

RACE-CONSCIOUS BUT RACE-NEUTRAL: THE
CONSTITUTIONALITY OF DISPARATE IMPACT IN THE
ROBERTS COURT

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ABSTRACT

Ricci v. DeStefano, the New Haven firefighters case, raised questions about the constitutionality of the disparate impact provisions of federal employment discrimination law. This Article draws on the Court's subsequent decision in Fisher v. University of Texas at Austin to clarify disparate impact's constitutionality. In Fisher, no Justice expressed concern about Texas's decision to promote diversity at the state university by admitting the top percent of the state's high school graduates—state action that is race-conscious in purpose, but race-neutral in form. Approval of the percent plan in Fisher shows that under equal protection

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law of the Roberts Court disparate impact law is not unconstitutional in purpose, as Justice Scalia suggested in Ricci.

In Fisher, the Court has demonstrated that government may change the selection standards in competitive processes without triggering strict scrutiny if the government acts (1) with a race-conscious goal of promoting equal opportunity; (2) the government requires a selection standard that is appropriate for the context; and (3) the standard does not classify individuals by race. These principles are satisfied in the ordinary case of voluntary disparate impact compliance in which an employer specifies conditions for employment in advance of evaluating applicants for the job in question, as well as in prospective remedies that courts ordinarily order for violations of Title VII.

Fisher clarifies that the problem in Ricci was New Haven's procedurally irregular means of complying with disparate impact law: the government discarded the test results of a group of applicants who had invested significant time in studying for a promotion exam, and explained this decision in terms which left the disappointed applicants with the impression that government was discarding their scores to advance the interests of another racially defined group. By avoiding a constitutional judgment and finding New Haven's manner of complying with the statute unlawful disparate treatment, Justice Kennedy warns that interventions designed to heal social division should be implemented in ways that endeavor not to aggravate social division.

Disparate impact law can promote equal opportunity, increase employee confidence in the fairness of selection criteria, and so reduce racial balkanization; but for disparate impact law to do so, Justice Kennedy seems to be saying in Ricci, disparate impact law needs to be enforced with attention to all employees' expectations of fair dealing.

INTRODUCTION

In *Ricci v. DeStefano*,¹ the Court raised and avoided questions about the constitutionality of actions taken by a public employer complying with disparate impact provisions of federal employment discrimination law. A concurring opinion by Justice Scalia warned of a coming “war between disparate impact and equal protection,”² and suggested that laws imposing disparate impact liability might reflect an invidious discriminatory

1. 557 U.S. 557 (2009).

2. *Id.* at 595 (Scalia, J., concurring).

purpose.³ Since *Ricci*, the Supreme Court has twice accepted cases involving Fair Housing Act disparate impact claims, only to have the parties settle before the Court heard argument.⁴ This Term, the Court has again accepted a case concerning the availability of disparate impact claims under the Fair Housing Act, in which the defendant asserts similar claims for constitutional avoidance.⁵

In this Article I show how the Court's affirmative action decision in *Fisher v. University of Texas at Austin*⁶ answers questions about the constitutionality of disparate impact under the equal protection law of the Roberts' Court. *Fisher* holds that before considering the race of individual applicants for the purpose of achieving diversity in university admissions, a school must show that that the program is narrowly tailored—that the school had considered “race-neutral alternatives” and could not achieve “sufficient diversity without using racial classifications.”⁷ Narrow tailoring doctrine allows government to act in ways that are race-neutral in form—that do not classify individuals by race—yet are race conscious in *purpose*. The “race-neutral alternative” at issue in *Fisher* is a program admitting the top ten percent of students in state high schools to the University of Texas which the state adopted when the university's original affirmative action program was struck down in the 90s. The program's supporters understood that, given the underlying segregation of the state school system, admitting the top ten percent of high school graduates would increase the racial diversity of UT's admitted class, and this was a reason they adopted the program.⁸

As the Court appreciated, the University of Texas considers race when it admits students through the percent plan, even if the University does not

3. See *id.* at 594 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (“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.”).

4. See *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013); *Magner v. Gallagher*, *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012).

5. See *Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 747 F.3d 275 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (U.S. Oct. 2, 2014) (No. 13-1371). For discussion of the constitutional avoidance claims in this case, see *infra* note 85.

6. 133 S. Ct. 2411 (2013).

7. *Id.* at 2420. Writing for seven members of the Court, Justice Kennedy reaffirmed that “[n]arrow tailoring . . . involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications [S]trict scrutiny [requires] a court to examine with care, and not defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’” *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003)). As this statement of the law illustrates, equal protection law characterizes practices that do not classify individuals by race as “race neutral.”

8. See *infra* notes 103–106.

consider the race of *individual* applicants.⁹ Justice Ginsburg objects that this difference in form is a distinction without a difference.¹⁰

But, from a constitutional standpoint, is a difference in form a distinction without a difference? Is purpose the only factor that matters in determining the constitutionality of race-conscious state action, or might the means the state employs to achieve its ends matter as well? In this Article, I explore what Justice Kennedy's endorsement of narrow tailoring in the *Fisher* case suggests about his underlying concerns in *Ricci*, and ask how form matters in the debate over disparate impact and in the architecture of equal protection law in the Roberts' Court.

Part I offers a brief review of disparate impact claims under federal employment discrimination law. Part II shows that, over the decades, judicial views about whether disparate impact was required, permitted, or prohibited by equal protection have evolved with the interpretation of the Equal Protection Clause itself. Part III examines the challenge to disparate impact first advanced in *Ricci*. To clarify the constitutional concerns potentially at stake in *Ricci*, Part IV situates disparate impact law in the equal protection doctrine of the Roberts Court, showing how the Court's recent decision in *Fisher* undermines the view that disparate impact is unconstitutional in purpose. Part V then puzzles about the precise locus of the Court's concern in *Ricci*, showing how Justice Kennedy responds to New Haven's procedurally irregular efforts to comply with disparate impact law in much the way he responds to affirmative action law. Disparate impact law can promote equal opportunity, *increase* employee confidence in the fairness of selection criteria, and so reduce racial balkanization; but for disparate impact law to do so, Justice Kennedy seems to be saying in *Ricci*, disparate impact law needs to be enforced with attention to *all* employees' expectations of fair dealing.

I. GRIGGS: DISPARATE IMPACT AS EQUALITY OF OPPORTUNITY

The disparate impact cause of action was first recognized by the Supreme Court in 1971 in *Griggs v. Duke Power Co.*,¹¹ and codified by Congress in the 1991 Civil Rights Act.¹² Under Title VII, plaintiffs can challenge facially neutral employment actions with a disparate impact on one of the Act's protected classes.¹³ Once the plaintiff shows that some employment practice causes a disparate impact on minorities or women, the

9. See *infra* text accompanying notes 104–108.

10. See *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

11. 401 U.S. 424 (1971).

12. Civil Rights Act of 1991, § 105(a), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

13. *Id.*

burden shifts to the employer to show that the challenged practice is justified by business necessity.¹⁴ If the employer makes such a showing, the practice is lawful, unless the challenging party can show that the employer has alternative ways to meet its business needs with lesser exclusionary impact.¹⁵ Courts do not require employers to adopt alternatives that are less effective or more expensive.¹⁶

Why impose disparate impact liability? Judges and commentators, both liberal and conservative, understand disparate impact liability to redress at least three kinds of discrimination that are common in societies that have recently repudiated centuries old traditions of discrimination.¹⁷

The first is covert intentional discrimination. Once a society adopts laws prohibiting discrimination, discrimination may simply go underground. When discrimination is hidden, it is hard to prove. Disparate impact tests probe facially neutral practices to ensure their enforcement does not mask covert intentional discrimination.¹⁸

The second is implicit or unconscious bias. Discrimination does not end suddenly; it fades slowly. Even after a society repudiates a system of formal hierarchy, social scientists have shown that traditional norms continue to shape judgments in ways that may not be perceptible even to the decision maker herself.¹⁹ Disparate impact tests probe facially neutral

14. *Id.*

15. *Id.* at § 2000e-2(k)(1)(A) (discussing burdens of proof in disparate impact cases).

16. *See, e.g.,* Ernest F. Lidge III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1, 32–38 (2005) (cataloging cases in which courts rejected plaintiffs' less discriminatory alternatives because of the costs they imposed on employers); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (O'Connor, J., for the plurality) ("Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals").

17. Justice Kennedy's opinion in *Ricci* suggests a fourth purpose for disparate impact liability: building employee confidence in the fairness of tests, and so avoiding the balkanization of the workplace. *See infra* notes 132–141 and accompanying text.

18. In his *Ricci* concurrence, Justice Scalia suggested that disparate impact law is constitutional to the extent that it redresses intentional discrimination. *See Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (suggesting that disparate impact is constitutional to the extent it is "an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment"). *See also In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1322 (11th Cir. 1999) ("[A]lthough the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination."); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1376 (2010) (presenting the view of disparate impact law as "an evidentiary dragnet intended to identify hidden intentional discrimination in the present"); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299 (1987) (arguing that like disparate treatment, disparate impact targets "pretextual discrimination," which is difficult to prove without direct evidence of employer intent).

19. Ample evidence suggests that implicit bias is rampant. For instance, Implicit Association Tests (IATs), which measure the strength of association between categories such as Black/White and Good/Bad by testing the reaction times of participants, have consistently shown that participants prefer white people and attributes. *See Cynthia Lee, Making Race Salient: Trayvon Martin and Implicit Bias*

practices to ensure their enforcement does not reflect implicit bias or unconscious discrimination.²⁰

The third form of bias is sometimes termed structural discrimination. An employer acting without bias may adopt a standard that has a disparate impact on groups because the standard selects for traits whose allocation has been shaped by past discrimination, whether practiced by the employer or by others with whom the employer is in close dealings.²¹ Disparate

in *A Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1571–72 (2013) (“Over fourteen million IATs, measuring various kinds of biases, including bias based on gender, sexuality, and age, have been completed. Seventy-five percent of those who have taken the race IAT have demonstrated implicit racial bias in favor of Whites.”). Resume studies confirm the pervasiveness of implicit bias. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004) (reporting that applicants with black-identified names had a fifty percent lower callback rate than applicants with white-identified names when researchers sent out comparable resumes); Corinne A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PROC. NAT’L ACAD. SCI. 16474, 16475 (2012) (reporting that both male and female faculty members reviewing undergraduate applicants for a laboratory manager position, who were randomly assigned either male or female names, were significantly more likely to rate the male applicant as more competent and more worthy of being hired and of receiving faculty mentorship and a higher salary). So do studies of the credit markets, *see, e.g.*, David G. Blanchflower et al., *Discrimination in the Small-Business Credit Market*, 85 REV. ECON. & STAT. 930, 931–32 (2003) (reporting, based on national economic data from 1993 and 1998, that black small-business owners are approximately twice as likely to be denied business loans than white business owners, even after controlling for differences in creditworthiness), and criminal prosecutions, *see, e.g.*, BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, VERA INST. OF JUSTICE, *Research Summary: Race and Prosecution in Manhattan 3*, 6–7 (July 2014), available at <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf> (reporting that “race remained a statistically significant independent factor in most of the discretion points that were examined as part of the research” and that black defendants were more likely to receive a sentence offer including a jail or prison term and be sentenced to imprisonment than similarly situated Whites and Asians). *See generally* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (discussing research on implicit bias and identifying institutional contexts in which interventions might be effective).

20. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (explaining that disparate impact liability is important because “even if one assumed that [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain”); *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992) (“The concept of disparate impact was developed for the purpose of identifying situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—although not necessarily deliberately, excluded black or female workers from equal employment opportunities.”); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 78 (“The core purpose of the disparate-impact provision is the government’s compelling interest to identify and eliminate intentional or unconscious discrimination that cannot be proved through the disparate-treatment provision.”); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 532–36 (2003) (analyzing this justification); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2159–60 (2013) (arguing that disparate impact law targets unconscious, implicit discrimination that is beyond the reach of disparate treatment law).

21. Structural discrimination, for instance, is at work where a city hiring prime contractors is concerned that prime contractors have systematically excluded minority sub-contractors from bid opportunities or trade organizations. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (plurality opinion) (noting that under such circumstances a “city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of

impact tests probe facially neutral practices to ensure their enforcement does not unnecessarily perpetuate the effects of past intentional discrimination.

Where disparate impact is used to ensure that job requirements are in fact job related—that requirements reflect the functional needs of the job, rather than hidden intentional discrimination, unconscious discrimination, or the legacy of past discrimination—disparate impact promotes equal opportunity. This is the argument of the Court’s 1971 opinion in *Griggs v. Duke Power Co.*²² recognizing disparate impact liability under Title VII.²³

In *Griggs*, the employer had openly discriminated before the effective date of Title VII; after the effective date of Title VII, the company dropped race from its job descriptions and required a standardized test and high school degree for new hires or transfers, but did not require current employees to meet these new standards for employment.²⁴ The test and degree requirements had a disparate impact on minority applicants.²⁵ In allowing plaintiffs to challenge the employer’s job requirements on grounds of disparate racial impact rather than intent, the Supreme Court emphasized the recent segregation of the North Carolina public schools.²⁶ Not only Duke Power Company but the institutions from which it was drawing its labor force had openly discriminated.²⁷ The Court allowed plaintiffs to challenge job requirements with an exclusionary impact to ensure that the requirements did not *unnecessarily* entrench the legacy of prior discrimination: “Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”²⁸ Employers were entitled to retain job requirements with racial disparate impact, but only so long as the employer could show the

race or other illegitimate criteria,” but determining that the city had not adequately shown these circumstances existed).

22. 401 U.S. 424 (1971).

23. For a history of the litigation, see ROBERT BELTON, *THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY* (Stephen L. Wasby ed., 2014).

24. Specifically, prior to 1965, the company expressly limited black employees to serving in one of its five departments—the labor department, whose positions all paid less than the lowest paid positions in the other four departments. In 1965, in order to qualify for a transfer from the labor department to the higher paying departments, employees were required to have a high school degree, or if they lacked that, to have passed two standardized tests. New employees seeking placement outside the labor department needed to have graduated and passed the two exams. *Griggs*, 401 U.S. at 426–28. See also BELTON, *supra* note 20, at 135.

25. *Griggs*, 401 U.S. at 426 (“[B]oth requirements operate to disqualify Negroes at a substantially higher rate than white applicants . . .”).

26. *Id.* at 430 (“Because they are Negroes, petitioners have long received inferior education in segregated schools . . .”).

27. See *id.* at 430 (citing *Gaston Cnty. v. United States*, 395 U.S. 285, 291–92 (1969)).

28. *Griggs*, 401 U.S. at 429–30.

requirements were functionally related to the job the employer needs done: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."²⁹ Courts interpret business necessity flexibly, with attention to employer needs.³⁰

Griggs presents disparate impact liability as vindicating equality of opportunity. As *Griggs* illustrates, probing qualifications with a racial disparate impact ensures they do not mask hidden and unconscious discrimination, and so "operate to 'freeze' the status quo of prior discriminatory employment practices."³¹ Job qualifications with a racial disparate impact that do *not* serve the functional needs of the employer can create a de facto preference for majority employees; by contrast, the Court observes, striking down job requirements that *do* serve the functional needs of the employer would create a preference for *minority* employees.³² *Griggs* charts a course between these two alternatives. Chief Justice Burger concludes his opinion for a unanimous Court: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."³³ The Court understands the framework it set forth in *Griggs* as ensuring that qualifications "measure the person for the job,"³⁴ and so creating a merits-based, race-neutral baseline for the selection of employees.

II. DISPARATE IMPACT: A SHORT CONSTITUTIONAL HISTORY

To this point we have considered the logic and purposes of disparate impact standards in federal employment discrimination law. I now begin to examine disparate impact's relation to the Equal Protection Clause. Appreciating how the relation of disparate impact and equal protection has evolved over the decades helps clarify disparate impact's status in the equal protection jurisprudence of the Roberts Court.

As we will see, in the 1970s when *Griggs* was decided, many federal judges thought inquiry into the racial disparate impact of state action was

29. *Id.* at 431.

30. *See supra* note 16 and accompanying text.

31. *Id.* at 429-30.

32. *Id.* at 430-31.

33. *Id.* at 436. *See also id.* at 430-31 ("[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

34. *Id.* at 436.

constitutionally *required* under the Equal Protection Clause; but the Supreme Court instead held that inquiry into disparate impact was constitutionally *permitted*. This understanding endured for decades until the litigation in *Ricci* put in issue whether equal protection might *prohibit* inquiry into disparate impact.³⁵

In 1971, when the Burger Court recognized the disparate impact cause of action under Title VII in *Griggs*, there was *no clear distinction between statutory and constitutional equality standards*. In this period, many federal courts thought that inquiry into state action with a racial disparate impact was *required* by the Equal Protection Clause.³⁶ Federal courts commonly looked to foreseeable disparate impact as evidence of unconstitutional purpose.³⁷ And some courts went further, holding that state action with racial disparate impact violated equal protection unless justified by a sufficiently compelling state interest.³⁸ Reasoning in this way, many courts of appeal applied *Griggs* in *equal protection employment discrimination cases* arising before Title VII was extended to public employers.³⁹

In an appeal from one such ruling, the Court announced in *Washington v. Davis*⁴⁰ that to make out a *constitutional* violation, plaintiffs would have to prove more than racial disparate impact; equal protection plaintiffs would now have to prove discriminatory purpose.⁴¹ In rejecting the many decisions that enforced disparate impact as a constitutional standard, the *Davis* Court noted that facially neutral legislation provides equal treatment;⁴² it then proceeded to discuss institutional considerations at

35. See Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11–23, 51–58 (2013) (charting this history).

36. *Id.* at 12–15.

37. For example, some courts of appeals inferred the “segregative intent” necessary to make out an equal protection violation per *Keyes v. School District No. 1*, 413 U.S. 189, 206 (1973), from the foreseeable effects of districting decisions. See, e.g., *United States v. Sch. Dist.*, 521 F.2d 530, 535–36 (8th Cir. 1975) (“[A] presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation.”).

38. See, e.g., *Baker v. Columbus Mun. Separate Sch. Dist.*, 462 F.2d 1112, 1114 (5th Cir. 1972) (“Whenever the effect of a law or policy produces such a racial distortion it is subject to strict scrutiny. . . . In order to withstand an equal protection attack it must be justified by an overriding purpose independent of its racial effects.”).

39. See, e.g., *Castro v. Beecher*, 459 F.2d 725, 732 (1st Cir. 1972) (“The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance.”). In *Washington v. Davis*, the Court cited five decisions of courts of appeals following this approach. 426 U.S. 229, 244 n.12 (1976).

40. 426 U.S. 229 (1976).

41. See *id.* at 239.

42. See *id.* at 245 (noting “difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies ‘any person . . . equal

length, worrying about the “far-reaching” consequences of involving federal courts in sorting through disparate impact challenges to facially neutral legislation.⁴³ *Davis* held that federal courts lacked authority to impose disparate impact liability directly under the Constitution, and *should wait for guidance from the legislature*. The Court’s opinion in *Washington v. Davis* concludes: “[I]n our view, extension of the [disparate impact] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, *should await legislative prescription*.”⁴⁴ *Davis*, in other words, held that inquiry into disparate impact was *not required, but permitted* by constitutional guarantees of equality.

Emphasizing the democratic deficit of federal courts, the Burger Court began differentiating constitutional and statutory frameworks, first holding in *Davis* itself that in constitutional cases plaintiffs would have to prove discriminatory purpose, and then, several years later, holding in *Personnel Administrator of Massachusetts v. Feeney*⁴⁵ that to prove discriminatory purpose, equal protection plaintiffs would have to show that the challenged action was undertaken at least in part because of, and not merely in spite of, its impact on a protected class.⁴⁶ *Feeney* vastly restricted the role that evidence of foreseeable disparate impact could play in proving discriminatory purpose in equal protection cases.⁴⁷ The Burger Court narrowed liability for discriminatory purpose arising under the judicially enforceable provisions of the Fourteenth Amendment on the view that it

protection of the laws’ simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.”)

43. The Court justified its decision by appealing to differences between standards that Congress might provide under Title VII and those the Court might impose under the Fifth or Fourteenth Amendments, observing that the disparate impact inquiry “involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.” *Id.* at 247.

44. *Id.* at 248 (emphasis added).

45. 442 U.S. 256 (1979).

46. *Id.* at 279.

47. Federal courts have regularly invoked *Feeney* in order to reject claims of discriminatory purpose, for instance, with respect to the death penalty, *see, e.g., McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (“For this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”) (citing *Feeney*, 442 U.S. at 279), and federal sentencing guidelines, *see, e.g., United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013) (“The [Defendants] and [a dissenting judge] add that Congress must have *foreseen* that its failure to make the Fair Sentencing Act fully retroactive would have a racially disproportionate impact. . . . [But] [n]o evidence exists that Congress refused to make the Fair Sentencing Act retroactive *because* this refusal would disproportionately harm black Defendants.”) (citing *Feeney*, 442 U.S. at 279)).

was the prerogative of representative government to lead the nation beyond the legacy of segregation.⁴⁸

As constitutional and statutory standards diverged, the importance of statutory antidiscrimination standards grew, as did the ferocity of conservative attacks on disparate impact law. The Burger Court had justified disparate impact as securing equality of opportunity; but by the 1980s, critics of disparate impact in and allied with the Reagan administration increasingly attacked the framework, arguing that it did not protect equality of opportunity but instead protected “equality of results.”⁴⁹ For example, in opposing 1982 amendments to the Voting Rights Act, Professor James Blumstein characterized disparate impact rules, or “substantive effects standards,” as a “means to the end of equal political and economic status for blacks and whites as groups,” contending that “[e]quality of end result replaces equality of opportunity as the yardstick for measuring civil rights progress.”⁵⁰

Did disparate impact law even the playing field, or tilt it? This emergent debate about baselines reflected differences in what I call “racial common sense”—assumptions about race that implicitly or explicitly guide understanding of everyday life. Was persisting racial stratification in the workplace likely the product of past and present bias, or was it more likely attributable to differences in racial group tastes and talents?⁵¹ For those who believed that past and present bias continued to play a role in shaping the workplace, disparate impact was an important tool for uncovering hidden and hard to prove intentional and unconscious discrimination, and for ensuring that workplace standards did not unnecessarily perpetuate the

48. See Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 20 (“The Burger Court repeatedly explained that it was for representative government, and not the federal courts, to guide the nation beyond the legacies of segregation. These institutional concerns, sounding in separation of powers and federalism, supply the central justification for the Court’s decision to restrict the scope of the judicially enforceable Equal Protection Clause in constitutional challenges to facially neutral statutes with racial disparate impact.”); see also *id.* at 20–23.

49. See, e.g., Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1312–13 (1986) (criticizing affirmative action, disparate impact liability, and similar measures for promoting “equality of results” over “equality of opportunity”) (emphasis in original). Abram was appointed by President Reagan to the U.S. Commission on Civil Rights. See Juan Williams, *Rights Panel Backs Reagan in Opposing Quotas*, WASH. POST, Jan. 18, 1984, at A1 (discussing Abram, vice chairman of the commission, as a Reagan appointee).

50. James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 650–51 (1983).

51. Then-chair of the EEOC, Clarence Thomas, believed it was the latter. See Robert Pear, *Changes Weighed in Federal Rules on Discrimination*, N.Y. TIMES, Dec. 3, 1984, at A1 (quoting Thomas as saying that “[e]very time there is a statistical disparity, it is presumed there is discrimination,” when in fact that disparity is often the result of non-discriminatory factors like culture, education, and “previous events”). For an example of similar reasoning in a publication of the Reagan Justice Department, see *infra* note 53.

legacy of past discrimination. As *Griggs* showed, the disparate impact inquiry could ensure that workplace standards actually reflected the skills needed to do the job, and so *reinforce* merit-based hiring and promote equality of opportunity. But for those who viewed the persisting stratification of the workplace as best explained by racial group differences in taste and talent, as Thomas Sowell and many in the Reagan administration argued,⁵² the disparate impact framework was not correcting bias, but instead introducing it. They saw disparate impact as akin to affirmative action⁵³ or a “quota,”⁵⁴ an illegitimate form of group preference.⁵⁵

In 1989, the year that a majority of the Rehnquist Court first applied strict scrutiny to affirmative action in *Croson*,⁵⁶ this *same* block of Justices changed the burdens of proof in Title VII disparate impact cases in a decision called *Wards Cove*.⁵⁷ Congressional efforts to reverse *Wards Cove* and codify the disparate impact framework provoked a fierce several year struggle, with opponents decrying the legislation restoring disparate impact as a “quota bill.”⁵⁸ Yet, strikingly, the conflict was *legislative*; opponents of

52. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: “DISPARATE IMPACT” AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 6 n.17 (1987) [hereinafter OLP, REDEFINING RACE] (citing THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 42–43 (1984)); see also Abram, *supra* note 49, at 1316 & n.11 (citing THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE 190 (1983)).

53. See generally OLP, REDEFINING RACE, *supra* note 52, at i (“[I]f ‘discrimination’ is understood to mean statistically disproportionate effects *alone*, the result will be nothing less than the permanent institutionalization of race- and gender-conscious affirmative action. The report suggests that such a result follows unavoidably from the naturally occurring statistical disparities between groups that are inevitable in a heterogeneous society such as the United States.”).

54. Memorandum from John Roberts, Special Assistant to the Att’y Gen., to the Att’y Gen., Talking Points for White House Meeting on Voting Rights Act (Jan. 26, 1982), available at <http://www.archives.gov/news/john-roberts/accession-60-89-0372/doc056.pdf> (“An effects test for § 2 could . . . lead to a *quota system* in electoral politics . . . Just as we oppose quotas in employment and education, so too we oppose them in elections.”).

55. For a closer look at debate over disparate impact in this period, see Siegel, *supra* note 48, at 23–29.

56. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

57. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Justice Stevens concurred in the judgment in *Croson*, and signed on to parts of Justice O’Connor’s opinion, but dissented in *Wards Cove*. The remaining members of the majorities are the same in both cases: Justices O’Connor, White, Rehnquist, Scalia and Kennedy. Compare *Croson*, 488 U.S. at 475, with *Wards Cove*, 490 U.S. at 644.

58. See, e.g., Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993). For an analysis of the debate, see Robin Stryker, Martha Scarpellino & Mellisa Holtzman, *Political Culture Wars 1990s Style: The Drum Beat of Quotas in Media Framing of the Civil Rights Act of 1991*, 17 RES. SOC. STRATIFICATION & MOBILITY 33 (1999).

the 1991 Civil Rights Act never questioned its constitutionality.⁵⁹ Debate over disparate impact persisted in different legislative arenas.⁶⁰

III. *RICCI*: DISPARATE IMPACT AS DISCRIMINATORY PURPOSE?

It was not until the *Ricci* case in 2009 that conflict over disparate impact took constitutional form.⁶¹ The suit came after decades of litigation between white and minority groups over minority access to the firefighting jobs in New Haven, Connecticut.⁶² In 2003, New Haven administered a written civil service exam to identify candidates for officer positions in the department, and received information from the company charged with scoring the results that no black candidates scored high enough to be considered for promotion.⁶³ When New Haven announced that the results of a written exam would result in the promotion of scarcely any minority firefighters,⁶⁴ the minority firefighters reacted with distrust. They suspected bias and, in a civil service board hearing, raised disparate impact concerns.⁶⁵ In response, the City announced it would void the results of the test, and retest the applicants using a new promotion exam.⁶⁶ White

59. For instance, in an important report issued by the Department of Justice during President Reagan's tenure, administration lawyers sharply criticized disparate impact liability, but did not consider the possibility that the Constitution prohibited disparate impact liability. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988). See also H.R. REP. NO. 102-40, at 52-81, reprinted in 1991 U.S.C.C.A.N. 694, 737-36 (criticizing bill without raising constitutional objections).

60. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there is no private right of action to enforce disparate impact claims under Title VI regulations, but raising no issue concerning the constitutionality of disparate impact).

61. Professor Richard Primus seems first to have raised the question of disparate impact's constitutionality in 2003. As he observed, "[t]he idea that equal protection might affirmatively prohibit the use of statutory disparate impact standards departs significantly from settled ways of thinking about antidiscrimination law." Primus, *supra* note 18, at 495. He attributed the plausibility of his constitutional challenge of disparate impact to changes in equal protection law since the 1970s that evince hostility to government action that "aims to allocate goods among racial groups, even when intended to redress past discrimination." *Id.* at 496.

62. *Ricci v. DeStefano*, 557 U.S. 557, 610-11 (2009) (Ginsburg, J., dissenting); see also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1324-25, 1338-40 (2011).

63. *Ricci*, 557 U.S. at 566. Of the 118 candidates who took either the lieutenant or captain examination—68 whites, 27 blacks, and 23 Hispanics—41 whites, 9 blacks, and 6 Hispanics passed. *Id.* Because the city's charter mandated that each vacancy must be filled by one candidate from the highest three scorers, 19 candidates were eligible for promotion to lieutenant or captain—17 whites, 2 Hispanics, and no blacks. *Id.*

64. *Id.*

65. *Id.* at 562.

66. *Id.*

firefighters brought suit,⁶⁷ raising both constitutional and statutory claims, and ultimately persuaded the Supreme Court that New Haven's decision to rescind the test results violated meritocratic standards, and amounted to unlawful disparate treatment on the basis of race.⁶⁸

Writing for the majority in *Ricci*, Justice Kennedy announced that the Court could decide the case under the federal employment discrimination statute and so avoid the equal protection claim.⁶⁹ Yet even as the Court professed to "avoid" the constitutional question, its decision under Title VII suggested that New Haven's enforcement of disparate impact might raise equal protection concerns. Justice Kennedy held that, in voiding the exam and announcing that it would retest applicants for promotion, New Haven engaged in disparate treatment in violation of Title VII: "the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'" ⁷⁰ "Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. *The City rejected the test results solely because the higher scoring candidates were white.*" ⁷¹

The Court did not find that New Haven acted with unconstitutional purpose, yet it did find that, in rejecting the test results, New Haven violated Title VII's prohibition on disparate treatment.⁷² To do so, the Court introduced into Title VII a new standard not mentioned in the 1991 Act, drawn from its equal protection-affirmative action decisions. The majority ruled that, henceforth, employers would have to show that they had "a strong basis in evidence" for believing they might be in violation of disparate impact law before they could take an adverse employment action

67. *Id.* at 574 ("The plaintiffs . . . are 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results.").

68. The plaintiffs in *Ricci* situated their constitutional argument in the Court's discriminatory purposes cases, arguing that "race was the 'predominant factor' in their refusal to promote petitioners." Petitioners' Brief on the Merits at 21–25, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328) (citing *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion)); *id.* at 24–25 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977), *Washington v. Davis*, 426 U.S. 229 (1976), and redistricting cases).

Plaintiffs also argued: "Strict scrutiny applies fully to race-based actions taken out of a professed desire to advantage or remedy past harms to minorities." *Id.* at 22. They never clarified what they meant by "race-based actions," a term that might have indicated purpose or classification. Further blending the lines of doctrine together, the plaintiffs cited *Adarand* for the proposition that a benign motive does not protect a racial *classification* from scrutiny and invoked it to say they do not need to make a showing of *Feeney*-style animus. *See id.* at 26–27.

69. *Ricci*, 557 U.S. at 593.

70. *Id.* at 579 (citations omitted); *id.* (quoting the district court's opinion noting that "respondents' 'own arguments . . . show that the City's reasons for advocating non-certification were related to the racial distribution of the results'").

71. *Id.* at 579–80 (emphasis added).

72. *Id.* at 593.

otherwise amounting to disparate treatment to comply with the statute's disparate impact provisions.⁷³

Justice Scalia went further. Instead of questioning New Haven's action in complying with Title VII, he challenged the disparate impact provisions of the 1991 Civil Rights Act on their face, suggesting they might be unconstitutional. Warning of a coming "war between disparate impact and equal protection,"⁷⁴ Justice Scalia cited *Feeney*, the equal protection discriminatory purpose decision, and observed: "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."⁷⁵ The statute did not impose quotas, Justice Scalia argued, but it imposed pressure on employers to design the workplace with attention to racial outcomes.⁷⁶ The fact that the government's purpose was benign should make no difference, he contended, citing *Adarand*,⁷⁷ an affirmative action case, for the proposition that "the purportedly benign motive for the disparate-impact provisions cannot save the statute."⁷⁸ "Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles."⁷⁹ The only justification for disparate impact liability that Justice Scalia recognized as weighty enough to save the law's constitutionality was that disparate impact liability might police for intentional discrimination.⁸⁰

Ricci has encouraged a stream of conservative challenges to disparate impact, in which the Court has expressed interest. Since its decision in *Ricci*, the Court has twice taken cases questioning whether the Fair Housing Act provides a disparate impact cause of action⁸¹—statutory cases

73. *Id.* at 583 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

74. *Id.* at 595.

75. *Id.* at 594.

76. *Id.*

77. *Id.* at 595 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

78. *Id.*

79. *Id.* at 594–95.

80. *Id.* at 595 ("It is one thing to free plaintiffs from proving an employer's illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.").

81. *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013); *Magner v. Gallagher*, *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012). Each case raised the question whether the Fair Housing Act was properly interpreted to authorize disparate impact claims—a question all courts of appeals that have considered the matter have answered in the affirmative. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381–84 (3d Cir. 2011) (citing decisions from each circuit except the Fourth Circuit), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013).

that also raised constitutional challenges to disparate impact, in the form of constitutional avoidance claims,⁸² and in briefs of amici;⁸³ in each case the parties settled just before the Court was to hear argument in the case.⁸⁴ This Term the Court has again taken a fair housing disparate impact case in which the defendant invokes Justice Scalia's opinion in *Ricci* to support similar constitutional avoidance claims.⁸⁵

IV. FISHER: HOW AN AFFIRMATIVE ACTION OPINION CHANGES THE DEBATE OVER DISPARATE IMPACT

Congress's decision to codify the disparate impact test in the 1991 Civil Rights Act may have been intentional and race conscious, but was Congress's decision to codify the disparate impact cause of action itself a

82. See, e.g., Petitioners' Opening Brief at 40, *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, cert. granted, 133 S. Ct. 2824 (2013), cert. dismissed, 134 S. Ct. 636 (2013) (No. 11-1507) ("[E]xposing the Township and other local governments to disparate-impact claims for otherwise neutral land-use decisions would affirmatively require them to 'classify individuals by race and allocate benefits and burdens on that basis.'" (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring in part and concurring in the judgment))).

83. See, e.g., Brief Amicus Curiae of Pacific Legal Foundation et. al. in Support of Petitioners at 5, *Magner v. Gallagher*, cert. granted, 132 S. Ct. 548 (2011), cert. dismissed, 132 S. Ct. 1306 (2012) (No. 10-1032) ("Subjecting government defendants to disparate impact claims leads them to engage in unconstitutional race-conscious decisionmaking to avoid liability for such claims.").

84. Adam Liptak, *Fair-Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html>.

85. See *Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 747 F.3d 275 (5th Cir. 2014), cert. granted, 135 S. Ct. 46 (U.S. Oct. 2, 2014) (No. 13-1371). While all courts of appeals to consider the question have recognized a disparate impact cause of action under the Fair Housing Act, see *supra* note 81, the State of Texas argues that the Court should reject that interpretation of the statute in order to avoid the conflict with equal protection that, it asserts, would result. See Brief for the Petitioners at 43, *Tex. Dep't. of Hous. & Cmty. Affairs*, 135 S. Ct. 46 (No. 13-1371) (Nov. 17, 2014) (arguing that HUD's disparate-impact rule "effectively compel[s] entities to engage in race-conscious decisionmaking in order to avoid legal liability" (citing *Ricci*, 557 U.S. at 580-84; *id.* at 594 (Scalia, J. concurring) ("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")); *id.* at 43-44 ("This is not acceptable under modern equal-protection doctrine, which requires colorblind government and abhors government decisionmaking based on race."); *id.* at 44 (claiming that "HUD's 'disparate impact' regime will compel every regulated entity to evaluate the racial outcomes of its policies and make race-based decisions to avoid disparate-impact liability" and arguing that "[t]he Constitution does not permit state actors to engage in racial balancing of this sort" (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003))). For similar claims by amici, see, for example, Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioners at 21, 24, *Tex. Dep't. of Hous. & Cmty. Affairs*, 135 S. Ct. 46 (No. 13-1371) (Nov. 24, 2014) (also invoking Justice Scalia's concurrence in *Ricci* and arguing that "the Court was 'merely postponing the evil day' when the Court must decide 'whether, or to what extent, are the disparate-impact provisions . . . consistent with the Constitution's guarantee of equal protection'" given that "disparate impact doctrine requires states to 'place a racial thumb on the scales, . . . evaluate the racial outcomes of [their] policies, and . . . make decisions based on (because of) those racial outcomes'" (quoting *Ricci*, 557 U.S. at 594 (Scalia, J. concurring))).

discriminatory purpose, an action in violation of the Equal Protection Clause?⁸⁶ As I will now show, Justice Scalia's suggestion that Congress's decision to codify disparate impact liability reflects a discriminatory purpose is at odds with equal protection precedents that allow, and even encourage, race-conscious but facially neutral state action that promotes equal opportunity or diversity. This understanding of equal protection law is assumed and confirmed by Justice Kennedy's recent opinion in *Fisher v. University of Texas*. *Fisher* poses a massive obstacle to Justice Scalia's claim that disparate impact law reflects a discriminatory purpose. Only after appreciating the obstacles to this broad facial challenge to disparate impact law can we isolate with greater precision the *kind* of constitutional concerns that so disturb the majority of the Court in *Ricci*.

A. *Disparate Impact under the Equal Protection Law of the Burger, Rehnquist, and Roberts Courts*

Numerous decisions of the Burger, Rehnquist, and Roberts Courts support the constitutionality of disparate impact standards:

- (1) *Washington v. Davis*, which establishes modern discriminatory purpose law, holds that legislatures have authority to adopt disparate impact laws, even if the judicially enforced Equal Protection Clause does not require such an inquiry.⁸⁷
- (2) The *Davis* line of cases defines discriminatory purpose in terms having nothing to do with the kinds of race consciousness that disparate impact law reflects. To make out a claim of discriminatory purpose under the Equal Protection Clause, plaintiffs have to show that government has acted with animus, malice, or intent to harm. "Discriminatory purpose," the Court explained in *Personnel Administrator of Massachusetts v. Feeney*,⁸⁸ "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁸⁹

86. A different way of framing this question might be to ask whether under the equal protection cases of the Roberts Court disparate impact embodies an unconstitutional "racially allocative" purpose. Cf. Primus, *supra* note 18, at 1341–48; Primus, *supra* note 20, at 494–99.

87. *Supra* text accompanying notes 40–44.

88. 442 U.S. 256 (1979).

89. *Id.* at 279 (citation omitted).

- (3) Modern strict scrutiny law repeatedly affirms that government can act for benign race-conscious reasons that do not amount to discriminatory purposes within the meaning of *Feeney*. To adopt an affirmative action program that classifies by race, government has to show that the program is narrowly tailored to achieve a compelling government end that government could not achieve by alternative race-neutral means.⁹⁰ The doctrine of narrow tailoring allows, and even encourages, government to pursue the race-conscious end of diversity or equality of opportunity by means that do not classify individuals by race.⁹¹ A majority of the Court—including Justice O'Connor and Justice Scalia—signed on to this narrow tailoring requirement in *Croson*,⁹² and Justice O'Connor writing for the Court repeated it again in *Grutter*.⁹³ In this body of law, form matters.
- (4) Reiterating the principles structuring the affirmative action cases, Justice Kennedy went out of his way in *Parents Involved*⁹⁴ to emphasize that race-conscious school districting to promote equal opportunity *was* permissible and would *not* trigger strict scrutiny, in the ways that classifying individual students by race does.⁹⁵ As he explained: “If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal

90. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

91. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (“Narrow tailoring . . . involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.”) (citation omitted).

92. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (describing the “race-neutral means to increase minority business participation” that the city could have pursued in lieu of a racial quota, such as favoring small businesses generally and lowering bond requirements); *id.* at 526 (Scalia, J., concurring in the judgment) (“A State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race. . . . Such programs may well have racially disproportionate impact, but they are not based on race.”); *see also id.* at 528 (“Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.”).

93. *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

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

95. In *Parents Involved*, Justice Kennedy objected to the strict colorblindness that Chief Justice Roberts insisted on his majority opinion. *Id.* at 788–89 (Kennedy, J., concurring in part and concurring in the judgment). Instead, he argued that the government could legitimately take steps to consider and alter the racial composition of schools in order to promote diversity in the student body and equal opportunity for minority students. *Id.*

educational opportunity to all of their students, they are 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.”⁹⁶ Race-conscious districting, he emphasized, was only one instance of many race-conscious but facially neutral forms of state action the government could employ to increase diversity and to promote equal opportunity.⁹⁷ Justice Kennedy explained: “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.”⁹⁸

In these passages of *Parents Involved*, Justice Kennedy reaffirms the principle on which the narrow tailoring cases rest. Not all race-conscious purposes are discriminatory purposes within the meaning of *Davis-Feeney*; government may engage in race-conscious state action to remedy past discrimination, promote equal opportunity, and achieve diversity, in cases where the law is facially neutral in form. This is not a bug, but a feature of equal protection law. It reflects the understanding that prohibiting de jure segregation was not enough to end discrimination and its legacies; baselines in the United States are still *not* race neutral.⁹⁹ As Justice Kennedy explained in *Parents Involved*:

Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present

96. *Id.*

97. *Id.*

98. The passage in full reads:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including 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. 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. 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. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Id. at 789 (citations omitted).

99. *See, e.g., id.* at 787–88.

achievements, however significant, and to recognize and *confront the flaws and injustices that remain*. This is especially true when we seek assurance that opportunity is not denied on account of race. *The enduring hope is that race should not matter; the reality is that too often it does.*

....

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. . . . [A]s 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.¹⁰⁰

B. *Fisher and Disparate Impact*

Fisher’s ruling on affirmative action reflects and affirms these equal protection principles of the Burger, Rehnquist, and Roberts Courts. The case provides a concrete illustration of the principle that government may pursue certain race-conscious purposes when it acts by facially neutral means. More particularly, the case illustrates (1) that government may act for the race-conscious end of promoting diversity and equality of opportunity if it acts by facially neutral means, (2) even if government acts with the specific end of altering racial outcomes (3) in a competitive process.

100. *Id.* at 787–89 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)). For another example of Justice Kennedy discussing similar themes, see *Miller v. Johnson*, 515 U.S. 900, 927 (1995) (“The [Voting Rights] Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities’ right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs.”). Justice O’Connor also recognized the persistence of discrimination and its effects. *See, e.g., Bush v. Vera*, 517 U.S. 952, 992 (1996) (O’Connor, J., concurring) (“The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation’s commitment ‘to confront its conscience and fulfill the guarantee of the Constitution’ with respect to equality in voting. Congress considered the test ‘necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights.’ It believed that without the results test, nothing could be done about ‘overwhelming evidence of unequal access to the electoral system,’ or about ‘voting practices and procedures [that] perpetuate the effects of past purposeful discrimination.’ And it founded those beliefs on the sad reality that ‘there still are some communities in our Nation where racial politics do dominate the electoral process.’ Respect for those legislative conclusions mandates that the § 2 results test be accepted and applied unless and until current lower court precedent is reversed and it is held unconstitutional.”) (citations omitted).

The question in *Fisher* was whether the University of Texas at Austin could consider race in individual admissions decisions when the University also relied on race-neutral means to achieve diversity in its student body. This inquiry was mandated by narrow tailoring, which *Fisher* explains “involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.”¹⁰¹ The alternative “race-neutral” means of achieving diversity at issue in *Fisher* was a “percent plan,” a program admitting the top ten percent of students in state high schools to the University of Texas at Austin that was enacted when the state’s original affirmative action program was struck down in the 90s.¹⁰² The state legislature understood that, given the underlying segregation of the state school system, admitting the top ten percent of high school graduates would increase the number of minorities in UT’s admitted class; that was one important reason that UT adopted the program.¹⁰³

There is no chance that the Court overlooked the race-conscious aims of the percent program. Increasing minority enrollment was repeatedly described as a purpose¹⁰⁴ of the percent plan in the *Fisher* litigation. The Fifth Circuit explained: “The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary,

101. *See id.* at 2420 (“Narrow tailoring also requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.”) (citations omitted).

102. In 1996, the Fifth Circuit invalidated the university’s process for evaluating applicants because it considered race but did not serve a compelling governmental interest. *See id.* at 2415 (citing *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996)).

103. *See id.* at 2433 (Ginsburg, J., dissenting) (citing an analysis of the bill prepared by the state’s House Research Organization, which read, “Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities.”).

104. Importantly, this was not the *only* purpose of the percent plan. Even Abigail Fisher acknowledged that the goal of the percent plan was “two-fold”: ensuring a pool of highly qualified students and promoting diversity. Motion for Preliminary Injunction at 4, *Fisher v. Texas*, 556 F. Supp. 2d 603 (W.D. Tex. 2008) (No. A-08-CA-263-SS), *aff’d sub nom.* *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013); *see also* STATE OF TEX. H. RESEARCH ORG., BILL ANALYSIS, HB 588, at 4 (1997), *available at* <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/75-0/HB588.pdf>. (“Admitting the top 10 percent of high school classes would ensure a highly qualified pool of students each year in the state’s higher education system.”). Indeed, the supporters of the bill argued that in addition to improving minority enrollment the percent plan would improve socioeconomic diversity: “This strategy would not only assist minority students to whom affirmative action programs were previously targeted but also similarly deserving Anglo students.” *Id.* at 5.

purpose.”¹⁰⁵ In its brief to the Supreme Court, the University of Texas explained: “An acknowledged purpose of the law was to increase minority admissions given the loss of race-conscious admissions.”¹⁰⁶ In *Gratz* and again in her *Fisher* dissent, Justice Ginsburg pointed out that the percent plan has a purpose of increasing minority enrollment, notwithstanding the law’s facial neutrality¹⁰⁷—a point emphasized by the plan’s constitutional critics.¹⁰⁸

No Justice raised questions about the constitutionality of the percent plan. The Court’s acceptance of the percent plan illustrates that government may act in race-conscious but facially neutral ways to promote equal opportunity, *even where government seeks to alter racial outcomes*. Texas decided to adopt the percent plan with a race-conscious aim of altering the mix of students the university admitted, and with the plan admitted a different group of minority and majority applicants than had been admitted under the old criteria.¹⁰⁹ The doctrine of narrow tailoring sanctions the use of race-conscious but facially neutral programs to increase diversity, so long as the program does not discriminate among individual applicants by race.¹¹⁰ The same can be said about a government’s decision to change school district lines in the ways Justice Kennedy described in *Parents*

105. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 224 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013). *See also id.* at 242 (“The Top Ten Percent Law was adopted to increase minority enrollment.”).

106. Brief for Respondents at 8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (“The Texas Legislature responded to *Hopwood* by enacting the top 10% law (House Bill 588), which guarantees admission to UT to any graduate of a Texas high school who is ranked in the top 10% of his or her high school class, beginning with the 1998 admissions cycle. An acknowledged purpose of the law was to increase minority admissions given the loss of race-conscious admissions.”) (citations omitted).

107. *See Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting) (“Calling such 10% or 20% plans ‘race-neutral’ seems to me disingenuous, for they ‘unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.’”) (citing Brief for Respondent Bollinger et al. at 44); *Fisher*, 133 S. Ct. 2411 at 2433 (Ginsburg, J., dissenting) (“[O]nly an ostrich could regard the supposedly [race] neutral alternatives as race unconscious.”).

108. *Regarding the Ten Percent Plan: Hearing Before the Tex. S. Subcomm. on Higher Educ.* 4–5, 2004 Leg. (“When the Texas Legislature designed the Ten Percent Plan, it did so with the purposeful intent of increasing the amount of certain minority students” at the university) (testimony of Roger Clegg, V.P. and Gen. Counsel, Ctr. for Equal Opportunity), *available at* <http://198.173.245.213/pdfs/Texastestimony.pdf>; *id.* at 5 (describing the percent plan as a deliberate effort to boost minority representation after the Fifth Circuit in *Hopwood* invalidated the express consideration of race in admissions); Marcus, *supra* note 20, at 73 (“Under *Ricci* and *Parents Involved*, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas’s racial motivations predominated in the institution of the plan.”).

109. *Cf. Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 645 (5th Cir. 2014) (“With its blindness to all but the single dimension of class rank, the Top Ten Percent Plan . . . [passed] over large numbers of highly qualified minority and non-minority applicants.”)

110. *Fisher*, 133 S. Ct. at 2420 (describing narrow tailoring as “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications”).

Involved. Consider again Justice Kennedy's observation: "If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are 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."¹¹¹

The Court's acceptance of the percent plan is significant for another reason. The Court's acceptance of the percent plan demonstrates that government may act in race-conscious but facially neutral ways to promote equal opportunity, *even where the state achieves this goal by altering the selection standards governing a competitive process.* Justice Scalia recently made a similar point in defending the constitutionality of Michigan's ban on affirmative action in *Schuette v. BAMN*.¹¹² Those who enacted Michigan's ban on affirmative action sought to change selection procedures that employed affirmative action¹¹³—presumably with the race-conscious goal of making the results of the selection process more equitable.¹¹⁴ Justice Scalia emphasizes that the state's purposes, even if race-conscious, did not amount to a discriminatory purpose, *as a matter of law*: "In my view, any law expressly requiring state actors to afford all persons equal protection of the laws . . . does not—cannot—deny 'to any person . . . equal protection of the laws' . . . regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court."¹¹⁵

In sanctioning the percent plan and the affirmative action ban, the Roberts Court has demonstrated that government may change the selection standards in competitive processes without triggering strict scrutiny if the government acts (1) with a race-conscious goal of promoting equal opportunity; (2) the government requires a selection standard that is appropriate for the context; and (3) the standard does not classify individuals by race. Judged by these criteria, both the Texas percent plan and the Michigan ban on affirmative action are constitutional. Both pursue a race-conscious goal of promoting equal opportunity. Each promotes selection standards that appear to conform with meritocratic norms. Neither law employs a selection standard that classifies individuals by race or

111. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

112. 134 S. Ct. 1623 (2014).

113. *Id.* at 1629.

114. *See infra* note 115.

115. *Schuette*, 134 S. Ct. at 1648 (Scalia, J., concurring in judgment). Justice Scalia observes that citizens may enact affirmative action bans for race-conscious reasons—because they are "opposed in principle to the notion of 'benign' racial discrimination"—and he approvingly characterizes the resulting bans as "racial-neutral alternatives." *Id.* at 1639.

selects only members of one racial group. Consequently, neither should trigger strict scrutiny.

Judged by these standards, the disparate impact framework is constitutional. Congress can (1) prohibit selection standards with unjustified racial disparate impact (2) in order to promote equal opportunity—to remedy and deter covert intentional discrimination, unconscious bias, and the legacy of past intentional discrimination. The purposes of disparate impact may be race-conscious but they do not amount to *discriminatory* purposes within the meaning of *Feeney*¹¹⁶—even if Congress undertakes to remedy and deter more forms of racial bias than the judicially enforced provisions of the Fourteenth Amendment require.

The narrow tailoring cases answer Justice Scalia's suggestion in *Ricci* that disparate impact may be constitutional under the Equal Protection Clause only to the extent it redresses intentional discrimination,¹¹⁷ a suggestion Justice Scalia has never reconciled with his own support for race-conscious, race-neutral state action in the affirmative action cases. In *Croson*, Justice Scalia explained: "A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race."¹¹⁸ In *Fisher*, no Justice suggested that the constitutionality of the percent plan depends on whether its purpose is to rectify intentional discrimination only; to the contrary, *Fisher* approvingly discusses race-neutral alternatives for achieving diversity.¹¹⁹ However Justice Scalia ultimately chooses to

116. As the Second Circuit has explained, the fact that the government designed a test with attention to racial disparate impact "does not demonstrate that the [government] designed the . . . exam 'because of' some desire to adversely affect" the other applicants. *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 50–51 (2d Cir. 1999) (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) ("Nothing suggests that the County sought to disadvantage appellants, or that the County was propelled by sinister or invidious motivations. A desire to reduce the adverse impact on black applicants and rectify hiring practices which the County admitted in the 1982 consent order might support an inference of discrimination is not analogous to an intent to discriminate against non-minority candidates.").

117. See *Ricci*, 557 U.S. at 595 (Scalia, J., concurring) ("It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment. . . . But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion . . .") (citations omitted). The only justification for disparate impact liability that Justice Scalia recognized as weighty enough to save the law's constitutionality was that disparate impact liability might police for intentional discrimination. *Id.* ("It is one thing to free plaintiffs from proving an employer's illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.").

118. *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment).

119. See *supra* text accompanying note 7.

reconcile his position in *Ricci* with his opinions in the affirmative action cases, it is clear that in the affirmative action cases most Justices of the Roberts Court have affirmed race-conscious but race-neutral efforts to achieve diversity and equality of opportunity. In sum then, it is not simply that the purposes of disparate impact law are constitutional under the definition of discriminatory purpose that the Court adopted in *Feeney*; *Fisher* and the affirmative action cases show that government can act to promote equal opportunity—to remedy and deter covert intentional discrimination, unconscious bias, and the legacy of past intentional discrimination—and to promote diversity by race-neutral means.

As importantly, *Fisher* and *Schuetz* demonstrate that Congress has chosen constitutional means to achieve a constitutional end. To promote equal opportunity, Congress may prohibit selection standards with an unjustified disparate impact, so long as Congress requires standards that are context-appropriate and do not classify by race. This is exactly how disparate impact laws operate. The framework *allows* selection standards with racial disparate impact where the employer can show the selection standards are “business related”; the framework prohibits selection standards with racial disparate impact only in cases where the employer could *as effectively achieve its business needs by means that had less exclusionary impact*.¹²⁰ The disparate impact framework may lead decision makers to adopt new facially neutral standards that foreseeably select different persons from majority and minority groups, but this shift in standards is not enough to make the disparate impact framework unconstitutional.¹²¹ The percent plan in *Fisher* and the affirmative action ban in *Schuetz* foreseeably select for a demographically different group of applicants and in neither case was this sufficient to make the change in standards unconstitutional.¹²²

120. See *supra* text at note 16.

121. Most cases of disparate impact compliance, whether adjudicated or administrative, involve a change of standards that will select for a different group of minority and majority group members, just as the laws in *Fisher* and *Schuetz* did. See Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1238 (2003) (noting that “[t]he standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group,” as the Court did in *Griggs*, stating that “if a high school diploma requirement has a disparate impact on blacks that cannot be justified by business necessity, a Title VII court would order the employer to drop the requirement for whites as well as blacks”); Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 547–48 (2012) (noting that “[t]he core remedy for a successful disparate impact claim is practice-specific rather than plaintiff-specific,” so that “the standard remedy is to enjoin the employer from using that practice in the future” which “will assist all others whom the practice harms or excludes”).

122. Foreseeable racial disparate impact is not alone enough to make state action unconstitutional. Discriminatory purpose doctrine allows government to adopt practices with foreseeable disparate racial impact—whether condemning “blighted” property, see *infra* note 165, or

Not surprisingly, the constitutionality of disparate impact law was never questioned for decades. Equal protection principles enunciated in the case law of the Burger, Rehnquist, and Roberts Courts amply support the constitutionality of disparate impact. Nor is some change of course imminent. The laws the Court sanctioned in *Fisher* and *Schuette* undermine the kind of direct facial challenge to disparate impact Justice Scalia advances in *Ricci*.¹²³

V. *RICCI* REDUX: HOW MEANS AND MEANING MATTER

Unlike Justice Scalia, Justice Kennedy's majority opinion in *Ricci* does not suggest that disparate impact law is facially unconstitutional. Rather, the majority opinion in *Ricci* focuses on New Haven's actions in voluntarily complying with the federal employment discrimination law.

There is no doubt that the steps New Haven took voluntarily to comply with the federal employment discrimination statute were unusual, if not unprecedented. After learning that no black candidates scored high enough on the written civil service exam to be considered for an officer position in the fire department,¹²⁴ and hearing complaints from minority employees that the test had a racial disparate impact,¹²⁵ the City announced it would void the results of the test, and retest the applicants using a new promotion exam.¹²⁶ The City's approach to complying with Title VII was certainly irregular, but was it unlawful?

A constitutional injury is not immediately evident. Was the City acting from an unconstitutional purpose when it announced that it would administer a new promotion exam? If not, did the City classify its employees on the basis of race?

The City had race-conscious reasons for changing the selection standard, but it is hard to see how they amount to a discriminatory purpose within the meaning of *Feeney*. The City learned from the testing company that its initial exam would result in the promotion of a virtually-all white cohort of candidates—a message conveyed to the City without information

imposing higher sentences on crack than on powder cocaine, see *supra* note 47 (discussing the Sixth Circuit's decision in *United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013)).

123. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) ("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.")

124. See *supra* note 63 and accompanying text.

125. *Ricci*, 557 U.S. at 562.

126. *Id.*

about individual scores.¹²⁷ The City then appears to have changed its selection standard to avoid Title VII liability, to reduce the chance it might be using a racially biased selection standard, and to appease its estranged minority employees¹²⁸—not out of a desire to harm or exclude whites. The City appears to have acted, not because of, but in spite of, the impact on whites. If an impact on whites was a foreseeable effect of the City's change in standards, harming white applicants was not the City's reason for action any more than harming white applicants was Texas's reason for choosing the percent plan.

Even if the City acted for legitimate reasons, did the City employ constitutional means to achieve its constitutional ends? The City did not initially give the applications of individual minority candidates a “plus,” discriminate among individual applicants, or otherwise employ “individual racial classifications”¹²⁹ of the kind featured in the Court's affirmative action cases. Would the new test have classified applicants on the basis of race?

We do not know what new test New Haven would have used. But let us assume that in changing the promotion test, the City looked for a new exam that would test in a different way for the skills needed to do the job, in the hopes of selecting a group of candidates that did not exclude all black applicants.¹³⁰ If so, in modifying its selection standard, New Haven would

127. *Id.* at 567 (The director of the City's Department of Human Resources opened the meeting by telling the civil service board that “‘there is a significant disparate impact on these two exams’ [and] distributed lists showing the candidates' races and scores (written, oral, and composite) but not their names.”) (citation omitted).

128. *See id.* at 567–74; *see also id.* at 612–18 (Ginsburg, J., dissenting).

129. Strict scrutiny is reserved for practices that “distribute burdens or benefits on the basis of individual racial classifications,” *Schuette v. BAMN*, 134 S. Ct. 1623, 1647–48 (2014) (Scalia, J., concurring in the judgment) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007)); as Justice Scalia emphasizes, a “law that ‘neither says nor implies that persons are to be treated differently on account of their race’ is not a racial classification.” *Id.* (citation omitted)).

130. Justice Ginsburg points to alternative testing methods suggested by experts, such as “an assessment center process, which is essentially an opportunity for candidates . . . to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test.” *Ricci*, 557 U.S. at 615 (Ginsburg, J., dissenting). *See also* Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents at 32, *Ricci*, 557 U.S. 557 (Nos. 07-1428, 08-328) (“It is . . . well-recognized in the research literature that assessment centers reduce adverse impact on racial minorities as compared to traditional standardized tests.”).

Justice Ginsburg notes that New Haven failed to consider “what sort of ‘practical’ examination would ‘fairly measure the relative fitness and capacity of the applicants to discharge the duties’ of a fire officer.” *Ricci*, 557 U.S. at 611 (Ginsburg, J., dissenting). She then notes that “Bridgeport . . . had once used a testing process similar to New Haven's, with a written exam accounting for 70 percent of an applicant's score, an oral exam for 25 percent, and seniority for the remaining five percent. Bridgeport recognized, however, that the oral component, more so than the written component, addressed the sort of ‘real-life scenarios’ fire officers encounter on the job. Accordingly, that city ‘changed the relative

have chosen a race-conscious but facially neutral means of serving its business needs that would also reduce the chance of bias and increase the diversity of its workforce. The City's interest in adopting a new selection standard is amply sanctioned by the narrow tailoring cases, and resembles Texas's decision to adopt the percent plan.

What then was the constitutional concern to which Justice Kennedy adverted, and which he used a decision on Title VII grounds to avoid? If no purpose that was discriminatory within the meaning of *Feeney* motivated the change in exam, and the substituted exam was appropriate to context and did not classify individuals by race, what did the City do that raised constitutional concerns? The question leads us to what is unusual, if not unprecedented, and for many quite disturbing about the *Ricci* facts. The City's change in exams was procedurally irregular in certain important respects. New Haven did much more than modify its selection standard. The City (1) jettisoned the test *after* administering it, (2) giving the applicants openly race-related reasons for discarding their test results.¹³¹

Justice Kennedy objected to just these features of New Haven's actions: "[O]nce [a promotions] process ha[s] 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."¹³² He further explained:

The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates 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.¹³³

The fact that New Haven discarded the results of white and minority applicants who had already taken the exam was of crucial importance to the majority. The reliance interest of white job applicants in *Ricci* may have been more attenuated than the reliance interest of white job holders threatened by a lay-off agreement giving preferences to minority

weights' to give primacy to the oral exam. Since that time . . . Bridgeport had seen minorities 'fairly represented' in its exam results." *Id.* at 614 (citations omitted).

131. *See supra* note 127 and accompanying text.

132. *See Ricci*, 557 U.S. at 585.

133. *Id.* at 593.

employees in *Wygant*,¹³⁴ even so, the majority emphasized *Wygant*-like reliance concerns.¹³⁵ A second exacerbating factor was the race-related reason for retesting which the City gave the applicants. The City explained that the test had a racial disparate impact, telling applicants the race, but not the names, of high and low scoring applicants, so that all of the individuals the City addressed knew that white applicants had performed better than minority applicants, even if they did not know *which* individual white applicants had done so.¹³⁶ The *Ricci* majority reasoned about this message as the plaintiffs likely did, *as if* each white applicant had been “told” he would have been awarded a promotion, but for race.

Justice Kennedy’s concern about the racial message the City communicated to the applicants echoes the concerns he expressed in *Parents Involved* when he explained why districting and other race-conscious but facially neutral means of increasing diversity were presumptively constitutional and affirmative action was not: “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.”¹³⁷

For the majority, then, it was *not* the City’s decision to comply with disparate impact law that was presumptively unlawful or unconstitutional.

134. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that a collective bargaining agreement which altered the standard seniority-based retention system to ensure that minorities were not disproportionately laid off violated the Fourteenth Amendment).

135. Justice Kennedy discusses *Wygant* in *Ricci*, and draws the “strong basis in evidence” standard from a passage of *Croson* that quotes *Wygant*. See *Ricci*, 557 U.S. at 581–82. See *infra* note 142.

136. See *supra* note 127.

137. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). Unlike the admissions policy in *Parents Involved*, the exam used to determine promotions in the *Ricci* case did not classify individuals by race. Race nonetheless became unusually prominent in the promotions process because the City threw out scores of a test it had already administered, for race-related reasons likely to disadvantage some applicant with reliance interests.

The elements of (1) procedural irregularity and (2) open consideration of race distinguish the *Ricci* facts from an ordinary case of disparate impact compliance. These features of the *Ricci* case bring to mind the voting rights cases involving districts that are so strangely drawn that their race-conscious design is legible to the public. These voting rights cases hold that race cannot be the “predominant” factor in the legislators’ decision—*not* that race conscious districting always triggers strict scrutiny. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (Kennedy, J. for the majority) (“Redistricting legislatures will . . . almost always be aware of racial demographics, but it does not follow that race predominates in the redistricting process”); see also *Bush v. Vera*, 517 U.S. 952, 993 (O’Connor, J., concurring) (1996) (“[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. . . . Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.”).

In fact, Justice Kennedy goes out of his way to protect the efforts of employers voluntarily to comply with the disparate impact provisions of Title VII law. The *Ricci* majority emphasizes that employers can modify tests *before* they administer them, and explains that involving employees during test design can foster constructive relations in the workplace: "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 individuals, 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."¹³⁸ A properly administered promotion exam can build the confidence of all employees in the fairness of selection devices. If the selection process is done with care, and in a fashion that earns the employees' trust, it is a source of confidence and community, rather than division. In this way, proper compliance with disparate impact law can guard against balkanization of the workplace. As Justice Kennedy explains: "*Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent.* Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics."¹³⁹

What made New Haven's actions problematic, then, was the irregular way in which the City complied with disparate impact law: by offering openly race-related reasons for changing promotion standards for an identified group of applicants who had already tested for the job. Changing standards in this way is not a normal method of Title VII compliance, a normal exercise of employer prerogatives, or the normal expression of meritocracy. However legitimate the government's ends may have been, the means it employed to achieve them violated the "high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process,"¹⁴⁰ replacing a meritocratic competition with a system of hiring that the applicants were expressly told would focus on race. *This* means of achieving the government's legitimate ends, Justice Kennedy emphasizes, is likely to be intensely divisive, to stimulate "the very racial animosities Title VII was intended to prevent."¹⁴¹ Writing for the majority, Justice Kennedy judged the City's attempt to discard test results as disparate treatment of the applicants, and in future cases required government to

138. *Ricci*, 557 U.S. at 585.

139. *Id.* at 584 (emphasis added).

140. *Id.* at 593.

141. *Id.* at 584 (quoted in full at *supra* text accompanying note 139).

show that it had a “strong basis in evidence” before engaging in disparate treatment of the kind involved in the City’s decision to discard test results.¹⁴²

To come full circle, New Haven’s irregular approach to complying with disparate impact law differs significantly from the change of selection standards in *Fisher* and *Schuette*. In those cases, the Court has demonstrated that government may change the selection standards in competitive processes without triggering strict scrutiny if the government acts (1) with a race-conscious goal of promoting equal opportunity; (2) the government requires a selection standard that is appropriate for the context; and (3) the standard does not classify by race.¹⁴³ These principles are satisfied in the ordinary case of voluntary disparate impact compliance, in which an employer specifies conditions for employment in advance of evaluating applicants for the job in question, as well as in prospective remedies that courts ordinarily order for violations of Title VII.¹⁴⁴

142. See *id.* at 582 (“The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion))).

Courts are still debating the circumstances in which an employer would have to meet the strong basis in evidence standard announced in *Ricci*. The *Ricci* opinion announces the standard as constraining employers’ freedom to engage in disparate treatment by discarding test results for racial reasons, and repeatedly discusses the standard as concerning the employer’s ability voluntarily to discard test results:

If an employer cannot rescore a test based on the candidates’ race, § 2000e-2(l), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations. . . . For the foregoing reasons, we adopt the strong-basis-in evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.

Id. at 584 (citations omitted); see also *id.* at 581–82, 585. *Accord* *Briscoe v. City of New Haven*, 654 F.3d 200, 206 (2d Cir. 2011) (“[A]ll other indications in the opinion are of a holding limited to formulation of a standard for disparate-treatment liability [r]estricting an employer’s ability to discard test results.” (quoting *Ricci*, 557 U.S. at 584) (alteration in original)).

If the strong basis in evidence standard does apply in any context other than discarding test results, it would have to involve disparate treatment of applicants analogous to New Haven’s actions in voiding the test scores of applicants for announced racial reasons. The standard does not constrain employer decisions to revise exams *before* applicants for an open position take the exam. *Cf. supra* text accompanying note 138.

143. See *supra* Part IV.B.

144. Most cases of disparate impact compliance, whether adjudicated or administrative, involve a change of standards that will select for a different group of minority and majority group members, just as the laws in *Fisher* and *Schuette* did. See *Schwab & Willborn, supra* note 121, at 1238 (“The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or

Even though the Court did not declare that the city violated the Constitution, the Court's ruling on the statutory question suggests that the city acted in ways that raised grave constitutional questions. This conclusion is striking, as it appears that in endeavoring to comply with Title VII, the city did not act from a discriminatory purpose within the meaning of the equal protection cases, nor did the city alter the employment status of applicants by discriminating among individuals on the basis of race.¹⁴⁵ The city's action in complying with Title VII seemed to fit comfortably within the Court's narrow tailoring decisions, just as the percent plan did, but for the city's decision to comply by jettisoning the exam results of a group of applicants for openly race-related reasons.

Is this difference of means of *constitutional* magnitude? *Ricci* does not answer this question squarely, yet the Court intimates that it may be. Government may act to remedy past discrimination, promote equal opportunity, and achieve diversity, but Justice Kennedy seems to be warning, it must pursue these ends with care, by means that do not violate citizen expectations of fair dealing.

"[E]mpathy" and "concern about protecting expectations of fair dealing that citizens have in interacting with the government" shapes the Court's affirmative action cases.¹⁴⁶ *Ricci* shows that the Roberts Court could extend this concern beyond affirmative action law requiring strict scrutiny of individual racial classifications to the review of at least certain forms of benign facially neutral state action as well. A city offering race-related reasons for irregular treatment of an identified group of job applicants with a reliance interest in the process might be such a case, Justice Kennedy suggested. Without finding discriminatory purpose or a racial classification

standard for everybody, not just the protected group," as the Court did in *Griggs*, stating that "if a high school diploma requirement has a disparate impact on blacks that cannot be justified by business necessity, a Title VII court would order the employer to drop the requirement for whites as well as blacks."); Travis, *supra* note 121, at 547-48 ("The core remedy for a successful disparate impact claim is practice-specific rather than plaintiff-specific," so that "the standard remedy is to enjoin the employer from using that practice in the future" which "will assist all others whom the practice harms or excludes.").

145. See *supra* note 129 and accompanying text.

146. See Siegel, *supra* note 48, at 31 ("Early justifications for judicial oversight suggest that the Justices who first applied strict scrutiny to affirmative action acted from empathy: they fashioned a body of equal protection law that cares about the impact of state action on citizens, and about citizens' confidence in the fairness of the state, in ways that the discriminatory purpose decisions of the Burger Court do not."); *id.* at 45 (discussing modern strict scrutiny as a body of law "designed to constrain the means by which government promotes diversity or pursues remedial ends that is focused on protecting expectations of fair dealing that citizens have in interacting with the government. These concerns shape not only the quantitative limits the decisions impose on affirmative action, but also the requirements the decisions impose on affirmative action's form").

as its equal protection case law seems to require,¹⁴⁷ the *Ricci* majority expresses concern about the appearance, impact, and public meaning of race-conscious but race-neutral state action, worrying about the ways ordinary citizens will understand and experience the challenged government action. Concern of this kind is welcome, *if* extended even-handedly; but in too many cases involving overtly racial state action that violates citizen expectations of fair dealing, judges invoke doctrines of discriminatory purpose to deny relief to minority claimants.¹⁴⁸

That said, it is clear that the circumstances triggering constitutional avoidance in *Ricci* are quite particular. They involve an irregular act of disparate impact compliance, in which the government discarded the test results of a group of applicants who had invested significant time in studying for a promotion exam, and explained its decision in terms which left the disappointed applicants with the impression that government was discarding their scores to advance the interests of another racially defined group. It is not surprising that New Haven's irregular course of compliance would concern a justice who allows affirmative action subject to strict scrutiny in order to constrain what he believes are its potentially balkanizing effects.¹⁴⁹

Disparate impact law can promote equal opportunity, lessen racial stratification, increase employee confidence in the fairness of selection criteria, and thus reduce racial balkanization; but for disparate impact law to do so, Justice Kennedy seems to be saying in *Ricci*, disparate impact law needs to be enforced with attention to *all* employees' expectations of fair dealing, that is, enforced with care not to excite racial balkanization. By finding New Haven's manner of complying with the statute unlawful disparate treatment, Kennedy warns that interventions designed to heal social division should be implemented in ways that do not aggravate social

147. *Cf.* *Schuette v. BAMN*, 134 S. Ct. 1623, 1647 (2014) (Scalia, J., concurring) (noting "the exceptionless nature of the *Washington v. Davis* rule" and the "unwavering line of cases from this Court hold[ing] that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent" (quoting *Hernandez v. New York*, 500 U.S. 352, 372–73 (1991) (O'Connor, J., concurring in the judgment))).

148. *See* Siegel, *supra* note 48, at 47–51.

149. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("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."). I have previously shown how the "antibalkanization" concerns of "racial moderates" such as Justice Kennedy have shaped cases on affirmative action and disparate impact. *See* Siegel, *supra* note 62; *see also* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1003–14 (2008) (discussing these themes in Justice Kennedy's opinion in *Parents Involved*).

division.¹⁵⁰ Implemented with care, a disparate impact framework can build the confidence of minority *and* majority communities in the fairness of selection procedures, redress discrimination, reduce balkanization, and promote racial solidarity.¹⁵¹

150. I would distinguish this reading from Richard Primus's account of the case on several grounds. Primus reads *Ricci* as possibly suggesting all disparate impact law is unconstitutional. See Primus, *supra* 18 at 1362 (offering three possible readings of disparate impact in *Ricci*, all three of which he believes are "plausible": what he terms the "general reading," in which "any operation of the disparate impact standard is an equal protection problem;" the "institutional reading," in which "the disparate treatment . . . problem in *Ricci* arose because the actor that implemented a disparate impact remedy was a public employer rather than a court;" and the "visible victims reading," in which "the city's conduct in *Ricci* was a disparate treatment . . . problem because it adversely affected specific and visible innocent parties"); see also Helen Norton, *The Supreme Court's Post-Racial Turn Towards A Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 234–35 (2010) (noting that "*Ricci*'s redefinition of culpable mental state for antidiscrimination destabilizes . . . the long-standing assumption that the Court does not view government's attention to race to achieve antisubordination ends as itself suspicious" and describing possible ways to read "the Court's move" in *Ricci*, including "a new zero-sum understanding of equality").

As I have shown, Primus's "general reading" of *Ricci* is inconsistent with Justice Kennedy's reasoning in *Parents Involved*, *Fisher*, and *Ricci* itself. The antibalkanization reading of *Ricci* I offer here, and in earlier writing, see Siegel, *supra* note 62, resembles what Primus terms the "visible-victims reading." Michelle Adams also narrows *Ricci*'s meaning along these lines. See Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA. L. REV. 837, 875 (2011) (explaining that "the lesson of *Ricci* is not that governmental action with an integrative motive is always prohibited (at least for now); instead it is that racial harm really matters" and that "the concept of 'because of' race does not include facially race-neutral, yet race-dependent, government action where the effect on white students is diffuse and amorphous . . ."). What my antibalkanization reading emphasizes is that Justice Kennedy's opinions in *Ricci*, *Parents Involved*, and *Fisher* all *affirm, as well as limit*, race-conscious state action promoting equal opportunity. As I point out in text, a central theme of Justice Kennedy's equal protection opinions is that government may intervene in race-conscious ways to heal social division, but should strive to do so in ways that do not aggravate social division.

151. See *supra* text accompanying notes 139–140; *Ricci*, 557 U.S. at 584 ("Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics."); see generally Siegel, *supra* note 62, at 1348 (citations omitted):

Forms of community forged at work, as at school, can divide or unite us. When employers hire and promote on the basis of criteria that have an unjustified racial disparate impact (because employers have hidden or unconscious biases or are selecting for traits associated with current jobholders rather than for the skills needed to do the job), they are not only perpetuating group inequality but also exacerbating balkanization in the workplace. The disparate impact framework provides incentives for employers to ensure that the employment criteria used select among applicants in race-salient ways—only insofar as needed to do the job in question. A workplace organized in this way is more likely to be and to be seen as open to all applicants. Thus, as the disparate impact framework ameliorates unjust social stratification, it also can alleviate balkanization—the rationale that Justice O'Connor offered for affirmative action.

VI. CONCLUDING THOUGHTS

In the wake of *Ricci*, a number of commentators have suggested that the decision results from a “zero-sum” conception of equality,¹⁵² reflecting the belief that status gains of minorities come at the expense of whites.¹⁵³ As Senator Jeff Sessions memorably expressed zero-sum concerns at Justice Sotomayor’s confirmation hearings: “Empathy for one party is always prejudice against another.”¹⁵⁴ This blunt expression of zero-sum anxiety does not adequately explain the Court’s decisions in *Fisher* and *Ricci* which each treat some forms of race-conscious state action as more constitutionally problematic than others.

People differ in their beliefs about the practices that present zero-sum threats to their status. Some may believe all race-conscious but facially neutral efforts to promote equal opportunity—such as percent plans—are constitutionally suspect.¹⁵⁵ But objections premised on zero-sum beliefs may instead be intermittently aroused, provoked by actions that convey a certain “social meaning,”¹⁵⁶ give rise to “identifiable harms,”¹⁵⁷ or stimulate “racial animosities.”¹⁵⁸

In *Fisher*, no Justice expressed suspicions about the constitutionality of the Texas percent plan, which was plainly designed to help a different

152. See Norton, *supra* note 150, at 197 (“[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”); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215 (2011) (finding that Whites view “racism as a zero-sum game, such that decreases in perceived bias against Blacks over the past six decades are associated with increases in perceived bias against Whites”); see also *Room for Debate: Is Anti-White Bias a Problem?*, N.Y. TIMES.COM (May 22, 2011), <http://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem> (discussing Norton & Sommers’ study).

153. See, e.g., Allen R. Kamp, *Ricci v. DeStefano and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 4–5 (2011) (“One can read *Ricci* as holding that an employer’s adoption of the anti-subordination principle is itself illegal discrimination. Employment is seen as a zero-sum game: changing the system for the benefit of minorities necessarily constitutes discrimination against non-minorities.”); Norton, *supra* note 150, at 229, 236 (discussing zero-sum readings of *Ricci* and alternatives); George Rutherglen, *Ricci v. DeStefano: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 85.

154. See *Statement of the Honorable Jeff Sessions: Hearing on Judge Sotomayor’s Supreme Court Confirmation Before the S., 111th Cong.* (2009), available at http://judiciary.senate.gov/imo/media/doc/sessions_statement_07_13_09.pdf

155. See Kamp, *supra* note 153, at 32–33 (citing Marcus, *supra* note 19, at 73); see also Norton, *supra* note 150, at 233; Abigail Thernstrom, *An Old Source of Resentment*, N.Y. TIMES.COM, (May 23, 2011), <http://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/an-old-source-of-resentment>.

156. Kamp, *supra* note 153, at 32–33; Norton, *supra* note 150, at 198.

157. See Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 34–35 (2009); see also Adams, *supra* note 150 at 837 (discussing “racial harm”); Norton, *supra* note 150, at 236.

158. *Ricci*, 557 U.S. at 584.

group of white and minority applicants get into college than had been admitted before. Not every act of government concern about minorities will trigger or sustain a reverse discrimination claim. In *Ricci*, however, a majority of the Court opposed New Haven's action in discarding the promotion test, suggesting that an irregular act of disparate impact compliance in which the government provided race-related reasons for discarding the test results of an identified group of job applicants would be understood as motivated by concerns about minorities alone and so would stimulate "racial animosities."¹⁵⁹

This comparison of the Court's reasoning in *Fisher* and *Ricci* suggests that if the current Court imposes equal protection constraints on disparate impact, it will not be for the reasons that Justice Scalia offered. Under the Constitution as interpreted by the Roberts Court, government *can* act in race-conscious ways to remedy past discrimination, promote equal opportunity, and achieve diversity, in cases where the law is facially neutral in form. *Fisher* shows these aims do not amount to a discriminatory purpose within the meaning of the Equal Protection Clause—at least not yet.

The hostility Justice Scalia expressed towards disparate impact law may be fueled by the belief that persisting racial stratification in the United States is primarily attributable to racial group differences and *not* to the effects of past and present discrimination—a view expressed by the Reagan administration in attacking disparate impact law as securing "equality of result" rather than "equality of opportunity."¹⁶⁰ But the Equal Protection Clause does not enact Thomas Sowell,¹⁶¹ nor should the Equal Protection Clause constitutionally entrench beliefs about racial group differences of this kind.¹⁶² Baselines in the United States are still *not* race neutral, as Justice Kennedy reasoned in explaining why he affirmed colorblindness as an "aspiration," but not a "universal constitutional principle":

Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present

159. *Ricci*, 557 U.S. at 584. Cf. Rutherglen, *supra* note 153, at 85 ("If any general principle emerges from *Ricci*, it is a hostility to zero-sum racial politics—justifying affirmative action for some groups at the expense of others without any showing of collective benefit to the community as a whole.")

160. See *supra* text accompanying notes 49-55 (discussing Thomas Sowell and other critics of civil rights law during the Reagan era who pointed to racial group differences to explain the persisting stratification of the workplace).

161. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.")

162. Cf. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) ("Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.")

achievements, however significant, and to recognize and *confront the flaws and injustices that remain*. This is especially true when we seek assurance that opportunity is not denied on account of race. *The enduring hope is that race should not matter; the reality is that too often it does.*¹⁶³

Legislative and administrative disparate impact standards provide tools to probe for hidden or unconscious bias in government decision making—whether in the decision of a city to contract with a firefighters union to fix the weight of written and oral tests for employment,¹⁶⁴ or the decision of a city to condemn property as blighted for urban renewal purposes.¹⁶⁵ Employed appropriately, these tools remain constitutional. In the Roberts Court, the Constitution *still* allows government to combat the legacy of discrimination, past and present, and to secure equal opportunity for all.

163. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). For other opinions reasoning along similar lines, see *supra* note 100 and accompanying text.

164. See *Briscoe v. City of New Haven*, 654 F.3d 200, 202 (2d. Cir. 2011) (challenging “the weighting of the written and oral sections of the test—60% and 40%, respectively, as dictated by the collective bargaining agreement between the city and the firefighters’ union—was arbitrary and unrelated to job requirements [and asserting] that the industry norm for such weighting was 30% written/70% oral”) (citation omitted).

165. A city’s decision to condemn a neighborhood as blighted figured in a disparate impact case recently before the Court. See Petitioner’s Opening Brief at 2, *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013) (No. 11-1507) (“This case comes to the Court after more than a decade of litigation over a small New Jersey Township’s decision in 2002 to redevelop a blighted residential area that all parties agree was and is in serious need of government intervention.”); see also *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 377–78 (3d Cir. 2011) (analyzing a disparate impact challenge under the Fair Housing Act to a township’s plan to redevelop a 30-acre “blighted” neighborhood “comprised predominantly of African-American and Hispanic residents” who “earn less than 80% of the area’s median income; with most earning much less”), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013). For scholarship on blight, see Equal Justice Society & Wilson Sonsini Goodrich & Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 HASTINGS RACE & POVERTY L.J. 241, 247–48 (2014) (“Social science research reveals that underlying implicit biases play a large role in housing decision-making that perpetuates segregation. . . . Recent social science research shows that implicit biases manifest in perceptions of disorder, criminality, and blight. In housing and land use planning, these psychological perceptions inform government and individual actions and ultimately harm minority communities.”); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 6 (2003) (“The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods.”)

