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Wencong Fa

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THE TROUBLE WITH RACIAL QUOTAS IN DISPARATE IMPACT REMEDIAL ORDERS

Wencong Fa*

ABSTRACT

Justice Scalia's concurring opinion in *Ricci v. DeStefano* highlighted severe conceptual tensions between the Equal Protection Clause of the Fourteenth Amendment, which protects individuals from racial discrimination, and disparate impact liability, which protects racial groups from adverse effects. Last year's Supreme Court decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* suggested that disparate impact liability under the Fair Housing Act was constitutionally unproblematic because successful fair housing lawsuits over the past four decades have led to only race-neutral remedial orders enjoining the practice causing the disparate impact.

This Article analyzes the constitutionality of another disparate impact remedy: the imposition of racial quotas. Employment lawsuits brought under Title VII of the Civil Rights Act of 1964 have resulted in such remedies, potentially opening the door to an as-applied constitutional challenge arguing that the remedies violate the Equal Protection Clause. The outcome will likely hinge upon the standard of review. Many have argued that a deferential standard is appropriate in light of federal court decisions approving the use of race in census questionnaires, suspect descriptions, and school zoning. This Article challenges that notion and argues that the proper standard is strict scrutiny.

* College of Public Interest Law (CPIL) Attorney, Pacific Legal Foundation; J.D., University of Michigan Law School; M. Sc., London School of Economics; B.S., University of Texas at Dallas. Thanks to R.S. Radford, Meriem Hubbard, Joshua Thompson, Ralph Kasarda, and Jonathan Wood for helpful comments, and to Aaron Lawson, Dorie Chang, Jessica Morton, and Nii-Amaa Ollennu for thoughtful remarks on earlier drafts. Thanks, also, to the entire journal staff of Volume 24 of the *William & Mary Bill of Rights Journal* for their hard work in getting this piece ready for publication.

INTRODUCTION

In 1964, Congress enacted Title VII of the Civil Rights Act to prohibit racial discrimination in employment.[1] In *Griggs v. Duke Power Co.*[2] seven years later, the Supreme Court read the law as imposing liability for disparate impact: facially neutral actions that were not intended to be discriminatory, but resulted in discriminatory effects.[3] In 1991, Congress amended Title VII to codify the standard set out in *Griggs* and allowed a plaintiff to establish an initial showing of disparate impact liability based on statistical disparities in outcomes between racial groups.[4]

Yet, liability based on statistics alone raises significant constitutional problems.[5] Although the Equal Protection Clause is concerned with the rights of individuals,[6] disparate impact liability is triggered by disparities between racial groups.[7] And, like

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[1] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

[2] 401 U.S. 424 (1971).

[3] *Id.* at 431.

[4] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074 (1991) (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

[5] *See* Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 509–15 (2003) [hereinafter Primus, *Equal Protection & Disparate Impact*].

[6] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (stating that the Fourteenth Amendment "protect[s] *persons*, not *groups*").

[7] *See infra* Part I.

affirmative action programs that the Supreme Court has invalidated over the past four decades,[8] a statute restricting racially disparate impacts is a race-conscious mechanism designed to reallocate opportunities from some racial groups to others.[9] These concerns culminated in Justice Scalia's concurrence in *Ricci v. DeStefano*, which asked "[w]hether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?"[10] The Supreme Court partially answered this question in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[11] in which it hinted that some applications of disparate impact liability were constitutionally permissible.[12] In that case, the Court interpreted the Fair Housing Act (enacted as Title VIII of the Civil Rights Act of 1968) to include a cause of action for disparate impact.[13] It explained that race-neutral remedies of the sort that had been applied in fair housing cases over the last four decades were constitutionally unproblematic,[14] but warned that remedial orders requiring racial targets or quotas might raise constitutional problems.[15]

Those sorts of remedies can result from Title VII lawsuits. For example, one consent decree in a Title VII disparate impact lawsuit ordered the defendant to hire "12 African American applicants and 18 Hispanic applicants from the . . . 2012 hiring process."[16] The district court in the case foreclosed the possibility of an equal protection challenge when it prevented the firefighters' union from intervening in the lawsuit, leaving open the question of whether a court would review the racial quota listed therein under strict scrutiny[17] or a deferential, rational-basis standard.[18]

Part I of this Article recounts the history of disparate impact liability, the constitutional problems with the theory, and the potential for an as-applied challenge to the use of remedial racial quotas in Title VII disparate impact cases. Part II shows why this is a difficult question. It examines court rulings on the census,[19] the use of race in

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[8] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 251 (2003) (invalidating the University of Michigan's undergraduate affirmative action program).

[9] Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 494.

[10] *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

[11] 135 S. Ct. 2507 (2015).

[12] *Id.* at 2522.

[13] *Id.* at 2518–19 (discussing Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 804(a), 805(a), 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3604(a), 3605(a) (2012))).

[14] *See id.* at 2522.

[15] *See id.*

[16] Consent Decree, United States v. City of Austin, No. 1:14-CV-00533-LY, at app. D (W.D. Tex. Nov. 7, 2014).

[17] *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (comparing strict scrutiny and rational-basis review).

[18] *See* Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 319 (1993) (applying a strong presumption of validity to laws reviewed under the standard).

[19] *See* Morales v. Daley, 116 F. Supp. 2d 801, 814–15 (S.D. Tex. 2000).

suspect descriptions,[20] school zoning,[21] and fair housing[22] to show why some scholars have argued that disparate impact liability does not raise significant constitutional problems, regardless of how it is applied.[23] Those commentators contend that the standard of review is determined by the normative reasonableness of the law, and a court may apply deferential review whenever it concludes that a law is desirable.[24] Part III demonstrates why that is not so. It shows why cases on the census, suspect descriptions, school zoning, and fair housing are fully consistent with requiring strict scrutiny of explicit racial quotas contained in disparate impact remedial orders. In doing so, I will draw on four principles distilled from key equal protection cases: burden allocation, expressive harm, universalism, and context.

I. DISPARATE IMPACT AND THE EQUAL PROTECTION CLAUSE

A. Title VII's Disparate Impact Provisions: A Brief History

In 1868, the nation ratified the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[25] For the next century, America struggled to live up to that promise. Through infamous Jim Crow laws, which explicitly differentiated between races, state and local governments authorized racial discrimination in virtually every facet of life.[26]

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[20] *See* Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

[21] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–11 (2007).

[22] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

[23] *See, e.g.*, Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1331 (2011) [hereinafter Siegel, *From Colorblindness*].

[24] Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 509–15.

[25] U.S. CONST. amend. XIV, § 1. The Federal Government must also guarantee the equal protection of the laws. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (interpreting the Fifth Amendment as including an implicit requirement of equal protection).

[26] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 393 (1978) (Marshall, J., concurring in part and dissenting in part) ("In the wake of *Plessy* [*v. Ferguson*, 163 U.S. 537 (1896)], many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts.").

In 1962, travelers at train stations were escorted to different waiting rooms designed to separate whites and blacks.[27] Restaurants hung signs saying "whites only" and "no blacks allowed."[28] Southern states bent on curbing minority participation in voting "came up with new ways to discriminate as soon as existing ones were struck down."[29]

It was no different with employment. In the early 1960s, mining companies discriminated against black coal miners "wherever coal was mined."[30] Employers intentionally sparked racial hostilities by providing less experienced Polish workers with preferential treatment.[31] Black workers in all professions were forced into undesirable positions with little chance at earning promotions.[32]

In recognition of these problems, Congress enacted the Civil Rights Act of 1964.[33] Title II of the Act dealt with discrimination in places of public accommodation.[34] Title VII sought to remedy discrimination in employment.[35] The statute made it unlawful for an employer "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,"[36] or "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"[37] for those reasons. The statute unambiguously imposed liability for "disparate treatment," also known as intentional discrimination.[38] There was, however, an open question as to whether the law implicitly imposed liability for actions that resulted in an adverse effect on a protected group, but were taken without any invidious purpose.

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[27] *See* STEVEN D. CLASSEN, WATCHING JIM CROW: THE STRUGGLES OVER MISSISSIPPI TV, 1955–1969, at 87 (2004).

[28] RUTH THOMPSON-MILLER, JOE R. FEAGIN & LESLIE H. PICCA, JIM CROW'S LEGACY: THE LASTING IMPACT OF SEGREGATION 43–44 (2014).

[29] Shelby Cty. v. Holder, 133 S. Ct. 2612, 2619 (2013).

[30] REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH 236 (William H. Chafe et al. eds., 2001).

[31] *Id.* at 236–37.

[32] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 708 (2006).

[33] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

[34] Daniel v. Paul, 395 U.S. 298, 301 (1969) ("Title II of the Civil Rights Act of 1964 enacted a sweeping prohibition of discrimination or segregation on the ground of race, color, religion, or national origin at places of public accommodation whose operations affect commerce.").

[35] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 56 (2006) ("Title VII of the Civil Rights Act of 1964 forbids employment discrimination . . . .").

[36] 42 U.S.C. § 2000e-2(a)(1).

[37] *Id.* § 2000e-2(a)(2).

[38] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (equating disparate treatment with intentional discrimination).

As originally enacted, Title VII did not expressly create a cause of action for disparate impact.[39] There is also good evidence that those who enacted the law did not intend to do so.[40] The bill's sponsors explained that "[t]here is no requirement in title VII that employers abandon bona fide qualification tests [whenever] . . . members of some groups [were] able to perform better on these tests than members of other groups."[41] Senator Hubert Humphrey added that the statutory text made it "wholly clear that inadvertent or accidential [sic] discriminations will not violate" Title VII, and promised to eat "the pages one after another" if any Senator could find language requiring an employer to "hire on the basis of percentage or quota related to color [or] race."[42] But in 1971, the Supreme Court decided otherwise.[43]

1. *Griggs*

In *Griggs v. Duke Power Co.*, the Court created a disparate impact cause of action in Title VII.[44] The employer in the case had openly discriminated against minority applicants,[45] and the changes that it made after Title VII went into effect were blatant attempts to evade the statute's requirements.[46] The employer's test for new applicants, which had replaced a system of forthright discrimination against minorities, was designed for those with a high school education—and administered at a time when most blacks did not go to high school.[47] Although the tests at issue in *Griggs* strongly suggested disparate treatment, the Court's endorsement of disparate impact liability

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[39] *See* Lewis v. City of Chicago, 560 U.S. 205, 211 (2010).

[40] *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1541 (2003) ("In construing especially controversial [disparate impact] provisions of Title VII, the Court rested its decisions on dubious pieces of legislative history.").

[41] 110 CONG. REC. 7213 (1964) (memorandum of Sens. Case & Clark).

[42] *Id.* at 6549, 7420, 12723–24 (statements of Sen. Humphrey).

[43] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

[44] *Id.*; *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2526 (Thomas, J., dissenting) ("[*Griggs*], which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact." (citations omitted)).

[45] *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 659 (2015) [hereinafter Siegel, *Race-Conscious*].

[46] *Id.*

[47] Selmi, *supra* note 32, at 716. *Griggs* was also decided at a time when the Court lacked a tool to smoke out intentional discrimination in facially neutral statutes. Since *Griggs*, the Court created the test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to do just that in Title VII claims, and the test set forth in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), to do so in constitutional claims.

in that case pervades employment discrimination law today. The Court held that once the plaintiff established that a business practice had an adverse effect on a protected group, the employer was required to demonstrate that the practice was necessary to its business.[48]

2. The Civil Rights Act of 1991

The Court retreated from this stringent standard on employers over the next 20 years. In *Wards Cove Packing Co. v. Atonio*,[49] the Court reduced the employer's burden to rebut a showing of disparate impact liability.[50] Employers were no longer required to demonstrate that an employment test was "essential" or "indispensable" to its business,[51] but only that it significantly furthered a legitimate business purpose.[52]

Congress abrogated the *Wards Cove* test with the Civil Rights Act of 1991, and returned disparate impact liability to the strict standards set forth in *Griggs*.[53] The statute governs disparate impact claims today:

> (1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .[54]

Disparate impact litigation can last up to three rounds. First, plaintiffs can make an initial showing (or establish a prima facie case) of disparate impact liability by showing that the employer used "a particular employment practice that cause[d] a disparate impact."[55] Employment practices include background checks, credit checks, and pen-and-paper tests.[56] According to the Equal Employment and Opportunity

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[48] *Griggs*, 401 U.S. at 431.

[49] 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991), *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

[50] *See id.* at 656–61.

[51] *Id.* at 659.

[52] *Id.*

[53] *See* § 105, 105 Stat. 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2012)).

[54] *Id.*

[55] Lewis v. City of Chicago, 560 U.S. 205, 212 (2010) (quoting Civil Rights Act of 1991, Pub. L. No. 102-166 § 105, 105 Stat. 1074 (1991) (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i))).

[56] Equal Emp't Opportunity Comm'n v. Freeman, 778 F.3d 463, 464–65 (4th Cir. 2015) (in which the Equal Employment Opportunity Commission (EEOC) alleged that background

Commission, a selection rate[57] of less than 80% "of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."[58]

For instance, an employer may use a pen-and-paper test and hire every applicant who scores above a certain grade. If 80% of white applicants and 72% of black applicants pass the test, there is no significant adverse effect on black applicants because the comparative selection rate for blacks was 90%.[59] But if 80% of white applicants and 60% of black applicants pass the test, there is a significant adverse effect on blacks because the comparative selection rate for blacks was 75%.[60]

Second, an employer can rebut an initial showing of an adverse effect on a protected class by convincing the court that the business practice at issue has "a manifest relationship to the employment in question."[61] Also known as the business necessity standard, an employer might be able to satisfy this requirement if it can prove that test scores are correlated with job performance.[62]

Third, if a court holds that the tests at issue are job related, the plaintiff can still win if it shows that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'" just as well.[63] A plaintiff might win under this element, and thus prevail in the disparate impact lawsuit, by showing that an oral test would have been just as effective as a written test in serving the employer's needs and would have led to a smaller difference in the selection rate between white and black applicants.[64]

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checks on job applicants violated Title VII's disparate impact prohibition); Equal Emp't Opportunity Comm'n v. Kaplan Higher Educ. Corp., 748 F.3d 749, 750 (6th Cir. 2014) ("In this case the EEOC sued the defendants for using the same type of background check that the EEOC itself uses."); Briscoe v. City of New Haven, 654 F.3d 200, 205–09 (2d Cir. 2011) (discussing firefighter promotion examinations).

[57] The percentage of people hired out of the people who applied.

[58] *See* 29 C.F.R. § 1607.4(D) (2009).

[59] To get this number, divide seventy-two (the pass rate for one group) by eighty (the pass rate for another group).

[60] Same formula: sixty divided by eighty.

[61] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)); *cf.* Ricci v. DeStefano, 557 U.S. 557, 587 (2009) ("[A] prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence" of liability under Title VII's disparate impact provisions (citations omitted)).

[62] *See, e.g.*, Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286, 291 (3d Cir. 2002) (finding that the employer showed that a running exercise was reasonably correlated with job performance because those who passed the run test "had a success rate on the job standards ranging from 70% to 90%" and the "success rate of the individuals who failed the run test ranged from 5% to 20%").

[63] *Albemarle Paper Co.*, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

[64] *Cf.* Johnson v. City of Memphis, 770 F.3d 464, 472 (6th Cir. 2014) (noting that the "less discriminatory alternatives" prong requires the plaintiff to "demonstrate: (1) the availability

Successful disparate impact lawsuits under Title VII, unlike successful disparate impact lawsuits under the Fair Housing Act, have led to remedies that raise constitutional difficulties.[65] In *Inclusive Communities*, the Court held that the Fair Housing Act encompassed a cause of action for disparate impact.[66] Justice Kennedy's opinion for the Court emphasized the history of disparate impact liability under the Fair Housing Act, observing that remedies ordered in successful lawsuits over the last four decades have led to race-neutral means to terminate unjustified barriers to fair housing[67] rather than remedies imposing racial quotas.[68] Title VII lawsuits in employment occasionally lead to the same remedy, only requiring the employer to stop the specific practice creating the disparate impact.[69] After *Inclusive Communities*, one can predict that such practices are safe from a constitutional attack unless a court finds a meaningful difference between employment and fair housing. In other cases, however, successful disparate impact lawsuits in employment have led to racial quotas,[70] which the Court in *Inclusive Communities* warned would raise serious constitutional problems.[71]

3. Racial Remedies in Disparate Impact Cases and the Looming Constitutional Challenge

Title VII remedial orders that require racial quotas seem ripe for an as-applied constitutional challenge. Several court orders and consent decrees in recent years have

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of alternative procedures that serve the employer's legitimate interests and (2) produce 'substantially equally valid' results, but with (3) less discriminatory outcomes").

[65] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991) (suggesting that "issues involving the relevance of legal novelty and unpredictability are best understood as addressing a question within the law of remedies").

[66] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

[67] *See id.* at 2524 ("Governmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))); Brief for John R. Dunne et al. as Amici Curiae Supporting Respondents at 7, *Inclusive Cmtys.*, 135 S. Ct. 2507 [hereinafter Brief for Dunne et al.] (No. 13-1371) ("But whatever may be its effect in *employment*, disparate impact liability in the *fair housing* context does not encourage racial classifications or redistribute zero-sum assets from whites to minorities.").

[68] *See Inclusive Cmtys.*, 135 S. Ct. at 2522 (observing that "disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions").

[69] *See, e.g.*, NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 486 (3d Cir. 2011) ("The permanent injunction against use of the Residents-Only List is properly circumscribed to eliminate the employment practice that the expert reports establish is causing the disparate impact.").

[70] *See infra* notes 71–89 and accompanying text.

[71] *Inclusive Cmtys.*, 135 S. Ct. at 2524 ("Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.").

imposed just such remedies.[72] *United States v. City of Austin*[73] is one recent example. In 2014, the Department of Justice filed suit against the City of Austin for a disparate impact resulting from the city's examination for entry-level firefighters.[74] The parties entered into a consent decree on the same day.[75] The complaint did not allege that the city engaged in intentional discrimination, and the United States conceded that the city did not do so.[76] Although the governmental interest of remedying intentional discrimination was absent in the case,[77] the settlement included a batch of remedies such as quota-based hiring for thirty minority firefighters,[78] allotted between "12 African-American and 18 Hispanic [applicants] from the 2012 hiring process."[79]

United States v. New Jersey[80] contained similar facts. In 2010, the United States sued New Jersey and the State's Civil Services Commission, alleging that the Commission's selection process for the position of police sergeant produced a disparate impact on African American and Hispanic applicants, who passed the promotional examination at lower rates than their white counterparts.[81] The parties entered into a consent decree, which the district court approved over 468 written objections, including many from those who had already passed the promotional exam, but were concerned about being skipped over for lower scoring minority applicants.[82] Like the consent decree in *United States v. City of Austin*, the New Jersey consent decree included a racial quota as a remedy, dividing sixty-eight priority promotions among forty-eight African American and twenty Hispanic candidates.[83]

Court judgments in Title VII disparate impact lawsuits can also mandate racial quotas. In *Lewis v. City of Chicago*,[84] a group of black firefighter applicants brought suit on behalf of themselves and every other black firefighter applicant who took Chicago's 1995 written firefighter examination.[85] The case went to the Supreme Court, which affirmed the unexciting proposition that plaintiffs in Title VII disparate impact cases may file their claims within 300 days after the employer executes the allegedly unlawful practice.[86] But things got more interesting on remand. The trial

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[72] *See infra* notes 73–89 and accompanying text.

[73] Consent Decree, United States v. City of Austin, No. 1:14-CV-00533-LY (W.D. Tex. Nov. 7, 2014).

[74] *Id.* at 2–3.

[75] *Id.* at 7.

[76] *Id.* at 6.

[77] *Id.* at 16.

[78] *Id.*

[79] *Id.*

[80] No. 10-cv-91, 2012 WL 3265905 (D.N.J. June 12, 2012).

[81] *Id.* at *2 ("From 2000 to 2008, 89% of white candidates passed the written examination, compared to 73% of African American candidates and 77% of Hispanic candidates.").

[82] *Id.* at *1.

[83] *Id.* at *5.

[84] No. 98-c-5596, 2014 WL 562527 (N.D. Ill. Feb. 13, 2014).

[85] *Id.* at *1.

[86] *See* Lewis v. City of Chicago, 560 U.S. 205, 210–13 (2010).

court entered judgment for the plaintiffs on their disparate impact claims, ordering the City to remedy the Title VII violation by hiring 132 black firefighters and granting them retroactive seniority.[87] But since the plaintiff class consisted of every black applicant to the 1995 exam, there were around 6,000 people eligible for relief.[88] The court did not order any sort of merit-based test for the applicants, opting instead for "an imperfect solution" that the "new hires be chosen by lot."[89]

As exemplified by all these cases, a constitutional challenge to Title VII's remedial orders containing racial quotas is fully feasible.[90] That is especially so given the deep tension between disparate impact liability and the Equal Protection Clause.

B. The "War" Between Disparate Impact and the Equal Protection Clause

Although Title VII was enacted to enforce the promise of the Fourteenth Amendment,[91] statutory liability for disparate impact has long been divorced from constitutional notions of discrimination. Just five years after the Court interpreted Title VII to include a disparate impact cause of action in *Griggs*, it rejected a constitutional challenge to a written test administered by the District of Columbia Metropolitan Police Department.[92] The employment practice at issue was a police examination that had a significant adverse impact on black applicants, who failed at a rate around four times higher than their white counterparts.[93] At the time, public employers such as the D.C. Metropolitan Police Department were not subject to Title VII.[94] Thus, plaintiffs brought their disparate impact claim under the Equal Protection Clause rather than Title VII.[95] The Court rejected the applicants' claims because they had not showed that the police department acted with a discriminatory purpose, which the Court held was a necessary element of an equal protection claim.[96]

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[87] *Lewis*, 2014 WL 562527, at *1.

[88] *Id.*

[89] *Id.*

[90] To be sure, the Court's plurality decision in *United States v. Paradise*, 480 U.S. 149 (1987), found that a promotional quota of 50% satisfied strict scrutiny. *Id.* at 149–67. But subsequent equal protection cases requiring a "demanding" inquiry into race-neutral alternatives make it unclear "if any vestiges of the *Paradise* approach remain." John Cocchi Day, Comment, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CALIF. L. REV. 59, 108 (2001).

[91] *In re* Emp't Discrimination Litig. Against Ala., 198 F.3d 1305, 1324 (11th Cir. 1999) (concluding that "in enacting the disparate impact provisions of Title VII, . . . Congress has acted pursuant to a valid exercise of its [power to enforce the Equal Protection Clause]").

[92] Washington v. Davis, 426 U.S. 229 (1976).

[93] Selmi, *supra* note 32, at 725.

[94] *Id.* at 726.

[95] *Davis*, 426 U.S. at 233. Because the defendant was a federal municipality, the claim was actually under the Fifth Amendment, which the Court had held "reverse incorporated" the Fourteenth Amendment right to equal protection. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[96] *Davis*, 426 U.S. at 240 ("[B]asic equal protection principle[s] [command] that the

Although *Davis* resolved a purely constitutional question, several Justices were equally anxious about statutory liability for disparate impact. Just the previous year, Justice Blackmun had expressed his concern that "a too-rigid application of the EEOC Guidelines [regarding test validation] will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection."[97] Then, in *Watson v. Fort Worth Bank & Trust*,[98] the Court observed that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures."[99]

White House officials echoed these concerns.[100] A report by Attorney General Edwin Meese warned that the Supreme Court could "Define Discrimination in Terms of 'Disparate Impact' and Thereby Use the Equal Protection Clause to Require Race and Gender 'Affirmative Action' Policies."[101] Disparate impact liability was also instantly controversial among academics. A law review article published the year after *Griggs* warned that "employers may use privately imposed quotas" to avoid disparate impact liability.[102] In another influential article four decades later, Richard Primus discussed the "serious conceptual tensions between modern equal protection doctrine and disparate impact law."[103]

The Supreme Court itself recognized these tensions in 2009 with its decision in *Ricci v. DeStefano*.[104] In 2003, the city of New Haven, Connecticut administered a written promotional exam to identify candidates for officers in the fire department.[105] After receiving information that black applicants failed at significantly higher rates, the city decided to suspend the process for promoting firefighters and scrapped the

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invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

[97] Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring).

[98] 487 U.S. 977 (1988).

[99] *Id.* at 992.

[100] *See* Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen. on Talking Points for White House Meeting on Voting Rights Act (Jan. 26, 1982), http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf [http://perma.cc/E42A-VZTK] ("An effects test for § 2 could . . . lead to a quota system in electoral politics . . . . Just as we oppose quotas in employment and education, so too we oppose them in elections." (emphasis omitted)).

[101] OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 44–56 (1988). For a similar argument, see David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 124–25 (arguing that affirmative action and disparate impact lie on the same conceptual continuum).

[102] Hugh Steven Wilson, *A Second Look at* Griggs v. Duke Power Company*: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 873 (1972).

[103] Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 495.

[104] 557 U.S. 557 (2009).

[105] *Id.* at 562.

initial test results in the process.[106] A group of white and Hispanic firefighters then challenged the decision on both statutory and constitutional grounds, alleging that the city's decision to discard the scores of the first test was discriminatory under both Title VII and the Equal Protection Clause.[107]

The Supreme Court held that the city's decision to scrap the initial test results violated the disparate treatment provision of Title VII because the city lacked a strong basis in evidence that it would have otherwise been liable under the disparate impact statute.[108] But since the statutory standard of disparate treatment under Title VII is the same as the constitutional standard for intentional discrimination under the Equal Protection Clause,[109] it is safe to say that the Court could have just as easily invalidated New Haven's actions on constitutional grounds.[110] Indeed, although the Court's statutory holding in *Ricci* made it unnecessary to resolve the constitutionality of disparate impact, Justice Scalia warned, in a separate opinion, that "the war between disparate impact and equal protection will be waged sooner or later."[111] He urged the Court to "begin thinking about how—and on what terms—to make peace between" Title VII's disparate impact provisions and the Equal Protection Clause.[112]

The latest battle was fought in *Inclusive Communities*, which asked "whether disparate-impact claims are cognizable under the Fair Housing Act."[113] Although the case dealt with a question of statutory interpretation, amici on both sides seized the opportunity to discuss the constitutionality of disparate impact liability.[114]

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[106] *Id.*

[107] *Id.* at 562–63.

[108] *Id.* at 585 ("[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.").

[109] Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354 (2010) [hereinafter Primus, *Future of Disparate Impact*] (noting that equal protection law has "the same substantive content as Title VII's prohibition on disparate treatment").

[110] *See id.* at 1354–55.

[111] *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring).

[112] *Id.* at 596.

[113] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

[114] *See, e.g.*, Brief for Gail Heriot & Peter Kirsanow as Amici Curiae Supporting Petitioners at 29, *Inclusive Cmtys.*, 135 S. Ct. 2507 (No. 13-1371) (arguing that disparate impact provisions of any kind must be subject to strict scrutiny—scrutiny that it likely cannot withstand); Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioners at 25–26, *Inclusive Cmtys.*, 135 S. Ct. 2507 (No. 13-1371) ("To avoid the clear conflict between disparate impact and the constitutional guarantee of equal protection, this Court should reject an interpretation of the Fair Housing Act that would permit disparate impact claims."); Brief for Dunne et al., *supra* note 67, at 3–4 (contending that disparate impact "likely does not even trigger strict scrutiny under the Constitution. Accordingly, the disparate impact doctrine under the FHA raises no serious constitutional questions").

The Court held that disparate impact claims were cognizable under the Fair Housing Act (FHA).[115] As a matter of statutory interpretation, the Court observed that the results-oriented phrase "otherwise make unavailable" in the Fair Housing Act refers to the consequences of an action rather than the defendant's intent.[116] This language, the Court added, was similar to language in two other antidiscrimination statutes that it had previously interpreted to encompass disparate impact liability: the Age Discrimination in Employment Act of 1967 and Title VII of the Civil Rights Act of 1964.[117] Thus, like those statutes, the Fair Housing Act encompassed a cause of action for disparate impact.

As a constitutional matter, the Court noted that remedies imposed in successful fair housing lawsuits have always been limited in key respects to avoid serious constitutional questions.[118] These remedies comprised of eliminating artificial, arbitrary, and unnecessary barriers to integration via race-neutral means.[119] The Court's holding did not fully answer questions about the constitutionality of disparate impact under Title VII.[120] Even proponents of disparate impact in employment have argued that "the only way to avoid disparate-impact liability is to engage in race-based remedies, not race-based thinking about what neutral criterion to adopt."[121] Moreover, disparate impact liability in fair housing, unlike in employment, "does not encourage racial classifications or redistribute zero-sum assets from whites to minorities."[122] As the Court warned in *Inclusive Communities*, remedial orders that impose racial targets or quotas—like those that arise under Title VII—may raise difficult constitutional questions.[123]

C. The Key Battleground

The crucial question today is whether remedial orders imposing racial quotas can survive an as-applied challenge. The answer hinges upon the standard of review.[124] Strict scrutiny, the most demanding standard of judicial review, requires the government to prove that its action both serves a compelling governmental interest[125] and

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[115] *Inclusive Cmtys.*, 135 S. Ct. at 2525.

[116] *Id.* at 2518.

[117] *Id.* at 2518–21.

[118] *Id.* at 2522.

[119] *Id.*

[120] *Id.* at 2525.

[121] Transcript of Oral Argument at 47, *Inclusive Cmtys.*, 135 S. Ct. 2507 (No. 13-1371).

[122] Brief for Dunne et al., *supra* note 67, at 7.

[123] *Inclusive Cmtys.*, 135 S. Ct. at 2523.

[124] *Cf.* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny."); *see also* Winkler, *supra* note 17 (providing an empirical analysis).

[125] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007) (noting that the Court's prior cases have recognized only two governmental interests

is narrowly tailored to serve that interest.[126] The Supreme Court has considered several forms of government laws,[127] policies,[128] and acts[129] under strict scrutiny and, in the equal protection context, has invalidated all of them but one—*Grutter v. Bollinger*.[130] The University of Michigan Law School's holistic use of race, no longer in place after Michiganders amended the state constitution,[131] survived strict scrutiny in *Grutter*, and that decision was hardly uncontroversial. Multiple Justices have criticized the *Grutter* majority for improperly applying strict scrutiny,[132] and others are eager to overrule the case.[133]

By contrast, rational basis review gives the government much more leeway. Laws subject to that standard are "accorded a strong presumption of validity,"[134] and the party challenging the law must negate every conceivable basis which might support it.[135] Judicial deference to laws is so great that some have questioned whether the standard provides meaningful review at all.[136]

Inclusive Communities is the latest case exacerbating the tension between rational basis review and strict scrutiny for disparate impact remedial orders containing racial quotas. Strict scrutiny is triggered in two situations: when a law contains an express racial classification (i.e., mentions race)[137] and when government action is taken

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as compelling: remedying the effects of past intentional discrimination and encouraging diversity in higher education).

[126] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420–21 (2013) (describing the Court's jurisprudence on narrow tailoring).

[127] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (invalidating the Virginia statute prohibiting interracial marriages involving white persons).

[128] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 254–57 (2003) (invalidating the University of Michigan's admissions policy of awarding every applicant from an under-represented racial or ethnic minority group twenty points).

[129] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (invalidating a California municipality's selective enforcement of a laundry ordinance).

[130] 539 U.S. 306 (2003). The internment policy in the infamous case of *Korematsu v. United States*, 323 U.S. 214 (1944), also survived strict scrutiny, but that case was analyzed under the Due Process Clause. *Id.* at 215–19.

[131] *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1628–31 (2014).

[132] *See, e.g.*, *Grutter*, 539 U.S. at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 387 (Kennedy, J., dissenting) (criticizing the majority for failing to apply strict scrutiny correctly).

[133] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring).

[134] Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 319 (1993).

[135] *Id.* at 320.

[136] Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 898 (2005) (arguing that the "rational basis test is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor").

[137] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227–31 (1995) (applying strict scrutiny to a facially classificatory program).

because of race.[138] Nonetheless, various applications of the standard in the past twenty years have caused significant confusion.[139] The census contains express racial classifications, but does not trigger strict scrutiny.[140] Police officers make decisions based on race when they use race in suspect descriptions, but courts do not apply strict scrutiny to the typical instance of that act.[141] Justice Kennedy's controlling opinion[142] in *Parents Involved* predicted that the usual instance of school zoning would not be subjected to strict scrutiny, even if the school board drew school lines with racial demographics in mind.[143] And in *Inclusive Communities*, the Court extrapolated that rule to fair housing.[144]

Before *Inclusive Communities*, academics addressing the conflict between disparate impact liability under Title VII and the Equal Protection Clause had reached one of three categorical conclusions: (1) disparate impact liability always triggers strict scrutiny;[145] (2) disparate impact liability never triggers strict scrutiny besides in limited situations such as *Ricci*;[146] or (3) some readings of *Ricci* will subject every form of disparate impact liability to strict scrutiny, while others will allow virtually all applications of disparate impact liability to be reviewed under a deferential standard.[147] After the Court's decision in *Inclusive Communities*, it is likely that none of these unyielding statements regarding disparate impact liability is correct. Rather, the Court will likely conduct a nuanced approach and distinguish between remedial orders imposing racial quotas and ones that do not.[148] Because *Inclusive Communities* implied that

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[138] *See, e.g.*, Johnson v. California, 543 U.S. 499, 502–03 (2005) (invalidating the unwritten prison policy of segregating new prisoners for up to sixty days).

[139] *See infra* Part II.

[140] *See, e.g.*, Morales v. Daley, 116 F. Supp. 2d 801, 814–15 (S.D. Tex. 2000).

[141] *See, e.g.*, Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

[142] *See, e.g.*, J. Harvie Wilkinson III, Comment, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 170 (2007) ("As the narrowest rationale in support of the prevailing judgment, the Kennedy opinion becomes the controlling one and the subject of close scrutiny for educators and lawyers alike." (footnote omitted)).

[143] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

[144] *See* 135 S. Ct. 2507, 2522 (2015) ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.").

[145] Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 CATO SUP. CT. REV. 53, 83 (2009).

[146] Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 502–15; Siegel, *From Colorblindness*, *supra* note 23, at 1315–48.

[147] Primus, *Future of Disparate Impact*, *supra* note 109.

[148] *Inclusive Cmtys.*, 135 S. Ct. at 2523 ("Without adequate safeguards . . . , disparate-impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise." (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989))).

remedial orders mandating only an injunction to halt the offending practice would only be subject to rational basis review in fair housing cases, there is a good possibility that the same remedy in employment disparate impact cases would be subject to the same type of review. But remedies imposing racial quotas implicate equal protection concerns to a much greater degree[149] and likely trigger strict scrutiny even after the Court's decision in *Inclusive Communities*.

The consequences of applying strict scrutiny in equal protection cases are significant. There are only two governmental interests that the Court has recognized as compelling: remedying the effects of past intentional discrimination and an interest in diversity in higher education.[150] The compelling interest of remedying intentional discrimination cannot justify a disparate impact remedial order containing racial quotas. The Court has consistently required a particularized showing of the prior discrimination by the governmental unit involved rather than an amorphous claim of societal discrimination.[151] In theory, courts could read Title VII's disparate impact provisions in a way that limits it as an evidentiary dragnet to smoke out instances of intentional discrimination.[152] In practice, they do not do so.[153] Rather, Title VII's disparate impact provisions are often used to remedy "structural discrimination," and impose liability on "employer[s] acting without bias."[154] Title VII's procedural mechanics confirm this point. The plaintiff in a disparate impact lawsuit is not required to plead intentional discrimination,[155] and the absence of a good-faith defense casts serious doubt on viewing disparate impact liability solely as an evidentiary dragnet for intentional discrimination.[156]

Nor could an interest in diversity justify disparate impact liability under Title VII. As the Court explained in *Parents Involved*, a compelling interest in diversity was tolerable in the unique context of higher education given "the expansive freedoms of speech and thought associated with the university environment," and the fact that "universities occupy a special niche in our constitutional tradition."[157] That setting

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[149] *See infra* Part III.

[150] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22 (2007).

[151] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion).

[152] *See* Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

[153] *See* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. (forthcoming 2016) (manuscript at 15) (noting other readings of Title VII's disparate impact provisions such as "aiming to overcome an unfair group-based distribution of jobs" and "protecting individuals against arbitrary barriers to opportunity") (on file with author).

[154] Siegel, *Race-Conscious*, *supra* note 45, at 658.

[155] *See Ricci*, 557 U.S. at 577 (noting that disparate impact claims involve "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities").

[156] *Id.* at 595 (Scalia, J., concurring).

[157] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 724 (2007) (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).

is altogether different from employment.[158] Thus, as the Deputy Solicitor General conceded in *Ricci*, the government's interest in a diverse workplace cannot be advanced by racial classifications.[159]

Professor Eang Ngov has identified one more interest as compelling, arguing that disparate impact liability serves the interest in "removing barriers and providing equal employment opportunities."[160] That is a laudable goal, of course, as there are many unnecessary barriers to economic opportunity in the country today.[161] But courts generally review those barriers under rational basis review[162] and permit most of them to remain in effect.[163] Moreover, the Supreme Court has suggested that government programs designed to eliminate barriers cannot serve as a compelling governmental interest if they eliminate barriers for only certain racial groups.[164] In *Grutter*, the Court hinted that the University of Michigan Law School could have de-emphasized the role of standardized test scores in admissions decisions for all students,[165] but no one argued that the University had a compelling interest in doing so for only underrepresented minorities.[166] Professor Ngov's proposed interest in removing barriers to equal employment opportunities thus cannot serve as a compelling interest for imposing a racial quota in a Title VII disparate impact remedial order.

That racial quotas in disparate impact remedial orders cannot survive strict scrutiny makes the issue left open after *Inclusive Communities* all the more crucial: What is the proper standard of review for such orders? Court cases on the census, suspect descriptions, and school zoning—as well as *Inclusive Communities* itself—make this a hard question.

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[158] *See* Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1130–57 (2006) (discussing reasons not to expand the diversity interest to employment).

[159] Transcript of Oral Argument at 38, *Ricci*, 557 U.S. 557 (No. 07-1428) ("[Court]: . . . Does the government consider promotion of diversity by itself a compelling state interest in the employment context as opposed to the school context? [Deputy Solicitor General]: We think . . . it probably is a compelling state interest, but it is not one that . . . can be advanced . . . by racial classifications.").

[160] Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 81 (2010).

[161] *See* Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1084–89 (2013) (summarizing the proliferation of occupational licensing laws).

[162] *See* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1023–24 (2006).

[163] *Id.* at 1024.

[164] *See supra* notes 161–63 and accompanying text.

[165] *See* Transcript of Oral Argument at 31, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (Court: "Now, if Michigan really cares enough about that racial imbalance, why doesn't it do as many other State law schools do, lower the standards").

[166] Brief for Respondents at 14–17, *Grutter*, 539 U.S. 306 (No. 02-241) (arguing that the university's program was justified solely by an interest in diversity).

II. BLURRING THE LINES: NOT ALL RACIAL CLASSIFICATIONS TRIGGER STRICT SCRUTINY

The Court has never produced a precise definition of what counts as a classification, and court decisions approving of the use of race in census questionnaires, suspect descriptions, and zoning decisions create confusion as to exactly what type of law or policy is subject to strict scrutiny.[167] Academics use these examples to say that courts must make judgments about "normative reasonableness" of racial quotas in disparate impact remedial orders before deciding whether to subject them to strict scrutiny.[168]

A. The Census

Remedial orders involving racial quotas lists racial groups,[169] and thus a straightforward application of strict scrutiny seems appropriate.[170] But although the Supreme Court has often repeated the maxim that all racial classifications trigger strict scrutiny,[171] a case applying rational basis review in an equal protection challenge to the census leads observers to believe that this maxim is incorrect.[172]

The Constitution directs Congress to conduct a census every ten years,[173] and every census since the Founding has included a question about race.[174] In *Morales v. Daley*, a group of five plaintiffs complained that two questionnaires from the 2000 census violated the Equal Protection Clause because they required individuals to self-identify by race.[175] Applying rational basis review, the court affirmed the constitutionality of the census.[176] It reasoned that there is a "distinction between collecting demographic data so that the government may have the information it believes . . . it needs in order to govern, and governmental use of suspect classifications without a compelling interest."[177]

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[167] Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 63–67 (2013) (using police practices as an example).

[168] *See* Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 512.

[169] *See, e.g.*, Consent Decree at 16–17, United States v. City of Austin, No. 1:14-CV-00533-LY (W.D. Tex. Nov. 7, 2014).

[170] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

[171] *Id.*

[172] *See* Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 505, 510.

[173] U.S. CONST. art. I, § 2, cl. 3.

[174] Morales v. Daley, 116 F. Supp. 2d 801, 805 (S.D. Tex. 2000).

[175] *Id.* at 803–04.

[176] *Id.* at 814–15.

[177] *Id.* at 814; *cf.* Brief for Dunne et al., *supra* note 67, at 11–12 (arguing that the race-tracking provision of the No Child Left Behind Act of 2001, like the disparate impact requirement of the Fair Housing Act, reflects a "commitment to reverse the legacy of public and

As an obvious racial classification subject to mere rational basis review, the census appears to have leveled a significant blow to strict adherents of an anticlassification principle.[178] According to some, *Morales* stands for the proposition that only classifications with particular effects are objectionable.[179] The rationale could be extended to apply deferential review for racial quotas in remedial orders.

B. Police Practices

Government decisions made on the basis of race are also considered classifications and generally subject to strict scrutiny. In *Yick Wo v. Hopkins*, for example, the Court famously struck down an ordinance that was selectively enforced by a city to close down laundries owned by Chinese persons.[180] More recently, in *Johnson v. California*, the Court invalidated an unwritten policy of segregating new prisoners for up to sixty days.[181] Disparate impact remedial orders that call for racial quotas also fall within this category. Whereas the government in *Yick Wo* used race as the determinative factor in deciding who should be burdened by its action, quota-based remedial orders use race to determine who should benefit.

But this rule also has its exceptions. Descriptions of suspects in police reports frequently contain the suspect's race.[182] Yet, courts have generally reviewed suspect descriptions containing race in police investigations under a deferential standard—at least in instances where race is used in conjunction with other identifiers.[183]

In *Brown v. City of Oneonta*, the Second Circuit held that the police may use race in determining who it should detain in response to a reported crime.[184] The case involved an equal protection challenge brought by several black males who were questioned in response to a midnight assault.[185] The court concluded that "[i]n acting on the description provided by the victim of the assault—a description that included race as one of several elements—[the police] did not engage in a suspect racial classification that would draw strict scrutiny."[186] Courts thus give the police leeway

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private discrimination" and "do[es] not trigger strict scrutiny merely because [it] forthrightly address[es] racial issues").

[178] *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 17–20 (2003).

[179] *See, e.g.*, Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1159 (2007).

[180] 118 U.S. 356, 373–74 (1886).

[181] 543 U.S. 499, 502, 515 (2005).

[182] *See, e.g.*, *How to Describe a Suspect*, CHI. POLICE, http://home.chicagopolice.org/get-involved-with-caps/hotlines-and-cpd-contacts/how-to-describe-a-suspect/ [http://perma.cc/W7K4-AMDH] (listing "[r]ace or national origin" as one of "[a] variety of general description information about the suspect [that] should be noted").

[183] *See* Brown v. City of Oneonta, 235 F.3d 769, 776 n.3 (2d Cir. 2000) (collecting cases), *cert. denied*, 534 U.S. 816 (2001).

[184] Brown v. City of Oneonta, 221 F.3d 329, 333–34 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

[185] *Id.*

[186] *Id.* at 337–38.

when they are looking for a specific perpetrator in response to a specific crime, such as describing the suspects in a bank robbery as "three slim black men between 20 and 25 years old," wearing dark clothing and between 5'5 and 5'8.[187] Courts do not defer to the police, however, in cases of racial profiling, such as random police sweeps targeted racial groups and aimed at preventing future crimes.[188] For instance, conducting highway searches on the basis of race because different races were suspected of carrying different drugs will likely trigger strict scrutiny.[189]

C. Zoning Decisions

Two similar examples come from Justice Kennedy, the Justice casting the deciding vote in the Court's most recent equal protection cases. In *Parents Involved*, Justice Kennedy's concurring opinion presumed that race-conscious school zoning decisions would not be subject to strict scrutiny.[190] In *Inclusive Communities* eight years later, Justice Kennedy used *Parents Involved* to refute the notion that disparate impact liability in fair housing raised significant constitutional problems.[191] He explained that just as school boards "may pursue the goal of bringing together students of diverse backgrounds and races through [race-neutral] means," housing authorities may combat racial isolation with race-neutral tools, and "mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[192] At the same time, the Court affirmed outer limits on the means used to further racial integration. In *Parents Involved*, the Court invalidated an attempt to integrate schools with the use of racial classifications.[193] In *Inclusive*

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[187] *See* United States v. Carpenter, 342 F.3d 812, 813–14 (7th Cir. 2003).

[188] *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013); Melendres v. Arpaio, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013). Commentators also distinguish between the use of race in suspect descriptions and racial profiling. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 50 (1999) ("Although racial identity, like hair color or attire, is an appropriate consideration in identifying suspects where an eyewitness has described a specific perpetrator of a particular crime, profiles serve a different function altogether."); Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13, 1999, at 34 (arguing that "[o]ur commitment to a just social order should prompt us to end racial profiling even if the generalizations on which the technique is based are buttressed by empirical evidence," but using race in suspect descriptions is acceptable because race, there, serves as "a trait linked to a particular person with respect to a particular incident. It is not a free-floating [accusation]"); *see also* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 196–200 (2002).

[189] *See* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 721 (2002).

[190] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

[191] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

[192] *Id.*

[193] *Parents Involved*, 551 U.S. at 747–48.

Communities, the Court hinted that it would strike down integrative housing programs that called for racial quotas.[194]

III. EXPLANATORY PRINCIPLES: WHY THE EXCEPTIONS ARE NOT THE RULE

Should remedial orders mandating racial quotas trigger strict scrutiny? There are four principles that may shed light on the inquiry: burden allocation, expressive harm, universalism, and context. Many of these principles are interrelated, so readers may disagree about the precise categorization of a court's statement in one section or another. For instance, laws that directly allocate burdens on the basis of race are more likely to generate hostility and impose visible harms. That the Court's statements are sometimes not susceptible to precise categorization is desirable and in accord with the general functions of constitutional law.[195]

There is already plenty of commentary that specifies how these principles are gathered from the Court's opinions, and what they say about the viability of a facial challenge to Title VII's disparate impact provisions.[196] But *Inclusive Communities* calls for a more nuanced approach, and the principles also explain why disparate impact remedial orders containing racial quotas call for a more stringent form of judicial scrutiny than those that do not.

A. Burden Allocation

1. Allocative Motive

In determining the proper standard of review, courts often look to whether the legislature intended to distribute benefits and burdens on a racial basis.[197] The requirement of an allocative motive serves as both a causation requirement and a limiting principle. It aligns the Court's equal protection jurisprudence with its oft-repeated presumption that most legislation is constitutional,[198] and it will not be reviewed

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[194] *Inclusive Cmtys.*, 135 S. Ct. at 2523.

[195] *See* R.S. Radford, Of Course *a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 395 (2004) (observing that standards in one area of constitutional law are often applied to another).

[196] Richard Primus has discussed disparate impact with respect to expressive harm. *See* Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 566–85. Reva Siegel has discussed disparate impact with universalism. *See* Siegel, *From Colorblindness*, *supra* note 23, at 1332–49. This Article builds on their analyses, focuses on remedies, and reaches a different result.

[197] *See, e.g.*, Morales v. Daley, 116 F. Supp. 2d 801, 814 (S.D. Tex. 2000) ("Plaintiffs' position is based upon a misunderstanding of the distinction between collecting demographic data so that the government may have the information it believes . . . it needs in order to govern, and governmental use of suspect classifications without a compelling interest.").

[198] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (justifying a presumption of constitutionality for duly enacted statutes based on Congress's right and duty to "make its

under a theory that some have called "fatal in fact."[199] And just as the causation requirement limits liability in contracts,[200] and torts,[201] it also limits the instances in which government decisions are subject to strict scrutiny.

Justice Kennedy's opinions in *Parents Involved*[202] and *Inclusive Communities*[203] are standard examples of the allocative motive requirement. The usual instance of school zoning will take multiple factors into account.[204] School boards often consider race-neutral criteria such as income distributions and traffic patterns anytime they need to draw new school lines, but the resulting boundaries may have a coincidental disparate impact on racial enrollment patterns.[205] The same reasoning leads to deferential review for zoning officials in housing, who "must often make decisions based on a mix of [race-neutral] factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture)."[206]

Another example is the Texas Top Ten Percent Plan,[207] often discussed by commentators as a reason not to apply strict scrutiny in an equal protection challenge to Title VII's disparate impact provisions.[208] That law allows students graduating in the

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own informed judgment on the meaning and force of the Constitution"); *cf.* Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 752 (2008) ("Indeed, the number of laws struck down by the Court is small. It has overturned fewer than 200 federal laws, which averages less than one per year since the Court's inception." (footnote omitted)).

[199] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

[200] Melvin Aron Eisenberg, *The Principle of* Hadley v. Baxendale, 80 CALIF. L. REV. 563, 612 (1992) (discussing the principle that consequential damages for breach of contract can be recovered only if foreseeable is derived from the emphasis on "certainty, liability-limiting devices, and standardized rules").

[201] Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1774 (1985) (observing that the causation requirement "plays an extremely significant role in both establishing and limiting legal responsibility").

[202] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring).

[203] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

[204] *See* Student Doe 1 v. Lower Merion Sch. Dist., No. 09-2095, 2010 WL 2595278, at *11–15 (E.D. Pa. June 24, 2010) (finding that the redistricting plan at issue was motivated by several non-racial reasons such as equalizing enrollment among the schools, minimizing travel time and costs, and maximizing the number of children who would be allowed to stay at their current school); *see also* Meredith Page Richards & Kori James Stroub, *School Catchment Zones, Politically Defined School Boundaries*, *in* SOCIOLOGY OF EDUCATION: AN A-TO-Z GUIDE 670, 671 (James Ainsworth ed., 2013) (detailing the use of the same race-neutral factors when drawing school lines).

[205] *See* Richards & Stroub, *supra* note 204, at 670–71.

[206] *Inclusive Cmtys.*, 135 S. Ct. at 2523.

[207] *See* TEX. EDUC. CODE ANN. § 51.803 (West 2015).

[208] *See* Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 541–42 ("The intent of the Ten Percent Plan . . . is to increase minority enrollment. Nonetheless, many opponents of classificatory affirmative action have endorsed the Ten Percent Plan." (footnote omitted)).

top 10% of their high school class automatic admission into any public school in Texas.[209] Most students choose the University of Texas, the top public university in the state.[210] The legislature enacted the program in response to plummeting numbers of minority enrollees at the University of Texas after the Fifth Circuit's decision in *Hopwood v. Texas*[211] did away with traditional affirmative action in the State. Several Justices have cited the plan with approval,[212] despite the contention that the program was created with an impermissible racial motivation.[213]

The Court's observations on the Texas Top Ten Percent Plan have much to do with its inability to make confident pronouncements about legislative motive given the dearth of an evidentiary record.[214] In light of the variety of factors that go into admissions programs, the Court is reluctant to tarnish the plan with the brush of discrimination before the Court can rule out race-neutral explanations such as increasing geographic or socioeconomic diversity.[215]

The Court's approval of the plan is also influenced by the doctrine-shaping role of appellate courts.[216] Although there was ample evidence that the Texas plan was motivated by racial considerations,[217] no one knows how a decision invalidating the law would affect similar programs around the country,[218] or indeed any decision by

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[209] The program originally guaranteed admissions to those finishing in the top 10% of their high school class. TEX. EDUC. CODE ANN. § 51.803 (West). The legislature amended the law, but not the name, allowing the University of Texas at Austin to limit its enrollment under the plan to 75% of total capacity. 2009 Tex. Sess. Law Serv. Ch. 1342 (West). In practice, however, UT–Austin only admits students in the top 7% of each high school class. *See* Matthew Watkins, *UT–Austin Automatic Admissions Standard for 2017: Top 7 Percent*, TEX. TRIB. (Sept. 29, 2015), http://www.texastribune.org/2015/09/29/new-ut-austin-automatic-admissions-standard-2017-t/ [http://perma.cc/4KST-QAMA].

[210] *See Top Public Schools: National Universities*, U.S. NEWS & WORLD REP., http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public [http://perma.cc/FC8B-BYWE] (last updated Sept. 11, 2015).

[211] 78 F.3d 932, 934–35 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (endorsing the limited use of race in law school admissions).

[212] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2432 (2013) (Thomas, J., concurring) (opining that "most blacks and Hispanics attending the University [of Texas] were admitted without discrimination" under the Top Ten Percent Plan).

[213] *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 323–27 (2001) (describing the origins and legislative history of the plan).

[214] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[215] *Cf.* Daniel Kiel, *Accepting Justice Kennedy's Dare: The Future of Integration in a Post*-PICS *World*, 78 FORDHAM L. REV. 2873, 2884 (2010) (arguing that student assignment plans that focus on non-racial factors such as socioeconomic status or geography would not trigger strict scrutiny).

[216] *See generally* Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045 (2008).

[217] *See* Fitzpatrick, *supra* note 213, at 321–30.

[218] *See* Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage*

admissions officers to de-emphasize traditional admissions criteria for other indicators of performance.[219]

These concerns, which have led to dictum supporting the Top Ten Percent Plan, are mostly absent with remedial orders that mandate racial quotas. An employer with a workforce that is racially balanced could be motivated by a number of concerns. An employment practice that results in a diverse workforce raises no significant problems because it will usually be impossible to trace the employer's motive in such circumstances as complying with Title VII's disparate impact provisions. *Ricci* was an outlier in this context because the city admitted that it scrapped the initial test due to the racial composition of successful candidates.[220] But courts are otherwise hesitant to select "complying with Title VII's disparate impact provisions" as the motivating factor absent overwhelming evidence to the contrary.[221]

The analysis changes altogether when a remedial order calls for a racial quota. When this is the case, the explicit requirement of the racial redistribution of a number of jobs is in the open. An apt comparison here is the difference between the use of race in suspect descriptions, which is reviewed under a deferential standard,[222] and racial profiling, which is subject to strict scrutiny.[223] Race is only one of many factors in decisions regarding employment[224] and housing.[225] Likewise, the police consider a multitude of factors when they use a suspect's description to narrow the list of people they will question, and a court might have a hard time guessing the degree to which race played a role. By contrast, race is the only factor in racial profiling and quota-based remedial orders, so neither leaves any doubt that race was the motivating factor.

2. Allocative Effect

Much of the analysis dealing with the requirement of an allocative motive overlaps with the requirement of an allocative effect. Courts do not use racial effects as a categorical trigger for strict scrutiny, because everything has a racial effect at some point.[226]

Plans,*"* 62 OHIO ST. L.J. 1729, 1740–46 (2001) (describing percentage plans in California and Florida).

[219] *See generally* Valerie Strauss, *Revolt Against High-Stakes Standardized Testing Growing—and So Does Its Impact*, WASH. POST: ANSWER SHEET (Mar. 19, 2015), http://www.washingtonpost.com/blogs/answer-sheet/wp/2015/03/19/revolt-against-high-stakes-standardized-testing-growing-and-so-does-its-impact/ [http://perma.cc/3FAK-WNWE].

[220] *See* Ricci v. DeStefano, 557 U.S. 557, 572–74 (2009).

[221] Primus, *Future of Disparate Impact*, *supra* note 109, at 1379.

[222] Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

[223] Floyd v. City of New York, 959 F. Supp. 2d 540, 570–71 (S.D.N.Y. 2013).

[224] *See* Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286, 291 (3d Cir. 2002) (describing twelve job standards for Pennsylvania police officers).

[225] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

[226] *Cf. Disparate Impact and the Rule of Law: Does Disparate Impact Liability Make Everything Illegal?*, FEDERALIST SOC'Y (Sept. 4, 2014), http://www.fed-soc.org/multimedia

Rather, courts have distinguished between direct racially allocative effects, which trigger strict scrutiny, and indirect effects, which do not. A racial quota in a disparate impact remedial order is the prime example of a direct racially allocative effect: the court orders the redistribution of a number of jobs to members of a certain race and it is done. But, with the census, the Top Ten Percent Plan, and disparate impact liability in fair housing, courts will not apply strict scrutiny because the racially allocative effect is too indirect, and recognizing a constitutional claim in such cases would subject every law to invalidation.

So it is true that laws like the Ten Percent Plan cause a racial effect, but the effect is less direct—and therefore less deserving of strict judicial scrutiny—than disparate impact remedial orders that involve racial employment quotas. For instance, 75% of the seats at the University of Texas are filled by those who are enrolled under the Top Ten Percent Plan.[227] Unsuccessful white applicants may argue that the plan reduced the number of seats available to those considered under holistic review. But if the University of Texas did away with its current use of racial classifications at the holistic review stage, then unsuccessful applicants would have a hard time proving that they were disadvantaged on the basis of illegitimate preferences at either the Top Ten Percent Plan stage or the holistic review stage of the application process. The same principle applies with census questionnaires and disparate impact liability in fair housing. Like racial quotas in remedial orders, both data gathered from the census and fair housing decisions may have a racial effect at some point.[228] But the effect is much more indirect.

B. Expressive Harm

The Equal Protection Clause is concerned with more than just racial allocation.[229] Expressive harm is a potential characteristic of the government's message: both the message conveyed and the message felt.[230] The doctrine recognizes that there is more

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/detail/disparate-impact-and-the-rule-of-law-does-disparate-impact-liability-make-everything-illegal-event-audiovideo.

[227] *See* TEX. EDUC. CODE ANN. § 51.803(a) (West 2015).

[228] Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 HARV. C.R.-C.L. L. REV. 391, 454 (2004) ("Race-based statistics undoubtedly provide the basis for race-based decisions—and the use of such information may be unpredictable."); *see also* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 95–97 (1994) (offering racial statistics as the basis for calculating tort damages).

[229] *Cf.* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1096 (2002) ("It is not always true, however, that a white applicant who would have been admitted had she been able to benefit from a racial preference also would have been admitted had the admissions process employed no racial preferences at all. In fact, the vast majority of such applicants would have been rejected even under a race-neutral process.").

[230] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). Richard Primus calls the message

to any act than the ultimate result.[231] Consider the custom of gift-giving. Many Americans exchange gifts for special occasions.[232] But giving money may be the better option for those concerned solely with utility. That's because many gifts end up in the hands of someone who has no use for them, or someone who may well have preferred buying a different item with the money used to buy the gift.[233] Economists call this inefficient outcome "deadweight loss," and the amount of it that results from gift-giving leaves them rubbing their eyes.[234]

But there's more to gifts than their utility.[235] There is also an expressive benefit: you took the time to find out what someone wanted. Handing someone a twenty-dollar bill instead of a gift card of the same value to that person's favorite restaurant might show that you didn't care enough to find out where the person likes to eat.[236] That's an expressive harm.

The Court has long been concerned with the expressive harm of race-based decision-making. From *Strauder v. West Virginia*[237] to *Brown v. Board of Education*,[238] the Court has been cognizant of the social meaning of government action.[239] Strange as it seems, the constitutional analysis can sometimes change according to how a law is viewed. The shift in the Court's views on laws requiring disclosure of racial information provides one example. In 1964, the Court applied strict scrutiny to a law that required political candidates to list their race on the ballot.[240] Decades later, a federal court rejected a challenge to the census, and analyzed the challenge under rational basis review.[241] The doctrine of expressive harm casts light on this shift. The civil rights community had previously distrusted government efforts to collect data, viewing it as a practice likely to entrench segregation.[242] It saw Louisiana's use of racial identifiers

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felt the "consequentialist approach" and the message conveyed to a reasonable observer "the revelatory approach." *See* Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 566–84.

[231] *See* Anderson & Pildes, *supra* note 230, at 1508–14 (summarizing expressive theories of individual conduct).

[232] *See* Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 571 (1997) (discussing formal gifts such as holiday cards and birthday gifts).

[233] *See* Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328, 1336 (1993) (noting that up to a third of the $38 billion spent on holiday gifts in 1992 was deadweight loss).

[234] *Id.*

[235] *See* Sara J. Solnick & David Hemenway, Comment, *The Deadweight Loss of Christmas*, 86 AM. ECON. REV. 1299, 1304 (1996) (contending that gifts are valued for reasons other than their price).

[236] *See id.*

[237] 100 U.S. 303 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

[238] 347 U.S. 483 (1954).

[239] *See* Primus, *Equal Protection & Disparate Impact*, *supra* note 5, at 566–85.

[240] Anderson v. Martin, 375 U.S. 399 (1964).

[241] Morales v. Daley, 116 F. Supp. 2d 801, 809–12 (S.D. Tex. 2000).

[242] Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 937 (2006).

on the ballot as a prelude to discrimination. But its views on data collection changed with the Civil Rights Act of 1964,[243] after which data collection measures were viewed as legitimate tools to smoke out violations of the Act.[244]

Two overarching themes the Court has adopted with respect to impermissible government expressions are related: treating people as members of racial groups instead of individuals[245] and the stigmatic harm imposed by racial preferences.[246] The Court frowns upon government treatment of its citizens as members of racial groups rather than individuals. Group-based treatment is "odious to a free people whose institutions are founded upon the doctrine of equality,"[247] and "reinforces the perception that members of the same racial group . . . think alike."[248] Another expressive harm deals with the stigma that preferences impose on those who benefit from such programs. Justice Brennan wrote four decades ago that such preferences "perpetuate[] disadvantageous treatment of [its] supposed beneficiaries."[249] Justice Thomas added more recently: "[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[250]

Not every race-conscious action reveals an impermissible viewpoint. Both suspect descriptions and racial profiling involve a government actor making race-conscious decisions. But the reason why courts have treated the two differently is the degree to which they reveal group treatment.[251] Racial profiles are undeniably focused on groups, whereas suspect descriptions allow for decisions that place less emphasis on race.[252] The *City of Oneonta* court explained this point. To start, the suspect description originated with a private party and there was no evidence in the record suggesting that the police intended to target a minority group.[253] And because the police were

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[243] *Id.* at 938.

[244] *Id.* at 938–39.

[245] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (reaffirming the notion that "the Constitution protects *persons*, not *groups*").

[246] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (noting that "[c]lassifications based on race carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

[247] *Adarand*, 515 U.S. at 214 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[248] Shaw v. Reno, 509 U.S. 630, 647 (1993).

[249] United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 172 (1977) (Brennan, J., concurring).

[250] *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

[251] R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1107 (2001) ("[P]rofiles foreground the group, while suspect descriptions focus on the individual. A profile suggests a type of person, a description a [sic] specific person. Profiles' emphasis on groups invokes the sorts of harms the Equal Protection Clause is thought to guard against, and suspect descriptions' focus on the individual seems to comport perfectly with notions of liberal individualism.").

[252] *Id.*

[253] Brown v. City of Oneonta, 221 F.3d 329, 338 (2d Cir. 2000) ("In this case, plaintiffs do not sufficiently allege discriminatory intent."), *cert. denied*, 534 U.S. 816 (2001).

seeking an offender whose race was already known, the practice did not brand other members of the race as crime prone.[254] By contrast, racial profiling ratifies an impermissible government viewpoint that some groups are more susceptible to crime.[255] As one court put it, such policies send the message that those detained are "criminals first and individuals second."[256]

That is all the more reason why racial quotas in remedial orders raise significantly more problems than enjoining truly arbitrary decision-making with an incidental disparate impact. Justice Kennedy's opinion in *Inclusive Communities* reflects the viewpoint that race-neutral remedies, like the use of race in suspect descriptions, leave ample room for individualized treatment. Remedies imposed in disparate impact lawsuits have traditionally forced zoning officials to focus on factors that did not inject race into the process.[257] In *Inclusive Communities*, the Court indicated that asking the defendant in a disparate impact lawsuit to focus on race-neutral measures that serve the defendants objectives just as well does not express an impermissible government viewpoint.[258] But that analysis says little about the viewpoint the government expresses when it redistributes opportunities on the basis of race alone.

Yet, another problem with quota-based remedies is that there are generally more claimants than beneficiaries. For example, in *Lewis v. City of Chicago*, there were around 6,000 claimants for only 132 spots.[259] As a consequence, the beneficiaries were selected by lot, and the pool of claimants included every black applicant.[260] In *Gratz v. Bollinger*,[261] the Court struck down an admissions program that gave all under-represented minorities an additional twenty points out of the one hundred points needed to guarantee admission into the school.[262] As the Court explained, allowing all members of certain races an additional benefit based on their race is unconstitutional, even if it is not a guarantor of success for all applicants. The remedial order in *Lewis* is more group-focused, and therefore more subjugating, than the affirmative action program in *Gratz*. In *Gratz*, the race-based bonus was just one part of the scoring process, and was used in conjunction with merit-based factors

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[254] Alschuler, *supra* note 188, at 265.

[255] *Id.*; *cf., e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994) ("Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

[256] United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000).

[257] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

[258] *See supra* notes 66–68 and accompanying text.

[259] No. 98-c-5596, 2014 WL 562527, at *1 (N.D. Ill. Feb. 13, 2014).

[260] *Id.*

[261] 539 U.S. 244, 270 (2003).

[262] *Id.* at 256.

such as high school grades, standardized test scores, athletic achievement and musical prowess.[263] In *Lewis*, race was the only factor.[264]

C. Universalism

The principle of universalism favors laws that seek to benefit everyone regardless of race. This concept originated with Derrick Bell's interest-convergence thesis,[265] which posited that the law cannot create theories of discrimination without broad societal support.[266] Although the Court is a countermajoritarian institution in theory,[267] its norms are unquestionably shaped by those of society.[268] Universalism weighs the degree to which a law emphasizes commonality against the degree to which it incites hostility. The principle has many benefits.[269] As a tactical matter, laws emphasizing common benefits secure political support and ensure broad judicial implementation.[270] As a substantive matter, they address discrimination in a more effective way by focusing on broader problems of injustice.[271] As an expressive matter, they undermine divisive stereotypes and send a message of community unity.[272] Perhaps for those reasons, universalism has been favored by the Justices who have cast the deciding votes in equal protection cases over the past forty years.[273]

Both Justice Powell in *Bakke* and Justice O'Connor in *Grutter* embraced fostering diversity in higher education as a compelling interest for affirmative action

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[263] *Id.* at 255.

[264] Lewis v. City of Chicago, 560 U.S. 205, 209 (2010).

[265] Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (positing that official policies supporting minorities emerge when the interests of those in power converge with the interests of those who are marginalized).

[266] Selmi, *supra* note 32, at 781–82 ("Perhaps the ultimate mistake of the disparate impact theory was a belief that our society and courts were better than they are, and that the law alone could create a theory of discrimination and equality without broader social support.").

[267] *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

[268] *See* Kevin Russell, *Ask the Author with Barry Friedman, Part I*, SCOTUSBLOG (Jan. 25, 2010, 5:20 PM), http://www.scotusblog.com/2010/01/ask-the-author-with-barry-friedman-part-i/ [http://perma.cc/G4Q8-GHDQ] ("[Russell:] What would you say that the basic thesis of your book is? [Friedman:] That the Supreme Court is, and always has been, accountable to the popular will.").

[269] *See generally* Samuel R. Bagenstos, Essay, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838 (2014) (surveying political and other benefits).

[270] *Id.* at 2847–51.

[271] *Id.* at 2856–59.

[272] *Id.* at 2863–64.

[273] *See* Heather K. Gerken, Comment, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007) ("Like his swing-vote predecessors Justices Powell and O'Connor, Kennedy is feeling the pressure associated with being the middle Justice on a divided Court.").

programs.[274] Indeed, the interest in diversity has gradually replaced an interest in remedying past discrimination as the primary justification for such programs.[275] The problem with the diversity justification, however, is that hardly anyone on either side believes that it is real. Those who support affirmative action are "increasingly dismayed [by] the costs to intellectual honesty of the felt need to shoehorn one's arguments into the language of 'diversity.'"[276] Those who oppose affirmative action call it "little more than an invitation for fraud by nearly all colleges and universities."[277]

But the appeal of the diversity interest for Justices Powell and O'Connor, perhaps, is that it reduces the role of blame in fostering a remedy, thereby increasing social support.[278] Justice Kennedy echoed this point in *Parents Involved* and *Inclusive Communities*. In *Parents Involved*, Justice Kennedy wrote separately to emphasize the universal benefits of facially neutral school zoning decisions, which he believed would not warrant strict scrutiny.[279] Justice Kennedy remarked that school authorities should be allowed to devise ways to offer "an equal educational opportunity to all of their students" without "caus[ing] a new divisiveness" and "corrosive discourse."[280] Justice Kennedy repeated these principles in *Inclusive Communities*, where he stated that using disparate impact liability solely as a mechanism to enjoin arbitrary housing practces can help with "our Nation's continuing struggle against racial isolation."[281]

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[274] Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) ("[T]he attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education.").

[275] RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 199–205 (2013).

[276] SANFORD LEVINSON, WRESTLING WITH DIVERSITY 56 (2003); *see also* Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) ("Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued.").

[277] Lino A. Graglia, *Affirmative Action: Today and Tomorrow*, 22 OHIO N.U. L. REV. 1353, 1359 (1996); *see* PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT 1 (2003) (arguing that "it is time to retire diversity from the small company of concepts that guide our thinking about who we are as a people and how we might best reconcile our differences"); Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in* Grutter, 15 TEX. REV. L. & POL. 437, 485 (2011) ("To put it bluntly, the diversity policy endorsed by *Grutter* is unconstitutional. It adopts the counter-constitutional principle of promoting group rights over individual rights."); *see also Grutter*, 539 U.S. at 354 n.3 (Thomas, J., dissenting) ("'[D]iversity,' for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue." (alteration in original)).

[278] *See* Bagenstos, *supra* note 269, at 2847–51.

[279] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

[280] *Id.* at 788, 797.

[281] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

1. Universal Benefits

A court examines the universal benefit of a law by looking at the degree to which it emphasizes commonality. Here, the Supreme Court is telling lawyers to frame arguments in terms of benefiting everyone,[282] thereby reducing the anxieties inherent in a pluralistic society.[283] It is therefore hardly surprising that briefs supporting affirmative action programs after *Grutter* emphasized the common benefits that affirmative action programs supposedly flow to people of all races.[284] There is no reason to expect that the universal benefits of a diverse workforce, if any,[285] would be different depending on whether the employer achieved its goals through a disparate impact remedial order or by other means. The difference comes in terms of pluralistic costs.

2. Pluralistic Costs

Laws that incite hostility are more susceptible to invalidation.[286] The census, the Top Ten Percent Plan, and disparate impact liability in fair housing do not involve visible victims,[287] likely a prime reason that the Court has not subjected them to strict scrutiny. By contrast, disparate impact lawsuits containing racial quotas in their remedial orders usually generate a significant amount of controversy.

To see how this is so, one would have to look no further than the cases of quota-based remedial orders provided earlier in this Article.[288] The Austin Firefighters' Union, for example, strongly objected to the consent decree in *United States v. City of Austin*,[289] and even attempted to intervene in litigation.[290] Union representatives complained that they were strong-armed by city officials, who told them in collective bargaining talks that if the city did not get what it wanted during the negotiations, it would have to reach its objective by ceding to a sham lawsuit and achieve its

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[282] *See* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 966 (1992).

[283] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 792–802 (2011).

[284] *See, e.g.*, Brief for Respondents at 39, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (arguing that the University's affirmative action program allows "all students to experience concrete benefits from diversity" (citation omitted)).

[285] *See* Mellott, *supra* note 158, at 1131–57.

[286] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race . . . lead to a politics of racial hostility.").

[287] *See* Primus, *The Future of Disparate Impact*, *supra* note 109, at 1369–75.

[288] *See supra* notes 124–68 and accompanying text.

[289] Consent Decree, United States v. City of Austin, No. 1:14-CV-00533-LY (W.D. Tex. Nov. 7, 2014).

[290] Michael King, *Point Austin: . . . And Two Steps Back*, AUSTIN CHRON. (July 4, 2014), http://www.austinchronicle.com/news/2014-07-04/point-austin-and-two-steps-back/ [http://perma.cc/9YBX-BKJU].

desired ends through a consent decree with the Department of Justice.[291] Three hundred firefighters stood against the decree at the city council debate, and the union president accused the city manager of intentionally framing the matter as a "race issue" to intimidate members of city council to vote for it.[292]

Similarly, in *United States v. New Jersey*,[293] an officer sought the public's help in filing objections to the decree, which overturned the "promotions of three Teaneck police officers to the rank of sergeant."[294] The officer noted his frustration that the entire decree was based on "one man's opinion" and that the declarations alleging the disparate impact did "not appear in the [consent] decree."[295] In the face of public pressure, the Department of Justice eventually allowed the officers to keep their promotions.[296]

D. Context

"Context matters when reviewing race-based governmental action under the Equal Protection Clause."[297] It is clear that virtually every Justice on the current Court is willing to apply limited context-based exceptions to the general rule that all classifications are subject to strict scrutiny.[298] In *Parents Involved*, Justices Breyer, Stevens, Souter, and Ginsburg argued that the Court's precedents on race-based decisions in higher education were inapplicable in the context of K–12 school assignments.[299] Similarly, Justices Thomas and Scalia have endorsed domain-based exceptions to standard equal protection jurisprudence in prisons. In *Johnson v.*

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[291] *Id.*

[292] Bob Nicks, *City Council Consent Decree Vote Result*, AUSTIN SAFETY FIRST (May 20, 2014), http://www.austinsafetyfirst.org/news-updates/city-council-consent-decree-vote-results [http://perma.cc/VF5G-A2XB].

[293] No. 10-cv-91, 2012 WL 3265905 (D.N.J. June 12, 2012).

[294] Jerry DeMarco, *Teaneck Sergeants Keep Their Promotions in Justice Department Ruling*, S. PASSAIC DAILY VOICE (Nov. 1, 2011) [hereinafter DeMarco, *Teaneck Sergeants Keep Their Promotions*], http://southpassaic.dailyvoice.com/police-fire/teaneck-sergeants-keep-their-promotions-in-justice-department-ruling/628135/ [http://perma.cc/84Y7-NU5M].

[295] Jerry DeMarco, *Teaneck Sergeants Demoted in Federal Discrimination Suit Seek Public's Help*, S. PASSAIC DAILY VOICE (Oct. 23, 2011), http://southpassaic.dailyvoice.com/police-fire/teaneck-sergeants-demoted-in-federal-discrimination-suit-seek-publics-help/629667/ [http://perma.cc/E3WL-PZKK].

[296] DeMarco, *Teaneck Sergeants Keep Their Promotions*, *supra* note 294.

[297] Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954) ("We must consider public education in the light of its full development and its present place in American life throughout the Nation."); Richard A. Epstein, *Rand Paul's Wrong Answer*, FORBES (May 24, 2010, 12:48 PM), http:// www.forbes.com/2010/05/24/rand-paul-rachel-maddow-opinions-columnists-richard-a-epstein.html [http://perma.cc/9VXU-P6A7] (arguing that Rand Paul's misguided attack on Title II of the Civil Rights Act was based upon a misunderstanding of "libertarian theory in its proper social and historical context").

[298] *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting), *with* Johnson v. California, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting).

[299] *See Parents Involved*, 551 U.S. at 843 (Breyer, J., dissenting).

California, the Supreme Court applied strict scrutiny to an unwritten policy by the California Department of Corrections that segregated prisoners on the basis of race.[300] In dissent, Justice Thomas made a context-specific argument for a more deferential form of review, reasoning that "whatever the Court knows of administering educational institutions, it knows much less about administering penal ones."[301]

City of Oneonta provides an example of a context-based ruling. Allowing the police to use race in determining whom to question reflects a concern that a contrary rule would bog down police investigations in emergencies.[302] In this area, natural incentives push the police away from making discriminatory actions. Namely, the police department's interest in efficient work and a police officer's interest in apprehending the perpetrator make race neutrality the baseline, at least where the plaintiffs themselves did not allege any racial animus.[303]

This argument does not apply with as much force in the context of remedial orders containing racial quotas. *Ricci* shows that municipal governments will often have different incentives, and Justice Alito's concurrence in the case highlighted the concerns with racial politics.[304] Those anxieties are heightened with disparate impact liability, which generally allows for a significant amount of prosecutorial discretion and generates plenty of news coverage.[305] *Ricci* isn't the only authority on this point, as it is widely acknowledged that many city officials welcome disparate impact challenges so that they could achieve their policy objectives through court orders and consent decrees.[306]

Moreover, courts are hesitant to double-check the government's homework in situations where the government must engage in continual line drawing.[307] New

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[300] *Johnson*, 543 U.S. at 506–09.

[301] *Id.* at 543 (Thomas, J., dissenting).

[302] *See* Mincey v. Arizona, 437 U.S. 385, 392–94 (1978) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. App. 1963))).

[303] Brown v. City of Oneonta, 221 F.3d 329, 338 (2d Cir. 2000) ("In this case, plaintiffs do not sufficiently allege discriminatory intent."), *cert. denied*, 534 U.S. 816 (2001).

[304] *See* Ricci v. DeStefano, 557 U.S. 557, 598–602 (2009) (Alito, J., concurring).

[305] *See supra* notes 282–95 and accompanying text.

[306] Selmi, *supra* note 32, at 764–67; *see also* Richard Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact After* Ricci *and* Inclusive Communities, *in* TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR JUNE 5–6, 2014, at ch. 17 (Anne Marie Lofaso & Samuel Estreicher eds., 2015) ("[M]any officials in the Nation's large cities have been happy to be sued on disparate-impact theories, especially when the result is a negotiated consent decree that gives local officials judicial cover for racially integrative (or otherwise racially allocative) policies that might have been difficult to pursue without the overlay of judicial compulsion.").

[307] *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("The[ ] restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.'" (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

schools are built all the time, and new lines must be drawn every time that happens. The frequency with which new schools are being built weighs against applying strict scrutiny.[308] If every new school were to trigger strict scrutiny, school districts would be incentivized not to build new schools in the first place. That rule would increase overcrowding in schools around the United States.[309] Applying strict scrutiny whenever a decision is made with awareness of race is also unworkable in the context of police investigations. The police regularly use suspect descriptions to hunt down perpetrators,[310] and even a policy requesting a general description of a suspect might often garner information about the suspect's race. Sympathetic to the difficulties of policing and cognizant of the unavailability of feasible alternatives,[311] courts forced to apply strict scrutiny might routinely uphold incidental uses of race in suspect descriptions while pretending to apply stringent review. Courts are thus hesitant to apply strict scrutiny knowing that doing so will lead to one of two undesirable outcomes: hampering police functions or diluting judicial review.[312]

These considerations do not, however, point toward deferential review for remedial orders containing racial quotas. The Court recently suggested a feasible alternative that has already been used in Title VII disparate impact lawsuits[313]: a remedial order that prospectively enjoins the practice causing the disparate impact, but does not reallocate opportunities on the basis of race.[314]

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[308] *Cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010) ("[T]he most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent . . . ." (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting))).

[309] *See, e.g.*, Rachel Lebeaux, *Legislature Restores $500K to Address Ashland Schools Overcrowding*, BOS. GLOBE (Aug. 4, 2015), https://www.bostonglobe.com/metro/regionals/west/2015/08/04/legislature-restores-address-ashland-schools-overcrowding/lgi4qrDQ30ZwmL9JiHbt2N/story.html.

[310] *See, e.g.*, Jerod MacDonald-Evoy, *Phoenix Police Look for Suspect in Woman's Stabbing*, AZCENTRAL (Aug. 16, 2015, 4:12 PM), http://www.azcentral.com/story/news/local/phoenix/breaking/2015/08/16/phoenix-police-stabbing-suspect/31825511/ [http://perma.cc/KEX7-MZ7W] (police described the suspect as "Native American, with a tattoo above his right eye").

[311] *Cf.* Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 683 (2003) ("As an alternative to racial descriptors, this Note proposes development of a Universal Color Complexion Chart. Such a chart would consist of ten to twenty skin tones covering the spectrum of human coloring, with a swatch for each color, in a manner similar to a paint chart.").

[312] Brown v. City of Oneonta, 235 F.3d 769, 778 (2d Cir. 2000) (Jacobs, J., concurring) ("[I]t trivializes strict scrutiny by applying it in routine circumstances in which the conduct scrutinized will be routinely validated.").

[313] *See, e.g.*, NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 470–71 (3d Cir. 2011) (injunctive relief).

[314] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–23 (2015).

CONCLUSION

In the final analysis, court decisions regarding the census, suspect descriptions, school zoning, and now fair housing will likely serve as fodder for those advocating for the far-reaching remedy of racial quotas in disparate impact litigation under Title VII. But those who apply the equal protection principles from those decisions should readily come to the conclusion that racial quotas in disparate impact remedial orders will be reviewed under strict scrutiny.

First, disparate impact remedial orders involving racial quotas impermissibly allocate on the basis of race. In stark contrast to disparate impact remedies in fair housing, which have only been used to impose race-neutral measures, remedial orders involving racial quotas in employment directly allocate goods on an explicitly racial basis.

Second, remedial orders containing racial quotas, because of their explicit mention of race, carry much greater expressive harm than remedies that are race-neutral. As the Court has said time and again, explicitly racial measures often reveal impermissible government viewpoints and stigmatize even those who benefit from racial preferences. Thus, remedial orders like the one found in the *City of Austin* case should be subject to strict scrutiny.

Third, the principle of universalism does not warrant deferential review for quota-based remedies in disparate impact. The pluralistic costs are minimal in cases in which the courts have applied deferential review, but disparate impact remedial orders with racial quotas have generally led to, unseemingly, "race wars" in cities across the United States.

Fourth, court decisions on the use of race in police investigations and zoning decisions can be explained by context, including the inevitable occurrence of such acts, and the lack of workable alternatives. But there is no reason to think that an employer must resort to racial quotas in Title VII disparate impact cases, since such extreme remedies have been virtually non-existent in Fair Housing cases over the last forty years.

At the end of the day, courts will apply principles of burden allocation, expressive harm, universalism, and context in determining the standard of review for a race-conscious law. But just as those principles have allowed deferential review for the census, suspect descriptions, and school zoning decisions, they command strict scrutiny for explicit racial quotas found in some disparate impact remedial orders. Such orders must be closely analyzed under the most stringent form of judicial review.