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

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

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

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

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

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

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

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

Table 3
Society, Elites, and Law

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

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

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

What's at Stake? Why Should We Care?

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

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

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

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

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

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

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

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

Why Is There Racial Realism? A Brief Look at Causes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

issues and affirmative action. The difficulty and expense of litigation involving the Civil Rights Act of 1964 was just too daunting.[124]

Roger Clegg, president and general counsel of the Center for Equal Opportunity, an organization opposed to affirmative action, has provided more insight into the difficulties of civil rights litigation strategies focused on employment. He argues that employment preferences are "less overt" than those practiced in university admissions, which enables employers to deny that they are actually using any racial preference when they hire, fire, or place an employee. They may claim that they stress race only in the recruitment phase of employment. In other words, "that it's harder to bring these cases helps explain why there are not more of them."[125]

Besides Supreme Court inaction on racial realism, a second legal factor that has allowed racial realism and its advocacy to flourish is more obvious: there are those rare instances when lower courts have acted to *authorize* racial realism. In a handful of cases, courts made law in creative new ways in this highly controversial area. As I note in the chapters that follow, while restriction of affirmative action has been mostly the work of judges appointed by Republicans, case law specifically enabling racial realism has been a bipartisan undertaking: judges appointed by both Democratic and Republican presidents have played roles. There are no partisan fingerprints on this judicial enabling, nor does there seem to be a pattern on the cases that specifically deny it.

How did judges create new law? They could do this for several reasons. Judges have considerable freedom to interpret statutes, and they may do so as urged by litigants or activists, or as directed by their own ideology. In legal scholars' strongest arguments on this point, judges simply choose precedents to fit the argument they want to make rather than making decisions based on precedents.[126] Political scientist Shep Melnick argues that shifts in legal interpretation occur particularly when the statutes are vaguely written.[127] This was certainly the case in the early years of Title VII, which did not even define the term "discrimination." In addition, as legal scholar William Eskridge has noted, statutes are based on assumptions that may "unravel over time" because culture, institutions, and expert opinion may change; courts therefore interpret them dynamically.[128] This point would seem to fit well with Title VII, written fifty years ago for a far less diverse population.

What is odd in the case of racial realism is that many of the arguments regarding judicial creativity stress *statutory* interpretation, but for racial realism, the clearest enabling decisions have been *constitutional*. This may be surprising because courts are less likely to engage

in adventurous interpretation of the Constitution than of statutes.[129] In Chapter 3, I describe a series of Fourteenth Amendment cases that allow an "operational needs" defense to law-enforcement institutions (and only law-enforcement institutions) to hire and place nonwhites—even if those nonwhites resist. In Chapter 4, I describe one federal district court case establishing a precedent that the First Amendment's free expression protection allows racial realism in casting. Title VII's lack of a BFOQ defense for race has proven to be too limiting on statutory interpretation. The two Title VII cases that have enabled racial realism did so only indirectly, by allowing a particular worker recruitment method. As I discuss in Chapter 5, these cases appeared to go against Title VII precedent and EEOC guidelines to allow greater employer discretion to use word-of-mouth hiring to remake their workforces with Latino and Asian low-skilled immigrants.[130]

All of these various factors—demographic, economic, organizational, political and legal—combined to slowly enable or encourage the advocacy and practice of racial realism described in the next four chapters. The complexity of their possible combinations also helps explain why this strategy for managing race arose without debate, direction, or analysis.

Some Notes on a Conceptual Framework and Methods

This book is about the meaning of "race"—a term that for decades has been controversial in the social sciences. The thrust of much recent theorizing has been to deny the existence of "race" or "racial groups" as such, or at least to emphasize their cultural nature. Race, in this view, is something that needs to be explained, not something that explains other things.[131]

I share with these scholars the notion that there is nothing necessary or natural about race, and that racial categories change over time and vary in different places. My interest in this book, however, is not in the origins of the racial understandings of employers (though that would make for an interesting project). I want to show that for many employers, as well as for various other interests concerned, for whatever reason, race matters in racial-realist ways, and that this has complex and important implications for civil rights law. In the sections of the book where I describe racial realism advocacy and practices, therefore, "race" connotes the largely ascriptive and incoherent collection of folk understandings

that employers mean by their use of the word—what David Hollinger has called the "ethno-racial pentagon" of American Indian, Asian, black, Latino, and white.[132] Though increasing immigration and intermarriage are blurring America's color lines and destabilizing America's "racial order," there is not yet much evidence that employers care about whether employees are mixed-race or how races are arranged in any power hierarchy outside of their own workplace.[133]

The concept of race is hardly more developed in employment discrimination law. Title VII does not define race. The EEOC says what race is not ("Race and ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins"), and then outlines how various regional ancestries fit into each category ("White" means "having origins in any of the original peoples of Europe, the Middle East, or North Africa").[134] Employers are told that in addition to not discriminating on the basis of race, they must not discriminate on the basis of an employee's partner's race, or on the basis of "cultural practices or characteristics often linked to race or ethnicity," such as dress or speech, and that "discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII, even though not all members of the race share the same characteristic."[135]

There is a related issue here regarding Latinos and national-origin discrimination. Is an employer who leverages the utility of Latino identities practicing *racial* realism, or something else? In official government statistics, Latinos are an ethnicity and not a race.[136] However, EEOC instructions for classifying employees long treated "Hispanic" as a category identical to "black" or "white," and only since the late 2007 did they begin to require that employers treat "Hispanic or Latino" background as an ethnicity.[137] Even now this category has a racial character because employees who select "Hispanic" or "Latino" are counted separately from whites, blacks, and Asians.[138] Moreover, the EEOC *Compliance Manual* discusses discrimination against Latinos in both its race and national origin discussions, noting that "discrimination based on physical traits or ancestry may be both national origin and racial discrimination."[139] In addition, some researchers argue that for many Latinos in America, "Latino" is effectively a racial identity, because various micro-processes involved in the daily life of living in the United States have helped create the notion of "Latino" or "Hispanic" as a discrete race, separate from "black" and "white."[140] Larger forces, including the media, contributed as well to the view of Latinos as a discrete, racial category.[141] Regardless

of how Latinos see themselves, the issue in discrimination law is how *employers* see them, and throughout this book, the discourse surrounding Latinos, Hispanics, and even more specific groupings (e.g., Mexicans or Puerto Ricans) is a racial discourse that typically counterposes them with whites and blacks.[142]

Related to the conceptual issues regarding race is the issue of employers perceiving that some workers have special abilities to work in low-skilled jobs by virtue of their foreign-born status. As described briefly above, there is little doubt that employers do sometimes perceive immigrant status as a qualification for some jobs, and that it is this status rather than race that suggests the special abilities. There is thus an "immigrant realism" apart from and in addition to a racial realism. As I show in Chapter 5, this approach to hiring and placement is, like racial realism, not authorized by any statute or court ruling, and therefore appears also to be a legal violation. However, while analytically distinct from race, immigrant realism often has a racial component. Employers sometimes show slippage and inconsistent language when talking about immigrant or nonimmigrant employees: they may speak in terms of national origin groups (e.g., "Chinese") or they may use pan-ethnic or racial terms (e.g., "Asian"). Even when valorizing immigrant abilities, they may be perceiving the workers through a racial lens when, for example, they compare "Mexicans" or "immigrants" to "blacks" and "whites."[143]

An important caveat or explanation is in order in this discussion of race. I focus on racial realism that lauds the abilities or signaling of *non*whites. This focus is not meant to deny that *whiteness* continues to matter most in employment. In fact, overwhelming evidence shows that discrimination against people of color is still an enormous problem, as I have discussed above. I focus on nonwhite racial realism for the important reason that it is nonwhite races that are explicitly a part of the racial-realist strategy. Employers, advocates, experts, political leaders all openly discuss the benefits flowing from the employment of nonwhites. They say little about whiteness. No mainstream advocates are (yet) discussing seriously strategies of managing race that place importance on the abilities or signaling of whites. I do discuss white racial abilities and white signaling when it is especially salient (such as in entertainment, and in a few contexts in business employment), but since it is not a part of the racial-realist vision that many people normatively want for the country, it is not a focus of analysis here.

A final note on race: I use the terms "black" and "African-American" interchangeably. I use "Latino" to describe persons with ancestry from

Latin America, though some of the speakers or other sources that I quote use the term "Hispanic."

In designing this study, I have aimed for a policy-oriented, "big picture" synthesis of findings in social science and legal scholarship. Researching employment practices that may be beyond the law is not easy. Employers are not always willing to talk, and their approach to questions varies from uninhibited to evasive.[144] Fortunately, there is a vast amount of excellent social science scholarship on employment, and much of it has not up to now been connected to the work on employment law in a comprehensive way. Still, in many cases, we have only the words of employers and various advocates regarding their intentions in hiring, and some data on the employment picture for different races. Though I present what data are available, it is not possible to offer a solid estimate of the extent to which certain employment practices are widespread, institutionalized, or even supported. I do believe, however, that the following chapters will make clear that support for racial realism is significant, and that it comes from employers and advocates with a variety of interests and from a diverse array of sectors. These practices are considered normal by mainstream and often elite voices throughout American society, despite their limited legal authorization, and that is a key point of the book.

The choice of cases analyzed here is based on a mix of factors: their intrinsic importance either in daily life or because of the functions they perform for government or industry; the amount of existing social science evidence and analysis; the amount and urgency of advocacy for racial realism; and the distinctiveness of the legal context. These are not the only cases where racial realism plays a role in employment. There are others with potentially interesting racial-realist dynamics that I could not include—for example, the military, bureaucrats and administrators in government, attorneys, and people involved in workforce recruiting.

The Plan of the Book

The next four chapters are empirical and have a similar organization. They are based on the specific legal regime that governs the employment sectors in question: high-skilled and professional employment; government employment; entertainment and media; and low-skilled employment. In each, I mostly stick to a common format. First, I describe the employment practices and/or advocacy in the relevant sectors

of employment, showing the various ways that a strategy of racial realism motivates or would motivate hiring, worker placement, and firing. I then review whether or not social science evidence supports the assumptions motivating this hiring: does race really provide the benefits that employers believe it does? In every case, there is mixed but still not insignificant evidence that employers do achieve their goals by hiring with race as a job qualification. I conclude by exploring the court decisions and EEOC guidelines regulating the relevant sectors of employment, showing the limited extent to which law can authorize or support racial realism.

Chapter 2 examines racial realism in white-collar and professional employment. I focus on medicine, journalism, and marketing, providing evidence of the strong support for hiring on the basis of racial abilities and signaling in these jobs. I also show the support for the racial abilities and signaling that make racial "diversity" attractive to corporate employers. When it comes to legal authorization for racial realism, there is surprisingly little in this sector, as the courts have refused to allow a race BFOQ, and they have not modified rulings that prohibit customer tastes as a justification for racial discrimination. Another key legal obstacle here is that courts have not allowed voluntary affirmative action to be motivated by racial-realist goals.

Chapter 3 focuses on government employment. I begin at the top, because political elites set the tone for America. I show that politicians do not practice what they preach: they may give rhetorical support to classical liberalism, but both parties commonly follow racial-realist logics when appointing government officials, including judges. I then show the long and prominent support given to racial realism in policing and education. The chapter concludes with an analysis of the constitutional jurisprudence that has authorized racial realism in law enforcement but barred it in other sectors, including education.

Chapter 4 explores racial realism in the advertising and entertainment industries (movies, TV, and professional sports). These cases are distinctive because they are almost totally focused on racial signaling—the image of the worker is very much the product that the employers are selling. Racial signaling is thus common in all of them, though rarer in sports than the other sectors, especially in the last few decades. In film, television, and advertising, racial preferences in hiring are widespread and blatant, including in casting calls. I show that Title VII law does not authorize these practices. I also examine the possibility that television shows' dependence on use of federally-regulated airwaves, and sports teams' dependence on the public financing of stadiums might

provide legal openings for racial realism in these sectors. Since this employment sector is about expression, I explore possible First Amendment defenses for these employers, and show that at least one court has found a constitutionally-protected freedom to discriminate.

Chapter 5 focuses on low-skilled employment. I show that employers have a racial hierarchy of preference and that they rely on word-of-mouth hiring to attract Latino and Asian workers with the racial and/or immigrant abilities they prize. I give special attention to meatpacking, a sector that has been racially remade in the past few decades. I then explore the ways Title VII should prevent this kind of hiring, which is more clearly based on crude racial stereotypes than the preferential hiring in skilled sectors, and I point out that it has for the most part been ineffective despite some recent EEOC victories. I show how judges have in fact created new opportunities for employers to use word-of-mouth hiring to build and maintain their Latino and Asian workforces without running afoul of the law. This chapter also shows how two other laws, the Immigration Reform and Control Act and the Racketeer Influenced and Corrupt Organizations Act, would seem to prohibit immigrant realism but have nonetheless failed.

The concluding Chapter 6 suggests several possible principles for reform that could guide attempts to bring law and practice closer together in a way that accepts at least some racial realism but is also in line with American values. These emphasize efforts to keep jobs open to all, encouraging employers and the government to have awareness of and take responsibility for the negative impacts of racial-realist management strategies, and efforts to shape the regulatory incentive structure so as to encourage movement toward these goals.