. *Id.*
500. *Id.* at 637.
501. *See infra* notes 600–17 and accompanying text.
502. Roberto L. Corrada, *Ricci's Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 257–58 (2011).
503. *See generally* Ricci v. DeStefano, 557 U.S. 557 (2009).
504. *See id.*
505. *Id.* at 562.
506. *Id.* at 566.
507. *Id.* at 563.
508. *Id.*

alternatives existed.[509] While the City ultimately lost, the case reaffirmed some core principles under Title VII.[510]

First, the majority rejected outright that an employer under Title VII is forbidden under any circumstances from making race-based decisions.[511] Second, Congress intended that "voluntary compliance" be the preferred means to achieve the objectives of Title VII and thus, a strong basis in evidence is not akin to actual proof of a disparate impact violation.[512] Such a standard would chill all voluntary remedial efforts.[513] Finally, *Ricci* explicitly recognized that voluntary efforts to address racial segregation is allowed and preferred under Title VII.[514] Thus, private employers can be far bolder in structuring affirmative action plans within the parameters outlined by the Court.[515]

V. RE-EMBRACING AFFIRMATIVE ACTION IN PRIVATE EMPLOYMENT

It is this Nation's "ongoing obligation to engage in constant deliberation and continued reflection" to achieve equality.[516] In the past, robust civil rights enforcement coupled with rising boycotts and political pressure from civil rights groups drastically increased the price of discrimination.[517] New environmental pressures are necessary to revamp the efforts to integrate the workforce and to increase economic progress among nonwhites.[518]

The law on affirmative action in the employment arena is not the obstacle that we perceive it to be; in fact, Title VII provides far

509. *Id.* at 587–88; Corrada, *supra* note 502, at 254 (explaining the City had met the traditional disparate impact test, where the pass rate for one group of test takers is less than 80% of the pass rate for the highest passing group).
510. *See Ricci*, 557 U.S. at 593.
511. *Id.* at 579.
512. *Id.* at 580–81.
513. Corrada, *supra* note 502, at 259. While private employers are not bound by the strict scrutiny strictures of the Fourteenth Amendment, *Ricci* imported the "strong basis in evidence" from the Equal Protection cases to a Title VII challenge. *Ricci*, 557 U.S. at 582.
514. *Id.*
515. *See supra* notes 483–510 and accompanying text; *see infra* note 612 and accompanying text.
516. Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2215 (2016).
517. *See* FREEMAN, *supra* note 87, at 93–94.
518. *Cf. id.* (showing that environmental social pressures were the key factor in the reduction of workforce discrimination in the civil rights era).

greater leeway for employers to voluntarily adopt affirmative action plans, including race-conscious decision-making.[519]

In order to reintroduce affirmative action as a viable remedy in employment, a new normative shift is needed. Affirmative action is universally described today as a controversial measure, thanks largely in part to Reagan's reframing it as an unfair system to innocent whites.[520] Once in power, the Democrats, limited by the conservative framework, weakly endorsed affirmative action and eventually relinquished the idea as a means towards employment equality.[521]

To achieve the normative shift requires reframing the public discourse through effective communication systems.[522] As the linguist and cognitive scientist George Lakoff has repeatedly stressed, thoughts are physical and all thoughts use conceptual frames.[523] These frames are "physically instantiated in the synapses and neural circuits of our brains" through repetition.[524] Frequency of language and imagery strengthens the brain circuit and synapses.[525] The constant use of a particular framing has enormous political consequences.[526] When gay civil rights leaders shifted the framing around gay marriage from a "rights" issue to an issue about love and commitment, it not only changed public perception but brought about a legal revolution.[527]

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519. *Cf.* Ricci v. DeStefano, 557 U.S. 557, 583 (2009) (noting the legislative intent that Title VII be voluntarily complied with by employers and discussing the permissibility of race-based decisions).
520. *See supra* notes 28–30 and accompanying text.
521. *See* Tricia McTague et al., *An Organizational Approach to Understanding Sex and Race Segregation in U.S. Workplaces*, 87 SOC. FORCES 1499, 1517–18 (2009) (describing how affirmative action weakened during the Reagan and Bush administration due to shifts in normative messaging, leading to weaker messaging from the Clinton administration than would have been expected in the pre-Reagan era).
522. *See* GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 3–4, 100–01 (2004) [hereinafter DON'T THINK OF AN ELEPHANT!] (discussing the principles of idea framing and how to effectively create a frame for one's ideas).
523. GEORGE LAKOFF, WHOSE FREEDOM? THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA 10 (2006) [hereinafter WHOSE FREEDOM?] ("'Frames' are mental structures of limited scope with a systematic internal organization").
524. *Id.* at 10.
525. *Id.*
526. *See id.* at 11–12 ("When you think within a frame, you tend to ignore what is outside the frame.").
527. Wofford, *supra* note 55; *see* DON'T THINK OF AN ELEPHANT!, *supra* note 522, at 48–49.

Reagan's reframing of affirmative action as "reverse discrimination" continues to dominate the public discourse.[528] Many proponents of affirmative action simply argue against the conservative frame, which legitimizes the racial hierarchy and stratification embedded into American society.[529]

Another frame that has often constricted the public dialogue is the concept of fairness and equality.[530] Proponents of Proposition 209, a 1996 ballot initiative in California that amended the California Constitution to prohibit public institutions from using affirmative action, framed the issue narrowly about fairness in competition, using so-called objective means.[531] Affirmative action, in this frame, is understood as unfair competition.[532] But this only makes sense when you focus solely on admissions decisions.[533] If you broaden the lens to include the historical advantage that segregation conferred on whites and the existence of current discrimination and bias in education, then affirmative action becomes an equalizing force to ensure fairness to blacks and other nonwhites.[534]

Similarly, equality has been straitjacketed into a narrow frame.[535] Equality of opportunity in public discourse simply means that everyone at the starting line has the same chance of winning the race.[536] However, you cannot take a person who has been denied the opportunity to train, denied access to proper shoes and running gear, denied expert coaching, and forbidden for centuries from running, and believe that you have provided equality of opportunity to compete fairly.[537]

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528. *See supra* notes 300–01 and accompanying text.
529. *See* KENNEDY, *supra* note 15, at 109–13 (detailing how to refute claims of "reverse discrimination" largely in terms of explaining the concept of discrimination); *see* DON'T THINK OF AN ELEPHANT!, *supra* note 522, at 28 (explaining that the main focus of activists on the left is to try to help people directly, leaving little time for framing issues through messaging, while on the right activists are focused on messaging and framing to preserve the dominance of their moral values).
530. *See* KENNEDY, *supra* note 15, at 112–13.
531. *See* WHOSE FREEDOM?, *supra* note 523, at 54–55.
532. *Id.* at 55.
533. *Id.*
534. *See* JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 231–33, 347–49 (2011); Shaun R. Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, 80 J. OF HIGHER EDUC. 389, 397, 400 (2009); *see also* JOE R. FEAGIN ET AL., THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE COLLEGES AND UNIVERSITIES 154–57 (1996).
535. *See* WHOSE FREEDOM?, *supra* note 523, at 50.
536. *See An Introduction to Equality of Opportunity*, STANFORD UNIV., https://edeq.stanford.edu/sections/equality-opportunity-introduction (last visited Dec. 20, 2018).
537. *See id.*

Equality and fairness are useful frames for affirmative action only if the frame is broadened to account for both historical and current discrimination.[538] While the election of the first black president made it easier to discount the current effects of slavery and segregation, the magnitude of empirical evidence coupled with the statistical data on the stratification of the labor market show that segregation today is a stark reality in employment.[539] With overt displays of white supremacy, it is much harder to deny that racism is still part of the American fabric.[540]

Discrimination, both past and present, imposes on the freedom to achieve economic prosperity.[541] Historically, a close partnership of private and institutional players systematically constructed a segregation system that eliminated any competition for good jobs, thus ensuring economic prosperity for whites and denying blacks jobs.[542] Today, implicit bias is having the same effect as "Whites Only" job ads of the 1950s, by limiting competition for the benefit of whites and to the actual detriment of blacks.[543] Discrimination, then, is a systemic cause of economic disparity for blacks.[544] It also makes white prosperity possible.[545] Affirmative action, thus, is a necessary antidote to discrimination and a countervailing force to the historic advantage conferred on whites.[546]

Reframing affirmative action needs sustained public discussion and investment in effective communication systems.[547] Conservatives

538. *See* WHOSE FREEDOM?, *supra* note 523, at 50–55.
539. *See supra* Section II.B.
540. *See, e.g.*, Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/.
541. *See supra* notes 6–10 and accompanying text.
542. *See supra* notes 149–55 and accompanying text; *see also* KATZNELSON, *supra* note 1, at 43.
543. *See supra* Section II.B.2; *see also* Erik Sherman, *Hiring Bias Blacks and Latinos Face Hasn't Improved in 25 Years*, FORBES (Sept. 16, 2017, 4:30 AM), https://www.forbes.com/sites/eriksherman/2017/09/16/job-discrimination-against-blacks-and-latinos-has-changed-little-or-none-in-25-years/.
544. *See supra* Section II.B; *see also* Michael Hiltzik, *Economic Inequality is the Cause and the Consequence of Our Racial Problems*, L.A. TIMES (July 11, 2016, 10:55 AM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-economic-racism-20160711-snap-story.html.
545. *See supra* Section II.B; *see also* DON'T THINK OF AN ELEPHANT!, *supra* note 522, at 167.
546. *See id.*
547. *See supra* text accompanying notes 522–27; WHOSE FREEDOM?, *supra* note 523, at 249.

invest twice as much money as progressives to develop and reinforce their frames through think tanks and training institutes for future leaders, as well as the media.[548] In November 2008, voters in Colorado defeated a ballot initiative to end affirmative action in public employment, education and public contracting.[549] An analysis of what led to the defeat of the proposition found that voter attitudes along with sustained media messaging influenced voter behavior.[550] The ballot initiative was poorly worded and confused voters that a "Yes" vote was a support for affirmative action.[551] In fact, if the initiative was clearly worded, then it would have failed by a much wider margin: 66 to 34 percent, because Coloradoans overwhelmingly supported affirmative action.[552] Furthermore, voters overwhelmingly relied on print and broadcast news reporting for information.[553] Perspectives against the ballot initiative were published at "nearly double the frequency" as pro-initiative and some newspapers published multiple editorial in opposition to the initiative.[554]

A concerted effort, thus, is necessary by progressives to reframe affirmative action and it is doable.[555] Progressives have allies and systems already in place, but these networks need to be pushed to embrace affirmative action in employment as a civil rights priority.[556] A new breed of civil rights activists has emerged that is once again making visible the discriminatory treatment of blacks with the help of

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548. ANNE JOHNSON & TOBIN VAN OSTERN, COMPARING CONSERVATIVE AND PROGRESSIVE INVESTMENT IN AMERICA'S YOUTH, CTR. FOR AM. PROGRESS 2, 4, 12 (Dec. 2012); DON'T THINK OF AN ELEPHANT!, *supra* note 522, at 16. The five conservative youth organizations with the biggest expenditures had a combined budget of $53 million while the five largest progressive youth organizations had $23 million. JOHNSON & VAN OSTERN, supra, at 12.

549. Naomi Zeveloff, *Amendment 46 to Repeal Affirmative Action Loses Despite Hefty Odds*, COLO. INDEP. (Nov. 7, 2008), https://www.coloradoindependent.com/2008/11/07/amendment-46-to-repeal-affirmative-action-loses-despite-hefty-odds/. By 2008, California, Michigan, Washington, and Nebraska, had passed anti-affirmative action ballot initiatives. *Id.* Since Colorado's defeat, three other states—Arizona, New Hampshire, and Oklahoma—have banned affirmative action. Drew DeSilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have*, PEW RES. CTR. (Apr. 22, 2014), http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/.

550. MOSES ET AL., *supra* note 56, at 1–2.

551. *Id.* at 1.

552. *Id.*

553. *Id.* at 2.

554. *Id.* at 4.

555. DON'T THINK OF AN ELEPHANT!, *supra* note 522, at 109.

556. *See infra* text accompanying notes 600–19.

social media; pithy hashtags capture the essence of the movements.[557] #BlackLivesMatter not only condemns police brutality but an entire society that does not value black lives.[558] #MeToo highlights the pervasiveness of sexual assault on women and breaks the silence and stigma around speaking out.[559]

Similarly, #OccupyWallStreet reframed the debate around economic inequality through the "We are the 99%" Tumblr blog.[560] It had a simple call: "Make a sign. Write your circumstance at the top, no longer than a single sentence . . . . Then, take a picture of yourself holding the sign and submit it to us. The 99 percent have been set against each other, fighting over the crumbs the 1 percent leaves behind."[561] The blog illustrated that the problems faced by individuals were a structural injustice of the economic system rather than personal shortcomings.[562]

Less ubiquitous is the #equalpay campaign, which seeks to eliminate the gender wage gap.[563] While the social media footprint is not as large as the other campaigns, #equalpay campaign has had success in mobilizing some large employers, such as Salesforce, to commit to pay transparency and equity.[564]

Some of these movements started out on social media without any tactical purpose, but have reshaped the American discourse on these issues.[565] Borrowing from the organizing tactics of these campaigns, through social media, old-fashioned protests, and boycotts,

557. *See* KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 23–24 (2016); *see also Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/herstory/ (last visited Dec. 20, 2018).

558. *See* TAYLOR, *supra* note 557, at 12–14; *see also What We Believe*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/what-we-believe/ (last visited Dec. 20, 2018).

559. ME TOO., *supra* note 51.

560. PAOLO GERBAUDO, TWEETS AND THE STREETS: SOCIAL MEDIA AND CONTEMPORARY ACTIVISM 118–19 (2012).

561. *Id.* at 119.

562. *Id.* at 119–20.

563. EMPLOYERS FOR PAY EQUITY http://www.employersforpayequity.com/ (last visited Dec. 20, 2018); EQUAL PAY TODAY! CAMPAIGN, http://www.equalpaytoday.org/ (last visited Sept. 30, 2018).

564. Lesley Stahl, *Leading by Example to Close the Gender Pay Gap*, CBS NEWS, 60 MINUTES (Apr. 15, 2018), https://www.cbsnews.com/news/salesforce-ceo-marc-benioff-leading-by-example-to-close-the-gender-pay-gap/; *see also* Cindy Robbins, *2017 Salesforce Equal Pay Assessment Update*, SALESFORCE BLOG (Apr. 04, 2017) https://www.salesforce.com/blog/2017/04/salesforce-equal-pay-assessment-update.html.

565. GERBAUDO, *supra* note 560, at 102–03.

companies can be targeted on their commitment to racial equity regarding hiring and promotion practices and demanded to take the Racial Equity Pledge.[566] Modeled around the Equal Pay Pledge campaign,[567] the Racial Equity Pledge can be a statement of a company's intention to address the disparities in employment.[568] A proposed pledge can incorporate a commitment to affirmative action:

> Employers have a critical role in reducing the racial disparity in economic progress. Towards that end, we commit to making public the aggregate racial/ethnic data based on job categories; to adopt objective hiring and promotion processes and procedures to reduce unconscious bias and eliminate structural barriers; to set hiring and promotion goals to correct any identifiable deficiencies; to take all affirmative steps, including affirmative race-conscious decision making, to achieve the goals; and to take all other necessary steps to ensure racial equity within our enterprise as well as our industry.[569]

Furthermore, social media can reboot the "Don't Shop Where You Can't Work" campaigns of the early twentieth century.[570] At the turn of the century, local civil rights groups from Chicago to Harlem began mobilizing these grassroots campaigns targeted at retail establishments like the five and dime stores that were located in black neighborhoods but rarely or never hired blacks for proportional representation in employment.[571] Championed by black labor unions, the campaign began to spread to pressure utility, telephone, and

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566. *See supra* notes 517–61 and accompanying text.
567. *White House Equal Pay Pledge*, OBAMA WHITE HOUSE ARCHIVES, https://obamawhitehouse.archives.gov/webform/white-house-equal-pay-pledge (last visited Dec. 20, 2018).
568. *See generally* Natalia Merluzzi, *These Businesses are Taking the Equal Pay Pledge*, OBAMA WHITE HOUSE ARCHIVES (June 14, 2016, 4:00 PM), https://obamawhitehouse.archives.gov/blog/2016/06/14/businesses-taking-equal-pay-pledge (explaining that the Equal Pay Pledge is a pledge proposed by the Obama administration for private sector companies to take to commit to paying men and women equally in order to close the gender pay gap).
569. *See* OBAMA WHITE HOUSE ARCHIVES, *supra* note 567.
570. Oppenheimer, *supra* note 21, at 65; *see* Matt Lavietes, *How Social Media is Shaping Civil Rights Movements*, RESOURCE (Jun. 14, 2017), http://resourcemagonline.com/2017/06/how-social-media-is-shaping-civil-rights-movements/79054/.
571. Engstrom, *supra* note 22, at 1120–21; Oppenheimer, *supra* note 21, at 64–65; *see* CAYTON, *supra* note 22, at 250.

transit companies to hire black workers including in white-collar and managerial positions.[572]

Dr. King took this concept nationwide during Operation Breadbasket, with support from the Southern Christian Leadership Conference (SCLC).[573] From 1962 till his death in 1968, Dr. King led a campaign demanding proportional hiring of black workers, under threat of boycott.[574] Operation Breadbasket campaigns demanded employment data from companies regarding the total number of workers in each job category and the number of black workers in each job category.[575] The proportional quota was determined by the percentage of jobs compared to the number of black people in the city and the volume of business done in the "Black ghetto."[576] For example, if the black population is 20% in the city but the business does 30% of its business in the black community, then 30% of the jobs in this company should be held by blacks.[577] Public pressure is easier to amplify in today's social media and online culture and a rebooting of these old tactics, updated for the twenty-first century, can have a large impact.[578]

Contrary to popular narrative that affirmative action programs have always been controversial, in the 1970s, during the normative climate of integration, there was broad support for affirmative action programs.[579] A 1979 Wall Street Journal poll of top executives reported that nearly two-thirds favored government mandated affirmative action programs.[580] Compensation of top-level managers and executives was tied to affirmative action compliance.[581] Human resource management journals embraced voluntary hiring quotas as one effective tool to comply with Title VII.[582] These management specialists believed that affirmative action practices were "essential

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572. Oppenheimer, *supra* note 21, at 65–66.
573. *Id.* at 77.
574. *Id.* at 76–77.
575. *Id.* at 77.
576. *Id.* at 77–78.
577. *Id.* at 77. Five years later, Dr. King estimated that Operation Breadbasket secured 5000 new jobs and upgraded positions worth millions of dollars in annual income. *Id.* at 78.
578. *See* Lavietes, *supra* note 570.
579. *Cf.* Dobbin & Sutton, *supra* note 30, at 442–43 (exploring employer initiatives made in response to changing federal employment laws).
580. *Id.* at 455.
581. *Id.* at 448.
582. *Id.*

management tool[s] which reinforce[] accountability and maximize[] the utilization of the talents of [the] entire work force."[583]

Today, large employers have replaced affirmative action programs with diversity initiatives, at the same time championing affirmative action in education.[584] In *Grutter*, *Fisher I*, and *Fisher II*, Fortune-100 and other leading American business submitted amicus briefs in support of affirmative action in education.[585] The main argument centered on the necessity of diversity to business success.[586] These companies are global, international companies, serving and working with people and cultures of all kinds.[587] Their briefs attest that "diversity is an increasingly critical component of their business, culture and planning."[588]

For example, in the *Grutter* amicus brief, Microsoft was heralded as increasing its percentage of minority employees, from 16.8% in 1997 to 25.6% by 2003.[589] However, this diversity was mostly accounted for by Asian males.[590] Blacks made up only three percent of Microsoft's workforce by 2014, slightly increasing to 3.7% in 2016.[591] These specific numbers by ethnicity were only released

583. *Id.* at 455.

584. Roger Parloff, *Big Business Asks Supreme Court to Save Affirmative Action*, FORTUNE (Dec. 9, 2015), http://fortune.com/2015/12/09/supreme-court-affirmative-action/; *see also* Vivian Yee, *Affirmative Action Policies Evolve, Achieving Their Own Diversity*, N.Y. TIMES (Aug. 5, 2017), https://www.nytimes.com/2017/08/05/us/affirmative-action-justice-department.html.

585. Brief for Amicus Curiae 65 Leading Am. Businesses in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056; Brief for Amici Curiae Fortune-100 and Other Leading Am. Businesses in Support of Respondents, Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297 (2013) (No. 11-345), 2012 WL 3418831; Brief for Fortune-100 and Other Leading Am. Businesses as Amici Curiae in Support of Respondents, Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6735839.

586. *See, e.g.*, Brief for Amicus Curiae 65 Leading Am. Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399056, at *1; Brief for Amici Curiae Fortune-100 and Other Leading Am. Businesses in Support of Respondents, *Fisher I*, 570 U.S. 297 (2013) (No. 11-345), 2012 WL 3418831, at *1–2; Brief for Fortune-100 and Other Leading Am. Businesses as Amici Curiae in Support of Respondents, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6735839, at *1–3.

587. Brief for Amicus Curiae 65 Leading Am. Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399056, at *1.

588. *Id.* at *8.

589. *Id.*

590. *See* Davey Alba, *Microsoft Releases More Diversity Stats, and They Aren't Pretty*, WIRED (Jan. 5, 2015), https://www.wired.com/2015/01/microsoft-diversity/.

591. *Id.*; Gwen Houston, *Global Diversity & Inclusion Update at Microsoft: Deepening Our Commitment*, MICROSOFT: OFFICIAL MICROSOFT BLOG (Nov. 17, 2016), https://

after activists pressured Microsoft to release its federal EEO-1 reports, which broke down employment data by employees' race, ethnicity, gender, and job category.[592]

The numbers are just as dismal at other technology companies.[593] A 2014 analysis by USA Today of employment statistics from seven technology companies in Silicon Valley found that blacks made up only 5% of the companies' total workforce, and only 2% of its technical workforce.[594] While these companies attribute the disparity to a lack of qualified candidates, this is simply not the case, as there were twice as many black graduates that year with a bachelor's degree in computer science or computer engineering from prestigious research universities.[595]

Although large employers have invested millions of dollars in diversity initiatives including targeted outreach and recruitment, these have largely failed to deliver a critical mass of black and other underrepresented groups to their workforce.[596] There is little resistance to affirmative outreach obligations to underrepresented communities.[597] But, large employers have not embraced affirmative race-conscious decision-making.[598] One reason is the erroneous assumption that such affirmative steps are prohibited by law.[599]

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blogs.microsoft.com/blog/2016/11/17/global-diversity-inclusion-update-microsoft-deepening-commitment/.

592. Alba, *supra* note 590 (speculating that transparency came as a result of a backlash after Microsoft's CEO said that women should not ask for raises but wait for "karma"). With the passage of Title VII, private sector employers with 100 or more employees and federal contractors with 50 or more employees and federal contract of $50,000 or more must submit EEO-1 reports. *EEO-1: Who Must File*, U.S. EQUAL OPPORTUNITY EMPL'T COMM'N, https://www.eeoc.gov/employers/eeo1survey/whomustfile.cfm (last visited Dec. 20, 2018).

593. Alba, *supra* note 590 (noting that the percentages of Blacks and Latinos at Facebook and Google are only 5%, compared to 8% at Microsoft).

594. Elisabeth Weise & Jessica Guynn, *Tech Jobs: Minorities Have Degrees, But Don't Get Hired*, USA TODAY (Oct. 12, 2014, 6:00 AM), https://www.usatoday.com/story/tech/2014/10/12/silicon-valley-diversity-tech-hiring-computer-science-graduates-african-american-hispanic/14684211/.

595. *Id.*

596. *See* Tessa L. Dover, Brenda Major & Cheryl R. Kaiser, *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, HARV. BUS. REV. (Jan. 4, 2016), https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they-make-white-men-feel-threatened.

597. *Id.*

598. *See id.*; *see supra* text accompanying notes 584–95.

599. *See* DeSilver, *supra* note 549 (discussing the fact that affirmative action laws are consistently altered on a state-by-state basis, often leaving employers uncertain of current laws); Valerie Bolden-Barrett, *For Tech Firms, It's 'Yes' to Hiring Diversity,*

Educating large employers about the legal validity and feasibility of affirmative race-conscious decision-making then should be the first step. These employers, theoretically, already value diversity as a business necessity. What they need is a roadmap on adopting voluntary affirmative action plans that can withstand challenges under Title VII.

Weber provides the basic framework.[600] A private employer should be able to adopt a plan that not only "break[s] down old patterns of racial segregation" but also disrupts contemporary discrimination and implicit bias in the workplace.[601] Since *Weber*, ample empirical evidence has proven the existence of implicit bias and discriminatory practices in the labor market.[602] New industries, like technology that are fairly homogenous,[603] can embrace voluntary affirmative action as much as traditional industries like banking.

An employer must compile evidence of racial segregation and hierarchy. A preliminary step is a survey that factors in: 1) the percentage of the nonwhite population in the area; 2) the percentage of the nonwhite work force as compared with the total work force; 3) the size of the unemployed nonwhite work force; and 4) the availability of nonwhites having requisite skills in an area in which the employer can reasonably recruit.[604] This analysis will help design "goals, timetables and affirmative action commitments" to correct any identifiable deficiencies.[605] These numerical goals and timetables must be flexible and can be achieved through various means.

Race-conscious training programs and internships provide an excellent vehicle to meet the remaining *Weber* factors. These programs are by their nature temporary. They can provide greater

'No' to Affirmative Action, HR DIVE (Jan. 12, 2017), https://www.hrdive.com/news/for-tech-firms-its-yes-to-hiring-no-to-affirmative-action/433865/ (evidencing that employers often avoid affirmative action programs for fear of backlash from reverse discrimination proponents).

600. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208–09 (1979).

601. *Id.* at 208.

602. *See, e.g.*, Kevin Lang & Jee-Yeon K. Lehmann, *Racial Discrimination in the Labor Market: Theory and Empirics*, 50 J. ECON. LITERATURE 959, 964–65 (2012) (noting that in 2008, the unemployment rate for black men ages 25-54 years old was 9.1% compared to 4.5% for white men of the same age range).

603. *See* Jessica Guynn, *Tech Not Diverse Enough? That's News to Workers*, USA TODAY (Mar. 22, 2017, 11:00 AM), https://www.usatoday.com/story/tech/news/2017/03/22/tech-is-already-diverse-enough-tech-workers-say-in-survey-from-atlassian/99457506/ (analyzing the U.S. Equal Employment Opportunity Commission's report that found that 68.5% of employees in the tech industry are white).

604. Hanson, *supra* note 22, at 254–55.

605. *Id.* at 255.

opportunities for nonwhites but at the same time are not an absolute bar to white employees. A training program or internship can even reserve a percentage of slots for blacks and other underrepresented groups, like the *Weber* training program did.[606] Employers that argue that there are not enough qualified nonwhite candidates in their field should be pressed to create training programs and internships that use race-conscious criteria.

Similarly, race-conscious hiring and promotion decisions, where race is but one factor, can pass statutory and constitutional muster.[607] Where a plan requires the taking away of an interest (such as an existing job or a guaranteed promotion based on a qualifying exam), it is more likely to be struck down.[608] The Supreme Court disfavors the disparate treatment of individual white employees but recognizes that a more diffused burden is permissible.[609] Because the Supreme Court has fluidly applied the analysis from the constitutional cases to Title VII statutory challenges, private employer can take guidance from the educational affirmative action cases.[610] Hiring decisions should evaluate candidates individually and based on a set of criteria that is specific to that position. Race acts as a plus factor that gives a preference to the nonwhite candidate. As the Supreme Court has repeatedly cautioned, the plan must be flexible with individualized assessments.[611]

Private employers can go a step further and try to justify their affirmative action hiring and promotion decisions under the diversity rationale approved in the educational cases.[612] With globalization and an increasingly diverse nation, employers need to ensure that

606. United Steelworkers of Am. v. Weber, 443 U.S. 193, 197–98 (1979).
607. *See* Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987).
608. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281–84 (1986); Ricci v. DeStefano, 557 U.S. 557, 562–63, 585 (2009).
609. *See Wygant*, 476 U.S. at 282.
610. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (permitting race as a plus-factor in admission decisions); Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2207 (2016) (holding the university's race-conscious program did not violate the Equal Protection clause).
611. *E.g.*, *Grutter*, 539 U.S. at 315, 334.
612. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *Grutter*, 539 U.S. at 306; Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297 (2013). Private employers should be cautious in importing wholesale the equal protection jurisprudence. *See Bakke*, 438 U.S. 265; *Grutter*, 539 U.S. 306; *Fisher I*, 570 U.S. 297. While the Supreme Court has blurred the statutory and constitutional boundaries, the heightened strict scrutiny standard is inappropriate to apply to purely private actors. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

workers at all levels of the labor market are diverse.[613] As Justice O'Connor recognized in the educational setting, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[614] Finally, *Ricci* allows private employers to adopt voluntary affirmative action plans to avoid disparate impact liability.[615] While it is unclear whether private employers would need to show the same "strong basis in evidence" as public employers, they will need to show more than "mere good-faith fear" of disparate impact liability.[616] Amorphous claims of disparate impact liability will not justify "unyielding racial quota[s]."[617]

The time is ripe to pressure large employers, especially technology companies, to embrace voluntary affirmative action plans that include race conscious decision-making.[618] In a survey of technology workers, nearly half said that the 2016 presidential election has made them care more about promoting diversity in their company, and a quarter of the respondents have taken proactive steps to engage with their colleagues and leadership about a more inclusive workplace.[619]

Unions must be equally engaged to pressure employers to adopt affirmative action plans and also help encourage the Democratic political leadership to re-embrace affirmative action programs.[620] Historically, blacks were excluded by unions; today, they have a higher union membership rate than any other ethnicity.[621] By the early 1970s, nearly 40% of black males were union members in the private sector.[622] Unionization rates for blacks have exceeded those of whites for decades.[623] Unionization has provided blacks with protection against discriminatory treatment and reduced wage

613. Weise & Guynn, *supra* note 594.
614. *Grutter*, 539 U.S. at 332.
615. Ricci v. DeStefano, 557 U.S. 557, 581 (2009).
616. *See id.* at 581–83.
617. *Id.* at 583 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989)).
618. *See* Weise & Guynn, *supra* note 594.
619. *Id.*
620. *See* discussion *infra* notes 621–34 and accompanying text.
621. BUREAU OF LAB. STAT., *supra* note 184 at 1–2; Rosenfeld & Kleykamp, *supra* note 62, at 1463–64, 1466–67.
622. *See* Rosenfeld & Kleykamp, *supra* note 62, at 1463.
623. *Id.*

inequality among black women.[624] The current decline of unions has correspondingly impacted black economic progress.[625]

Although blacks overwhelmingly gravitate towards unions and take union staffer and leadership roles, unions have adopted the colorblind adage.[626] But as unions depend on black and immigrant workers for their growth, they have started to take a leadership role in centering discussion on race and economic progress.[627] In a study commissioned by the AFL-CIO to assess its own internal equity policies, an overwhelming number of respondents supported the adoption of specific numerical requirements that promote diversity in delegates attending national conventions.[628] The AFL-CIO constitution was amended accordingly, requiring affiliated unions to ensure that their delegations to the convention "generally reflect the racial and gender diversity of its membership."[629] In 2015, the AFL-CIO created the Labor Commission on Racial and Economic Justice to examine how issues of race can be better addressed by the labor movement.[630]

If the labor movement can embrace affirmative action as one tool to help combat the racial disparity in employment, there will be ripple effects on the political landscape. Unions play a central role in the Democratic Party through contributions and volunteers that mobilize and turn out voters.[631] A revolution in the Democratic Party is already underway, fueled by the candidacy of Bernie Sanders, towards a more progressive agenda.[632] Unions can tip the balance on

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624. *Id.* at 1460, 1462; Cherri Bucknor, *Black Workers, Unions and Inequality*, CTR. FOR ECON. & POL'Y RES. 12, 16–17 (Aug. 2016), http://cepr.net/publications/reports/black-workers-unions-and-inequality.
625. *See* Rosenfeld & Kleykamp, *supra* note 62, at 1484, 1487; Bucknor, *supra* note 624, at 16–17.
626. *See* Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 229 (2002); MARC BAYARD, PARTNERSHIP BETWEEN THE LABOR MOVEMENT AND BLACK WORKERS: THE OPPORTUNITIES, CHALLENGES, AND NEXT STEPS 1 (Apr. 2015), https://ips-dc.org/wp-content/uploads/2015/04/MarcReport.pdf.
627. *See generally* O'Melveny, *supra* note 62.
628. *Id.* at 529.
629. *Id.* at 523.
630. AM. FED'N L. & CONGRESS INDUS. ORGS., *supra* note 59.
631. *See* James Feigenbaum et al., Demobilizing Democrats and Labor Unions: Political Effects of Right to Work Laws 13 (Oct. 4, 2017) (unpublished manuscript), https://businessinnovation.berkeley.edu/wp-content/uploads/2017/10/rtw-laws-manuscript_oct2017.pdf.
632. Alexander Burns, *There Is a Revolution on the Left. Democrats Are Bracing.*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/us/politics/democratic-party-midterms.html.

issues like affirmative action within the Democratic Party.[633] Once a mainstay of Democratic Party platforms, affirmative action has fallen out of favor with mainstream Democrats as being too controversial.[634]

While the addition of Brett Kavanaugh to the Supreme Court tips the balance against affirmative action,[635] I remain optimistic in the long run that public pressure coupled with an effective Congress can shift the judiciary into upholding narrowly tailored affirmative action plans to further the goals of Title VII.[636]

VI. CONCLUSION

The unfinished work on racial equality that abruptly halted in the 1980s must be reinvigorated in the employment arena.[637] Affirmative action is one effective tool to combat discrimination and stem the widening economic disparity between blacks and whites.[638] Using affirmative action to increase black employment is both constitutionally[639] and statutorily viable.[640] While the Supreme Court has narrowly interpreted the Fourteenth Amendment, frustrating the intent and purpose of the Amendment, it has not shut its door on affirmative action.[641] In the employment context, there is a greater opportunity for constitutionally valid affirmative action plans.[642] The

633. *See id.*
634. *Cf. id.* (stating generally that there are many progressive policies that people want that are not being supported by mainstream Democrats).
635. Eoin Higgins, *Yale Legacy Admission Brett Kavanaugh is Now the Swing Vote on Affirmative Action at Universities*, INTERCEPT (Oct. 8, 2018, 4:36 PM), https://theintercept.com/2018/10/08/brett-kavanaugh-affirmative-action-at-universities/.
636. The genesis of wage and hour legislation at the turn of the twentieth century is a case in point. *See* Lochner v. New York, 198 U.S. 45 (1905); Adkins v. Children's Hosp., 261 U.S. 525, 561–62 (1923); Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L. J. 19, 113–14 (2000). As states began to affirmatively set maximum hours and minimum wages, the Supreme Court in the *Lochner* era struck down these laws as "repugnant" to due process. *Lochner*, 198 U.S. at 64. Eventually, the Supreme Court shifted as a result of a deft political move by President Roosevelt who was frustrated by the restrictive view of the Supreme Court. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 449 (Found. Press ed., 1978). At the same time, a national movement advocating for federal and state wage and hour legislation was growing. *See* Harris, *supra*, at 46–48.
637. *See supra* notes 181–85 and accompanying text.
638. *See supra* notes 241–51 and accompanying text.
639. *See supra* note 381 and accompanying text.
640. *See supra* notes 488–89 and accompanying text.
641. *See supra* notes 336–41 and accompanying text.
642. *See supra* notes 431–32 and accompanying text.

Supreme Court has approved of affirmative action plans in educational institutions and to remedy past discrimination in public employment.[643] Furthermore, the Supreme Court has approved of voluntary affirmative action plans adopted by private employers under Title VII as a means to effectuate the purpose of Title VII.[644]

Affirmative action has been decimated through the normative shift brought about by the Reagan Administration's efforts to frame it as reverse discrimination.[645] Reagan assaulted affirmative action to brazenly appease white racial anxiety.[646] Reagan launched his presidential campaign in Philadelphia, Mississippi—a town made famous by the murder of three civil rights workers—and opposed the Civil Rights Act, the Voting Rights Act, the 1968 Fair Housing Act, and a federal holiday honoring Dr. King.[647] The Reagan Administration's offensive to dismantle and disinvest in the civil rights infrastructure is coming full circle with the Trump presidency.[648]

The time is ripe to muster the political will to overcome the stasis on affirmative action in employment.[649] Key leadership of civil rights organizations, private employers, unions and grassroots community activists should embrace employment equity as a pressing civil rights issues.[650] The widening economic gap between whites and blacks is a national disgrace.[651] We must reignite the quest for equality in employment by re-embracing affirmative action in private employment.[652]

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643. *See supra* Section IV.A.3.
644. *See supra* Part IV.B.
645. *See supra* Section III.B.
646. *See supra* text accompanying note 28; *cf. supra* text accompanying notes 292–93.
647. Juan Williams, *Reagan, the South and Civil Rights*, NAT'L PUB. RADIO (June 10, 2004, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=1953700; Paul Krugman, *Republicans and Race*, N.Y. TIMES (Nov. 17, 2007), https://www.nytimes.com/2007/11/19/opinion/19krugman.html.
648. *See* Erica L. Green et al., *Trump to Scrap Obama-Era Affirmative Action Guidelines*, BOSTON GLOBE (July 3, 2018), https://www.bostonglobe.com/news/nation/2018/07/03/trump-reportedly-planning-scrap-obama-era-affirmative-action-guidelines/OIWB5ldjD482t80icdh8lI/story.html.
649. *See supra* note 49 and accompanying text.
650. *See supra* notes 58–63 and accompanying text.
651. *See* Brian Thompson, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, FORBES (Feb. 18, 2018, 12:15 PM), https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/.
652. *See supra* Part V.