Inclusion: Preventing Anti-Other Discrimination and Fulfilling the Promise of Equal Employment Opportunity in Public Employment

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INTRODUCTION

The story was all too familiar coming from yet another friend of mine, who lives in a big metropolitan city, considered a “melting pot” for the vast array of minorities in its population. In fact, in this city, minorities comprise over half of the population, with one minority group representing nearly 40% of the population. I listened to this friend lament about not being hired for a city job for the fifth time, despite her Masters degree, several years of relevant work experience, and outstanding references. Unemployed for nearly a year and a half, she, like the others, was having no luck getting hired, although she was always interviewed and received praise from her interviewers.

Like the others, she was usually interviewed by a minority, and, like the others, she never suspected that her race and her accent could be the primary reason she did not get the job. As the others had done, she considered and ruled out every possible reason why she was not hired (lack of experience, lack of charisma, demand too high of a salary) and the only thing left to consider was her race. But how could that be? Was she not just like those who had interviewed her? And isn’t discriminating something that White people do to minorities and not something minorities do to each other? Indeed, the individuals who had interviewed her and the others would generally be referred to as

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“minorities” because they are not White. However, those individuals, while racial minorities in the United States, belonged to a dominate group in this particular setting, and were no longer numerical minorities, but members of the numerical majority. The persons they refused to hire were not.

In states where minorities comprise a significant portion of the population and the public workplace, our concern about racial discrimination should not wane. We should not ignore the absence or underrepresentation of specific racial groups in the public workplace, even where a particular minority group comprises the numerical majority of that workplace. Racial disparities in the workplace may be indicators of a pattern or practice of discrimination, regardless of whether the agents or victims belong to a group traditionally referred to as “minority.” Accordingly, we should not reject affirmative action as an effective tool for removing such disparities.

Take for example, a state like California, where minorities comprise 48.3% of the workforce.\(^1\) Now, consider that in Los Angeles County alone, the workforce is 36.5% White, 38.8% Hispanic, 12.5% Asian, and 9% Black.\(^2\) With two racial groups, White and Hispanic, comprising an overwhelming majority of the labor force in Los Angeles County, the opportunities for racial discrimination by those racial groups against Blacks and Asians could be considerable. Whether the discrimination is perpetuated by Hispanics and Whites who seek to protect their own status within the workforce, by Whites who prefer Hispanic workers over Black and Asian workers, or by Hispanics who

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prefer White over Asian and Black workers, the opportunity to discriminate is present. In this situation, the challenge would be to determine how to ensure that the rights to equal treatment of Black and Asian workers are not thwarted and denied on the basis of their non-membership to one of the majority racial groups. This challenge is not unique to California. It is relevant in any circumstance where any single racial group comprises the numerical majority and where the numerical racial minority is subject to the decision making power.

Racial discrimination in the American workplace remains a problem that has not subsided since the 1964 Civil Rights act was passed. Present-day racial discrimination may not be as overt as it was prior to the Civil Rights Movement but it still exists; it easily cloaked when the discriminatory actors are not White. In order to effectively identify, prevent, and remedy present-day discrimination we must disarm our notions of racial discrimination and equip ourselves with a variegated concept. This requires attention not only to White/non-White discriminatory practices, but to minority-majority discriminatory practices as well. Using contemporary notions of racial discrimination in the workplace will expose the growing existence and severity of discrimination against minorities. Additionally, it will expose ongoing discrimination by Whites against only

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4 Tanya Kateri Hernandez, Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense, 42 HARV. C.R.-C.L. L. REV. 259, 261 (2007) (“on-White racial hierarchies appear opaque to decision makers and other legal actors, who find it difficult to recognize the indicators of discrimination. Agents of discrimination are perceived as uniformly White-Anglos and all incidents are envisioned as having a White-versus-non-White dynamic.”).
5 Id. at 265-66 (“Examining Latino bias may tell us much about the ability of legal actors to recognize and articulate the harm of inter-ethnic discrimination in a legal system steeped in an understanding of discrimination as solely a White/non-White phenomenon.”); see also id. at 264 (suggesting that in developing a new conceptual framework for discrimination, “[i]nter-ethnic discrimination is viewed expansively in order to depict the many ways non-White ethnic groups and sub-groups are complicit in
certain minority groups. Attention to racial discrimination in these covert forms will demonstrate the continuing need for states to take affirmative measures. States need to ensure that their agencies do not engage in a system, actively or passively, that fosters racial subordination among minorities as well as between Whites and minorities.

Current anti-discrimination laws and jurisprudence fall short of meeting the challenge of removing racial barriers to equal employment opportunity in public and private agencies for several reasons. First, the current laws fail to recognize the existence of discrimination outside of the White/non-White paradigm, so that inter-ethnic discrimination, or anti-other discrimination, is masked and left uncorrected. There is also conflict between what is a legally permissible affirmative action program and under what circumstances such a program should be adopted under Title VII \(^6\) and the Equal Protection Clause of the Fourteenth Amendment. Next, the law replaces attention to race with colorblindness which could mask discriminatory practices rather than expose them for remediation. Fourth, the current laws overestimate the success of policies that promote diversity by mistaking minimal workplace racial diversity for compliance with anti-discrimination employment laws. Finally, they fail to compel public employers, namely states, to adopt and administer affirmative race-neutral and race-conscious policies to ensure compliance with anti-discrimination mandates under Title VII and the Equal Protection Clause.

This discussion addresses the above shortcomings of our present anti-discrimination laws in the following manner. Part I provides a comparative analysis of Title VII and the Equal Protection Clause of the Fourteenth Amendment. Part II

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discusses anti-other forms of discrimination with a focus on inter-ethnic discrimination.\(^7\) Part III discusses the United State Supreme Court’s decisions in Title VII affirmative action cases and compares them with cases the Court has decided under the Equal Protection Clause, showing how the former approach is better suited to eliminate all patterns or practices of racial discrimination in the workplace. This includes the more easily hidden, but harmful, violations among minorities. Further, it discusses why, in light of anti-other discriminatory practices, the Court’s approaches to affirmative action in *Grutter v. Bollinger*\(^8\) and *Parents Involved in Community Schools v. Seattle School District*\(^9\) (hereinafter “PICS”) are inadequate to identify and eliminate discrimination in employment.\(^10\) This section will focus primarily be on colorblindness and diversity as concepts in need of renovation in our twenty-first century workplace, and why doing so is not only morally mandated, but constitutionally permissible. Part IV discusses why the federal government should compel offending public employers to adopt both race-conscious and race-neutral policies to eliminate racial discrimination in public employment. Part IV also discusses why public employers have a compelling interest to use race-conscious means to prevent and correct racial discrimination. Finally, Part V considers and proposes several race-neutral and race-conscious options as a means to bring us closer to ensuring equal employment opportunities by demolishing racial hierarchies in the workplace and eliminating racial exclusionary employment practices.

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\(^7\) See Hernandez, *supra* note 4, at 264 (defining inter-ethnic discrimination as “discrimination among non-White racial and ethnic groups”). For the purposes of this paper, inter-ethnic discrimination shall be defined narrowly to only refer to discrimination among non-white racial groups, regardless of ethnicity.

\(^8\) See generally 539 U.S. 306 (2003).


\(^10\) Of course, these cases are about public schools, not public employment. I will distinguish the circumstances and discuss their relevance to employment later.
For the purposes of this discussion, the term “employment discrimination” refers to adverse “employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals” of a certain race.\textsuperscript{11} The specific type of employment discrimination discussed below is a systemic pattern or practice of discrimination. “A systemic ‘pattern or practice’ of intentional discrimination involves statistical and/or other evidence that demonstrates that discrimination is ‘standard operating procedure – the regular rather than the unusual practice.’”\textsuperscript{12} Thus, “a pattern or practice would be established if, despite the fact that Blacks made up 20% of a company’s applicants for manufacturing jobs and 22% of the available manufacturing workers, not one of the eighty-seven jobs filled during a six year period went to a Black applicant.”\textsuperscript{13} The term “majority” is not synonymous with “White.” It refers to the racial group that comprises the numerical majority in the specific workplace or job group. The term “minority” is not synonymous with “Black” or “African American,” it refers to the racial group that comprises the numerical minority in the workplace or job group.\textsuperscript{14} Furthermore, it refers to those racial groups recognized by the federal government as protected classes consistent with the United States Census EEO-1 Job Category demographic reports.\textsuperscript{15}


\textsuperscript{13} Id.


\textsuperscript{15} \textsc{United States Census Bureau, Census 2000 EEO Data Tool, available at: http://www.census.gov/eeo2000/index.html} (select "EEO-1 Job Categories"; click "Next"; then click "Next"; then click 'Display Table'). This list includes: Black, Hispanic, Asian, and Native American. Please also note that there will be no distinction drawn between “Black” Hispanics and “White” Hispanics, as is done in the census data since no other groups are divided as such.
I. A Comparative Analysis of the Equal Protection Clause of the Fourteenth Amendment and Title VII

Different principles underlie the Equal Protection Clause and Title VII. The Equal Protection Clause demands that individuals be given equal protection of the laws. In contrast, Title VII requires that individuals be given equal employment opportunities regardless of race. Title VII is a forward-thinking manifestation of the Fourteenth Amendment’s remedial and prophylactic powers because it is designed to achieve what guaranteeing equal protection of the laws does not.

The Fourteenth Amendment was enacted during Reconstruction to benefit the then severely marginalized group, African Americans, by ensuring all the privileges of citizenship. Specifically, the Amendment was Congress’ response to several states’ enactments of Black Codes and other laws designed to impede the full integration of ex-slaves into American society. At the time of its enactment, the distinct purpose of the Fourteenth Amendment was clear: To regard those who had previously been denied equal status as equal members of society, prohibit the denial of due process to these new

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16 U.S. Const. amend. XIV, § 1 provides:
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

17 42 U.S.C.A. § 2000e-2(a) provides:
It shall be an unlawful employment practice for employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.


19 PAUL BREST, ET. AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 301 (5th ed. 2006).
citizens, and prohibit the states from denying all persons equal protections of the law.\textsuperscript{20} Thus, at the heart of the Fourteenth Amendment there is protection for each individual’s right of equal citizenship, connoting full participation in American life without denial of benefits or distinction of burdens on the basis of race.

Title VII regulates private decision making. Although the Supreme Court has said that “Title VII . . . was enacted . . . to regulate purely private decision making and was not intended to incorporate and particularize the commands of the . . . Fourteenth Amendment . . .,” the applicability of Title VII to public employers implies otherwise.\textsuperscript{21} Specifically, Title VII regulates private \textit{and} public decision making.\textsuperscript{22} While the federal government is exempt under Title VII, state subdivisions are not.\textsuperscript{23} The heart of Title VII is the elimination of racial discrimination, which is realized by racial subordination and perpetuated by racial and social hierarchies by means of the state or private entities.\textsuperscript{24}

The right to equal protection of the laws and to full participation in American life requires the right to be free from arbitrary racial barriers in one’s pursuit of employment. Employment is the primary means by which individuals are able to realize the full benefits of living in the United States and under the U.S. Constitution. The promise of equal protection of the laws is void if an individual can be denied equal access to employment opportunities in our society. The problem can be compared to having a bank account full of money and a functioning ATM card, but no pin number or personal

\textsuperscript{20} \textit{Id.} at 319.


\textsuperscript{22} 42 U.S.C.S. § 2000e(b) provides: “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees . . .”).

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{See Weber,} 433 U.S. at 208 (Court stated that the purpose of Title VII is “to break down old patterns of racial segregation and hierarchy” and open up opportunities for Blacks “in occupations which have been traditionally closed to them.”); \textit{see also} Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) (Court asserted that the “purpose of Title VII [is to make] the workplace be an environment free of discrimination, where race is not a barrier to opportunity.”).
identification card to make a withdrawal. If an employer, on the basis of race, can prevent an individual from cashing in on the right to equal access to for employment what is the benefit of the Constitution’s declaration of rights? The Constitution’s promise of equality under the law is fulfilled when Title VII is interpreted properly to prevent anti-other discrimination in employment and to allow for affirmative action policies to achieve actual diversity in employment.

II. CONTEMPORARY DISCRIMINATION: ANTI-OTHER AND INTER-Ethnic

My understanding of anti-other employment discrimination comes by way of professional experience and research. Prior to law school, I was an EEO Specialist/Compliance Officer25 for the Office of Federal Contract Compliance Programs (OFCCP). OFCCP is responsible for monitoring federally contracting employers’ compliance with anti-discrimination employment laws, namely Title VII. The agency is different from the Equal Employment Opportunity Commission (EEOC) in that one of the responsibilities of the OFCCP is the enforcement of Executive Order 11246, a relative

25 A Compliance Officer (“CO”) is charged with reviewing the affirmative action plans of federally contracting “Supply and Service” and construction companies. In doing so, the CO must evaluate the plans for effectiveness, review the employers’ personnel data and run statistical analyses of that data. Should the data return an “indicator” of systemic discrimination, then a process similar to “discovery” in the legal profession is commenced. In that process, the employer is asked to submit additional information to help explain the disparity in the specific segment of its workforce. If that information is inconclusive, an onsite investigation is scheduled which takes place at the employer’s facility. During that investigation, the CO will interview managers, human resources staff, and employees to ascertain information to determine whether the employer has engaged in a pattern or practice of employment discrimination or whether a neutral employment policy has a disparate impact on a protected group. Once the investigation is concluded, either a letter of compliance or a notice of violation will be issued to the employer. In some instances where systemic discrimination is established, conciliation arrangements are made with the employer that may include back-pay, offers of employment, and a promise to set reasonable placement goals for the affected class. Where systemic discrimination is not established, but significant racial disparities are identified, the employer is directed to make good faith efforts to affirmatively increase the number of underrepresented racial minorities in its applicant pool for available job opportunities.
to affirmative action for minorities and women.\textsuperscript{26} Enforcement of this Order, issued by President Lyndon B. Johnson in 1965, is not an easy task.\textsuperscript{27} A large proportion of the OFCCP cases that I became familiar with resulted in employers being cited for failing to take affirmative action and ensure that significantly under-represented racial groups in their workforce were: (1) provided with access to information concerning job opportunities, and (2) not denied employment because of their race.

One of the duties of a Compliance Officer is to conduct statistical analyses of employers’ hiring, promotions, and terminations data. In these studies, the group labeled the “favored” group (the group against whom every other group is compared) is usually “White” by default. By conducting the analyses in this way, discrimination between non-White minorities can go undetected if a particular minority group is substantially represented in the organization. For experimental purposes, I removed the Whites as the “favored” group and replaced it with the racial group that comprised the numerical majority.\textsuperscript{28} When I made this change, I discovered that individuals of any racial group, including Whites, can be victims of systemic racial discrimination, when they are not part of the workplace numerical majority.

Specifically, I discovered that when comprising the numerical workplace majority, minorities often discriminate against other minorities and White people. Minorities are just as capable as White people of denying entry into or advancement within the workplace, if the individuals are not members of the same racial group. I also discovered


\textsuperscript{28} i.e. Hispanics.
that with any one employer or industry, a particular minority may find itself as the most favored or most disfavored class of persons to employ or advance in employment. When this situation occurs, an employer may exclusively extend job opportunities and opportunities for advancement in the workplace to individual members of its favored minority group or may exclusively deny employment and advancement opportunities in the workplace to individuals belonging to the racial minority group that the employer dislikes or distrusts. In hindsight these more idiosyncratic discriminatory practices and preferences might seem obvious, but they are nevertheless difficult to identify and remedy when relying on traditional Black/White indicators of discrimination.

Today, the United States is more diverse than ever, and organizations are employing more minorities than at any other time in history. This means we need to expand judicial analysis of employment discrimination to include how groups of color can be complicit or active agents against other groups of color. In twenty-first century America, employment discrimination is not solely a “White on non-White” issue. This problem is especially prevalent now that more minorities have decision making,

29 See Miriam Jordan, Blacks v. Latinos at Work, in RACE, CLASS, AND GENDER IN THE UNITED STATES, 277, 278 (Paula S. Rothenberg ed., Worth Publishers 2007) (discussing EEOC settlement with Farmer John meat packing company on behalf of seven African-American applicants who applied for production jobs but were rejected because of their race. According to EEOC findings, “[the company] had been almost exclusively hiring Hispanics for warehouse, packing, and production jobs.” Jordan also points to EEOC settlement, on behalf of ten African-American applicants, with Zenith National Insurance Co., where the agency found that the company hired a Latino male with no experience for its mailroom position after turning down ten African Americans with relevant experience).

30 Lee Christie, Census: U.S. Becoming More Diverse, CNNMONEY.COM, May 14, 2009, http://money.cnn.com/2009/05/14/real_estate/rising_minorities/index.htm?postversion=2009051405 (“The nation is becoming even more diverse: More than one third of its population belongs to a minority group, and Hispanics are the fastest-growing segment.”); see also Diana Mirel, Cultural Crossroads: As Corporate America Grows More Diverse, the Real Estate Industry Follows Suit, JOURNAL OF PROPERTY MANAGEMENT, Jan/Feb 2007, 30, 31 (“Today . . . the ethnic and gender make-up of the workforce is evolving as the number of minorities in the United States increases.”).

31 Hernandez, supra note 4, at 315-316.

32 Employment discrimination is much more complex and involves discriminatory practices employed by minorities and Whites alike.
supervisory positions. Thus giving them the authority to make personnel decisions with regard to the recruitment and hiring of applicants; and the termination and promotion of employees.\textsuperscript{33}

Whites are not the only ones who discriminate, and they can even be victims of discrimination themselves. Nonetheless, discrimination is perceived as having a White-versus-non-white dynamic.\textsuperscript{34} Professor Tanya Kateri Hernandez, in her article, \textit{Latino Interethnic Employment Discrimination and the Diversity Defense},\textsuperscript{35} discusses inter-ethnic discrimination in the Latino/anti-Black context and demonstrates how minorities - namely, Latinos - in today’s work place are complicit in discriminatory practices directed against other minorities, namely Blacks.\textsuperscript{36} Her focus is to develop an effective conceptual framework and to understand inter-ethnic discrimination claims.\textsuperscript{37} Hernandez highlights the growing problem of inter-ethnic discrimination in the workplace, but she does not discuss the effectiveness and legality of affirmative means to eliminate the discrimination in public employment. Hernandez points out that in inter-ethnic discrimination, Latinos are prominently in the forefront of employment discrimination allegation contrary to the public image.\textsuperscript{38} She suggests that the discrimination perpetuated by Hispanics against Blacks is motivated by racial animus.

\textsuperscript{33} Mirel, \textit{supra} note 30, at 31 (“As corporate America diversifies, corporate leadership is beginning to follow the trend.”).
\textsuperscript{34} Hernandez, \textit{supra} note 4, at 261.
\textsuperscript{35} \textit{Id.} at 264
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} Hernandez, \textit{supra} note 4, at 266.
This article, however, contends that such discrimination is more nuanced at its core. Workplace discrimination today is rooted in an anti-other sentiment, attributable to what economic theorists term “status production” and “statistical” discrimination.  

Status production discrimination results from elevating one’s racial status and subordinating another. Under this model, members of one group elevate their self-esteem by reducing the status of the group discriminated against. Status production discrimination knows no dominant race; it produces dominance through its execution. Recognizing this model is essential to understanding inter-ethnic discrimination.

Statistical discrimination occurs when an employer prefers workers who belong to a certain racial group on the assumption that the person’s race is indicative of certain desirable work characteristics. Under this model, employers make what they believe to be rational inferences of individual employee productivity based on group characteristics when making employment decisions. Consequently, race is used as a proxy for performance. The person’s race is used to judge the competency, loyalty, and

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39 Jacob E. Gersen, Markets and Discrimination, 82 N.Y.U. L. REV. 689, 697-702 (2007) (discussing various economic theories of employment discrimination). Several scholars have proffered economic theories to explain employment discrimination. In doing so, it appears as though there is an effort to rationalize discrimination. See FRANK H. WU, YELLOW: RACE IN AMERICAN BEYOND BLACK AND WHITE, 204 (Basic Books 2002) (Wu points out, [t]he economic analysis that is its mainspring posits that the human beings who are actors in the system are guided by rationality and not some metaphysical morality.”). Whether conscious or unconscious bias, rational or not, the result is the same – individuals are denied equal access to resources and opportunities because of their membership in a racial group to which some stigma has attached. Although I believe that knowing the economic theories of discrimination are important, I do not introduce them here to rationalize discrimination. Therefore let me plainly state that discrimination based on animus or harmful stereotypes of an individual’s race or membership in a racial group is always irrational. Still, to have a thorough discussion of employment discrimination, it is important that I identify and explain the body of legal and economic theory that attempts to explain discrimination – even if we still conclude that discrimination is irrational.
40 Gersen, supra note 39, at 701 (discussing “status production” discrimination).
41 Id.
42 Gersen, supra note 39, at 699 (discussing “statistical discrimination”).
43 Id.
satisfactory performance of the individual via referral to a mental rolodex of stereotypes held about the particular racial group to which the employee or applicant belongs.\textsuperscript{44}

According to the status production model, discrimination within an industry rises as the number of non-White workers increase.\textsuperscript{45} Status production discrimination is particularly salient for minorities. As past victims of societal discrimination, obtaining a group position of dominance and power within an organization creates a sense of personal security that the dominant group wants to protect, but that integration threatens. For example, during my investigative capacity at the OFCCP, I found that feelings of competition fueled anti-other and even anti-White sentiment amongst Hispanics. This sentiment was especially apparent in entry-level, blue-collar, and construction jobs. Specifically, there was usually a sentiment that one should help one’s own kind to the exclusion of all others. This is not unique to Hispanics.

This was also the case when I investigated firms in which Asians were the racial majority group. In those firms, employment opportunities were extended to Asian applicants and employees to the exclusion of all others. Again, I did not sense any racial animus toward other groups, but rather a duty and obligation to one’s own group in order to protect the group’s status within the workplace. Nevertheless, the harm to the excluded group or person is the same regardless of the presence of racial animus or the lack thereof—denial of employment opportunity on the basis of race.

\textsuperscript{44} See JORDAN, supra note 29, at 278 (asserting that discrimination is “[e]xacerbated by strong stereotypes that have set in among some employers about the pluses and minuses of hiring from each pool of minority workers.”).

\textsuperscript{45} Gersen, supra note 39, at 713.
To better illustrate this point, I consider the case of *Decorte v. Jordan*.

In that case, Jordan, a Black, was elected District Attorney for Orleans Parish in Louisiana. He appointed a transition team, which compiled a report of its recommendations for the new administration. The transition team formed a non-attorney staff development and retention committee and appointed a chair. The chair selected exclusively Black members and volunteers to serve on the committee. The committee interviewed present non-attorney employees who wanted to continue working during the new administration. The chair did not recommend Plaintiff for the transition team, which resulted in his termination.

All of the plaintiffs, with the exception of one Hispanic, were White. The 5th Circuit Court of Appeals found that within the first 72 days that Jordan was in office, the racial composition of the D.A.’s non-attorney staff changed from 77 Whites and 56 Blacks to 27 Whites and 130 Blacks. Of the 56 individuals terminated, 53 were White, one was Hispanic, and 2 were Black. 20 of the 56 individuals terminated, all White, held an investigator’s position. Jordan retained 5 Black investigators and hired an additional 10 Blacks for the vacated investigator positions.

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46 497 F.3d 433 (5th Cir. 2007).
47 *Id.* at 436.
48 *Id.*
49 *Decorte*, 497 F.3d at 436.
50 *Id.*
51 *Id.*
52 *Id.*
53 *Decorte*, 497 F.3d at 438.
54 *Id.*
55 *Id.* at 438.
56 *Id.*
57 *Decorte*, 497 F.3d at 439; see also Bryant v. Jones, 575 F.3d 1281, 1288 (11th Cir. 2009) (analyzing an Equal Protection charge brought by White managers against officials in Dekalb County, Georgia, on the grounds that the new and first African American CEO of the County “embarked on a wholesale plan to replace its White County managers with African Americans.”).
The discriminatory practices at issue in *Jordan* do not indicate racial animus toward Whites, but rather a power play – an assertion of dominance. When a racial group controls the decision making, it attempts to maintain that control by subordinating all others because majority status in the workplace has desirable benefits. Maintaining a workplace where one’s race is represented at all tiers of the organizational hierarchy allows for a certain pride to develop: The pride belonging to the group with the power and control of the organization.

Racial homogeneity in the workplace engenders a sort of cultural comfort. This provides little incentive for the dominant group to work at cultural sensitivity. Even if a group is concentrated only in sections of the organization, interacting primarily with members of one’s own racial group can create a level of comfort to which integration poses a threat. Consequently, members of a racial group that dominate the workplace may discriminate against non-members. This discrimination occurs not out of racial hostility, but out of an assumption that members of the dominant group are better suited for the job, are easier to work with, and do not pose a threat to the dominant group’s majority status. This type of discrimination is anti-other discrimination.

Where there are majorities, there are minorities. Furthermore, where there are majorities, the rights and opportunities of the minority can be stunted and denied not necessarily for hostile reasons, but for racial-isolationist, anti-other reasons nonetheless. The history of racial discrimination and subordination in the United States proves that “people are not . . . terribly anxious to be equal . . . but they love the idea of being superior . . . people are perpetually attempting to find their feet on the shifting sand of
status.‖ Our goal should be to prevent any kind of racial majorities in any setting from denying, abridging or infringing upon the rights of the racial minority. In a racially diverse society, we must sever our reliance on the traditional White actor/non-White victim paradigm of racial discrimination in the workplace. We must consider that if a majority exists, it may be a non-White majority and if there is a minority, it may be a White minority. We must realize that Whites too should be protected from unequal treatment based on their non-membership in the workplace majority class. Identifying and acknowledging inter-ethnic discrimination and discrimination against particular racial minority groups can become imperative.

III. PRESENT-DAY JURISPRUDENCE ON AFFIRMATIVE ACTION AND EQUAL PROTECTION

There is a general societal consensus that discriminatory practices promote and protect racial hierarchies and reinforce notions of racial subordination in the workplace. And those practices should be eliminated. Controversy still exists over whether race-conscious affirmative action is an effective and lawful means to eliminate and prevent those practices. Current orthodoxy says that voluntary affirmative action programs adopted pursuant to Title VII are permissible for private employers. On the other hand, affirmative action programs adopted by public employers risk a constitutional challenge on the grounds that they violate the non-benefited group’s right to equal protection of the laws as guaranteed by the Fourteenth Amendment. The United States Supreme Court has addressed the question of permissible affirmative action programs adopted by private

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and public employers pursuant to Title VII. With respect to public employment, however, the Court has given no clear guidelines on permissible affirmative action programs that would withstand an Equal Protection challenge under strict scrutiny.

To withstand strict scrutiny, a policy or program that considers race in the decision-making process, such as an affirmative action plan, must be narrowly tailored to achieve a compelling governmental purpose. Although the Court has identified some interests compelling enough to warrant the consideration of race in public school admissions, few interests have been recognized as compelling in the context of hiring, firing and promoting in public employment. Governmental interests recognized as compelling in the context of public education include remedying the affects of past discrimination and achieving broad student-body diversity. Justice Kennedy’s concurrence in Parents Involved in Community Schools (“PICS”) pointed out that avoiding racial isolation is a compelling governmental interest.

The Court’s reasoning in cases concerning affirmative action programs in school admissions should be extended into the realm of public employment. In PICS, Chief Justice Roberts’s plurality opinion asserted that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” This decision evokes a broad-based concept of diversity and colorblindness in adhering to the Fourteenth Amendment.

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60 Most notable are United Steel Workers of Am. v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, Santa Clara, 480 U.S. 616 (1987); but see Ricci v. DeStefano, 129 S. Ct. 2658 (2009). Shedding some light on the ability of public employers to employ race conscious remedies in order to avoid Title VII liability, although not an affirmative action case and not decided under the Equal Protection Clause. Specifically, the Court found that Under Title VII, public employers may take race conscious action for the purpose of avoiding disparate impact liability under Title VII only where there is strong basis in evidence to believe that the employer will be subject to liability under Title VII for failure to take such action.

61 Tack, supra note 18, at 957.


63 Id. at 720-22.

64 Id. at 797 (Kennedy, J., concurring).

65 Id. at 748.
Amendment’s Equal Protection guarantee. These principles, however, do not account for inter-ethnic or anti-other discrimination. Therefore, a concern arises that when the question of public employment affirmative action comes before the Court, it will ill-advisedly impose the crippling limitations of colorblindness and broad diversity on public employers. The appropriate means for ensuring compliance with Title VII and the Equal Protection Clause is focusing on “broad” workplace diversity in terms of creating a White/non-White balance, rather than claiming to be colorblind. Race-neutrality, race-consciousness, and multi-racial diversity are required to eliminate practices and procedures that promote and protect racial hierarchies that reinforce notions of racial subordination in the public workplace. Lower courts and administrative agencies have been unable to effectively promote these goals thus far for want of clear policies and judicial guidelines.

If private and public employers are required to adhere to Title VII’s mandate of non-discrimination, then race-conscious affirmative action programs legally adopted by public employers pursuant to Title VII should not be invalidated. The programs are designed to do more than just remedy the effects of present discrimination and ensure broad-based diversity. When deciding whether the adoption of race-conscious affirmative action programs by employers is permissible under Title VII, the Court should apply the same standards to private and public employers in affirmative action cases.

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66 Parents Involved in Cmty. Schools, 551 U.S. at 748. See also Grutter, 539 U.S. 306, 324-25 (2003) (reaffirming that diversity “is not an interest in simple ethnic diversity [but rather] a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978))).

67 Namely, the Office of Federal Contract Compliance Programs.
A. Affirmative Action Pursuant to Title VII: Keeping Weber and Johnson Alive

Presently, a private employer can engage in affirmative action policy.\(^{68}\) Public employers, constrained by the Constitution, may not.\(^{69}\) For example, in Weber, a private employer adopted an affirmative action plan designed to eliminate conspicuous racial imbalances in its almost exclusively White workforce and reserved 50\% of openings in a program for Black trainees.\(^{70}\) A White employee, alleged reverse discrimination, challenged the affirmative action program.\(^{71}\) In upholding the employer’s affirmative action plan, the Court stated that the language of Title VII is “intended as a spur or catalyst to cause employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”\(^{72}\)

The Court pointed to several features of the employer’s plan that made it permissible. First, the replacement of White employees with new Black hires did not infringe on the interests of the remaining White employees.\(^{73}\) Second, denying Whites training in the program did not prevent advancement of those employees.\(^{74}\) Third, the plan was designed to eliminate an obvious racial imbalance.\(^{75}\) Finally, the plan was a temporary solution to increase the number of skilled Black workers in the employers labor force.\(^{76}\)

\(^{68}\) White, supra note 59, at 273.
\(^{69}\) Id.
\(^{70}\) Weber, 443 U.S. at 197-98.
\(^{71}\) Id. at 199.
\(^{72}\) Id. at 204 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).
\(^{73}\) Id. at 208
\(^{74}\) Weber, 443 U.S. at 208.
\(^{75}\) Id.
\(^{76}\) Id.
The Court has upheld some affirmative action programs adopted by public employers pursuant to Title VII as well. In *Johnson v. Transp. Agency*, the Court upheld a public employer’s affirmative action plan in part because of its case-by-case approach. The plan was also flexible, assuring a more gradual improvement in increasing the amount of minority and female employees. In this case, a public employer hired a female for a road dispatcher position in its Skilled Craft Worker job classification pursuant to its affirmative action plan. Prior to her hire, women did not hold any of the 238 positions in its Skilled Craft Worker job classification. The employer’s affirmative action plan permitted its decision makers to consider sex as “one factor” in evaluating applicants. Decision-makers could consider sex when promoting into position in which historically women were underrepresented. The plan’s “long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force.” The employer justified the affirmative action plan by pointing to societal factors, showing that women have traditionally been underrepresented in these positions, and were encouraged to apply for the position due to the limited past opportunities in these job classifications.

In upholding the employer’s plan, the court pointed to the annual adjustments that would be made to guide employment decisions, and the fact that the plan did not look to

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77 *Id.* at 642.
78 *Id.* at 621.
79 *Id.* at 620-21.
80 *Id.* at 620-22.
81 *Johnson*, 480 U.S. at 621-22.
82 *Id.* (quoting Br. for Appellant at 57) (“The Agency Plan acknowledged the ‘limited opportunities that have existed in the past,’ for women to find employment in certain job classifications ‘where women have not been traditionally employed in significant numbers.’ As a result, observed the Plan, women were concentrated in traditionally female jobs in the Agency, and represented a lower %age in other job classifications than would be expected if such traditional segregation had not occurred.”). *Id.* at 634.
set aside positions for a specific type of person. The Court stated that “an employer seeking to justify the adoption of a[n] [affirmative action] plan need not point to its own prior discriminatory practices, nor even to evidence of an ‘arguable violation’ on its part.”84 “Rather, [the employer] need point only to a ‘conspicuous . . . imbalance in traditionally segregated job categories.’”85 The court further stated that the “manifest imbalance need not be such that it would support a prima facie case against the employer.”86

Johnson and Weber are particularly important to our discussion here because those cases represent the latitude granted to affirmative action programs adopted pursuant to Title VII. In particular, the Weber court held that when there is a conspicuous and manifest imbalance in the workforce an employer may adopt voluntary affirmative action practices.87 The Johnson court holding allows an employer to adopt an affirmative action program when the lack of representation of a protected class within the employer’s workforce can be attributed to factors external to the employer’s own personnel practices.88 These factors may nonetheless have an impact on the employer’s applicant pool for available opportunities. As I will demonstrate below, no such latitude is granted for the same type of affirmative action plans adopted by public employers pursuant to Title VII, when challenged under the Equal Protection Clause.

B. Affirmative Action and the Equal Protection Clause: Reconsidering Croson and Moving Forward Post Grutter and Parents Involved in Community Schools

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83 Id. at 622.
84 Id. at 630 (quoting Weber, 443 U.S. at 212).
85 Johnson, 480 U.S. at 620 (quoting Weber, 443 U.S. at 209).
86 Id. at 632.
87 Weber, 443 U.S. at 197.
88 Johnson, 480 U.S. at 642.
The constitutional standards for affirmative action in the workplace are more stringent than those under Title VII. In *City of Richmond v. J.A. Croson*, the City adopted an affirmative action program where it required city contractors to subcontract 30% of their contracts to a minority run business. The purpose of the plan was to promote minority business participation in public construction.

The Court invalidated the City’s affirmative action plan on the grounds that the city failed to present direct evidence of its own history of race discrimination in contracting or discrimination on the part of prime contractors. The Court stated that the City could not rely on an “amorphous claim that there had been past discrimination in a particular industry” to justify its set-aside program. The City needed to prove that it had actively discriminated against minority contractors in the past or was a passive participant in racial exclusion within the construction industry. Providing some direction for the City, the Court held, as it had in *Weber*, that a showing of a pattern or practice of discrimination can be made by pointing to statistical racial disparities in the incumbency of the job group or classification at issue and in the relevant labor force.

The Court reasoned that “any public entity, state or federal, has a compelling interest in

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89 White, *supra* note 59, at 273.
91 *Id.* at 477.
92 *Id.* at 478.
93 *Id.* at 480.
94 *City of Richmond*, 488 U.S. at 499. This is contrary to the approach the Court took in *Johnson*, where it permitted societal discrimination as a justification for adopting an affirmative action plan pursuant to Title VII.
95 *Id.* at 492.
96 *Id.* at 492. The court also stated that “for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer’s workforce to the racial composition of the relevant population may be probative of a pattern of discrimination. . . . But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 501-02.
assuring that public dollars, drawn from the tax contributions of all citizens, do not serve
to finance the evil of private prejudice.” 97

A question arises as to the ongoing vitality of affirmative action programs adopted
by public employers in light of the Court’s more recent affirmative action cases, Grutter
v. Bollinger and PICS. In Grutter, 98 the Court upheld the University of Michigan Law
School’s affirmative action program. It found that the University had a compelling
interest in attaining student body diversity and that the means employed by the University
were sufficiently narrowly tailored to achieve its goal. 99 In this case, the University of
Michigan Law School adopted an affirmative action policy where it sought to achieve
student body diversity with special attention to the inclusion of African Americans,
Hispanics and Native Americans who might otherwise be unrepresented in its student
body. 100 As identified in the plan, part of the University’s admissions goal was to
assemble a “broadly diverse” class and “to enroll a ‘critical mass’ of minority
students.” 101 In evaluating applicants for admission, race was a “plus” factor taken into
consideration by the University. 102 The Court approved that race may be considered as a
“plus” factor in an applicant’s file, but held that the admissions program should consider
all elements of diversity, with race or ethnicity being an important but singular factor. 103

Grutter is important because the Court specifically states that the type of diversity
that furthers a compelling governmental interest is diversity encompassing a wide variety
of factors, not just race. Given the Court’s holding in this case, factors such as geography,

97 Id. at 492.
99 Id. at 343.
100 Id. at 316.
101 Id. at 329 (quoting Brief for Respondent Bollinger et al. at 13).
102 Id. at 309.
103 Id. at 325 (quoting Bakke, 438 U.S. at 315).
foreign language fluency, and athleticism would also be elements of diversity. Race would be equated with such factors. If the purpose of the sought after diversity is to ensure the inclusion of underrepresented racial groups and to safeguard non-racial discrimination then selection for diversity must be in terms of race and race only.

The Court’s discussion in *PICS* is particularly important for forecasting the constitutional future of public employer affirmative action programs and for laying the groundwork for my later discussion on effective race-conscious and race-neutral affirmative action measures. In *PICS*, the Court struck down two school districts affirmative action plans on the grounds they did not serve a compelling governmental interest.\(^\text{104}\) In this case, two school districts adopted affirmative action plans whereby they classified children according to “[W]hite/non-[W]hite terms” or “[B]lack/‘other’ terms” and assigned them to schools within the district accordingly.\(^\text{105}\) In one district, the racial classification was used to “allocate slots in oversubscribed high schools.”\(^\text{106}\) In the other district, the racial classification was used to make assignments and transfer requests for an elementary school.\(^\text{107}\) Both of the districts relied on a “student’s race in assigning that student to a particular school, so that the racial balance at the school [fell] within a predetermined range based on the racial composition of the school district as a whole.”\(^\text{108}\)

Applying strict scrutiny, the court struck down the plans on the grounds that the districts failed to show that the plans were adopted to remedy the affects of past or present discrimination, and the plans “employ[ed] a limited notion of diversity, viewing

\(^{104}\) *Parents Involved in Cmty. Schs.*, 551 U.S. at 720-23.  
\(^{105}\) *Id.* at 723.  
\(^{106}\) *Id.* at 710.  
\(^{107}\) *Id.*  
\(^{108}\) *Parents Involved in Cmty. Schs.*, 551 U.S. at 710.
race exclusively in [W]hite/non-[W]hite terms . . . and [B]lack/‘other’ terms.” The Court ultimately found that the affirmative action plans amounted to racial balancing “pure and simple,” which it has repeatedly held to be unconstitutional. The Court stated,

[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not simply as components of a racial . . . class.”

Further, the Court stated, “[a]llowing racial balancing as a compelling end in itself would ‘effectively assure that race will always be relevant in American life,’” and that the goal of eliminating the use of race from governmental decision making “will never be achieved.”

The Court subsequently added criteria for assessing the constitutional validity of race-conscious affirmative action plans: whether the adopting agency had “considered methods other than explicit racial classifications to achieve their stated goals.” Specifically in PICS, the Court held that “[n]arrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives.’” Lastly, the Court found that the cost of adopting race-conscious measures outweighed any attainable benefits by stating that the school districts’ race-conscious methods “promote ‘notions of inferiority and lead to a politics of racial hostility.’” These methods “‘reinforce the belief . . . that individuals should be judged by the color of their skin,’ and ‘endorse race-based

109 Id. at 720-21, 723.
110 Id. at 726, 730.
111 Id. at 730 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).
112 Id. at 730 (quoting Croson, 488 U.S. at 495 (O’Connor, J., plurality opinion)).
113 Id. at 735.
114 Id. at 735 (quoting Grutter, 539 U.S. at 339).
115 Id. at 746 (quoting Croson, 488 U.S. at 493 (O’Connor, J., plurality opinion)).
reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.‖

When it appeared that the Court was going to put the final nail in the coffin of race-conscious measures to achieve equality in public schools, Justice Kennedy’s concurring opinion provided some hope for the future. This hope came in the form of limited adoption of race-conscious affirmative action plans. Justice Kennedy asserted that maintaining the status quo of racial isolation in schools is troubling from a constitutional perspective and found a compelling interest in avoiding racial isolation. Accordingly, he identified benign race-conscious ways that schools would bring together students of diverse backgrounds; ways that would not send the message to students that “he or she is to be defined by race.‖ The measures included “strategic site selection of new schools,” “drawing attendance zones with general recognition” of neighborhood demographics, “allocating resources for special programs,” “recruiting students and faculty in a targeted fashion,” and “tracking enrollments, performance, and other statistics by race.‖

Justice Roberts’s signature line in Parents Involved, that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” is, at best, philosophical word play. This line suggests that the way to end unlawful racial discrimination is to stop monitoring for and guarding against it. Race-conscious programs like affirmative action are necessary when discrimination is ongoing and based

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117 Parents Involved in Cnty. Schs., 551 U.S. at 797 (Kennedy, J., concurring) (Justice Kennedy stated, “A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.”).
118 Id. at 789 (Kennedy, J., concurring).
119 Id.
120 Id. at 748.
on arbitrary, specious assumptions about the abilities, capabilities, and rights of individuals because of their race. It also occurs when discrimination is motivated by a desire to maintain a status quo of racial superiority and inferiority among classes of individuals. Racial discrimination of this kind cannot be prevented or halted without consciously acknowledging racial categories in public service and employment.

C. The Big Picture: Title VII, Equal Protection and Public Employment

Public employers face both constitutional and statutory challenges. Under Title VII and the Equal Protection Clause, the challenge is that race-conscious affirmative action plans discriminate on the basis of race by taking affirmative steps to ensure that individuals of the targeted racial groups are recruited, hired, and advanced in employment. Although not an affirmative action case, Ricci v. DeStefano illustrates this type of dual challenge to race-conscious action. In Ricci, a city fire department administered objective examinations to its firefighters to identify the most qualified candidates for promotions to its lieutenant and captain positions. When the examination results revealed that White candidates had out performed minority candidates, the City decided to discard the test results for fear of a disparate impact suit by the minority firefighters. The plaintiffs, all White with the exception of one Hispanic, brought suit against the City alleging that “by discarding the test results, the City and [its] officials discriminated

121 White, supra note 59, at 273.
122 Ricci, 129 S. Ct. at 2664.
123 Id.
124 Id.
against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964 . . . and the Equal Protection Clause of the Fourteenth Amendment.”

The Court has never addressed the issue of permissible affirmative action plans under Title VII and the Equal Protection Clause in the same case. Applying standards under Title VII, the Court has held that the use of a race-conscious affirmative action plan is justified. There needs to be a showing of past societal discrimination or employment practice, resulting in a manifest imbalance of a particular race in a specific job group. Applying strict scrutiny under Equal Protection analysis, the Court has held that healing the effects of societal discrimination and removing manifest racial imbalances are not permissible goals for adopting race-conscious affirmative action plans. The Court has held that remediying the effects of past or present intentional discrimination and attaining broad diversity, with race serving as only one factor amongst many, are the only two interests compelling enough to justify the use of race-conscious affirmative action programs by public entities. On the other hand, the Court has mentioned that the government has an interest in “avoiding racial isolation” and “assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”

In determining whether there is past or present discrimination to justify the adoption of race-conscious affirmative action plans by public employers, the Court

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125 Id. (citation omitted).
126 Tack, supra note 18, at 959.
128 Parents Involved in Cmty. Schs., 551 U.S. at 731-32.
129 Id. at 720-21.
130 Id. at 797 (“a compelling interest exists in avoiding racial isolation”) (Kennedy, J., concurring).
131 Croson, 488 U.S. at 492.
should apply the “statistical disparity” approach adopted in Weber\textsuperscript{132} and cited in Croson.\textsuperscript{133} This approach permits the consideration of racial disparities in workforce composition when compared to the relevant qualified labor market as evidence of a pattern or practice of systemic disparate treatment discrimination. Further, in assessing the permissibility of public employer affirmative action programs, the Court should follow Weber’s progeny. According to Weber, race-conscious affirmative action plans are permissible under Title VII so long as they do not unnecessarily trammel the interests of others, are designed to eliminate a manifest imbalance, and are a temporary measure.\textsuperscript{134}

A strict and intransigent interpretation of Equal Protection under the Fourteenth Amendment should not be continued. Pretending that race is not relevant to governmental decision making, especially in ensuring equal employment opportunities to historically excluded and marginalized racial minorities is not helping the situation. The Court should narrow its concept of “diversity” to respond to a pressing need to attain measurable and valuable racial diversity in the public workplace.\textsuperscript{135}

\section*{IV. The Shortcomings of Present-Day Affirmative Action Jurisprudence}

“Our Constitution is colorblind, and neither knows nor tolerates classes among citizens . . . The law regards man as man, and takes no account of his surroundings or of

\textsuperscript{132} Weber, 443 U.S. at 213.
\textsuperscript{133} Croson, 488 U.S. at 497.
\textsuperscript{134} Weber, 443 U.S. at 208.
\textsuperscript{135} Particularly where there is an over representation or concentration of any one racial group (ethnic minority or not) in the workplace which can give a false impression of diversity but may actually be attributed to a pattern or practice of systemic disparate treatment.
his color when his civil rights as guaranteed by the supreme law of the land are involved.”

A. The Doctrine of Colorblindness

There are two possible ways to interpret Justice Harlan’s theory of the colorblind Constitution. One way is that race is relevant but may not be used to perpetuate a system of social or racial hierarchy by mandating differential treatment of individuals based on race. In his article, Diversity v. Colorblindness, Professor Patrick Shin asserts that, “for [Justice] Harlan, colorblindness represents a constitutional commitment to ignore the actual superiority and dominance of the ‘[W]hite race.’” Shin states that Harlan’s dissent in Plessy “should be read to contain a self-imposed blindness to the actual differences among the races as a way of realizing the racial anti-subordination principal he sees embedded in the Equal Protection Clause.” Thus, “constitutional colorblindness expresses equal respect for the legal rights and status of individuals who, by virtue of their race, might otherwise be regarded as inferior or of less deserving of legal protection.”

The alternative way to interpret Justice Harlan’s theory of a colorblind Constitution is that race is a group classification that is unimportant to decision-making; therefore, when distributing benefits or burdens in our Nation, considerations of race are

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136 Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting).
138 Id. at 1210.
139 Grutter, 593 U.S. at 345 (Ginsburg, J., concurring); see also Weber, 443 U.S. at 251.
140 Shin, supra note 137.
141 Id. at 1212 (emphasis added).
142 Id.
143 Id. (emphasis added).
According to this interpretation the “equal protection of the laws” means that the law does not distinguish between individuals on the basis of race because race is irrelevant. It has been this concept of colorblindness that the Court has most adhered to in recent cases, and that has been used to annihilate state affirmative action programs by forbidding any use of race as a governmental classification. In his article, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, Kahled Ali Beydoun details how opponents of affirmative action and leaders of a campaign to end affirmative action sought the vote of minorities by circulating literature asserting that ending affirmative action would be consistent with the 1964 Civil Rights Act. The literature described Proposal 2, which would amend the Michigan State constitution to ban affirmative action. Specifically, the literature asserted that:

Proposal 2 reflects the colorblind language of the 1964 Civil Rights Act – because equal treatment is the essence of civil rights. Proposal 2 ends discrimination against groups and individuals based on race or sex for state employment, university admissions, and public contracting, and Proposal 2 bans quotas and set-aside programs giving every person a fair chance to compete for good paying jobs and college admissions.

This doctrine of colorblindness does little to advance Title VII’s purpose of eliminating racial barriers to equal employment opportunities in public organizations and

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144 *Grutter*, 593 U.S. at 326 (defining race as “a group classification long recognized as in most circumstances irrelevant and therefore prohibited”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 227 (1995)).
145 *Id.*
147 *Id.* at 466, 489.
148 *Id.* at 470.
149 *Id.* at 489. The problem is that when confronted with this type of literature, most people would likely favor the thing promising equality and fairness, but they are not envisioning the end of programs designed to ensure that racial minorities are actively considered and included in the extension of public programs, benefits, and opportunities. Also, please note that as previously stated, for the purposes of this article, “minority” refers to protected class groups fitting into the EEO-1 categories: Black, Hispanic, Asian, and American Indian. The term “racial minority” is used to include Hispanic, Black, Asian, White, and Native American who comprise a numerical minority in the workplace.
frustrates the purpose of the Equal Protection Clause. The colorblind theory is flawed in
that it sees non-recognition of race as being the same as non-perception.\textsuperscript{150} The doctrine
of colorblindness seems to be more of a plausible lie, or a hopeful ideal, and our country
is far too immersed in a culture and history of racial subordination and supremacy to
make it a reality. If society continues to hold on to our roots of racial hostility, using it to
form perceptions, colorblindness will never be achieved.\textsuperscript{151} Studies on cognitive bias
show that even the “self-professed ‘colorblind’ [decision maker] will fall prey to the
various sources of cognitive bias,” which causes him to act in a discriminatory manner
without necessarily having a discriminatory motive.\textsuperscript{152}

Consider the following hypothetical scenarios:

(1) A large defense manufacturing and design company sends its managers to
career fairs at elite colleges around the nation to recruit for their prestigious and lucrative
engineering positions. While at these career fairs, the managers actively engage the
White students who approach their table. They fail to do the same with the Asian and
Indian students because they assume they may not speak fluent English. They also fail to
reach out to the Black students because they assume that the Black students are not
members of the School of Engineering. When questioned about their recruitment
practices, the managers believe they have recruited fairly, and that race had nothing to do
with their recruitment strategies.

\textsuperscript{150} Hernandez, supra note 58, at 158; see also, Wu, supra note 39, at 166 (“The determination to be
color blind, however, is not sufficient by itself although it is necessary. As noble as they may be, good
intentions are only good intentions; admonitions can be heeded in breach; and rules are empty without
enforcement.”).
\textsuperscript{151} Id. at 144.
\textsuperscript{152} Linda Hamilton Krieger, The Content of Our Characters: A Cognitive Bias Approach to
(2) A state university is recruiting three professors for its Pan African American Studies department. The hiring committee receives resumes and conducts interviews. After the interviews, the committee members elect only to advance the African American applicants to the next stage of the selection process. The other well-qualified White and Hispanic candidates do not advance because the committee assumes that the African American candidates will be best suited for the job because of their racial connection to the subject matter.

(3) An employer hiring for secretarial positions collects resumes and conducts interviews. Mostly females apply for the jobs. There are White, Hispanic and Black female applicants, and all meet the minimum qualifications for the job. The employer chooses to invite only White and Hispanic applicants back for a second interview. When asked why he did not choose the Black female applicants, he insists that race had nothing to do with his decision, and that the Black females just seemed too aggressive for secretarial positions.

Race is a salient feature and has social meaning derived from stereotypes deeply embedded in American history and culture. Studies on subconscious bias reveal that whether they want to or not, individuals carry the burden and/or benefit of the stereotypes associated with their race.\(^\text{153}\) Colorblindness ignores this fact; “in a culture in which race, gender, and ethnicity are salient, even the well-intentioned will inexorably categorize

\(^{153}\) See generally, Krieger, supra note 152. A burden would be that the individual is perceived negatively because of stereotypes about lack of intelligence, laziness, hostility, or untrustworthiness associated with his or her race. A benefit would be that an individual is perceived positively because of stereotypes of intelligence, workmanship, rationality, and loyalty associated with his or her race.
along racial, gender, and ethnic lines. And once these categorical structures are in place, they can be expected to distort social perception and judgment.\textsuperscript{154}

Colorblindness requires that we deprogram ourselves and forget every stereotype that we have been taught. Whether originating from our private circle of friends and family, or those that are reinforced within our communities, media, and social settings such as work and school. I am not confident that this is a realistic possibility.

Given the reality of race-consciousness, the goal of eliminating discrimination in the workplace requires two actions. The first way is by resurrecting the original understanding of a colorblind constitution, as expressed by Justice Harlan. This doctrine states that we do not ignore race but we acknowledge it and do not discriminate on the basis of it. The second way is to employ race-neutral and race-conscious measures that not only promote racial diversity, but ultimately prevent racial majorities from creating barriers to equal employment opportunities to racial minorities because of their race.

B. Why “Diversity” is Not Enough

It is generally understood that diversity is good. The effectiveness of diversity in the context of eliminating employment discrimination will depend on how society defines diversity.\textsuperscript{155} According to the Court in \textit{Grutter}, “the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of

\textsuperscript{154} \textit{Id.} at 1217.
\textsuperscript{155} Wu, \textit{supra} note 14, at 227 - 28
which racial or ethnic origin is but a single though important element.”

This broad diversity the Court speaks of is meaningless in the pursuit of eliminating racial hierarchies and subordination in the workplace or preventing racial exclusion from the workplace. If diversity is defined as being any combination of differences then it will be easily attainable by any institution. Diversity in employment must engender a commitment to eliminating racial barriers to equal employment opportunity. In the context of public employment, “diversity” should be defined exclusively in terms of race and should require targeting individual racial groups underrepresented in the employment sector.

The problem with attaining “diversity” as a compelling governmental purpose is that “[t]he concept [of diversity] is as vague as it is in vogue.” Diversity is both the cherished friend and the arch enemy of the mission to eliminate racial discrimination in the workplace. As the cherished friend, diversity helps ensure the inclusion of racial minority groups to the workplace. As the arch enemy, diversity masks discrimination against particular minority groups who are excluded from the workplace because of race. If diversity is to serve any significant governmental purpose in public employment, it must be attained for the purposes of including underrepresented racial minority groups in the workplace, in order to ensure non-discrimination and anti-subordination. This line of reasoning is consistent with the Court’s assertion in Hazelwood School District v. United

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156 Grutter, 539 U.S. at 325 (quoting Bakke, 438 U.S. at 315).
157 Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of “Diversity,” 1993 Wis. L. Rev. 105 (1993) at 12; see also BREST, supra note 19, at 1148 (stating that there are four different types of diversity: ideological diversity, experiential diversity, diversity of talents, and demographic diversity. These types of diversity “point in different directions.” For example, admitting a conservative pro-life white female who plays the flute may add to ideological diversity and diversity of talents, [but not] demographic diversity. Admitting an African American student may promote demographic diversity or experiential diversity, but it may not promote demographic or experiential diversity as much as admitting a student from Malyasia or Kazakstan” or Armenia for that matter).
158 Wu, supra note 39, at 227.
States. "Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." There is no expectation that every employer will attain proportional representation of the community, but no representation, or mere token representation is unacceptable.

Consider how “diversity” broadly defined may be met while racial subordination in the workplace persists. Members of an ethnic group may make up the majority of an organization’s low-wage, low-skill labor force, but they are not in decision-making positions, and therefore, they will be overrepresented and discriminated against. An employer with 500 employees, 80% Hispanic and 20% White, can argue that his workforce is “diverse,” even though the Hispanic workers are the only minority group represented, and are only employed in factory operations or laborer job categories. Likewise, an employer who almost exclusively hires Whites and Asians for upper level management positions can argue that the company is diverse, although he or she has failed to consider qualified Blacks and Hispanics in the relevant labor market. In order to avoid this type of ongoing racial stratification it is crucial to define racial diversity narrowly.

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161 Wu, supra note 39, at 145 (“We do not expect exact proportions of each group in all walks of life, but neither are we satisfied with token numbers at the top.”).
162 Id. at 144.
163 Whether or not the Court would find this employer’s idea of “diversity” troubling, and thereby permit the use of race-conscious policies to actively include Blacks and Hispanics is unknown because the Court has yet to address the issue of “diversity” in the context of employment.
In addition to reducing the domination of one race by another, consideration of racial diversity is valuable in and of itself.\footnote{Shin, supra note 137, at 1182-85 (identifying and discussing concepts of intrinsic and extrinsic value of diversity).} Professor Shin suggests:

\[T\]hat it is good for a group to exhibit racial diversity, because the fact of diversity indicates that the group is in some respects socially healthy, e.g., that it does not engage in exclusionary discrimination and perhaps that it is committed to a certain progressive ideal of equality...\footnote{Id. at 1196, 1218.} Our vision of justice.

This view of diversity allows for the possibility that employers will maintain racial subordination, but facially structure diversity in the workplace to prevent lawsuits.\footnote{Hernandez, supra note 4, at 316.}

This is particularly apparent when considering the “model minority” problem.

\textit{i. The Model Minority as a Danger to Actual Racial Diversity}

The “model minority” is a myth which associates positive characteristics to an individual based on positive stereotypes attached to the ethnic minority group to whom he/she belongs. The myth and deification of the “model minority” is one of the greatest dangers to promoting valuable racial diversity. It allows discrimination to be practiced openly, unapologetically, and against non-favored racial groups with “diversity” strapped to its belt in defense.\footnote{Id., at 266 (explaining that the diversity defense describes “the way in which legal actors view a racially ‘diverse’ workplace as the equivalent of a racially harmonious workplace, thereby failing to recognize incidents of discrimination and the relevant case law.”).} While the “model minority” seems to be a benign classification because it appears on its face to compliment rather than negatively stigmatize a racial group, it operates as a tool for covert discrimination against individual members of racial groups who do not fit the model.\footnote{At its essence, the model minority myth is predicated on how well the minority groups demonstrate characteristics and values that have been deemed “white.” In his article explaining the model minority myth, Frank Wu writes, “[t]o be a citizen, an Asian American must be thought of as an honorary white, someone who is not considered a minority.” Wu, supra note 14, at 225. Similarly, Tanya Hernandez}
The myth of the “model minority” perpetuates stereotypes, and sanctions special treatment of specific racial minorities based on overbroad generalizations at the expense of other racial minorities. In society “[t]he attention paid to [model minorities] is disingenuous. It pits [the model minority group] against [other minority groups] as if one group could succeed only by the failure of the other.” Additionally, “[w]hen and where the economic and cultural circumstances change, the previously positive model minority image turns negative” and the “model minority” becomes subject to exclusion, subordination, and racial animus. In other words, the overbroad generalizations that worked to admit and propel individuals belonging to the “model minority” group in the workplace can be the very generalizations that work to deny them entry into the workplace or to hinder their progression in the workplace at some later time. For example, during the early part of the twentieth century, Blacks were often brought in by White employers to break strike lines, demonstrating that Blacks were “courageous and

writes, that “[p]rior to the Chicano movement, Mexican American leaders claimed that Mexicans were Caucasian and therefore deserving of the same social status as White-Anglos. ‘The Mexican American generation saw themselves as a White group . . . [which] drew upon and led to prejudice against African Americans, which in turn hindered direct relations between those two groups.’” Hernandez, supra note 4, at 276-277 (quoting Ian Haney Lopez, Protest, Repression, and Race: Legal Violence and the Chicano Movement, 150 U. Pa. L. REV. 205, 216 (2001). This preference for attaining a white status is true even within the Black community itself where “the dominant preference operates in favor of lighter skin tones” because such preference is ignorantly associated with education and social prominence. Trina Jones, Shades of Brown: The Law of Skin Color, 49 DUKE L.J. 1487, 1519 (2000). The complexity of white idealism is beyond the scope of this article, but it is important to understand the criteria used to determine the model minority.

Wu, supra note 14, at 226, 229 (―The model minority myth of Asian Americans has been used since the Sixties to denigrate other non-whites. [Today, Asian Americans] are compared to other racial minorities . . . [but] primarily to African Americans.”—) (alterations to original text).

Id. at 226, 243 (pointing out that “[c]onflicts between Korean Americans and African Americans, especially in Los Angeles after the verdict in the Rodney King case, are the most dramatic examples” of how the model minority myth and 1960’s “Japan-bashing” contribute to tensions among racial groups).

Id. at 229, 241-43 (discussing the reversal of the model minority myth, from positive to negative, with respect to Asian Americans and pointing out that “this type of reversal of the model minority myth was reinforced by the rise of Japan-bashing during the 1980’s”); see also id. at 228-29 (Wu specifically notes that, “the conception of Asian Americans as an exemplary subordinate group has roots in the Reconstruction Era,” but in the nineteenth century, Asian Americans were seen as economically threatening permanent foreigners’); see also id. at 240-41 (asserting that “in the [model minority] stereotype, every positive element is matched to a negative counterpart”).
capable.” Many leaders believed that [B]lack competition would convince White unions to stop discriminating based on race.\textsuperscript{172} On the other hand, the same “courage” and capability that gained them entry into certain industries was used to deny them entry later. A group praised for its courage and willingness to work was eventually stigmatized by the current stereotypes as “defensive” and “hostile.”

Frank Wu writes that “during Reconstruction Southern Plantation owners who previously relied on Black Slave labor, turned to import Chinese laborers as replacements” and praised the Chinese workers over the Black workers for being “more obedient and industrious.”\textsuperscript{173} The reason for this praise was to punish freed slaves from abandoning their masters’ control.\textsuperscript{174} Similarly, Wu points out that the Chinese were praised over Irish immigrants because the Chinese “did not drink whiskey, stab one another, or beat their wives.”\textsuperscript{175} However, the very attributes that earned the Chinese praise have been attached to Asian Americans in general and used to justify their exclusion from many social groups and the work place. For example, Wu explains: “To be hard-working is to be unfairly competitive. To be family oriented is to be clannish, ‘too ethnic,’ and unwilling to assimilate. To be law abiding it to be rigidly rule-bound . . . .”\textsuperscript{176}

Latinos are also the subject of a “model minority” myth. The myth is based on the same shade of stereotypes that preferred Chinese laborers over Black laborers in the post reconstruction era. The stereotype is that certain Latino groups have a stronger work

\textsuperscript{172} 1 ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY 26 (Erik Arnesen ed., Routledge 2007).
\textsuperscript{173} Wu, supra note 14, at 230-31.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 241.
ethic than other minorities, are more obedient, and are more appreciative of the opportunity to work. In her article, *Blacks vs. Latinos at Work*, Miriam Jordan, points out that “there is a perception that Latinos . . . might work harder than [B]lack persons,” and that “Latinos may be viewed as ‘preferred applicants’” because employers see them as exploitable where they are “immigrants who are more likely to accept low wages and be less aware of their rights than blacks.”177 Only time and economic conditions will determine whether there will be a reversal in the concept of Latinos as the “model minority,” which may then preclude their entry and advancement in the workplace as well.

The “model minority” ideal is repugnant to our equal protection jurisprudence and frustrates Title VII’s goal of eliminating employment discrimination based on race. Discriminating based on race subordinates one group of people and draws conclusions about people based on that classification, rather than on their individual capabilities and shortcomings. By recognizing a “model minority” of any sort, employers become passive participants in a system of racial exclusion or actively engage in patterns of discrimination. They use group membership to infer specific characteristics about an individual.”178 Attaining racial diversity requires guarding against the model minority myth and its likely result of preferential treatment of individuals based on membership in a particular racial minority group and not another.

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177 Jordan, *supra* note 29 (quoting the Vice President of a community organization, stating “[t]here is a perception that Latinos . . . might work harder than [B]lack persons,” and the Vice President of the Mexican-American Defense League, stating “Latinos may be viewed as ‘preferred applicants’” because employers see them as exploitable where they are “immigrants who are more likely to accept low wages and be less aware of their rights than blacks”).

V. WHY STATES HAVE A COMPELLING INTEREST IN ADOPTING RACE-CONSCIOUS AND RACE-NEUTRAL AFFIRMATIVE ACTION POLICIES IN PUBLIC EMPLOYMENT

States have an interest in adopting mandatory affirmative action plans designed to reduce manifest racial imbalances at all levels of employment within their political subdivisions and to ensure the inclusion of individuals from excluded racial groups. First, “exclusion of [racial groups] from effective participation in the bureaucracy not only promotes ignorance of . . . problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.”\(^\text{179}\) Second, “ensuring that public institutions are open and available to all segments of American society, including people of all races . . . represents a paramount government objective.”\(^\text{180}\) Third, “any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of . . . prejudice.”\(^\text{181}\) Lastly, since state political subdivisions respond to the people and are funded by the constituents through taxes and fees, those divisions should reflect the diversity of the people to the extent that it is economically efficient and procedurally possible. A colorblind approach will not achieve these goals. The prevalence of the “model minority” myth means broad diversity as a guidepost will not achieve these goals. Race-conscious measures with particularized attention to racial minorities are the best way to achieve these goals.

One might argue that state constituencies are comprised of an array of individuals from ethnic backgrounds that span the entire globe and that to adopt a policy for the inclusion of all would not only be economically inefficient but procedurally impossible.

\(^{179}\) Tack, *supra* note 18, at 965 (quoting S. REP. No. 415).
\(^{180}\) *Grutter*, 539 U.S. at 331-32 (O’Connor, J., quoting United States amicus curiae).
\(^{181}\) *See Croson*, 539 U.S. at 492.
My proposal, which follows in Part VI *infra*, concerns only a narrow racial diversity and not an all-inclusive global ethnic diversity. This makes sense because for the purposes of effectuating the goals of Title VII and the Equal Protection Clause, affirmative efforts should be specifically directed at those races that have a history in the United States of subordination, exclusion, degradation, and persecution because of their salient racial features. These “protected” groups are Black, Asian, Hispanic, and Native American.\(^{182}\) Whites should be a protected racial group when the circumstances have resulted in a systemic pattern or practice of excluding and/or subordinating them in the workplace. An affirmative action plan which monitors patterns or practices that exclude these “protected” racial groups would be limited in scope and easy to monitor, both economically and procedurally.

Adopting an affirmative action plan of this sort would be too costly\(^{183}\), even if limited in scope and application. The successful implementation of affirmative action programs such as the one proposed would likely reduce public employer liability under Title VII. By failing to identify and correct on-going discrimination in the workplace, a public employer exposes itself to litigation for violations of Title VII as well as the Equal Protection Clause. Unlike private employers who might argue against a policy of racial inclusion and participation as not maximizing profits, the state’s greatest interest is not in

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\(^{182}\) See THE NATIONAL ARCHIVES, EQUAL EMPLOYMENT OPPORTUNITY TERMINOLOGY, http://www.archives.gov/eoo/terminology.html#p (last visited Feb. 24, 2010) (definition of “protected class” asserting that “every U.S. citizen is a member of some protected class, and is entitled to the benefits of EEO law. However, the EEO laws were passed to correct a history of unfavorable treatment of women and minority group members.”)

\(^{183}\) Resulting in legal claims of reverse discrimination brought under Title VII and the Equal Protection Clause.
profit maximization, but rather quality public service through trained and informed agents who are representative of the community which they serve.\textsuperscript{184}

\section*{VI. Public Policy}

I propose race-conscious measures that will not have the effect of excessively burdening the interest of groups who are not included in the affirmative action plan which is otherwise limited in scope, application, and time. Michael J. Yelonsky argues for a "preventative approach" to affirmative action.\textsuperscript{185} He proposes that employers use preferences to attain a racially balanced workforce as a measure to prevent discrimination.\textsuperscript{186} His proposal rests upon the assertion that where minorities—in his case Blacks—are represented in the workplace only in token numbers, they stand a greater chance of being victims of discrimination.\textsuperscript{187} To prevent discrimination, Yelonsky advocates for racial preferences to ensure that Blacks are not represented in token numbers; therefore, making them less susceptible to discrimination. Although not specifically stated in his article, this proposition assumes that discrimination occurs on a White/Black basis. This approach, applied more broadly to any racial group, including Whites, would strengthen the prevention justification for affirmative action. Yelnosky's proposal is different from the one proposed below in that his is applicable to private, not

\textsuperscript{184} Some other issues to consider include who or what will monitor the progress and success of the affirmative Action plans? Should the responsibility be delegated to decision-makers who may already be members of the workplace majority? Or, should this responsibility be assigned to an objective independent contractor that can consult persons within the subdivisions who have the authority to make personnel decisions on effective courses of action? Presently, my position is that the responsibility of monitoring progress and goals should be delegated to a racially diverse, objective, non-partisan, non-governmental, consultant or agency because they are the best positioned to effectively ensure that any affirmative measures are fair and seriously undertaken.


\textsuperscript{186} \textit{Id.} at 1388.

\textsuperscript{187} \textit{Id.} at 1390.
public, employers and speaks only of justifying affirmative action programs under Title VII.¹⁸⁸

Professor Frank Wu suggests conceiving affirmative action “as one part of a more powerful anti-subordination principle.”¹⁸⁹ Under this principle, an affirmative action program would be justified on “a showing of past discrimination, or future discrimination” and “proportionate representation or diversity rationales would be insufficient by themselves.”¹⁹⁰ He suggests a combination of a cultural meaning test and statistical showings that was required in Croson.¹⁹¹ The cultural meaning component would enable Whites to bring racial discrimination claims, but not where there “was not at least the same factual basis already demanded of racial minorities.”¹⁹² Here, “affirmative action could have minimum quotas for beneficiaries without having maximum quotas for any specified group.”¹⁹³

The anti-subordination principle is central to an effective affirmative action program; however, so are the principles of inclusion and equality of access and opportunity. This is not to assert that the anti-subordination principle that Wu discusses does not encompass these ideas as well, but is to suggest that they can be principles independent of one another and each can justify the adoption of an affirmative action program. If the government has an interest in avoiding racial isolation as asserted by

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¹⁸⁸ Although the goals of Title VII and the Equal Protection Clause are interrelated, affirmative action programs adopted by private employers will likely only be challenged under Title VII. However, because public employers are governmental bodies, they are not only accountable to Title VII, but also the Fourteenth Amendment. Thus, speaking only in terms of Title VII compliance does not address the question of public employers meeting the requirements for governmental use of race in employment decision making with respect to the Fourteenth Amendment’s equal protection guarantee.

¹⁸⁹ Wu, supra note 14, at 282.
¹⁹⁰ Id. at 283.
¹⁹¹ Id.
¹⁹² Id.
¹⁹³ Wu, supra note 14, at 284.
Justice Kennedy in *PICS*, then principles of inclusion would justify the adoption of race-conscious affirmative action plans. Adoption of affirmative action programs are justified if the main governmental objection is open public institutions and workforce for every race. Wu’s anti-subordination principle speaks in terms of racial justice, suggesting that the principle should go beyond legal analysis and compel legislatures to aid in creating societal change. While this is an important goal, it is not the result that I expect or even propose in my approach to affirmative action. My proposal is narrowed and deals only with public employment.

Pursuant to my proposed plan, public employers must make an effort to actively recruit and include those qualified individuals belonging to racial groups that are presently underrepresented in the workforce and grant them preference over similarly situated individuals belonging to racial groups that are already disproportionately represented in the workplace. Public employers would also be required to monitor their workforces for manifest racial imbalances, using statistical data from the relevant labor market to determine whether they could be prima facie liable for pattern or practice discrimination. If the statistical numbers indicated a systemic pattern or practice of discrimination, the employer would take immediate action to ensure the inclusion of those racial groups who are not represented or who are significantly underrepresented.

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194 *Grutter*, 539 U.S. at 331-32 (O’Connor, J.).
195 *Id.*
196 Of course, my plan is based on the presumption that “in most selection processes, decision makers must pick among may competitors who meet the threshold qualifications in every respect, not between a single person who is patently more qualified in every respect than everyone else.” Wu, *supra* note 39, at 162.
197 Importantly, this is not a plan that uses set-asides or quotas, such as Professor David Strauss’s program that argues in favor of a numerical approach. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case of Numerical Standards*, 79 GEO. L. J. 1619, 1655 (1991). Under the numerical standards approach, employers would be required to “employ minorities in proportion to their percentage in the national community,” and failure to do so would cause the employer to be
Case law and OFCCP regulations for government contractors\textsuperscript{198} are instructive on effective procedures that states can adopt to address and eliminate patterns or practices that serve as racial barriers to equal employment opportunity. I propose that states should be required to conduct a thorough evaluation of their subdivisions to determine the racial demographics at each level of employment within the division. The state would determine the number of positions at each level of employment and the racial demographics of the employees. The state would then compare the percentage of its incumbent workers of each racial group to the racial make-up of the relevant labor market to determine if any significant statistical disparities exist. Following this, the state could establish flexible placement goals where significant disparities arise and employ one or all of the following affirmative measures to meet those goals:

(1) Establish recruitment methods and direct them at community organizations and colleges where the target racial group is significantly represented;

(2) Assign an affirmative action officer to each of its hiring divisions who will be charged with reviewing applications, scheduling interviews, and making recommendations for hire;

(3) Create training programs which target individuals belonging to racial groups that are not represented at the level of employment related to the training;

(4) Construct management training programs to achieve proportional representation of all individuals in the workplace.

\textsuperscript{198} See 41 C.F.R. § 60-1.20 for specific affirmative action regulations and guidelines for government contractors.
Although this is not an exhaustive list, these are some of the race-conscious ways in which states could include all racial groups in the workplace with a goal of breaking down racial hierarchies and eliminating racial subordination at all levels of employment. In addition, issues with hiring and advancement are maximized to achieve all aspects of racial diversity in the workplace. This approach is similar to those that require states to ensure that the workforces of their political subdivisions reflect the community in which they operate. It is therefore prone to an attack as a policy that promotes racial balancing.\footnote{See \textit{Gratz v. Bollinger}, 539 U.S. 244, 270-71 (2003).} But, importantly, this plan does not advocate the sort of racial balancing that the Court called “patently unconstitutional” in \textit{PICS},\footnote{See \textit{Parents Involved in Cmty. Schs}, 551 U.S. at 740 (plurality) (citing \textit{Grutter}, 539 U.S. at 330).} where pools of individuals are assigned to certain jobs on the basis of their race to ensure that there is an ideal balance of all the races represented. Further, this is a type of remedy that would remove manifest racial imbalances such as the one in \textit{Weber}, with a goal of attaining a workforce that is representative of the community.

Race-conscious measures are preferable to race-neutral ones such as class-based preferences because, as many have noted, in some places the racial majority also comprise the majority of the poor. As such, targeting individuals under a certain income level may in effect still include more individuals from the racial majority while excluding all others. It would not achieve the racial diversity sought.

Preferences based on geographic location are insufficient to achieve racial diversity and end racial discrimination in public employment. This system may be an effective
measure in states that are largely segregated by race, because the states could specifically target those communities where racial minorities reside, but only in those states.  

VII. CONCLUSION

“Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.”

Public employers have a duty to ensure equality of access and opportunity for employment within their subdivisions, and when necessary, to do so through race-conscious measures in addition to race-neutral measures. In order for these measures to be effective, the federal courts must address the difficult question of permissible affirmative action with respect to public employers under Title VII and the Equal Protection Clause. The Supreme Court in particular must reform its concept of a colorblind Constitution and the narrow definition of diversity as racial diversity that serves a compelling governmental interest. Further, the Court must broaden the interests that States may pursue in considering race in its recruitment, hiring, and promotion practices. These interests should include avoiding racial isolation, equal access and opportunity, and ensuring that taxpayer dollars do not fund prejudice. Moreover, many of these interests have already been identified or alluded to as being compelling. The approach that I have proposed treats individuals as equal without ignoring the significance of race and the necessity of considering race under certain circumstances.

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201 This approach is similar to what Justice Kennedy suggests in PICS when he identifies “drawing attendance zones with general recognition of neighborhood demographics as a means to achieving racial diversity in public schools.” Parents Involved in Cmty. Schs, 551 U.S. at 789 (Kennedy, J., concurring in part).

202 Id. at 787.
have attempted to provide a means for ensuring equality of access and opportunity without favoring one group over another based solely on race, instead focusing on factors indicating a lack of access and opportunity, something that the government is positioned to address. “The enduring hope is that race should not matter; the reality is that too often it does.”\textsuperscript{203} As such, the government should continue to monitor for patterns and practices that deny individuals employment within its institutions because of race and actively pursue measures to include in its workforce individuals belonging to unrepresented or under-represented racial groups.

One of the core values of our democracy is representative government. Government that is representative of the people should be as racially diverse as the community that it serves. The benefits that flow from ensuring that government is reflective of its constituency demonstrates that the government is committed to adhering to its principals of inclusion and anti-discrimination, is able to serve racially diverse groups, and is prepared to evolve as its community demographics and needs change. While affirmative action is not by any means an end in itself, it is certainly an effective tool for public employers to simultaneously attain the goals of Title VII and the Equal Protection Clause and thereby further our democratic ideals of equality and justice for all.

\textsuperscript{203} Id.