

October 2010

## The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality

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## The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality

### Cover Page Footnote

The Supreme Court—along with the rest of the country—has long divided over the question whether the United States has yet achieved a “post-racial” society in which race no longer matters in significant ways. How, if at all, this debate is resolved carries enormous implications for constitutional and statutory antidiscrimination law. Indeed, a post-racial discomfort with noticing and acting upon race supports a zero-sum approach to equality: if race no longer matters to the distribution of life opportunities, a decision maker’s concern for the disparities experienced by members of one racial group may be seen as inextricable from its intent to discriminate against others. In recent decades, the Court’s swing Justices expressly rejected claims of post-racial success even while moving towards an insistence that government remain color-blind in its actual treatment of individuals. Uncomfortable with the use of race-based classifications to further a governmental interest in addressing long-standing racial subordination, yet reluctant to dismiss the strength of that interest given its view of the continuing relevance of race to American life, a majority thus remained unwilling to treat as discriminatory government’s attention to racial impact when choosing among various policy options. Recent developments, however, signal the possibility that the Court has now embraced a new understanding of equality that may be triggered by an assumption of post-racial success in certain contexts. For example, the Court in *Ricci v. DeStefano* for the first time characterized a decision maker’s attention to its practices’ racially disparate impact as evidence of its discriminatory, and thus unlawful, intent under Title VII. Ricci’s redefinition of culpable mental state for antidiscrimination purposes thus destabilizes the longstanding premise that the Court does not view decision makers’ attention to race to address patterns of racial hierarchy as itself suspicious. Decades after holding that the Equal Protection Clause does not require government to reconsider its actions that disproportionately exclude people of color and women so long as those actions are not motivated by an intent to harm, the Court has now concluded that statutory antidiscrimination law—and perhaps the Equal Protection Clause as well—prohibits government from reconsidering these actions under certain circumstances. If applied in the constitutional setting, as concurring Justice Scalia predicted, such a zero-sum understanding of equality would treat a government decision maker’s attention to racial and gender hierarchies when choosing among various policy options as inherently suspicious—and thus unconstitutional unless the government’s action survives heightened scrutiny. But such a turn is by no means inevitable. Indeed, Justice Kennedy’s swing opinions in the Court’s recent race discrimination decisions suggest the additional possibility that the Court has not yet determined in which direction, if any, it might turn in its understanding of equality. If so, opportunities remain for shaping that turn in ways that might avoid a collision between antidiscrimination commitments. These include revisiting the social meaning of measures that attend to the impact of various rules or standards on protected class members when choosing among available options that will then apply to all regardless of protected class status. Indeed, disparate impact provisions and similar efforts play an important role in ensuring that candidates—regardless of protected class status—are selected on actual merit, rather than on unexamined yet entrenched assumptions that replicate patterns of subordination at the expense of individual opportunity. Revisiting the social meaning of such efforts illustrates their win-win possibilities and challenges a zero-sum understanding of equality as ultimately impoverished.

## THE SUPREME COURT'S POST-RACIAL TURN TOWARDS A ZERO-SUM UNDERSTANDING OF EQUALITY

HELEN NORTON\*

### ABSTRACT

*The Supreme Court—along with the rest of the country—has long divided over the question whether the United States has yet achieved a “post-racial” society in which race no longer matters in significant ways. How, if at all, this debate is resolved carries enormous implications for constitutional and statutory antidiscrimination law. Indeed, a post-racial discomfort with noticing and acting upon race supports a zero-sum approach to equality: if race no longer matters to the distribution of life opportunities, a decision maker’s concern for the disparities experienced by members of one racial group may be seen as inextricable from its intent to discriminate against others.*

*In recent decades, the Court’s swing Justices expressly rejected claims of post-racial success even while moving towards an insistence that government remain color-blind in its actual treatment of individuals. Uncomfortable with the use of race-based classifications to further a governmental interest in addressing long-standing racial subordination, yet reluctant to dismiss the strength of that interest given its view of the continuing relevance of race to American life, a majority thus remained unwilling to treat as discriminatory govern-*

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\* Associate Professor, University of Colorado School of Law. Many thanks to Rachel Arnow-Richman, Alan Chen, Danielle Keats Citron, Josh Civin, Roberto Corrada, Tommy Crocker, Julie Gantz, Melissa Hart, Marty Katz, Michael Maurer, Scott Moss, Robert Nagel, Raja Raghunath, Nantiya Ruan, Jocelyn Samuels, Paul Secunda, Joe Seiner, Catherine Smith, Anna Spain, Charlie Sullivan, Sharyn Tejani, and Carolyn Wheeler for their insightful comments on various drafts. This Article also benefited greatly from participants’ comments at the Annual Colloquium on Current Scholarship in Labor and Employment Law, the Rocky Mountain Legal Scholars Workshop, and a University of Colorado School of Law faculty colloquium. Finally, thanks to Dean David Getches for the law school’s financial support for this project, and to Katharine Decker and Jodie Hoke for their dedicated research assistance.

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*Recent developments, however, signal the possibility that the Court has now embraced a new understanding of equality that may be triggered by an assumption of post-racial success in certain contexts. For example, the Court in Ricci v. DeStefano for the first time characterized a decision maker's attention to its practices' racially disparate impact as evidence of its discriminatory, and thus unlawful, intent under Title VII. Ricci's redefinition of culpable mental state for antidiscrimination purposes thus destabilizes the longstanding premise that the Court does not view decision makers' attention to race to address patterns of racial hierarchy as itself suspicious. Decades after holding that the Equal Protection Clause does not require government to reconsider its actions that disproportionately exclude people of color and women so long as those actions are not motivated by an intent to harm, the Court has now concluded that statutory antidiscrimination law—and perhaps the Equal Protection Clause as well—prohibits government from reconsidering these actions under certain circumstances. If applied in the constitutional setting, as concurring Justice Scalia predicted, such a zero-sum understanding of equality would treat a government decision maker's attention to racial and gender hierarchies when choosing among various policy options as inherently suspicious—and thus unconstitutional unless the government's action survives heightened scrutiny.*

*But such a turn is by no means inevitable. Indeed, Justice Kennedy's swing opinions in the Court's recent race discrimination decisions suggest the additional possibility that the Court has not yet determined in which direction, if any, it might turn in its understanding of equality. If so, opportunities remain for shaping that turn in ways that might avoid a collision between antidiscrimination commitments. These include revisiting the social meaning of measures that attend to the impact of various rules or standards on protected class members when choosing among available options that will then apply to all regardless of protected class status. Indeed, disparate impact provisions and similar efforts play an important role in ensuring that candidates—regardless of protected class status—are selected on actual merit, rather than on unexamined yet entrenched assumptions that replicate patterns of subordination at*

*the expense of individual opportunity. Revisiting the social meaning of such efforts illustrates their win-win possibilities and challenges a zero-sum understanding of equality as ultimately impoverished.*

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## INTRODUCTION

Americans remain deeply divided over the question whether we have yet achieved a “post-racial” society in which race no longer matters in significant ways.<sup>1</sup> Although this is by no means a new debate,<sup>2</sup> it has gathered considerable intensity with the election of our first African American President.<sup>3</sup> How, if at all, this debate is resolved carries enormous implications for constitutional and statutory antidiscrimination law.

As just one example, characterizing contemporary America as successfully post-racial undermines the central premises of disparate impact theory: that racial disparities are sufficiently suspicious to demand justification and that those disparities that remain unjustified are morally and instrumentally unwise. To those who believe that race is still substantially relevant to the distribution of life opportunities in the United States, such attention is morally justified, if not compelled, as well as instrumentally desirable in that it leads to more effective outcomes, for example, in encouraging the reconsideration of traditional yet unexamined practices that may be poor predictors of successful job performance.<sup>4</sup> To those who believe that the United States has largely achieved

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1. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (defining “post-racialism” as “a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action”).

2. Indeed, this debate began as early as the Reconstruction Era immediately following the Civil War and the end of slavery. *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 125 (2009) (describing debates over the wisdom and necessity of the Freedmen’s Bureau and other efforts targeted to benefit African Americans during Reconstruction); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L.R. 917, 973 (2009) (same).

3. *See, e.g.*, Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 41-42 (2009); William Darity Jr., *Stratification Economics: Context Versus Culture and the Reparations Controversy*, 57 U. KAN. L. REV. 795, 797 (2009); Jennifer Holladay & Catherine Smith, *A Cautionary Tale: The Obama Coalition, Antisubordination Principles, and Proposition 8*, 86 DENV. U. L. REV. 819, 822-24 (2009); Gregory S. Parks, Jeffrey J. Rachlinski & Richard A. Epstein, Debate, *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210, 210 (2009), <http://www.pennumbra.com/debates/pdfs/ImplicitBias.pdf>; John a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 789 (2009).

4. *See infra* notes 233-39 and accompanying text.

post-racial success, however, such disparities trigger no great suspicion.<sup>5</sup> In other words, one's view on our post-racial status often drives what one identifies as troubling: attending to race or not attending to race.

This divide helps explain why some see no conflict at all in an antidiscrimination regime that bars not only intentional discrimination based on race (that is, disparate treatment) but also practices that impose unjustified racial disparities (that is, disparate impact).<sup>6</sup> Others, in contrast, believe that the two cannot be reconciled. Senator Jeff Sessions so concluded, for example, when criticizing then-Judge Sotomayor's vote that a city fire department did not violate Title VII when it discarded the results of a test that imposed a severe disparate impact against members of some racial and national origin groups.<sup>7</sup> Senator Sessions believed that the fire department, by considering disparate impact against some, intended to discriminate against others: "It seems to me that in *Ricci*, Judge Sotomayor's empathy for one group of firefighters turned out to be prejudice against the others. That is, of course, the logical flaw in the 'empathy standard.' Empathy for one party is always prejudice against another."<sup>8</sup> A post-racial discomfort with noticing and acting upon race supports such a zero-sum understanding of equality: if race no longer matters, a decision maker's concern for the disparities experienced by members of one racial group ("empathy") inevitably includes the intent to discriminate against others ("prejudice").<sup>9</sup>

Further illustrating the significance of these divisions, the Supreme Court's swing Justices in recent decades found themselves uncomfortable with the use of race-based classifications to further a governmental interest in addressing long-standing racial subordi-

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5. See *infra* notes 31-33 and accompanying text.

6. See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2699 (2009) (Ginsburg, J., dissenting) ("Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.").

7. See *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

8. *Confirmation Hearings of Judge Sonia Sotomayor to the United States Supreme Court Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit\\_id=515](http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=515).

9. See Cho, *supra* note 1, at 1595 (describing post-racial advocates as maintaining that "race does not matter, and should not be taken into account or even noticed").



nation, yet unwilling to dismiss the strength of that interest given their view of the continuing relevance of race to American life. Justices O'Connor and Kennedy, in particular, remained reluctant to claim complete post-racial success and thus to characterize as inherently suspicious government's interest in addressing unjustified racial disparities.<sup>10</sup> While the Court increasingly moved towards an insistence that government remain color-blind in its actual treatment of individuals, a majority still expressly rejected post-racial assumptions and thus remained unwilling to treat as discriminatory government's attention to racial impact when choosing among various policy options. Examples include efforts to reduce racial isolation by designating school attendance zones with an eye towards neighborhood demographics,<sup>11</sup> or to generate more diverse applicant pools by the targeted recruitment of workers of color.<sup>12</sup>

Recent developments, however, signal the possibility that the Court has adopted a new, zero-sum understanding of equality that may be triggered by an assumption of post-racial success in some contexts—an assumption that “empathy” for some groups is inevitably accompanied by “prejudice” against others. In *Ricci v. DeStefano*, for example, the Court for the first time characterized a public employer's attention to its practices' racially disparate impact as evidence of its discriminatory, and thus unlawful, intent.<sup>13</sup> This redefinition of culpable mental state for antidiscrimination purposes destabilizes the long-standing premise that a majority of the Court does not view a decision maker's attention to its practices' racially disparate impact as the sort of attention to race that threatens equality values. Decades after holding that the Equal Protection Clause does not *require* government to reconsider its actions that disproportionately exclude people of color and women so long as those actions are not motivated by an intent to harm,<sup>14</sup> the Court has now concluded that statutory antidiscrimination law—and

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10. See *infra* notes 43-58 and accompanying text.

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

12. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

13. 129 S. Ct. 2658, 2664-65 (2009) (holding that a public employer's decision not to use a test because of concerns about its disparate impact against members of some racial groups constituted an act of intentional discrimination against members of other racial groups in violation of Title VII).

14. *Washington v. Davis*, 426 U.S. 229, 238-42 (1976).

perhaps the Equal Protection Clause as well—*prohibits* government from doing so under certain circumstances. Indeed, if applied in the constitutional setting, as concurring Justice Scalia predicted,<sup>15</sup> such an understanding of equality would treat a government decision maker's attention to racial and gender hierarchies as inherently suspicious—and thus unconstitutional unless the government's action can survive heightened scrutiny.

This Article explores the possibility—and potential consequences—of the Court's embrace of a post-racial view of the United States that in turn encourages a zero-sum understanding of equality. To that end, Part I describes the Supreme Court's long-standing struggle over a debate that turns in part on one's assessment of the United States' post-racial achievement: whether antidiscrimination law should be understood as driven by anticlassification as opposed to antistatutory values.<sup>16</sup> Part II then explores *Ricci* as a particularly powerful illustration of the Court's deeply divided views over the United States' post-racial status, examining in detail the strikingly differing narratives offered by the majority and the dissent.

The remaining Parts consider several different directions in which the Court might take its antidiscrimination jurisprudence. Part III first examines the possibility that the Court has taken a significant turn towards a zero-sum understanding of equality that treats a decision maker's attention to racial hierarchies as inherently suspicious for antidiscrimination law purposes. It then explores what such a turn might mean for equal protection law: the potential constitutional end of statutory disparate impact standards and perhaps also of an even wider range of important responses to government's self-analysis of the racial or gender impact of its actions. Examples include public schools' efforts to increase the

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15. *Ricci*, 129 S. Ct. at 2682-83 (Scalia, J., concurring) (“[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”).

16. As discussed in detail *infra* notes 18-24 and accompanying text, anticlassification theorists identify race-based differentials in treatment as inherently offensive to equality values regardless of their motivation or effect, whereas antistatutory advocates urge that antidiscrimination law should instead be understood as barring those actions that have the intent or the effect of perpetuating traditional patterns of racial subordination, but not those race-based actions that undermine such hierarchies.

admission of students of color through the use of facially race-neutral criteria like economic disadvantage or high school class rank, or government's choice to fund certain health initiatives to address racial or gender disparities in access to or quality of health care.<sup>17</sup>

Part IV considers alternatives that understand the Court as signaling a less pronounced turn. More specifically, it examines Justice Kennedy's swing opinions in the Court's recent race discrimination decisions as suggesting the possibility that the Court has not yet determined in which direction, if any, it might turn in its understanding of equality. For example, the Court may view actions motivated by a decision maker's interest in ameliorating racial disparities with suspicion only when those actions make identifiable third parties worse off in tangible ways, because at that point, and not until that point, it sees the costs of attending to race for antisubordination ends as outweighing its benefits.

Part V then explores opportunities for shaping the Court's approach to equality to avoid a collision between antidiscrimination commitments. These might include a renewed debate over the social meaning of measures that attend to the impact of various rules or standards on protected class members when choosing among available options that will then apply to all, regardless of protected class status. More specifically, Part V examines the role that disparate impact standards and similar efforts play in ensuring that candidates—regardless of protected class status—are selected on actual merit rather than on unexamined yet entrenched assumptions that replicate patterns of subordination at the expense of individual opportunity. It also explores the social welfare benefits of measures that rely on racial or gender disparities to trigger reconsideration of what may be poor measures of ability for choosing among candidates for public safety leadership roles and other important positions. Revisiting the social meaning of such efforts illustrates their win-win possibilities and challenges a zero-sum understanding of equality as ultimately impoverished.

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17. See *infra* notes 148, 150 and accompanying text.

## I. TWO COMPETING VIEWS OF EQUALITY

Courts, policymakers, and scholars have long struggled with a vigorous and perhaps intractable debate: whether antidiscrimination law should be understood as driven by antisubordination as opposed to anticlassification values.<sup>18</sup> Antisubordination advocates urge that the Equal Protection Clause should be understood to bar those government actions that have the intent *or* the effect of perpetuating traditional patterns of hierarchy.<sup>19</sup> Under this view, government actions that seek to undermine such hierarchies, including those expressly based on race, do not offend antidiscrimination values.<sup>20</sup> This approach thus finds “no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”<sup>21</sup>

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18. Although this Part focuses on competing understandings of the Fourteenth Amendment's Equal Protection Clause, this debate is relevant to understanding other antidiscrimination commitments as well. *See, e.g.*, *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202-04 (1979) (characterizing Title VII as primarily motivated by Congress's antisubordination ends); *id.* at 219-22 (Rehnquist, J., dissenting) (characterizing Title VII as animated by anticlassification objectives). James Gray Pope, moreover, has described similarly competing understandings of the Thirteenth Amendment's prohibition on involuntary servitude. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1496-99 (2010).

19. *See, e.g.*, Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1395 (2005) (“[The Equal Protection Clause] creates a new substantive value of ‘nonslavery’ and antisubordination to replace the old values of slavery and white supremacy.”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004) (describing the antisubordination principle as “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups”).

20. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-57 (1976) (urging a “group-disadvantaging” interpretation of the Equal Protection Clause that attends to racial groups’ varying experience of disadvantage in American life); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2455 (1994) (advocating an “anticaste” understanding of the Equal Protection Clause that “forbids social and legal practices from turning highly visible but morally irrelevant differences into a basis for second-class citizenship”).

21. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 864 (2007) (Breyer, J., dissenting) (“The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates

Those who urge an anticlassification understanding of the Equal Protection Clause, in contrast, take the view that the Constitution prohibits government from “[r]educ[ing] an individual to an assigned racial identity for differential treatment.”<sup>22</sup> They thus consider differential race-based treatment as uniformly morally and legally repugnant regardless of motive.<sup>23</sup> Under this approach, moreover, the government’s facially neutral actions that impose severe racial disparities do not offend antidiscrimination values unless the government intended such harmful effects.<sup>24</sup>

Among the clearer illustrations of this divide<sup>25</sup> is the contrast between the opinions of Justice Blackmun and Chief Justice Roberts when considering the constitutionality of governments’ race-based efforts to ameliorate racial disparities in various educational contexts. Justice Blackmun’s assessment that the United States’ post-racial aspirations have yet to be achieved led him to the antisubordination conclusion that “[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetu-

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racial minorities and state action that seeks to bring together people of all races.”); *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551-52 (1989) (Marshall, J., dissenting) (“A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.”).

22. *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and dissenting in part).

23. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 132-33 (1975); Morris B. Abram, Commentary, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1312 (1986); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008 CATO SUP. CT. REV. 53, 55-56; Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25.

24. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (describing anticlassification theory as holding “that government may not classify people either overtly or surreptitiously on the basis of ... race”).

25. Anticlassification and antisubordination theories are not always in tension. The Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, can be justified on both grounds, as school segregation involved an express race-based classification that perpetuated traditional racial hierarchies.

ate racial supremacy.”<sup>26</sup> Chief Justice Roberts, however, insisted simply: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>27</sup> Justice Scalia similarly declared: “In the eyes of government, we are just one race here. It is American.”<sup>28</sup>

Anticlassification adherents have long described their views as driven not only by instrumental concerns that race-based classifications stigmatize beneficiaries and exacerbate racial divisions,<sup>29</sup> but also by the moral commands of colorblindness: “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>30</sup> In other words, under this

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26. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 403, 407 (1978) (Blackmun, J., concurring) (“I yield to no one in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that that hope is a slim one.”) (citation omitted).

27. *Parents Involved*, 551 U.S. at 748 (plurality opinion). Chief Justice Roberts was more equivocal about race-conscious measures in the voting rights context. See *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2516 (2009) (“More than 40 years ago, this Court concluded that ‘exceptional conditions’ prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.”) (citation omitted).

28. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

29. See *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (maintaining that government’s race-based classification “is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and ‘provoke[s] resentment among those who believe that they have been wronged by the government’s use of race’” (quoting *Adarand*, 515 U.S. at 241)); *id.* at 761-66 (contesting educational benefits of government’s attention to race in student assignments and maintaining that race-based classifications of any sort tend to entrench further race discrimination).

30. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part); see also *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); *Adarand*, 515 U.S. at 224 (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”); *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept

view, it is morally wrong to consider race because race *shouldn't* matter.

As Sumi Cho explains, such a commitment to colorblindness “offers a largely normative claim for a retreat from race that is aspirational in nature.”<sup>31</sup> But anticlassification theory also finds support in post-racial understandings that conclude, as a descriptive matter, that the United States has achieved “a racially transcendent event that authorizes the retreat from race.”<sup>32</sup> Under a post-racial view, it is not only wrong but also irrelevant and counterproductive to consider race because race *doesn't* matter any more in significant ways.<sup>33</sup> Some characterize the post-racial view as essentially optimistic.<sup>34</sup> Others see such an approach as ignoring or masking continuing racism.<sup>35</sup>

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is alien to the Constitution's focus upon the individual, and its rejection of dispositions based on race, or based on blood.”) (citations omitted).

31. Cho, *supra* note 1, at 1598.

32. *Id.* at 1597-98.

33. See *id.* at 1595 (“[O]ne who points out racial inequities risks being characterized as an obsessed-with-race racist who is unfairly and divisively ‘playing the race card’—one who occupies the same moral category as someone who consciously perpetrates racial inequities.”); powell, *supra* note 3, at 789 (“[Under a post-racial view, race] is not just a distraction, it is a divisive [sic]. The alternative to this old, tired battle is post-racialism. The question of where we are with regard to race then becomes binary. We are either in a divisive space from the past where we continue to assert the dominance of conscious racism, or we are in a post-racial world where race really does not matter to most Americans.”).

34. See *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., dissenting) (“Admitting that a prophylactic law as broad as section 5 [of the Voting Rights Act] is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.”); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 559 (2003) (“The individualist impulse in equal protection thus offers an escape from confronting the depressing degree to which race influences the lives of members of historically subordinated groups. It invites us instead to bathe in a sunnier worldview informed by ideals of universal human potential.”).

35. See Balkin & Siegel, *supra* note 24, at 31 (“By reinterpreting and remembering the civil rights movement through the formalist lens of anticlassification, white America could more easily believe that racial inequality was a thing of the past; and that it had done—and nobly done—everything it needed to do to make whites and blacks equal citizens before the law.”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991) (arguing that “color-blind constitutionalism ... fosters white racial domination”); Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 600 (2008) (“[P]retending to have achieved color-blind as well as open opportunity—when we have not—disables individuals and communities from understanding what is going on and from becoming equipped to deal with it.”).

Whether one adopts an anticlassification or antisubordination interpretation of equality law thus may turn on one's view of the continuing relevance, if any, of race to American life.<sup>36</sup> This, of course, is a long-standing debate for the Court<sup>37</sup> as well as for the rest of the country.<sup>38</sup>

To be sure, anticlassification rationales have increasingly commanded a majority of the contemporary Court. In *Washington v. Davis*, for example, the Court concluded that the Constitution does not require government attention to the racial disparities created by its facially neutral actions, even if such disparities have the effect of reinforcing traditional racial hierarchies.<sup>39</sup> Rejecting an equal protection challenge to the District of Columbia's examination for police officers that had the effect of disproportionately excluding African Americans from such positions, the Court held that the Equal Protection Clause addresses only intentionally discriminatory government actions.<sup>40</sup> Along the same lines, the Court later demonstrated an anticlassification suspicion of affirmative action programs' consideration of race to expand opportunities for people of color in government contracting and elsewhere.<sup>41</sup> It thus ruled that the Equal Protection Clause requires strict scrutiny of any inten-

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36. But not necessarily. As discussed *infra* note 58, Justices Scalia and Thomas (and perhaps other Justices) ascribe to an anticlassification view on moral and instrumental grounds regardless of their assessment of the United States' post-racial status.

37. Compare *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."), with *id.* at 61-62 (Harlan, J., dissenting) ("It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws.... To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship.").

38. See Powell, *supra* note 3, at 792-93 ("Why is it divisive to focus on race-specific programs or talk about race? The stock explanation is that race does not matter. But even if race does not matter why is such an approach seen as divisive? The very intensity of racial feelings in our society belies the assertion that race does not matter.").

39. 426 U.S. 229, 238-42 (1976).

40. *Id.* at 239-41.

41. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").



tional governmental race-based treatment, regardless of whether that decision was motivated by a desire to undermine, rather than perpetuate, traditional patterns of racial subordination.<sup>42</sup>

At the same time, however, the swing Justices remained reluctant to choose between these competing understandings of the Equal Protection Clause. Frequently uncomfortable with government's use of race-based classifications to further an antisubordination interest, they nevertheless found themselves unwilling to dismiss the strength of that interest given their resistance to declaring post-racial victory. Thus, while the Court increasingly insisted that government remain color-blind in its actual treatment of individuals, a majority still remained unwilling to characterize government's interest in addressing racial disparities as itself inherently suspicious.

In *Adarand Constructors, Inc. v. Peña*, for example, Justice O'Connor's majority opinion took the anticlassification view that whenever government engages in differential race-based treatment, such means are sufficiently suspicious to trigger strict scrutiny regardless of its antisubordination end.<sup>43</sup> The Court thus remanded for evaluation under this demanding standard a federal affirmative action program that provided financial incentives for contracting with minority-owned businesses.<sup>44</sup> At the same time, however, Justice O'Connor refused to declare post-racial victory: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."<sup>45</sup> She thus took pains to preserve the possibility that antisubordination interests could justify government's race-based treatment by emphasizing that such programs might survive strict scrutiny.<sup>46</sup>

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42. *Id.* at 235 (holding that strict scrutiny applies to all race-based action by the federal government); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (applying strict scrutiny to all race-based action by state and local governments).

43. 515 U.S. at 235.

44. *Id.* at 204-05.

45. *Id.* at 237.

46. *Id.* ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

She reiterated her rejection of post-racial assumptions in *Grutter v. Bollinger*, when she cast the decisive vote to uphold a public law school's consideration of race as a plus-factor in its admissions program to achieve a diverse student body: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."<sup>47</sup> Further demonstrating her ambivalence, however, she famously went on to predict post-racial success—and thus the end of a need for race-based means to achieve antisubordination ends—by the year 2028: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>48</sup>

More recently, Justice Kennedy sought to claim space between the poles of pure anticlassification and antisubordination theory with his separate opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>49</sup> On one hand, he cast the fifth vote to strike down, on equal protection grounds, public school districts' use of race as a factor to be considered when assigning students to elementary and high schools. In so doing, he emphasized his abhorrence for race-based classifications on both moral<sup>50</sup> and instrumental<sup>51</sup> grounds.

On the other hand, his explicit unwillingness to claim post-racial victory led him to write separately to emphasize the strength of government's continuing interest in addressing patterns of subordination:

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47. 539 U.S. 306, 333 (2003); *see also id.* at 337-38 ("With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.").

48. *Id.* at 343.

49. 551 U.S. 701 (2007).

50. *Id.* at 797 (Kennedy, J., concurring in part and dissenting in part) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change.").

51. *Id.* ("Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.").

The enduring hope is that race should not matter; the reality is that too often it does.

... The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution....

The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy v. Ferguson*. The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.<sup>52</sup>

To achieve the government's compelling antisubordination ends, he thus urged that school authorities should remain

free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

... Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.<sup>53</sup>

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52. *Id.* at 787-88 (citations omitted). Similarly, in the voting rights context, Justice Kennedy's plurality opinion rejected the African American plaintiffs' Voting Rights Act challenge on statutory grounds but held back from declaring post-racial victory. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) ("Some commentators suggest that racially polarized voting is waning—as evidenced by, for example, the election of minority candidates where a majority of voters are white. Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.") (citations omitted); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006) (concluding that Texas's decision to dismantle a congressional district where Latinos "had found an efficacious political identity" violated the Voting Rights Act).

53. *Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and dissenting in part).

As a normative matter, Justice Kennedy shared anticlassification advocates' moral and instrumental condemnation of race-based differences in treatment. But he rejected both a descriptive post-racial claim that race no longer significantly shapes the distribution of American life opportunities as well as its normative conclusion that we thus need not, and should not, attend to race. Indeed, he identified a range of race-conscious means to achieve antisubordination ends that he considered insufficiently suspicious to trigger strict scrutiny.<sup>54</sup> These included "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."<sup>55</sup>

In short, Justices O'Connor and Kennedy expressly rejected post-racial assumptions to help form a majority of the Court willing to credit the strength of government's antisubordination interests in two important contexts. First, they characterized such interests as sufficiently compelling to justify certain race-based differentials in treatment even under strict scrutiny.<sup>56</sup> Second, they considered such interests to be insufficiently suspicious to trigger strict scrutiny when they inspired governmental means other than race-based differences in treatment.<sup>57</sup> These swing Justices thus distanced themselves from other anticlassification theorists on the Court by refusing to treat government's interest in undermining racial

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54. *Id.* at 789 ("These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.").

55. *Id.*

56. Note, however, that Justice O'Connor proved considerably more willing than Justice Kennedy—at least to date—to apply that principle in practice to uphold government's consideration of race. *Compare* *Grutter v. Bollinger*, 539 U.S. 306, 333-40 (O'Connor, J., writing for the majority) (finding that the University of Michigan Law School's consideration of race in admissions was sufficiently narrowly tailored to survive strict scrutiny), *with id.* at 388-92 (Kennedy, J., dissenting) (concluding that the law school's program was not narrowly tailored and thus violated the Equal Protection Clause).

57. *See Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and dissenting in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507, 509-10 (1989) (plurality opinion) (suggesting the constitutionality of facially neutral efforts to achieve government's interest in addressing racial disparities).

hierarchy as equally troubling as an interest in perpetuating patterns of subordination.<sup>58</sup>

This brings us to *Ricci v. DeStefano*, which now raises questions about antistatutory theory's continuing ability to command a majority of the Court on at least the second of these premises. There Justice Kennedy cast the fifth vote to treat a decision maker's consideration of its practices' racially disparate impact as evidence of its discriminatory, and thus presumptively unlawful, intent.<sup>59</sup> In a decision that may also have constitutional implications, Justice Kennedy's majority opinion newly characterized as suspicious for statutory purposes the institutional frame of mind that he had previously appeared to endorse: an interest in addressing unjustified racial disparities in recognition that race still too often matters.

## II. TWO COMPETING VIEWS OF *RICCI*

Title VII's disparate treatment provision prohibits employers from intentionally treating employees or applicants less favorably because of their race, sex, color, religion, or national origin.<sup>60</sup> In addition, Title VII's disparate impact provision prohibits an employer from using an employment practice that disproportionately excludes or disadvantages protected class members unless the employer can "validate" the practice—that is, unless it can show that the practice is "job related for the position in question and consistent with business necessity."<sup>61</sup> If the contested practice takes the form of an examination, the employer must show not only that the examination tests for knowledge or skills necessary for successful job performance, but also that its use of cut-off or rank-order

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58. *Cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment) ("I believe that there is a 'moral [and] constitutional equivalence,' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.") (citation omitted). Justices Scalia and Thomas (and perhaps other Justices) thus ascribe to an anticlassification view on moral and instrumental grounds, regardless of their assessment of America's post-racial status.

59. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

60. 42 U.S.C. § 2000e-2(a)(1) (2006); *see also* *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

61. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

scores to screen candidates reliably sorts candidates based on ability.<sup>62</sup> Even if the employer succeeds with this showing, its decision to maintain the practice still violates Title VII if the plaintiff can prove the existence of a less discriminatory alternative.<sup>63</sup> Although the employer's state of mind—that is, its intent to discriminate based on race or another protected characteristic—is a key element of a disparate *treatment* claim,<sup>64</sup> such intent is not at all required in a disparate *impact* claim.<sup>65</sup>

At the end of 2003, the New Haven Fire Department administered promotional examinations to fill vacancies in the positions of Captain and Lieutenant.<sup>66</sup> The collective bargaining agreement between the city and the New Haven firefighters' union required that any promotional examination include both a written and oral component, weighted to comprise 60% and 40%, respectively, of the applicant's total score.<sup>67</sup> The city's merit system then required the New Haven Civil Service Board to certify the test results before the promotional process could proceed.<sup>68</sup> The City Charter's "Rule of Three" then mandated that only the three applicants with the highest exam scores would be eligible for promotion to each vacancy.<sup>69</sup>

The pass rate for the white candidates who took the Captain exam was 64%, compared to 37.5% for both the African American and Latino candidates.<sup>70</sup> The pass rate for whites taking the Lieutenant exam was 58.1%, compared to 31.6% for African American candidates and 20% for Latino candidates.<sup>71</sup> The "Rule of Three"—which required that successful candidates have one of the top three scores on the exam—meant that the top ten scorers on the Lieutenant exam would have been eligible for promotion to the

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62. See 29 C.F.R. § 1607.5(H) (2009) ("Where cut off scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force.").

63. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

64. *Teamsters*, 431 U.S. at 335 n.15 (stating that "[p]roof of discriminatory motive is critical" in disparate treatment cases).

65. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

66. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

67. *Id.*

68. *Id.* at 144.

69. *Id.* at 145.

70. See *id.*

71. See *id.*

eight Lieutenant vacancies, and that the top nine scorers on the Captain exam would have been eligible for promotion to the seven Captain vacancies.<sup>72</sup> As a result of this rank-order rule, no African Americans or Latinos would have been eligible for promotion to the position of Lieutenant.<sup>73</sup> No African Americans and only two Latinos would have been eligible for promotion to the position of Captain.<sup>74</sup>

Although all parties agreed that the tests at issue thus imposed a severe disparate impact upon African American and Latino firefighters,<sup>75</sup> considerable controversy remained over the tests' accuracy in identifying the best candidates for promotion and the availability of less discriminatory alternatives that might better measure leadership ability.<sup>76</sup> Citing concerns that the examinations were vulnerable to Title VII challenge in light of their disparate impact and uncertainty over their validity,<sup>77</sup> the city declined to certify the test results, and no firefighter was promoted.<sup>78</sup> The plaintiffs—a group of test-takers who received high scores on the examinations—argued that the public employer's refusal to use a test because of its impact against members of some racial and national origin<sup>79</sup> groups constituted an act of intentional discrimination against members of other groups for both equal protection and Title VII purposes.<sup>80</sup>

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72. *Id.*

73. *Id.*

74. *Id.*

75. *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2677-78 (2009).

76. *See id.* at 2667-71. Concerns about the examinations included the city's failure to consider any methods other than the testing regime outlined in the collective bargaining agreement, the failure to justify the 60/40 weighting ratio between the written and oral exams, questions about access to study materials, concerns about the failure to vet the tests with local reviewers familiar with New Haven firefighting practice, and the availability of alternatives like the risk assessment centers used by most other fire departments. *See infra* notes 99-103 and accompanying text.

77. *Ricci*, 554 F. Supp. 2d at 150.

78. *Id.*

79. Note that national origin is among the characteristics protected by statutory and constitutional antidiscrimination law and, indeed, the practice at issue in *Ricci* imposed substantial disparate impact on the basis of national origin as well as race. *See supra* notes 70-75 and accompanying text. In the interest of brevity, this Article sometimes uses "race" as shorthand for "race and national origin."

80. *See Ricci*, 129 S. Ct. at 2671.

The federal district court granted the city's summary judgment motion,<sup>81</sup> and the Second Circuit affirmed.<sup>82</sup> Addressing only the Title VII question, a 5-4 Supreme Court reversed, and instead granted summary judgment to the plaintiffs.<sup>83</sup>

The various opinions in the Supreme Court offer strikingly different narratives that provide a particularly powerful illustration of the Court's continuing divide over the extent to which the United States has successfully achieved post-racial status. Those Justices joining the majority, for example, delivered short, simple factual narratives that began and ended with the individual plaintiffs. As concurring Justice Alito wrote:

Petitioners are firefighters who seek only a fair chance to move up the ranks in their chosen profession. In order to qualify for promotion, they made personal sacrifices.

... Petitioners were denied promotions for which they qualified because of the race and ethnicity of the firefighters who achieved the highest scores on the City's exam.<sup>84</sup>

Justice Ginsburg's dissent told a considerably longer story that started much earlier in both national and local history. She viewed the history of race discrimination by local governments generally, and in New Haven in particular, as an essential part of the narrative: "Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow."<sup>85</sup> In contrast to Justice Kennedy's brief and acontextual recitation of the disparate impact standard in the majority opinion,<sup>86</sup> Justice Ginsburg then described in detail the development of disparate impact law in response to such long-standing racial hierarchies.<sup>87</sup> She concluded:

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81. *Ricci*, 554 F. Supp. 2d at 160.

82. *Ricci v. DeStefano*, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam).

83. *Ricci*, 129 S. Ct. at 2681. I served pro bono as counsel of record to amici in support of the City of New Haven in this case. See Brief of the National Partnership for Women & Families et al. as Amici Curiae in Support of Respondents, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428 and 08-328).

84. *Ricci*, 129 S. Ct. at 2689 (Alito, J., concurring).

85. *Id.* at 2690 (Ginsburg, J., dissenting); see also *id.* at 2690-91 (recounting legislative history describing municipalities' long history of racism that led Congress to expand Title VII to cover state and local government employers).

86. See *id.* at 2672-73 (majority opinion).

87. *Id.* at 2696-99 (Ginsburg, J., dissenting).



“It is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed.”<sup>88</sup>

The narratives differ strikingly not only in their starting points, but also in their causal complexity. The *Ricci* majority repeatedly characterized New Haven as “reject[ing] the test results solely because the higher scoring candidates were white.”<sup>89</sup> The dissent, in contrast, treated the city’s decision as motivated instead by concern about the exams’ ability to identify successful leaders—concern, to be sure, triggered by the tests’ racially disparate impact as Title VII requires:

Infecting the Court’s entire analysis is its insistence that the City rejected the test results “in sole reliance upon race-based statistics.” But as the part of the story the Court leaves out so plainly shows—the long history of rank discrimination against African Americans in the firefighting profession, the multiple flaws in New Haven’s test for promotions—“sole reliance” on statistics certainly is not descriptive of the ... decision.<sup>90</sup>

The opinions differ further in their assessments of the reasonableness of test-takers’ expectations, based in part on the Justices’ differing levels of confidence in traditional measures of merit. The majority focused on the time and effort invested by high-scoring test-takers: “Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.”<sup>91</sup> The dissent, however, maintained that

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88. *Id.* at 2691.

89. *Id.* at 2674 (majority opinion); *see also id.* at 2673 (“All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates.”); *id.* at 2676 (“Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.”). At one point, however, the majority opinion appeared to hedge its characterization of the city as acting “solely” because of racial disparities. *See id.* at 2681 (“[A]fter the tests were completed, the raw racial results became the predominant rationale for the City’s refusal to certify the results.”).

90. *Id.* at 2702 n.8 (Ginsburg, J., dissenting) (citations omitted).

91. *Id.* at 2676 (majority opinion).

[t]he legitimacy of an employee's expectation depends on the legitimacy of the selection method. If an employer reasonably concludes that an exam fails to identify the most qualified individuals and needlessly shuts out a segment of the applicant pool, Title VII surely does not compel the employer to hire or promote based on the test, however unreliable it may be. Indeed, the statute's prime objective is to prevent exclusionary practices from "operat[ing] to 'freeze' the status quo."<sup>92</sup>

The dissent further emphasized that—in contrast to New Haven's examination, which relied only on a paper-and-pencil test and an oral interview to evaluate leadership potential—most fire departments use assessment centers that evaluate candidates for supervisory positions by requiring them to respond to hypothetical emergency and personnel management scenarios through interviews, group discussions, and written and other exercises as more accurate measures of leadership ability.<sup>93</sup>

Not surprisingly, the strikingly different narratives led to very different conclusions, both as to the appropriate standard to be applied as well as to the proper application of that standard. The majority "conclude[d] that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."<sup>94</sup> The dissent, in contrast, would permit an employer to "jettison[]" a particular practice for choosing among candidates when its disproportionate racial impact becomes apparent, so long as it had "good cause" to believe that such an impact was unjustified—in other words, that it had evidence indicating the device's invalidity or the availability of less discriminatory alternatives.<sup>95</sup>

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92. *Id.* at 2702 (Ginsburg, J., dissenting) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

93. *Id.* at 2704-05 (describing 1996 study indicating that two-thirds of municipalities used assessment centers for promotional decisions and that those cities that still relied on written examinations weighted them much less heavily than did New Haven); *see also id.* at 2706 (quoting Chad Legel, the New Haven test developer, as testifying that because he had been instructed to rely exclusively on a written and oral exam, his exams "had not even attempted to assess 'command presence' ... '[Y]ou would probably be better off with an assessment center if you cared to measure that.'").

94. *Id.* at 2664 (majority opinion).

95. *Id.* at 2699 (Ginsburg, J., dissenting).

Nor did the Justices agree as to how the new strong-basis-in-evidence standard should apply to the facts at hand, primarily because of their entirely different assessments of evidence that the tests did not accurately predict job performance and that less discriminatory alternatives existed. The majority repeatedly dismissed such evidence as insufficient<sup>96</sup> and at one point as entirely nonexistent: “[T]here is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City.”<sup>97</sup> It thus awarded summary judgment to the plaintiffs.<sup>98</sup>

The dissent, on the other hand, would have granted summary judgment to the city even under the majority’s strong-basis-in-evidence rule. In concluding that the city had a strong basis to believe that its examination was invalid, the dissent emphasized the city’s failure to consider any methods other than “the testing regime outlined in its two-decades-old contract with the local firefighters’ union,”<sup>99</sup> the failure to justify the 60/40 weighting ratio between the written and oral exam,<sup>100</sup> questions about access to study materials,<sup>101</sup> concerns about the failure to vet the tests with local reviewers familiar with New Haven firefighting practice,<sup>102</sup> and the availability of alternatives like the risk assessment centers used by most other fire departments.<sup>103</sup>

In short, it’s hard to believe that the opinions describe the same case.<sup>104</sup>

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96. *See id.* at 2678 (majority opinion) (“There is no genuine dispute that the examinations were job-related and consistent with business necessity.”); *id.* at 2677 (“[T]he record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate.”); *id.* at 2679 (“Respondents also lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative.”).

97. *Id.* at 2681.

98. *Id.*

99. *Id.* at 2691-92 (Ginsburg, J., dissenting).

100. *Id.* at 2699 n.5 (“What was the ‘business necessity’ for the tests New Haven used? How could one justify, *e.g.*, the 60/40 written/oral ratio under that standard? Neither the Court nor the concurring opinions attempt to defend the ratio.”) (citation omitted).

101. *Id.* at 2706.

102. *Id.*

103. *Id.* at 2704-05.

104. Adding to the narrative possibilities, Justice Alito’s concurrence argued that a reasonable jury could conclude that New Haven was motivated not by an interest in avoiding liability for its practices’ disparate impact, but instead by an illegitimate desire to “placate

As others have observed, the Court's antidiscrimination decisions frequently feature such dramatically varying narratives.<sup>105</sup> Possible explanations for these differences include political affiliation<sup>106</sup> or the continuing battle between formalists' preference for bright-line rules and realists' affinity for flexible standards.<sup>107</sup> Other explanations include variations in outsiders' and insiders' perception of discrimination<sup>108</sup> or differences in attributing outcomes to structural as opposed to individual causes, such as reliance on situationism as

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a politically important racial constituency." *Id.* at 2684 (Alito, J., concurring). Justice Alito's narrative parallels Kim Forde-Mazrui's earlier explanation of some of the Court's antidiscrimination decisions:

The Court's normative vision that race is irrelevant, or at least should be treated as such by government, seems to underlie a further concern of the Court over the use of racial classifications, namely, 'racial politics'.... Although the Court [in *Croson*] does not explain what it means by simple racial politics, the concern seems to be over the enactment of race-based laws simply to appease a racial group instead of laws designed to promote a "genuine public interest."

Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2356 (2000) (referencing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

105. Paula Monopoli, for example, contrasted Justice Alito's "detached" description of the facts in the majority opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), a Title VII pay discrimination case, with dissenting Justice Ginsburg's "less distant," "powerful" recitation. Paula A. Monopoli, *In a Different Voice: Lessons from Ledbetter*, 34 J.C. & U.L. 555, 562-63 (2008). For a description of the varying narratives featured in the Court's labor and employment cases more generally, see Paul Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. (forthcoming 2010) (manuscript at 27, on file with the author).

106. See Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1006-12 (2007) (describing the political divisions between anticlassification and antisubordination theorists); see also CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 150 (2006) ("In many domains, Republican appointees vote very differently from Democratic appointees.").

107. See Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 238-39 (2009) (asserting that judges' differing factual narratives may indicate their preferences for rules as opposed to standards and are a "localized variant" of the battle between formalism and realism: "Notice what Holmes and Cardozo have done. Their pro-rule and pro-standards positions, respectively, have already been prefigured at the level of the evidentiary and operative facts.>").

108. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1093 (2008) ("Differences in perception have profound implications for how our judicial machinery, which consists predominantly of white male judges, resolves antidiscrimination claims. Judges are likely to impose their own contingent conceptions of discrimination, with little or no awareness of the perceptual limitations shaping their judgments."); see also Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 679-87 (2007) (similar agreement).

opposed to dispositionism in explaining human behavior<sup>109</sup> or one's adherence to "just world theory."<sup>110</sup> Dan Kahan, for example, has extensively explored how judges (and others) frequently "resolve disputed facts in a manner supportive of their group identities."<sup>111</sup>

Without discounting the possibility that any or all of these dynamics may be at work, the differing narratives may also be explained as reflecting a substantive disagreement: the Court's deeply divided views over the meaning of equality, which in turn may be informed by a divided empirical assessment of the United States' post-racial status. The next Part explores this possibility.

### III. THE COURT'S POTENTIAL TURN AND ITS IMPLICATIONS FOR ANTIDISCRIMINATION LAW

The *Ricci* majority made at least two deeply contested moves. First, it newly defined an employer's culpable mental state for Title VII purposes, concluding that an employer's attention to its practices' racially disparate impact is itself evidence of its racially discriminatory intent.<sup>112</sup> Although Title VII's separate disparate

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109. See Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 314 (2008) (contrasting "dispositionism"—which explains outcomes and behaviors in terms of individuals' personalities and preferences—and "situationism"—which often ascribes outcomes and behaviors to forces and influences external to the individual).

110. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 891 (2008) ("Certain widely held belief systems encourage the denial of individualized discrimination, particularly the belief in a just world, the ideology of individual responsibility, and the reluctance to blame others.").

111. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009); see also *id.* at 842-43 ("Social psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor."). For an application of Kahan's theories to the Court's labor and employment decisions, see Secunda, *supra* note 105, at 34.

112. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009) ("The question is not whether the conduct was discriminatory but whether the City had a lawful justification for its race-based action."); *id.* at 2673 ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race .... Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race.").

treatment and disparate impact prohibitions had long been considered complementary tools for addressing barriers to equal opportunity,<sup>113</sup> the *Ricci* majority interpreted them for the first time as potentially antagonistic.<sup>114</sup> Second, the Court then concluded that New Haven had no strong basis in evidence for doubting the tests' validity in predicting successful job performance.<sup>115</sup> Not only did it reverse the lower courts' award of summary judgment to the city, it granted summary judgment to the plaintiffs instead.<sup>116</sup>

### A. *A Post-Racial Turn?*

One's view of this decision may turn in great part on one's view of whether the United States has yet reached post-racial status. To those who consider the United States to have largely achieved post-racial success, the examinations' racial disparities trigger no

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113. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasizing that Title VII "prohibit[s] all practices in whatever form which create inequality in employment opportunity due to discrimination"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").

114. As Charles Sullivan frames the statutory question, "[D]oes an employer who rejects an employment practice that disparately impacts blacks (thus jumping out of the disparate impact pan) necessarily intentionally discriminate against whites (thus landing in the disparate treatment fire)?" Charles A. Sullivan, *Colloquy, Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 201, 203 (2009).

115. *Ricci*, 129 S. Ct. at 2673, 2676 (ruling that the city's decision not to certify the test results violated Title VII's disparate treatment prohibition due to that motivation because New Haven had no "strong basis in evidence" for believing that the test's adverse impact on African Americans and Latinos could not be justified as "job related for the position in question and consistent with business necessity" (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006))).

116. *Id.* at 2681. The majority then sought to immunize the city from liability to African American firefighters who might later challenge certification of the test results on disparate impact grounds:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

*Id.* Normally, of course, an employer defending a suit that challenges its practices' disparate impact must establish the statutory defense that the practice is "job related for the position in question and consistent with business necessity." See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

great suspicion.<sup>117</sup> Indeed, in a post-racial world, attending to such disparities is itself suspicious. To those who believe that race still plays a significant role in shaping the distribution of life opportunities in the United States, in contrast, such attention is both morally justified by antistatutory concerns and instrumentally wise in that it encourages the reconsideration of practices that may be poor screens for actual ability.

Indeed, although Justice Kennedy explicitly rejected post-racial assumptions in earlier opinions, such a rejection is difficult to square with his opinion in *Ricci*. As discussed above,<sup>118</sup> he stripped its factual narrative not only of any discussion of the history of race discrimination both local and national, but also of any explanation of the adoption of disparate impact theory by the Supreme Court and Congress in response to that history. Making no mention of the “backdrop of entrenched inequality”<sup>119</sup> to which disparate impact theory responds—nor of the possibility that race continues to play a role in the assessment of ability and thus the distribution of employment opportunities today—Justice Kennedy’s majority opinion held, for the first time, that an employer’s attention to disparate impact against some is in fact evidence of its disparate treatment of others.<sup>120</sup> The majority’s premise that Title VII’s disparate treatment and disparate impact provisions are potentially antagonistic thus departs dramatically from the assumptions of the *Griggs* Court and Congress that attention to employment practices’ racially

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117. See Derrick Darby, *Educational Inequality and the Science of Diversity in Grutter: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 769-74 (2009) (describing racial disparities’ failure to trigger suspicion of discrimination in a post-racial era).

118. See *supra* note 86 and accompanying text.

119. See *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting).

120. See, e.g., Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness*, 58 UCLA L. REV. (forthcoming 2010) (manuscript at 9, on file with the author) (“Prior to *Ricci* the Court had never held that an employer risks Title VII disparate treatment liability for failing to use an employment test that produces racially adverse impact.”); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350 (2010) (“[N]o prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment.”); *id.* at 1351 (describing how, prior to *Ricci*, disparate impact remedies had not been thought “to involve any illicit motives on the part of employers”); Michael J. Zimmer, *Ricci’s Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?* 13-14 (2009) (unpublished manuscript, on file with the author) (characterizing the Court as either newly defining the city’s consideration of its practices’ racially disparate impact as impermissible animus or as newly holding that animus is no longer required for Title VII disparate treatment purposes).

disparate impact remains entirely consistent with and complementary to Title VII's objective in ensuring equal employment opportunities for all.<sup>121</sup> That the majority now finds tension between the two unsettles the longstanding premise that attending to practices' racially disparate impact for antisubordination purposes is not the sort of attention to race that threatens equality values.

Indeed, one struggles to square Justice Kennedy's opinion in *Ricci* with that in *Parents Involved*. One could envision him as writing an opinion in *Ricci* that largely tracks that in *Parents Involved*: a discussion of the need to attend to race so long as race continues to play an important role in American life, followed by a conclusion that this particular consideration of race went too far. But in *Ricci* we instead see the latter without the former. Nowhere do we see any sign of his impassioned rejection in *Parents Involved* of post-racial claims that downplay the strength of ongoing antisubordination concerns in light of discrimination's continuing legacy.<sup>122</sup>

Furthermore, Justice Kennedy's majority opinion not only created a brand-new evidentiary rule, the strong-basis-in-evidence test, but it then applied that rule to hold for the plaintiffs on summary judgment—suggesting a comfort with traditional yet unexamined measures of merit that also may be shaped by one's assumptions about the United States' post-racial success, at least in the employment context.<sup>123</sup> All agreed that the promotional examinations at issue in *Ricci* imposed a significant disparate impact against African Americans and Latinos. Considerable uncertainty remained, however, over the tests' accuracy in identifying the best candidates for promotion and the possibility of less discriminatory alternatives that better predict successful performance in leadership positions.<sup>124</sup> In invalidating New Haven's response to such uncertainty, the Court simply denied its existence.<sup>125</sup>

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121. See *supra* note 113 and accompanying text.

122. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and dissenting in part).

123. Professors Harris and West-Faulcon describe *Ricci* as “race-ing efforts to install fair selection measures—that is, treating the use of job-related assessment tools that correct racial imbalance and better measure merit as racially disparate treatment of whites.” Harris & West-Faulcon, *supra* note 120, at 8.

124. See *supra* notes 75-76 and accompanying text.

125. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) (“[T]here is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-



Along these same lines, the majority simply deferred to the terms of the collective bargaining agreement between New Haven and its firefighters' union, even though a public employer's practice is never immunized from statutory or constitutional challenge just because a collective bargaining agreement requires it.<sup>126</sup> In response to testimony that the contract's unexamined requirements that the city administer written and oral tests and weight them on a 60/40 basis undermined the examinations' validity,<sup>127</sup> the majority remarked, "[B]ecause [the 60/40 weighting of the written and oral tests] was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason."<sup>128</sup> Yet the Court's antidiscrimination jurisprudence is replete with cases in which it carefully scrutinized—and not infrequently invalidated—employers' collective bargaining agreements for statutory and, in the case of public employers, constitutional violations.<sup>129</sup> The *Ricci* majority itself relied on such a

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related or because other, equally valid and less discriminatory tests were available to the City."). Even supporters of the Court's new rule have concluded that the majority applied it inaccurately in this case. *See* Marcus, *supra* note 23, at 75-77 (expressing support for the strong-basis-in-evidence rule, but concluding that the Court should have remanded the case under its new evidentiary standard because "Justice Kennedy is flatly wrong" in minimizing New Haven's evidence of invalidity). Professor Marcus offers a strategic hypothesis for the Court's summary judgment move. If the Court had remanded the case for application of the new evidentiary standard to the facts, he predicts that the lower courts would likely have found that New Haven in fact had the requisite strong basis in evidence for believing that the test was invalid. *Id.* at 77. If that were the case, the only way for the Court to rule in favor of the *Ricci* plaintiffs would be to declare Title VII's disparate impact provision unconstitutional—a move that Professor Marcus suggests is inevitable but that perhaps Justice Kennedy was not yet ready to make. *Id.* at 77, 83.

126. *See Ricci*, 129 S. Ct. at 2703 n.11 (Ginsburg, J., dissenting) ("It is not at all unusual for agreements negotiated between employers and unions to run afoul of Title VII." (citing *Peters v. Missouri-Pacific R.R. Co.*, 483 F.2d 490, 497 (5th Cir. 1973))).

127. *See supra* notes 93, 100 and accompanying text (discussing testimony that the use of written examinations rather than assessment centers and the 60/40 weighting—as required by the collective bargaining agreement—raised concerns about the examinations' ability to predict successful job performance).

128. *See Ricci*, 129 S. Ct. at 2679.

129. *See, e.g.*, 14 Penn Plaza, L.L.C. v. Pyett, 129 S. Ct. 1456, 1463-74 (2009) (evaluating a collective bargaining agreement's arbitration provision for compliance with the Age Discrimination in Employment Act); *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 79-80, 94 (1981) (concluding that collectively bargained wage differentials violated Title VII and the Equal Pay Act); *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979) (evaluating a collective bargaining agreement's affirmative action plan for compliance with Title VII); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 328 (1977) (evaluating a

case, borrowing its “strong-basis-in-evidence” rule<sup>130</sup> from *Wygant v. Jackson*, in which the Court struck down a public school district’s collective bargaining agreement that required the consideration of race when making layoff decisions.<sup>131</sup>

That the *Ricci* majority worked so hard to reach its result suggests that the racial trigger for the tests’ reconsideration doomed that action in its eyes, regardless of the legitimacy of the city’s concerns about the tests’ validity. Again, one’s view on post-racial status may drive what one identifies as dangerous in this context: paying attention to race or not paying attention to race.<sup>132</sup> Reflecting what appear to be very different views as to the United States’ post-racial success, the Court’s majority and dissent identified entirely different subjects—or targets—of New Haven’s action, which in turn shaped their very different assessments of the city’s motive. The majority described New Haven as having decided not to promote *the plaintiffs* because of their race,<sup>133</sup> while the dissent viewed the city as having decided not to use *the tests* because of concerns about their accuracy and fairness.<sup>134</sup>

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collective bargaining agreement’s seniority provisions for compliance with Title VII).

130. See *Ricci*, 129 S. Ct. at 2674-75 (discussing *Wygant*).

131. 476 U.S. 267, 269-70, 284 (1986).

132. Tommy Crocker described this in another context as “the way in which the Court employs relative states of vision”—that is, what it looks closely at and what it thus sees, and to what it remains blind. Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 40 (2007).

133. See *Ricci*, 129 S. Ct. at 2674 (“The City rejected the test results solely because the higher scoring candidates were white.”). As Charles Sullivan points out, the Court’s decision potentially departs from its approach in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), which held that purposeful discrimination for equal protection purposes requires that the decision maker acted “because of”—and not merely “in spite of”—the act’s adverse consequences for protected class members. See Sullivan, *supra* note 114, at 206-07. Professor Sullivan suggests that we might understand New Haven as declining to certify the test results “because of” the tests’ flaws and only “in spite of” the adverse consequences for some white test-takers if the test results were not certified, just as Massachusetts was found to be acting “because of” an employment preference’s advantages for veterans and only “in spite of” its enormous disparate impact against women. See *id.* at 206-08.

134. See *Ricci*, 129 S. Ct. at 2710 (Ginsburg, J., dissenting) (“It is indeed regrettable that the City’s noncertification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers.”).

*B. What's at Stake*

Prior to *Ricci*, a majority had never considered government's antistatutory ends to be troubling in and of themselves, instead identifying certain race-based means to those ends as sufficiently suspicious to trigger strict scrutiny. The Court now, however, appears to treat a decision maker's attention to the disparities experienced by members of traditionally subordinated racial groups—that is, its antistatutory ends—as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification. *Ricci* may thus reflect a dramatic shift to a new, zero-sum understanding of equality.

Indeed, Justice Scalia concurred separately in *Ricci* to emphasize the possibility that the Court had indeed signaled such a new understanding of equality that logically extends to constitutional, as well as statutory, antidiscrimination law:

[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State or municipal—discriminate on the basis of race. As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.

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... [T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.<sup>135</sup>

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135. *Id.* at 2682-83 (Scalia, J., concurring) (citations omitted). As Justice Scalia's reference to "private, State, or municipal" employers makes clear, this is not just a question of whether Congress has the constitutional authority under section 5 of the Fourteenth Amendment to apply disparate impact standards to state or local government employers. Instead, the question is whether government's requirement that any entity, public or private, attend to the racial disparities of its action under a disparate impact standard is a governmental requirement of race-based discrimination in violation of the Equal Protection Clause.

Such a war would dramatically reshape the equal protection landscape in several ways. Because the standards for determining intentional discrimination are the same for both Title VII and equal protection purposes,<sup>136</sup> such a war could mean, for example, the constitutional end of Title VII's disparate impact provision as well as other statutory prohibitions of unjustified disparate impact.<sup>137</sup> As Justice Scalia further observed:

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles.<sup>138</sup>

*Ricci* thus imperils a decision maker's choice among facially neutral practices, such as various selection devices used to screen applicants for hiring or promotion, when its choice is motivated by an interest in avoiding or ameliorating disparate impact—unless the decision maker can establish the requisite strong basis in

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136. See, e.g., *Williams v. Seniff*, 342 F.3d 774, 788 n.13 (7th Cir. 2003); *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 192 (1st Cir. 2003); *Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001); see also *Primus*, *supra* note 120, at 1354 (“[T]he *Ricci* premise is properly understood as a constitutional proposition as well as a statutory one. The reason is that constitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII’s prohibition on disparate treatment.”).

137. For example, courts have interpreted the Fair Housing Act, 42 U.S.C. § 3601 et seq., to prohibit housing practices that impose unjustified racially disparate impacts. See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000) (recognizing a disparate impact cause of action under Fair Housing Act); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988) (same); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984) (same). As another example, federal agency regulations enforcing Title VI’s statutory prohibition on race discrimination by federally funded activities include a prohibition on activities that impose unjustified racially disparate impacts. See, e.g., 28 C.F.R. § 42.104(b)(2) (2009) (Department of Justice regulation interpreting Title VI of the Civil Rights Act); 49 C.F.R. § 21.5(b)(2) (2009) (Department of Transportation regulation interpreting Title VI).

138. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

evidence for concern about a rejected practice's validity.<sup>139</sup> Indeed, *Ricci* now gives employers pause before choosing practices that lessen disparate impact either on their own initiative or in settlement of Title VII disparate impact claims, as some wonder if they need, and have, a strong basis in evidence before doing so.<sup>140</sup> If extended to the constitutional context, this view of equality would characterize governmental attention to racial disparities when designing its programs as sufficiently suspicious to trigger strict scrutiny, and would treat government attention to gender disparities as sufficiently suspicious to trigger intermediate scrutiny.<sup>141</sup>

As a number of scholars earlier observed, the rationale underlying the Court's affirmative action decisions—in which a majority took the anticlassification view that government's actions are sufficiently suspicious to trigger strict scrutiny whenever it engages in differential race-based treatment, regardless of its antisubordination motive<sup>142</sup>—also invited the argument that an institution acts similarly suspiciously when it intentionally selects practices to avoid or ameliorate racial disparities. For example, in 2003 Richard Primus noted the tension between the Court's move towards an

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139. See *id.* at 2676 (majority opinion) (describing the strong-basis-in-evidence standard as “appropriately constrain[ing] employers’ discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.”).

140. See Melissa Hart, *Procedural Extremism: The Supreme Court’s 2008-09 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL’Y J. 253, 264 (2009) (*Ricci* “make[s] voluntary diversity efforts less appealing to employers by casting a shadow of potential litigation over these efforts. Will an employer going through a reduction in force (RIF), for example, be sued by white employees if it seeks to ensure that the RIF is not unduly impacting minority employees?”). Richard Primus thus predicts that “disparate impact doctrine is in greatest danger of being held unconstitutional in cases where employers voluntarily seek to comply with Title VII.” Primus, *supra* note 120, at 1346; see also *id.* at 1385 (“[I]f employers try to fix disparate impact problems themselves, they risk creating facts on which disparate impact doctrine might seem intolerable. After *Ricci*, the best chance for disparate impact doctrine to survive is for employers to ignore it until they find themselves in court.”).

141. Under strict scrutiny, government’s race-based actions will fail equal protection analysis unless necessary to further a compelling government interest. *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). Government’s gender-based actions violate equal protection unless substantially related to an important interest. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996). For a discussion of how disparate impact provisions might survive strict scrutiny, see Primus, *supra* note 120, at 1382-85.

142. *Adarand*, 515 U.S. at 235 (holding that strict scrutiny applies to all race-based action by the federal government); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (applying strict scrutiny to all race-based action by state and local governments).

anticlassification understanding of equal protection and statutory disparate impact standards.<sup>143</sup> More specifically, Professor Primus described Title VII's disparate impact provision as motivated by the government's interest in increasing the hiring and promotion of women and people of color.<sup>144</sup> He then characterized such motives as potentially repugnant to an individualist, or anticlassification, view of equal protection because they ultimately seek to change the racial make-up of society's winners and losers.<sup>145</sup>

Writing before *Ricci*, Professor Primus assessed as "entirely remote" the chance that the statutory disparate impact standards so long embraced by the Court and Congress would be struck down on equal protection grounds.<sup>146</sup> As Justice Scalia anticipates in his concurrence, however, *Ricci* now makes that outcome significantly more likely.<sup>147</sup>

143. Primus, *supra* note 34, at 494.

144. *Id.* at 527 ("[U]nless one is prepared to purge Title VII of its responsiveness to history and structural hierarchy, it is hard to characterize disparate impact doctrine as free of racially allocative motives.").

145. *Id.* at 494 ("[A] statute restricting racially disparate impacts is a race-conscious mechanism designed to reallocate opportunities from some racial groups to others. Accordingly, the same individualist view of equal protection that has constrained the operation of affirmative action might also raise questions about disparate impact laws.").

146. *Id.* at 501; *see also id.* at 495 (characterizing the issue as "analytic and conceptual rather than predictive: it seems unlikely that disparate impact law will actually be held unconstitutional"); *id.* at 585 ("The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection suggests that only a very uncompromising Court would issue such a decision.").

147. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring). Professor Primus more recently observed that the possibility that the Court might strike down disparate impact provisions on equal protection grounds "was once academic speculation [but] is now judicially actionable." Primus, *supra* note 120, at 1343. *But see* Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 423 (2009) ("It is staggering to consider the implications of the Court holding that disparate-impact liability is not allowed under civil rights statutes. But at this stage, it is hard to imagine that there would be five votes for such a radical change in the law.").

To be sure, Justice Scalia anticipated the possibility that Title VII's disparate impact standard might still survive constitutional challenge if understood as simply a tool for uncovering covert race-based classifications. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (discussing efforts to characterize disparate impact as "simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment"). He was considerably less sanguine, however, about disparate impact's continuing viability given its unabashedly antisubordination objectives. *See id.* (noting that "arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely

Moreover, if *Ricci* augurs the beginning of the constitutional end of statutory disparate impact provisions, an even broader range of governmental action is at risk, as the zero-sum view that attention to racial disparities against some is evidence of intentional discrimination against others potentially imperils a wide variety of government efforts to ameliorate continuing racial and gender hierarchies. Examples include public schools' efforts to increase the admission of students of color through the use of facially race-neutral criteria like economic disadvantage or high school class rank, such as Texas's "Ten Percent Plan."<sup>148</sup> Others include government's reconsideration of sentencing provisions for crack and cocaine violations when such reconsideration is triggered by their racially disparate impact,<sup>149</sup> or its choice to fund certain health initiatives to address racial or gender disparities in access to or quality of health care.<sup>150</sup> In short, if extended to equal protection law, a zero-sum understanding of equality would treat with suspicion a wide range of government responses to its self-analysis of the racial or gender impact of its actions.<sup>151</sup>

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reasonable"). The Supreme Court's recent disparate-impact decision in *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010), sheds no light on this matter. In that case, a unanimous Court interpreted Title VII's limitations provision to permit a plaintiff to file a charge within 300 days of an employer's use of a test that imposes disparate impact to make promotion decisions, rather than within 300 days of the employer's announcement that it planned to make promotion decisions based on the test. *Id.* That case offered the Court no opportunity to consider the merits, much less the constitutionality, of a disparate impact claim.

148. See TEX. EDUC. CODE ANN. § 51.803(a) (Vernon 2009) (codifying Texas's "Ten Percent Plan," which guarantees state university admission to the top ten percent of each Texas high school graduating class). For examples from other states, see THE REGENTS OF THE UNIV. OF CAL., POLICY ON UNDERGRADUATE ADMISSIONS (1988), available at <http://www.universityofcalifornia.edu/regents/policies/2102.html>; Fla. Exec. Order No. 99-281 (Nov. 9, 1999), available at [http://dms.myflorida.com/media/general\\_counsel\\_files/one\\_florida\\_executive\\_order\\_pdf](http://dms.myflorida.com/media/general_counsel_files/one_florida_executive_order_pdf). To be sure, some welcome the demise of such programs. See, e.g., Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001) ("[T]here is something wrong, indeed, unconstitutional, with a legislative motive to increase the percentage of one racial group in a state university at the expense of another."); Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1306, 1308-09 (1997) (asserting that such programs may harm both beneficiaries and nonbeneficiaries).

149. Brief of the American Civil Liberties Union et al. as Amici Curiae in Support of Respondents at 28-29, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428 and 08-328).

150. See *id.* at 27.

151. See Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci and PICS*, 16 MICH. J. GENDER & L. 397, 408-09 (2010) (discussing *Ricci*'s implications

This is not an entirely new concern, although *Ricci* adds to its salience. In the immediate aftermath of the Court's decision in *Adarand*, for example, Kim Forde-Mazrui identified the constitutional vulnerability of facially neutral actions consciously designed to address racial disparities in education and elsewhere, recognizing the growing threat posed to such programs by the Court's increasingly anticlassification bent: "If race must never occupy the thoughts of governmental decisionmakers, then the government cannot respond to racial problems in any fashion, not just without reliance on racial preferences."<sup>152</sup>

To be sure, such a prediction of the constitutional fate of such programs is by no means inevitable. Professor Primus, for example, earlier suggested that even anticlassification advocates might distinguish facially neutral means motivated by antisubordination ends from express race-based classifications—and thus refrain from applying strict scrutiny to the former—on the grounds that such actions' racial motive is not predominant.<sup>153</sup> Andrew Carlon similarly urged that the Court's equal protection jurisprudence be understood to save such programs from strict scrutiny because they do not have immediate effects on persons classified by race.<sup>154</sup> Moreover, even if the Court treats any such government action with suspicion, such measures may still survive strict scrutiny, as Kim Forde-Mazrui and Jennifer Hendricks have argued.<sup>155</sup> What *Ricci*'s redefinition of culpable mental state for antidiscrimination

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for government's efforts to address long-standing racial and gender hierarchies); Marcus, *supra* note 23, at 71 ("After *Ricci*, one can draw a parallel lesson from Kennedy's *Parents Involved* concurrence: Facially neutral educational decisions will trigger strict scrutiny when they are motivated by a predominantly race-conscious intent. That link between the two opinions has broad implications.").

152. Forde-Mazrui, *supra* note 104, at 2348 ("Taken to its logical end, the Equal Protection Clause requires government to ignore the stark racial disparities that persist in our society. The government cannot, in response ... seek to address the conditions that undermine their education, such as poor quality schools, poverty, or family breakdown, even if disadvantaged children of all races, including white, are benefited."); *see also id.* at 2332; Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts To Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 282-83 (2009) (describing constitutional vulnerability of race-neutral efforts intended to increase racial diversity).

153. *See* Primus, *supra* note 34, at 549.

154. Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1153-60.

155. *See* Forde-Mazrui, *supra* note 104, at 2336-37 (marshaling arguments that such measures are narrowly tailored to achieve compelling government interests); Hendricks, *supra* note 151, at 414 (same).



purposes destabilizes, however, is the long-standing assumption that the Court does not view government's attention to race to achieve antistatutory ends as itself suspicious.

#### IV. EXPLORING OTHER PATHS

Part III examined the possibility that the Court has now signaled a post-racial turn towards a new, zero-sum understanding of equality that logically extends to constitutional, as well as statutory, antidiscrimination law. To be sure, however, this is not the only way to understand the Court's move.<sup>156</sup> This Part considers alternative directions in which the Court might turn.

##### *A. Maybe the Court Hasn't Turned Very Hard*

Prior to *Ricci*, a Court majority had never considered government's antistatutory ends to be troubling in and of themselves, instead identifying certain race-based means to those ends as sufficiently suspicious to trigger strict scrutiny. Although Part III.B considered the possibility that the majority now considers all attention to race—regardless of its antistatutory ends—as suspicious, this Part examines the possibility that the majority simply viewed the city as engaging in the sort of race-based

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156. For other explorations of *Ricci*'s possible implications for equality law generally, see Harris & West-Faulcon, *supra* note 120, at 10 (describing *Ricci* as a move towards "whitening discrimination—that is reframing antidiscrimination law's presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim"); Marcus, *supra* note 23, at 55 (arguing that *Ricci* correctly suggests "that equal protection is consistent with disparate impact only when the latter provision is narrowly construed"); Primus, *supra* note 120, at 1346, 1382-85 (exploring alternative understandings of *Ricci* and its implications, and concluding that the Supreme Court's ultimate choice among the available alternatives "may be substantially driven by the way the next case to reach the Court frames the question"). For discussions of *Ricci*'s implications for Title VII more specifically, see Joseph Seiner & Benjamin Gutman, *The New Disparate Impact*, 90 B.U. L. REV. (forthcoming 2010) (manuscript at 4, on file with author) (arguing that *Ricci* creates a new affirmative defense for employers facing disparate impact claims); Kerri Lynn Stone, *Ricci Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 752, 752 (2010) (describing the *Ricci* Court as endorsing a new "transferred intent" claim under Title VII); Sullivan, *supra* note 114, at 211 (predicting that *Ricci*'s implications will be limited to relatively narrow fact patterns); Zimmer, *supra* note 120, at 5 (describing the Court as newly expanding the definition of disparate treatment for Title VII purposes in ways that might be "used to advance the general antidiscrimination agenda").

means—that is, differential treatment based on race—that it had long considered suspicious.

In other words, the Court may view actions motivated by antisu bordination ends with suspicion only when those actions make identifiable third parties worse off in tangible ways, because at that point, and not until that point, it sees the costs of attending to race for antisu bordination ends as outweighing its benefits.<sup>157</sup> Charles Sullivan, for example, explains the majority's move in *Ricci* as reflecting its concern for an employer's very late-stage changes that frustrated identifiable plaintiffs' significant reliance interests. He thus suggests that *Ricci* might prove a fact-specific anomaly, with little significance for antidiscrimination law outside of "the end-stages of any selection process."<sup>158</sup> Along similar lines, Richard Primus characterizes this as the "visible-victims reading" of *Ricci*, in which the decision turns on "the fact that the decision disadvantaged determinate and visible innocent third parties."<sup>159</sup> Under this view, antidiscrimination law "may well distinguish between those [race-conscious actions] that have visible victims and those whose costs are more diffuse."<sup>160</sup>

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157. Indeed, the *Ricci* majority emphasized what it saw as tangible costs incurred by the test-takers. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) ("The injury arises in part from the high, and justified, expectations of the candidates .... Many of [whom] had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe."); see also *id.* at 2676 ("Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.").

158. Sullivan, *supra* note 114, at 208; see also *id.* ("The majority in *Ricci* repeatedly referred to the white firefighters' expectations of, and reliance on, the use of the test as a promotion method, neither of which would exist if the employer's disparate impact calculations occurred early in the process.").

159. Primus, *supra* note 120, at 1345.

160. *Id.* In addition to identifying as possibilities that *Ricci* might be broadly understood as the end of disparate impact doctrine or instead more narrowly as treating with suspicion only those race-conscious actions that harm "visible victims," Professor Primus posits a third "institutional" reading, in which "courts may order race-conscious remedies for disparate impact problems, but *public employers* may not." *Id.* at 1364. Under this view, changing racial and political dynamics in many American cities mean that "under current conditions, a municipal employer like New Haven might have incentives to engage in race-conscious decisionmaking beyond that which a court would order to remedy authentic disparate impact violations." *Id.* at 1369; see also *id.* ("Within that framework, it makes sense for equal protection to be less tolerant of a public employer's race-conscious actions taken to comply with Title VII than of a court's race-conscious actions taken to enforce the same statute.").

Under this reading, employers may still attend to potential racial disparities when choosing among various available employment practices *before* the reliance interests of identifiable victims cohere. For example, under this approach New Haven could choose to rely on assessment centers rather than written tests without violating antidiscrimination law even though motivated by an interest in ameliorating racially disparate impact—so long as it did so *before* it fueled candidates' expectations of a written test. Employers would remain free under this view to avoid a number of New Haven's mistakes at the design stage, which include the city's failure to consider the possibility of risk assessment centers instead of other selection devices, its unexamined adherence to the 60/40 weighting of the written and oral examinations, and its failure to find some opportunity for the exams' review by those familiar with firefighting practices specific to New Haven.<sup>161</sup>

Indeed, Justice Kennedy's opinion indicates the possibility of a limiting principle along these lines:

Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race....

Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individu-

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Although this reading may or may not accurately describe the majority's underlying concerns, its empirical premise has yet to be proven. *See Ricci*, 129 S. Ct. at 2690 n.1 (Ginsburg, J., dissenting) ("Never mind the flawed tests New Haven used and the better selection methods used elsewhere, Justice Alito's concurring opinion urges. Overriding all else, racial politics, fired up by a strident African American pastor, were at work in New Haven. Even a detached and disinterested observer, however, would have every reason to ask: Why did such racially skewed results occur in New Haven, when better tests likely would have produced less disproportionate results?") (citation omitted). As discussed *infra* notes 233-39 and accompanying text, I also resist this reading as a normative matter because Title VII's disparate impact provision has been so key in forcing reexamination of and improvements to public sector employment practices.

161. *See Ricci*, 129 S. Ct. at 2710 (Ginsburg, J., dissenting) ("This case presents an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place.").

als regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.<sup>162</sup>

If *Ricci* in fact “applies only to actions taken at the back-end of a selection process when employer or applicant expectations have crystallized and reliance on the process has begun,”<sup>163</sup> then how such a rule would work in practice remains unclear.<sup>164</sup> For example, would it freeze an employer’s choices “once that process has been established and employers have made clear their selection criteria,”<sup>165</sup> even though the disparate impact of such choices may not become apparent until the practices have passed the design stage into implementation? How would an institution acquire a “strong basis in evidence” for determining whether its possible options would generate an unjustified disparate impact at those early pre-implementation stages?<sup>166</sup>

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162. *Id.* at 2677 (majority opinion). Note, however, that Justice Kennedy speaks only to the opportunity for all “to apply,” “to participate,” and to respond to an employer’s invitation for comments on test design. That is not the same as considering or measuring racial disparities and acting in response to them, as Justice Scalia recognized in his concurrence. *See id.* at 2682 (Scalia, J., concurring) (“Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain.”).

163. *See Sullivan, supra* note 114, at 211.

164. The majority’s articulation of its new rule invites considerable uncertainty about how broadly or narrowly it should be understood, depending on how broadly or narrowly one frames the city’s action: “We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong-basis-in-evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” *Ricci*, 129 S. Ct. at 2664; *see also id.* at 2676 (describing the strong-basis-in-evidence standard as “appropriately constrain[ing] employers’ discretion in making race-based decisions: it limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.”).

165. *Id.* at 2677.

166. *See John Hasnas, Equal Opportunity, Affirmative Action, and the Antidiscrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 507 (2002) (“[I]t is impossible to know in advance whether one’s actions will in fact perpetuate or add to the societal subordination of any minority group.”). To be sure, though, some practices’ disparate impact and suspect validity may be immediately apparent—such as height and weight requirements that create an obvious disparate impact against women or residency requirements in areas that have few minority residents.

Consider, for example, a range of decisions to abandon a selection device at different stages in the process once its disparate impact has become apparent: for example, the decision to extend an application deadline in light of concerns that the applicant pool generated only by word-of-mouth recruiting had a racially disparate impact, or the decision to interview additional candidates in light of concerns about racial disparities in a finalist pool generated after subjective interviews. At what point in the process, if any, can the employer modify its process due to concerns about racial disparities? At what point have the applicants who complied with the original rules established sufficiently strong reliance interests such that a decision to change the rules imposes unacceptably great costs to them, and thus violates antidiscrimination law?<sup>167</sup> If the Court's turn is in fact limited to the rare situation involving an employer's very late-stage changes in its practices that frustrate the already-established reliance interests of—and thus pose unacceptably great burdens to—nonbeneficiaries, then the next step is to develop further guidance on an employer's ability to measure and respond to racial disparities in these various contexts.

*B. Maybe the Court Hasn't Yet Decided Whether (And in What Direction) It's Turning*

The yet-unanswered questions posed above suggest another alternative: that the Court has yet to determine the direction of any change in its understanding of equality. Prior to *Ricci*, a majority had never considered government's antistatutory ends to be troubling in and of themselves. Instead, the Court identified certain race-based means to those ends as sufficiently suspicious to demand justification.<sup>168</sup> *Ricci* forced the Court to confront the question of when attention to race for antistatutory ends is suspicious, and when it is not, in the context of means that are difficult to characterize with confidence as facially race-based or race-neutral. On one hand, New Haven did not apply different rules to different employ-

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167. In light of these practical challenges, Professor Sullivan suggests that *Ricci* must simply be inapplicable to such early stage decisions, especially outside of the testing context. See Sullivan, *supra* note 114, at 211.

168. See *supra* notes 56-58 and accompanying text.

ees based on race.<sup>169</sup> On the other hand, New Haven did consider racially disparate impact in choosing which rule to apply—with racially predictable effects.<sup>170</sup>

New Haven's action thus poses a challenge for those seeking to locate it on the Court's long-standing equal protection map of government's permissible and impermissible means for attending to race.<sup>171</sup> This map reveals that the Court's comfort with—or suspicion of—race-conscious actions sometimes turns on the government's underlying ends and sometimes on the degree to which the individual effects of its racially motivated means can be characterized as concrete or diffuse. The complexity of the *Ricci* facts, in short, makes it difficult to determine whether the majority viewed the fundamental threat to equality as the city's chosen ends, its means, or some combination of the two. A key unanswered question thus turns on whether the Court is rethinking the universe of race-conscious motivations or race-conscious means, or both, that it considers suspicious for antidiscrimination law purposes.

In one corner of the map, first consider those actions in which “the government distributes burdens or benefits on the basis of individual racial classifications”<sup>172</sup>—that is, when it treats individuals differently because of race.<sup>173</sup> Andrew Carlon helpfully describes these actions as “classifications with effects”—that is, “individual racial classifications with immediate effect on the persons classified.”<sup>174</sup> The Court treats such means as sufficiently suspicious to

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169. See *supra* note 78 and accompanying text.

170. See *supra* note 77 and accompanying text.

171. For a related taxonomy of “racially-attentive” actions, see Harris & West-Faulcon, *supra* note 120, at 22-23 (describing how policymakers’ “racial attentiveness” may accompany “race-positive,” “race-neutral,” or “race-negative” results).

172. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 719, 720 (2007) (plurality opinion). Andrew Carlon also describes this as “racial adjudication”—that is, the product of “a particularized proceeding that seeks to identify, as one of its determinative elements, the race of the person whose rights or liabilities are being adjudicated” and that has “immediate effect on the persons classified.” Carlon, *supra* note 154, at 1159, 1199. As Richard Primus explains, this also describes “disparate treatment” for Title VII purposes—that is, when “employers apply[] different rules to employees of different races.” Primus, *supra* note 120, at 1350.

173. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (“[The Equal Protection Clause] simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”).

174. Carlon, *supra* note 154, at 1199. Professor Carlon describes the commonly used equal protection vocabulary of “classifications” as “unfortunate ... because it is not really

trigger strict scrutiny, regardless of the government's benign or malign ends.<sup>175</sup> As described above,<sup>176</sup> however, a majority long distinguished between those motives when determining whether they are sufficiently compelling to overcome such suspicion for purposes of equal protection analysis.<sup>177</sup>

Second, government's facially neutral means that are motivated by its intent to perpetuate racial hierarchy—that is, government's subterfuge in concealing what are really efforts to engage in race-based classifications—violate equal protection.<sup>178</sup> Examples include school districts' facially neutral closure of public schools to students of all races in an effort to prevent desegregation.<sup>179</sup>

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'classification' generally that is under review, but a sort of classification *with effect*." *Id.* at 1157 (emphasis added). As he points out, courts have not considered "classifications *without* ... effect," such as tracking racial demographics for census purposes, as suspicious. *Id.* at 1158-59 (emphasis added).

175. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)). Whether such actions survive such scrutiny often depends on how much or how rigidly race is considered at the decision-making stage. Compare *Gratz v. Bollinger*, 539 U.S. 244, 271-72, 275-76 (2003) (invalidating public university's automatic and predetermined race-based "bonus" in admissions decisions), with *Grutter v. Bollinger*, 539 U.S. 306, 334-35, 343-44 (2003) (upholding public law school's more flexible consideration of race as a plus-factor in admissions decisions).

176. See *supra* notes 56-57 and accompanying text.

177. Many of these cases thus focus on contested characterizations of the government's motive—that is, whether it actually sought to remedy continuing discrimination or instead to achieve some other, presumably less compelling, objective. See, e.g., *Wygant v. Jackson*, 476 U.S. 267, 274-76 (1986) (plurality opinion) (discussing competing characterizations of the motive actually underlying government's race-based classification as either seeking to achieve an antisubordination interest in remedying past discrimination or instead an interest in ensuring a racially diverse pool of role models for students).

178. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Ass'n*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976). Richard Primus notes that Title VII's disparate treatment prohibition has been similarly understood to

cover[] cases of illicit employer *motive*, whether or not those motives lead to disparities in the treatment of individuals of different races.

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We simply understand that "disparate treatment" in Title VII is a term that covers both formal differences in the treatment of people of different groups and unlawful employer motives.

Primus, *supra* note 120, at 1350, 1351 n.56 (emphasis added).

179. See *Green v. County Sch. Bd.*, 391 U.S. 430, 439-40 (1968); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233-34 (1964). The Court's decision in *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971)—in which it rejected an equal protection challenge to a city's facially neutral closure of all city swimming pools rather than desegregate them—seems hard to square with this rule. Apparently recognizing that tension, the Court in later cases characterized the city's action in *Palmer* not only as facially neutral but also as motivated by a sincere interest "to

A third category involves the flip side of the second: government's facially neutral actions that are motivated by its intent to undermine racial hierarchy.<sup>180</sup> Examples include statutory disparate impact provisions, admissions programs like the Texas "Ten Percent Plan" that seek to increase racial diversity by basing admissions on class rank in all schools, and school siting decisions that draw neighborhood attendance zones with an eye to racial demographics. Here, government considers the racial impact of various rules or standards when choosing among available options—but those standards, once selected, then apply to all regardless of race. The Court has not considered these as covert efforts to engage in race-based classifications, and thus has not treated them with suspicion, at least not prior to *Ricci*.<sup>181</sup>

More difficult to map is a fourth set of race-conscious governmental actions motivated by antistatutory ends that may or may not be characterized as the sort of race-based means—that is, differential treatment based on race—that clearly trigger the Court's suspicion, and thus strict scrutiny. Examples include the decision to target limited resources towards the recruitment of students or workers of color to generate a more racially diverse

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preserve peace and avoid deficits" rather than by a desire to perpetuate racial hierarchy. *See Davis*, 426 U.S. at 243. Along these lines, the Court later significantly narrowed the meaning of "intent" for equal protection purposes to require that the decision maker acted "because of"—and not merely "in spite of"—the act's adverse consequences for protected class members. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (rejecting equal protection challenge to state veterans' preference program on grounds that state legislature enacted the program "in spite of" and not "because of" its effect in excluding women from most state jobs); *see also McCleskey v. Kemp*, 481 U.S. 279, 287, 291-92 (1987) (rejecting equal protection challenge to state's administration of death penalty in which defendants charged with killing whites were 4.3 times as likely to receive a death sentence than defendants charged with killing African Americans). Decades after announcing a narrow understanding of government's purposeful discrimination against traditionally subordinated groups, *Ricci* suggests the Court's newly expanded willingness to find that the government has purposefully discriminated when it seeks to ameliorate disparities experienced by those same groups.

180. Andrew Carlon describes such actions as "*race-conscious policymaking*"—that is, "the prospective design of generally applicable policies not directed at identifiable individuals, which takes into account the aggregate racial makeup of those predicted to be affected by these policies." Carlon, *supra* note 154, at 1160 (emphasis added). Kim Forde-Mazrui earlier described such practices as "alternative action." Forde-Mazrui, *supra* note 104, at 2332. Richard Primus then characterized such "alternative action" as "an *Arlington Heights* law in reverse. It is, by hypothesis, a law motivated by the desire to allocate something to one or more racial groups at the inevitable expense of others." Primus, *supra* note 34, at 541.

181. *See supra* notes 148-55 and accompanying text.



applicant pool. Although the decision to recruit some and not others based on race is arguably a difference in treatment that affects the size of the applicant pool and thus individuals' chances of securing scarce slots, that decision does not consider race in allocating the ultimate employment or educational opportunity itself.

Before *Ricci*, courts generally<sup>182</sup> have not viewed government's attention to race, that is, its antistatutory ends, with suspicion if its chosen means fall in either of the last two categories—apparently because those means impose comparatively diffuse effects on nonbeneficiaries such that the costs incurred by third parties remain outweighed by the benefits of achieving antistatutory ends.<sup>183</sup> Recall, for example, Justice Kennedy's vigorous defense of measures in both those categories in *Parents Involved*, where he emphasized the importance of preserving “strategic site selection of new schools,” “drawing attendance zones with general recognition of the demographics of neighborhoods,” and “recruiting students and faculty in a targeted fashion.”<sup>184</sup> Justice Kennedy noted that the moral and instrumental concerns of antistatutory advocates like himself are not only attenuated in the context of such race-conscious measures because they do not treat individuals “in different fashion solely on the basis of a systematic, individual typing by race,”<sup>185</sup> but are also ultimately outweighed by the moral and instrumental benefits of attending to antistatutory concerns in a society that has not yet achieved post-racial status.<sup>186</sup> For these reasons, prior to *Ricci*, the Court had treated government's

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182. But not always. The D.C. Circuit Court of Appeals, for example, applied strict scrutiny to, and struck down, the Federal Communications Commission's race-targeted recruiting requirement. See *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 20-21 (D.C. Cir. 2001) (“[T]he Commission has compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates. As a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race.”).

183. See *supra* notes 148-55 and accompanying text; see also Carlon, *supra* note 154, at 1199 (“[R]ace-conscious policymaking is entirely appropriate, as long as it is driven by antistatutory values.”).

184. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and dissenting in part) (“[A] constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”).

185. See *id.* at 788-89.

186. *Id.* at 788-90.

attention to race to achieve antistatutory ends as suspicious only when such race-consciousness animated differential treatment based on race, that is, “classifications with effects,” but *not* when such motives animated something else, that is, facially neutral treatment or measures like targeted recruitment that are difficult to characterize.<sup>187</sup>

But Justice Kennedy did not view the city’s action in *Ricci* as the sort of permissible means to the end of destabilizing long-standing racial disparities that he defended in *Parents Involved*. As explored in Part IV.A, his opinions in these two cases might be harmonized as permitting an actor to attend to race for antistatutory purposes at the planning stage, but not after it begins to make decisions that impair the specific expectations of, and thus impose unacceptably tangible costs to, racially identifiable individuals.<sup>188</sup> In other words, he may have considered the city’s action as constituting the sort of “classification with effects” that triggers suspicion under the Court’s pre-*Ricci* precedents.<sup>189</sup> Indeed, the *Ricci* majority signaled such an understanding when it characterized the city’s action as “express, race-based decisionmaking”<sup>190</sup> and “the sort of racial preference that Congress has disclaimed”<sup>191</sup>—apparently because it found the “losers” in this case to be readily identifiable on racial grounds, an outcome offensive to anticlassification advocates.

The *Ricci* facts, however, are not so easily located on the Court’s long-standing equal protection map. Indeed, the decision turns in great part on the choice to frame the target of New Haven’s action as the white test-takers or instead the potentially flawed tests<sup>192</sup>—a choice complicated by the fact that New Haven’s concerns about fairness and accuracy were triggered by its attention to the tests’ racial disparities, as Title VII’s disparate impact provision requires.

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187. See *id.* at 797 (describing “race-conscious measures that do not rely on differential treatment based on individual classifications” as insufficiently suspicious to trigger strict scrutiny); see also Carlon, *supra* note 154, at 1153 (characterizing Justice Kennedy in *Parents Involved* as having “seen where the logic of ‘reactionary colorblindness’ is ultimately taking us. He needs a stopping point—and so do we.”).

188. See *supra* notes 156-67 and accompanying text.

189. Kenneth Marcus suggests that Justice Kennedy’s opinions can be reconciled as reflecting the view that facially neutral actions should trigger courts’ suspicion when race is the “predominant” motivation. Marcus, *supra* note 23, at 72.

190. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

191. *Id.* at 2677.

192. See *supra* notes 133-35 and accompanying text.

In other words, New Haven's action might be understood as motivated by a desire for a certain racial mix or instead by a desire for a fairer and more accurate promotional process.<sup>193</sup> In choosing between these frames, recall that an anticlassification interpretation of equality law forbids actors from "[r]educ[ing] an individual to an assigned racial identity for differential treatment."<sup>194</sup> But different from what or whom? To be sure, Mr. Ricci probably *was* treated differently than he would have been absent the existence of Title VII's disparate impact standard, which requires that employers consider their practices' impact on employees of different races. Without such a provision, New Haven would likely never have assessed its tests' disparate impact and potential invalidity and thus reconsidered their use. But Mr. Ricci was not treated differently than any other firefighter based on race, and in fact was not treated differently than any other firefighter at all: the test results were discarded for all, regardless of race, and no one was promoted, regardless of race.<sup>195</sup>

For this reason, New Haven's response to its practices' disparate impact is not an example of affirmative action programs that are more easily mapped as falling within the first category of "classifications with effects" described above<sup>196</sup> and thus generally among the institutional actions quickest to trigger objections by post-racial and

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193. Neither the parties nor the Court apparently considered the possibility that both were at work. See *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (Calabresi, J., concurring in the denial of rehearing en banc) (explaining that the plaintiffs had not raised a mixed-motives claim). Instead, the fight centered on how to frame what all appeared to agree was a single motive. As Michael Zimmer points out, "[T]he facts here would also just as readily support a finding that the City acted 'solely' because the scores of minority test-takers taken as groups were too low when compared with the scores of white test-takers." See Zimmer, *supra* note 120, at 12. That the majority sees the two as inextricable further indicates its new zero-sum understanding of discrimination.

194. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 701, 795 (Kennedy, J., concurring in part and dissenting in part).

195. See Banks, *supra* note 3, at 55 ("[T]here is no doubt that the case raises the question of the permissibility of race-neutral measures undertaken for a race related purpose."); Marcus, *supra* note 23, at 70 ("The key fact in *Ricci* is that disparate-treatment analysis was triggered by an employment decision that arguably had race-conscious intent and effects, even though it treated employees of all races in an identical manner—by discarding their test scores."); Primus, *supra* note 34, at 563 ("Nothing in disparate impact doctrine calls for individual employees or applicants to be treated differently from one another on racial grounds at the moment an employment decision is made.").

196. See *supra* note 174 and accompanying text.

other anticlassification adherents.<sup>197</sup> Although both categories are motivated by antistatutory objectives, they use different means to further those ends. New Haven's decision applied to all—disappointing high scorers and offering another opportunity to low scorers—regardless of race or national origin.

The most vigorously contested affirmative action measures, in contrast, involve race-based classifications that an employer seeks to justify as falling within an exception to Title VII's disparate treatment provision<sup>198</sup> or, in the equal protection context, that a government actor seeks to defend as satisfying strict scrutiny.<sup>199</sup> As an illustration, consider the program at issue in the Court's 1986 equal protection decision in *Wygant v. Jackson Board of Education*.<sup>200</sup> There the Court upheld a constitutional challenge to the enforcement of a public school district's collective bargaining agreement that provided African American teachers with preferential protection from layoffs.<sup>201</sup> Emphasizing teachers' heavy reliance interests in retaining their existing jobs, the *Wygant* plurality found that the agreement's provision unsettled the white teachers' entrenched expectations and thus was not narrowly tailored as required to survive equal protection analysis even if motivated by the government's compelling interest in remedying past discrimination.<sup>202</sup>

Key differences distinguish the *Wygant* facts from those in *Ricci*. Perhaps most important, *Wygant* involved a concededly race-based classification, thus falling in the first category of "classifications

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197. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2700 (2009) (Ginsburg, J., dissenting) (distinguishing the plaintiffs' claim in *Ricci* from a challenge to an affirmative action plan).

198. The Court has interpreted Title VII to permit employers to consider protected class status as part of an affirmative action plan so long as the plan's purpose mirrors that of Title VII and does not unnecessarily trammel the rights of nonbeneficiaries. See *Johnson v. Transp. Agency*, 480 U.S. 616, 619-20 (1987) (upholding county's consideration of sex or race as a plus-factor in promotions to remedy substantial underrepresentation of women and people of color in traditionally segregated jobs); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979) (upholding collective bargaining agreement's dedication of a certain percentage of openings in training programs to African American workers to break down long-standing patterns of racial hierarchy within those jobs).

199. The Court has interpreted the Equal Protection Clause to permit government actors to consider race as part of an affirmative action plan so long as the plan is narrowly tailored to achieve a compelling government interest. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

200. 476 U.S. 267 (1986).

201. *Id.* at 269-70, 284.

202. *Id.* at 283.

with effect” described above: individual employees were identified as winners and losers (those who were laid off and those who were not) based in part on race.<sup>203</sup> In *Ricci*, in contrast, no individual employees “won”—no promotions were made, regardless of race. Similarly, no individual employees “lost” in *Ricci*, at least in the *Wygant* sense, as New Haven’s high-scoring test-takers were eligible for—but not entitled to—promotion even under the city’s original plan.<sup>204</sup>

Moreover, the *Wygant* plurality suggested a spectrum of race-based treatment characterized as more or less troubling based on the diffuseness of the burdens experienced by nonbeneficiaries, with layoffs resulting in job loss closer to one end and disappointed hiring expectations closer to the other. The plurality indicated that government’s race-based decisions are more likely to fail narrow tailoring analysis when they impose particularly tangible or concrete costs—that is, when they change the status quo: “While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.”<sup>205</sup> The *Ricci* majority’s heavy weighting of the reliance interests impaired by disappointed promotion expectations, in contrast, casts doubt on whether the current Court still embraces the *Wygant* spectrum, or

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203. See *id.* at 270-72.

204. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) (“The white firefighters who scored high on New Haven’s promotional exams understandably attract this Court’s sympathy. But they had no vested right to promotion. Nor have other persons received promotions in preference to them.”); see also Brief of the States of Maryland, Alaska, Arkansas, Iowa, Nevada, and Utah as Amici Curiae Supporting Respondents at 3-4, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428 and 08-328) (arguing that the *Ricci* plaintiffs’ allegations of future adverse action are not justiciable on standing and ripeness grounds and that an employer’s decision to defer final action is not an adverse employment action for Title VII purposes); Primus, *supra* note 120, at 1357 (“*Ricci* never acknowledges that as a matter of disparate treatment doctrine, the plaintiffs’ claim of statutorily cognizable injury might be premature. The Court’s apparent indifference on this score is the first suggestion that its analysis did not hew to the distinctive concerns of disparate treatment law.”); Zimmer, *supra* note 120, at 25 (“What [the plaintiffs] lost was a promotional opportunity which, presumably, would be replaced with a different procedure that would likely give them another opportunity to be promoted. In other words, it may be that all they suffered was a delayed promotion.”).

205. See *Wygant*, 476 U.S. at 282-83 (“Denial of a future employment opportunity is not as intrusive as loss of an existing job.”); *id.* at 283 (“Layoffs disrupt these settled expectations in a way that general hiring goals do not.”).

whether it has instead expanded its understanding of the costs to nonbeneficiaries that are sufficiently weighty to trump the benefits of achieving antisubordination ends.

A related question turns on whether the majority views race-conscious means that impose effects on third parties' employment opportunities as more concrete and thus suspicious than those that impose effects on voting and certain educational opportunities.<sup>206</sup> For example, unlike the *Wygant* plurality, the current majority may see employment opportunities as inherently zero-sum, as the hiring or promotion of one applicant often forecloses that of another. Along these lines, some evidence suggests that Justice Kennedy's comfort with race-conscious means to antisubordination ends may not apply to the employment setting—perhaps because he is quicker to see post-racial progress in that context and thus less likely to credit the continuing strength of antisubordination interests there.<sup>207</sup> Or perhaps Justice Kennedy has not yet decided in which direction his understanding of equality—and that of the Court as well<sup>208</sup>—will turn.<sup>209</sup> The possibilities thus remain that the Court has either redrawn its equal protection map or that it has not yet determined whether and how it might do so.

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206. See Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 105 (2007) (suggesting that Justice Kennedy's views on race may be tied to certain voting and educational contexts "and less generalizable across cases"); *id.* at 116 ("[E]ven a judge committed to the colorblind ideal might worry, as Kennedy seems to, that the value of colorblindness cannot be learned in a racially segregated school.") (emphasis added).

207. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (2007) (Kennedy, J., concurring in part and dissenting in part) (expressing concern that the dissent's application of antisubordination theory would apply "in areas far afield from schooling"); see also *Grutter v. Bollinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting) ("It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place.... The Constitution cannot confer the right to classify on the basis of race *even in this special context* absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race *in this one context*, I must dissent in the present case.") (emphasis added).

208. See Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL'Y 333, 348 (2009) (book review) ("[I]t is safe to say that, for the foreseeable future, the outcome of race cases will all depend upon Justice Kennedy."); see also *id.* at 333 (describing Justice Kennedy as "the Court's one and only swing Justice" after Justice O'Connor's retirement).

209. See *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting) (predicting that the majority's opinion "will not have staying power").

V. AVOIDING A COLLISION BETWEEN ANTIDISCRIMINATION VALUES  
BY CHALLENGING A ZERO-SUM UNDERSTANDING OF EQUALITY

This last possibility invites efforts to shape the direction of the Court's understanding of equality by revisiting the social meaning of decision makers' attention to racial or gender impact when choosing among available policy options that will then apply to all, regardless of protected class status. Deborah Hellman, for example, urges that we understand government action as offending equality principles "if its *meaning* conflicts with the government's obligation to treat each person with equal concern."<sup>210</sup> This approach understands antidiscrimination values as rooted primarily in the meaning onlookers derive from the contested action—in particular, whether they understand the government to be acting in a way that demeans some person or persons. As Richard Primus similarly observed,

Symbolism and social meaning have always shaped the law of equal protection, and necessarily so.... The canonical failure of equal protection analysis, after all, was *Plessy v. Ferguson*'s refusal to understand that a formally neutral action might carry a clear meaning about racial hierarchy.

... The social meaning of disparate impact doctrine accordingly figures in the assessment of its constitutionality, and social meaning is in part a function of what is visible to a public audience.<sup>211</sup>

What is visible to a public audience—and thus what shapes social meaning—often turns on the narratives we emphasize. Indeed, as Professor Hellman observes, "[H]ow else can we come to understand the meaning of actions than by talking and listening to each other? Debates about the meaning of laws and policies, both inside and outside the courtroom, are important parts of this endeavor."<sup>212</sup> Part II of this Article, for example, focused on the competing narratives offered by the various opinions in *Ricci*, where the majority found,

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210. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

211. Primus, *supra* note 120, at 1347.

212. See Hellman, *supra* note 210, at 69.

and made, particularly visible the expectations of hard-working white test-takers who played by the announced rules.<sup>213</sup>

Consider, then, the possibility of a counter-narrative that explores the win-win possibilities<sup>214</sup> created by disparate impact provisions in expanding opportunities for those—regardless of protected class status—who are overlooked by measures that do not accurately assess ability. In other words, although the *Ricci* majority characterized disparate treatment and disparate impact as antidiscrimination values in collision,<sup>215</sup> they need not be so understood if one recognizes that they share a commitment to identifying and rewarding individual merit as well as achieving antisubordination goals. By revisiting the role that disparate impact doctrine and similar measures play in ensuring that candidates are selected on actual merit rather than on unexamined yet entrenched assumptions that replicate patterns of subordination, this Part offers a case study for reshaping an impoverished zero-sum understanding of such efforts.<sup>216</sup>

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213. See powell, *supra* note 3, at 792-93 (“There is an assumption that racially targeted programs create white resentment because there is a sense that whites who are playing by the rules are having things taken from them and given to undeserving non-whites who do not play by the same rules. This resentment is, apparently, not of the Jim Crow form. These whites are willing to accept any non-white that plays by the rules. What they object to is helping those they perceive as rulebreakers.”). As another example of how social meaning may turn on such narrative choices, consider the following June 2009 CNN poll question that makes no mention of the dispute over the tests’ ability to predict successful job performance:

In a case currently before the Supreme Court, a city decided to use a test to determine which firefighters should receive promotions. No black firefighters scored high enough on the test to earn a promotion, so the city decided not to offer promotions to the white firefighters who got the highest scores on the test. Which of the following statements comes closest to your view? Those white firefighters were victims of discrimination and should get the promotions based on the test results [or] [b]ecause no black firefighters got high scores, the city should use a new test to make sure that blacks were not victims of discrimination.

CNN/Opinion Research Corporation Poll (June 26-28, 2009), *available at* <http://www.pollingreport.com/race.htm>. Sixty-five percent of respondents chose the first statement; 31 percent the latter; 4 percent were unsure. *Id.*

214. Negotiation theory, for example, often emphasizes a focus on identifying parties’ shared interests in hopes of maximizing gains for all, as opposed to position-based approaches that think purely in “win-lose” terms. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES* 13 (1991); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 11-14 (1987).

215. See *supra* note 94 and accompanying text.

216. Although this Part focuses on disparate impact standards, one could similarly revisit



To be sure, these arguments are unlikely to persuade those who adhere to anticlassification theory for moral and/or instrumental reasons entirely apart from whether the United States has or has not achieved post-racial status.<sup>217</sup> But they may appeal to those who are attracted to anticlassification theory yet who nonetheless find continuing power in antistatutory arguments until we have achieved post-racial success<sup>218</sup>—for example, those who are sympathetic to claims of post-racial progress yet sensitive to the ways in which race continues to matter.<sup>219</sup>

For example, consider the contentions in a complaint filed against New Haven a few months after the Court's decision in *Ricci*.<sup>220</sup> Michael Briscoe, the plaintiff in that suit, is an African American firefighter who received the top score of all candidates on the oral exam for the position of Captain.<sup>221</sup> If that had been the only measure of merit, he would have been first in line to be promoted.

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the social meaning of efforts like the Texas "Ten Percent Plan" or targeted recruitment plans in expanding opportunities for those overlooked by traditional approaches, regardless of protected class status.

217. Some may also resist this Part's characterization of such measures' benefits, arguing that disparate impact provisions encourage employers to modify their practices simply to eliminate disparities rather than to take the time and trouble to figure out how to accurately measure merit instead. See Marcus, *supra* note 23, at 64 ("An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism. The tendency of disparate-impact law is to pressure employers to effectuate quotas in just this manner."). Plenty of examples to the contrary abound, as this Part discusses. But even if it could be empirically proven, such an objection suggests that the status quo's inattention to merit in ways that exclude members of subordinated groups remains preferable to inattention to merit in ways that do not. It is not clear why this would be so.

218. As John Powell has observed, "the post-racial proponents have not stated a justification of when and why race should be considered in this post-racial world." Powell, *supra* note 3, at 799; see also Banks, *supra* note 3, at 54 ("[T]he idea of colorblindness is itself malleable, subject to alternative formulations. One might view a commitment to colorblindness as prohibiting only policies that differentiate among individuals on account of race in the distribution of burdens or benefits. Alternatively, one might extend the colorblindness principle to formally race neutral practices that are undertaken for a race related purpose.").

219. See Po Bronson & Ashley Merryman, *See Baby Discriminate*, NEWSWEEK, Sept. 5, 2009, available at <http://www.newsweek.com/id/214989/> (describing social psychologists' study of parents' reluctance to talk about race to their children because they want their children to grow up color-blind, and children's resulting struggles to make sense of their observations of race).

220. See Plaintiff's Amended Complaint for Damages and Injunctive Relief, *Briscoe v. City of New Haven*, Civ. No. 3:09cv1642(CSH) (D. Conn. Nov. 2, 2009).

221. *Id.* at 2.

Similarly, if the oral exam had received a 70 percent weighting—the norm for public safety agencies, according to Mr. Briscoe’s complaint<sup>222</sup>—he would have ranked fourth, and again would have been eligible for promotion.<sup>223</sup> Even if the written/oral weighting were 40/60 respectively, rather than New Haven’s 60/40, he would have been ranked ninth and thus remained eligible for promotion.<sup>224</sup> Under the city’s 60/40 written/oral weighting, however, he ranked twenty-fourth and was ineligible for advancement.<sup>225</sup>

Mr. Briscoe alleged that the oral examination on which he received the highest score required candidates to respond in detail to real-life fire scenarios and personnel management situations and thus tested not only job knowledge but also managerial and leadership skills, in contrast to the multiple-choice written exam’s focus on memorization.<sup>226</sup> More specifically, he alleged that the

differences between the written test and the oral exam disadvantaged a candidate, like the plaintiff, who had diligently studied and learned all the material taught during years of on-the-job experience and extensive in-service training, compared to one who did little until the run-up to the exam but then memorized the facts that were included in the assigned written materials.<sup>227</sup>

Mr. Briscoe offers a compelling counter-narrative to that of Mr. Ricci—that of a hard-working African American firefighter who excelled on what matters for success in firefighting leadership, only to find that his employer did not value those qualities.<sup>228</sup> In short, although Mr. Ricci’s reliance interests are significant, they may not be the only, and perhaps not the most important, reliance interests implicated by New Haven’s actions in particular and by attention to disparate impact generally. Under this view, attention to disparate

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222. *Id.* at 6.

223. *Id.* at 4-6.

224. *Id.*

225. *Id.* at 6.

226. *Id.* at 4-6.

227. *Id.* at 5-6.

228. For an extensive evaluation of the merits of a hypothetical lawsuit by minority firefighters challenging New Haven’s tests, see Harris & West-Faulcon, *supra* note 120, at 47-48.

impact coheres with equal protection values because it encourages a more accurate measure of, and reward for, individual ability regardless of protected class status by undermining unexamined yet entrenched preferences.

Even if one resists Mr. Briscoe's narrative as yet to be proven,<sup>229</sup> other illustrations abound that further this understanding of disparate impact's meaning as consistent with a commitment to individual worth and dignity.<sup>230</sup> One might similarly imagine, without much effort, a white candidate with outstanding leadership skills who nonetheless may never be identified as such because he performs poorly on standardized tests. Indeed, the designer of the New Haven tests conceded that the examinations did not attempt to measure the critical job qualifications of command presence or supervisory ability.<sup>231</sup>

Disparate impact provisions' attention to unjustified disparities also substantially enhances social welfare by improving the practices used to fill key positions in public safety and elsewhere.<sup>232</sup> The

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229. The federal district court dismissed Mr. Briscoe's claim without reaching the merits, ruling that the *Ricci* Court's award of summary judgment to the plaintiffs necessarily foreclosed any subsequent disparate impact challenge to the contested examinations. *Briscoe v. City of New Haven*, No. 3:09-cv-1642, 2010 WL 2794212, at \*8 (D. Conn. Apr. 28, 2010).

230. See *supra* note 134 and accompanying text.

231. Justice Ginsburg's dissent, for example, quoted the testimony of test developer Chad Legel that he had "never discussed with the City the propriety of the 60/40 weighting and 'was not asked to consider the possibility of an assessment center.' The IOS exams, Legel admitted, had not even attempted to assess 'command presence': '[Y]ou would probably be better off with an assessment center if you cared to measure that.'" *Ricci v. DeStefano*, 129 S. Ct. 2658, 2706 (2009) (Ginsburg, J., dissenting) (citation omitted).

232. Psychologists, for example, have found that decision makers frequently define merit for specific jobs in ways "congenial to the idiosyncratic credentials of individual applicants from desired groups, rather than necessarily attending to objective assessments of the jobs' requirements." Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit To Justify Discrimination*, 16 PSYCHOL. SCI. 474, 474 (2005); see also David Dunning, Ann Leuenberger & David A. Sherman, *A New Look at Motivated Inference: Are Self-Serving Theories of Success a Product of Motivational Forces?*, 69 J. PERSONALITY & SOC. PSYCHOL. 58, 58 (1995) (describing how individuals often define merit in a self-serving manner by emphasizing criteria consistent with their own credentials); Michael I. Norton, Joseph A. Vandello & John M. Darley, *Casuietry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 817 (2004) (finding that evaluators strategically emphasized certain performance criteria to justify discriminatory decisions in hiring and admissions). For example, one study found that evaluators strategically defined merit in a manner that favored male over female applicants when hiring for the job of police chief. Uhlmann & Cohen, *supra* at 476. Study participants emphasized the importance of education and experience when evaluating a male candidate who had strong credentials in those areas, but devalued those

disparate impact standard, for example, triggered reconsideration of a wide range of promotion practices and other devices that failed to accurately measure and predict candidates' job performance.<sup>233</sup> Too often employers relied on examinations and other devices without ensuring that performance on those tests actually predicted success on the job.<sup>234</sup> Reconsidering practices that imposed racially disparate impact led to the creation of selection instruments that more accurately identified top performers. As just one example, Title VII's disparate impact provision spurred the development of risk assessment centers that more accurately replicate real-world emergency and management scenarios and thus better predict

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same qualities when evaluating a male candidate who lacked them. *Id.*

233. See, e.g., *Nash v. Consol. City of Jacksonville*, 837 F.2d 1534, 1538 (11th Cir. 1988), *vacated and remanded*, 490 U.S. 1103 (1989), *Eleventh Circuit opinion reinstated on remand*, 905 F.2d 355 (11th Cir. 1990) (rejecting a written promotional test after identifying the complex behaviors required of a firefighting officer and concluding that none "is easily measured by a written, multiple choice test"); *Wilmore v. City of Wilmington*, 699 F.2d 667, 668 (3d Cir. 1983) (invalidating assignment and promotional practices that imposed a disparate impact on the basis of race); *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir. 1980) (invalidating examinations for police and firefighter positions that imposed a disparate impact on the basis of race); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 357 (8th Cir. 1980) (rejecting the validity of a multiple-choice examination for promotion to firefighting jobs that do not depend "on any of the ... skills associated with outstanding performance on a written multiple choice test"); *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 149 (D. Mass. 2006) (invalidating municipalities' written civil service examination that imposed disparate impact against African Americans and Latinos and was not job related and consistent with business necessity).

234. *United States v. Vulcan Soc'y, Inc.*, 637 F. Supp. 2d 77, 84 (E.D.N.Y. 2009) ("[I]t is natural to assume that the best performers on an employment test must be the best people for the job. But, the significance of these principles is undermined when an examination is not fair. As Congress recognized in enacting Title VII, when an employment test is not adequately related to the job for which it tests—and when the test adversely affects minority groups—we may not fall back on the notion that better test takers make better employees. The City asks the court to do just that. Regrettably, though, the City did not take sufficient measures to ensure that better performers on its examinations would actually be better firefighters."). For another recent example of an examination proven to have created substantial disparate impact without any meaningful tether to successful job performance, see *Lewis v. City of Chicago*, No. 98 C5596, 2005 WL 693618, at \*1 (N.D. Ill. Mar. 22, 2005). There the district court concluded that the city had not proven that its test predicted firefighter performance, and that the examination was instead "skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities." *Id.* at \*10. The court also found that the cut-off score distinguishing the qualified from well-qualified pools was "statistically meaningless." *Id.* at \*9. The city did not appeal those merits findings, instead arguing only that the plaintiffs' charge was not timely filed. *Lewis v. City of Chicago*, 528 F.3d 488, 490 (7th Cir. 2008). The Supreme Court ultimately held that the plaintiffs' charge was timely. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

public safety job performance than other forms of promotional testing like multiple-choice tests.<sup>235</sup>

Attention to disparate impact similarly led to changes in employers' physical ability tests that disproportionately excluded women from firefighting and other traditionally male jobs without a demonstrable connection to workforce quality. To be sure, firefighters and other public safety officers must be strong and fit. But tests too often rewarded candidates' sprinting speed, even though many fire departments "forbid sprinting" in practice because it is "fatiguing" and may "exacerbate smoke inhalation."<sup>236</sup> Other tests measured only a certain level of isolated upper body strength, even though successful firefighting requires full-body strength, agility, and stamina.<sup>237</sup> For these reasons, courts in a wide range of jurisdictions have struck down public safety agencies' ostensibly neutral physical ability tests that disproportionately denied jobs to women without any meaningful relationship to the jobs' actual physical requirements.<sup>238</sup>

Attention to disparate impact also inspired other jurisdictions to make such changes on their own initiative. After carefully considering its physical ability tests, for example, Minneapolis developed

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235. See Winfred Arthur Jr. et al., *A Meta-Analysis of the Criterion-Related Validity of Assessment Center Dimensions*, 56 PERSONNEL PSYCHOL. 125, 145-46 (2003); Barbara B. Gaugler, *Meta-Analysis of Assessment Center Validity*, 72 J. APPLIED PSYCHOL. 493, 503 (1987); James R. Huck & Douglas W. Bray, *Management Assessment Center Evaluations and Subsequent Job Performance of White and Black Females*, 29 PERSONNEL PSYCHOL. 13, 13-14 (1976).

236. Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas & Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. DIVERSITY ORGS., COMMUNITIES & NATIONS 189, 198 (2008).

237. *Id.*

238. See, e.g., *Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 474-75 (2d Cir. 1999) (fire department's timed physical agility test that disproportionately excluded women violated Title VII because city failed to prove that the passing score was job-related); *Harless v. Duck*, 619 F.2d 611, 616 (6th Cir. 1980) (police department's physical ability test violated Title VII because it disproportionately excluded women and the city failed to prove that the tested exercises and passing scores were related to the physical requirements of the job); *United States v. City of Erie*, 411 F. Supp. 2d 524, 568-70 (W.D. Pa. 2005) (police department's physical agility test that disproportionately excluded women was neither job-related nor justified by business necessity); *Thomas v. City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) (police department failed to justify its physical agility test that imposed a disparate impact against women); *Berkman v. City of New York*, 536 F. Supp. 177, 179, 206 (E.D.N.Y. 1982) (fire department's physical ability test that imposed disparate impact against women violated Title VII because it was not sufficiently job-related).

new selection devices that advanced both merit standards and equal opportunity. In the words of Fire Department Chief Rocco Forte, “There’s no reason to lower your standards for diversity. We’ve actually raised ours. There was no physical fitness tie to job functions before. People could do sit-ups, but could they perform a rescue?”<sup>239</sup> In this way, attention to disparate impact spurred better hiring for key public safety positions.

To be sure, disparate impact has achieved antisubordination goals at the same time.<sup>240</sup> When Congress extended Title VII’s reach to include state and local government employers in 1972, it identified race discrimination by fire departments as among the most pressing problems to be addressed.<sup>241</sup> No woman, moreover, had ever served as a paid firefighter in the United States before the 1972 amendments that included fire departments—along with other state and local governments—among the employers covered by Title VII.<sup>242</sup> But attention to disparate impact thereafter led to the elimination of agencies’ height and weight standards and other facially neutral requirements that disproportionately excluded women and people of color from a wide range of public safety jobs without any demonstrable connection to successful job performance.<sup>243</sup>

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239. Int’l Ass’n of Women in Fire & Emergency Servs., *Minneapolis Walks the Walk*, [http://www.i-women.org/archive\\_articles.php?article=24](http://www.i-women.org/archive_articles.php?article=24) (last visited Sept. 26, 2010).

240. For a less optimistic view, see Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 753 (2006) (arguing that disparate impact doctrine has failed to achieve substantial social change).

241. 118 CONG. REC. 1817 (1972) (describing a series of discriminatory barriers to African Americans’ entry into the firefighting corps).

242. Hulett et al., *supra* note 236, at 191 (noting that no woman served as a paid firefighter before 1973). Nor did public safety agencies hire women as firefighters in any significant numbers until the 1980s. *Id.* The City of New Haven, for example, did not hire its first woman firefighter until 1983. See Brief of Plaintiff-Appellee at 4, *Broadnax v. City of New Haven*, No. 04-2196-cv (2d Cir. Aug. 16, 2004).

243. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama’s height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Bouman v. Block*, 940 F.2d 1211, 1228 (9th Cir. 1991) (holding that a sheriff’s department’s written promotion examination violated Title VII because it disproportionately excluded women without any evidence of business justification); *Costa v. Markey*, 706 F.2d 1, 6 (1st Cir. 1983) (concluding that a police department’s height requirement imposed unjustified disparate impact on women in violation of Title VII); *Horace v. City of Pontiac*, 624 F.2d 765, 768-69 (6th Cir. 1980) (holding that a police department’s height requirement imposed unjustified disparate impact in violation of Title VII); *Harless*, 619 F.2d at 616-17 (concluding that a police department’s use of structured

Many of those sympathetic to anticlassification arguments find race-based classifications offensive in large part for fear that attention to race will obscure what they see as more relevant aspects of individual identity, like ability.<sup>244</sup> They thus share a stake in accurately selecting qualified candidates for leadership roles and other important positions, rather than privileging unexamined tradition over ability. Such a commitment to actual merit, however, is undermined by a zero-sum understanding of equality that prohibits decision makers from reconsidering what may be poor measures of ability when racial or gender disparities trigger such reconsideration.

### CONCLUSION

This Article seeks to examine the implications of a potentially post-racial Court for equality law, rather than to add to the debate over the current extent of our post-racial progress. Indeed, I find it difficult to improve upon Professor Forde-Mazrui's elegant response to the post-racial claim:

We cannot eliminate race from the American psyche until we understand and eliminate the conditions that cause people to make assumptions about others because of their race. Assuming, optimistically, that racism no longer seriously impairs the life

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oral interviews as a selection device was “rife with the potential for discrimination and is not job-related” because the practice disproportionately disadvantaged women without any relationship to actual job performance and was instead subject to a host of errors due to a lack of standardized conditions and objective criteria); *United States v. Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (rejecting Virginia State Patrol's height and weight requirement as disproportionately excluding women without basis in business necessity in violation of Title VII); *United States v. City of Milwaukee*, 481 F. Supp. 1162, 1164-65 (E.D. Wis. 1979) (invalidating Milwaukee's policy of hiring as paramedics only individuals who were also Milwaukee firefighters when no woman had ever been hired as a Milwaukee firefighter: “Paramedics seldom, if ever, perform firefighting duties (and are never relied upon to extinguish fires) during their regular work week.”).

244. See *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989) (plurality opinion) (characterizing the Equal Protection Clause as protecting a “personal right[] to be treated with equal dignity and respect” and thus “eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race” (quoting *Wygant v. Jackson*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting))).

chances of racial minorities, we cannot ignore the social and economic deprivations that do. These conditions, by their example, do more than affirmative action to reinforce stereotypes, justify racism, and thereby exacerbate racial tensions. Worse, these conditions cause misery to those who must endure them.<sup>245</sup>

Decades after concluding that the Equal Protection Clause does not require that public employers reconsider their practices that disproportionately disadvantage people of color so long as those actions are not motivated by an interest in perpetuating racial hierarchy,<sup>246</sup> the Court has now concluded that Title VII forbids them—and private employers too—from doing so under certain circumstances. This may reflect the majority's assumption of post-racial success (at least in the employment context) that in turn triggers a new, zero-sum understanding of equality—that is, that “empathy” for disparities experienced by some groups is inevitably accompanied by “prejudice” against others. If applied in the constitutional setting, such an understanding of equality would, for the first time and with potentially devastating results, treat with suspicion a government decision maker's attention to racial and gender hierarchies when choosing among available policies and programs.

Such a turn towards a zero-sum understanding of equality, however, is by no means inevitable. Indeed, the Court's recent antidiscrimination decisions are also susceptible to a number of alternative understandings, some with decidedly narrower implications than others. For example, the Court may view actions motivated by a decision maker's interest in ameliorating racial disparities with suspicion only when those actions make identifiable third parties worse off in tangible ways, because at that point—and not until that point—it sees the costs of attending to race for antistatutory ends as outweighing its benefits.

Revisiting the social meaning of decision makers' attention to racial and gender hierarchies when choosing among various policy options can remind us of such efforts' win-win possibilities. Title VII's disparate impact provision, as just one example, bars practices

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245. Forde-Mazrui, *supra* note 104, at 2397.

246. *Washington v. Davis*, 426 U.S. 229, 238-39, 251-52 (1976).



that impose racial and gender disparities only when those practices cannot be justified as accurately measuring the qualities key to successful job performance. By seeking to identify those people of all protected classes who may not be recognized as productive because of traditional yet unexamined assumptions, these provisions further individual dignity and social welfare as well as antistatutory values.