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2013

## Saving Disparate Impact

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# SAVING DISPARATE IMPACT

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More than four decades ago, in *Griggs v. Duke Power Co.*,<sup>1</sup> the Supreme Court concluded that Title VII of the Civil Rights Act of 1964's prohibition on racial discrimination in employment is properly construed to forbid "practices, procedures, or tests neutral on their face, and even neutral in terms of intent," that nevertheless "operate as 'built-in headwinds' for minority groups . . . that are unrelated to testing job capability."<sup>2</sup> On that basis, the Court held that Duke Power's requirement that employees outside of its Labor Department have a high-school education or a passing score on standardized intelligence tests violated Title VII because of its adverse impact on African Americans.<sup>3</sup>

Although some have argued that this holding rested on a doubtful interpretation of the statute,<sup>4</sup> *Griggs* gave rise to a long line of cases explicating the disparate-impact theory of liability under Title VII.<sup>5</sup> In the Civil Rights Act of 1991, Congress

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\* Professor of Law, Chapman University School of Law. Many thanks are owed to the participants at the Sixth Annual Labor and Employment Law Colloquium and the participants in a faculty workshop held at Chapman University School of Law for their many helpful suggestions. A special debt of gratitude is owed to Tom Campbell, Christopher Lund, Adam Winkler and Michael Zimmer for their generous and enormously valuable advice. The author is indebted as well to Isa Lang, Brandon Lewis, Zachariah Moura, and the staff of the Chapman University School of Law's Rinker Law Library for enormously capable research and other assistance. A note on terminology may be appropriate. Although the author prefers use of the term "African Americans" and will use that term when not misleading, many of the source materials cited in this article uses the term "Blacks," usually because much of the relevant statistical datasets use that term and are not based on citizenship or national origin. Accordingly, with some misgivings, the article will use that term when necessary to avoid mischaracterizing cited sources.

<sup>1</sup> 401 U.S. 424 (1971).

<sup>2</sup> *Id.* at 430, 432.

<sup>3</sup> *Id.* at 430-33.

<sup>4</sup> See, e.g., Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 492-578 (1985); Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 259-69 (1993); Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87, 92-100 (1997).

<sup>5</sup> See, e.g., *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 989-91 (1988) (applying disparate-impact liability to subjective assessments of applicants for promotion); *Connecticut v. Teal*, 457 U.S. 440, 446-51 (1982) (applying disparate-impact liability to examination determining eligibility for

codified liability for cases in which an employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>6</sup>

As many have observed, disparate-impact liability, by forcing employers to justify employment practices that have the effect of excluding women and minorities from their workforce, has been of considerable importance in producing reform in employment practices that had inhibited the economic advance of women and minorities.<sup>7</sup> In the future, the disparate-impact theory of liability could be of no lesser importance. The racial gap between White and Black students in terms of educational achievement has remained substantial.<sup>8</sup> Moreover, there is rather a consensus in the

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promotion); *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977) (applying disparate-impact liability to minimum height and weight requirements); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (applying disparate-impact liability to general ability tests).

<sup>6</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074, codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

<sup>7</sup> See, e.g., Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Liability*, 22 HOFSTRA LAB. & EMP. L.J. 431, 454-63 (2005); Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 3-7 (1987); Susan P. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 295-98 (2011); Barry Goldstein & Patrick O. Peterson, *Ricci v. DeStefano: Does it Herald an “Evil Day,” or Does it Lack “Staying Power”?*, 40 U. MEM. L. REV. 705, 753-65 (2010); Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 253-56 (2010). For a particular example involving the revolutionary impact that the disparate-impact liability had on the St. Louis Fire Department, see Glen M. Gebhart, William C. Duffe & Roger A. McCurley, *Fire Service Testing in a Litigious Environment: A Case History*, 27 PUB. PERS. MGMT. 447 (1998). A few revisionists, however, have questioned the significance of disparate-impact liability. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 20-24 (2006); Michael Selmi, *Was Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 732-45 (2006). See also Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 86-115 (2011) (discussing flaws in conventional theories of employment discrimination liability).

<sup>8</sup> See, e.g., NAT’L CENTER FOR EDUC. STATS., U.S. DEP’T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 53-62 (July 2010); JAEKYUNG LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 22-26 (June 2006); Vilsa E. Curto, Roland G. Fryer, Jr. & Meghan L. Howard, *It May not Take a Village: Increasing Achievement among the Poor, in WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* 483, 486 (Greg J. Duncan & Richard J. Murnane eds., 2011) [hereafter WHITHER OPPORTUNITY?]; Katherine Magnuson & Jane Waldfogel,

scholarly literature that as a statistical matter, a cognitive ability test is likely to have something approaching one standard deviation of disparate racial impact on Blacks.<sup>9</sup> Thus, the disparate-impact theory of liability continues to have importance in minimizing the impact of cognitive ability tests as barriers to the economic advance of African Americans.

Beyond that, as many legal scholars have observed, social science research has demonstrated the prevalence of discrimination in the workplace in forms subtler than in the past, often operating at an unconscious level and frequently regarded as implicit in its character.<sup>10</sup> As it is currently understood, however, the concept of intentional discrimination, or disparate-treatment liability, does not comfortably reach these forms of discrimination.<sup>11</sup> If a supervisor,

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*Introduction*, in STEADY GAINS AND STALLED PROGRESS: INEQUALITY AND THE BLACK-WHITE TEST SCORE GAP 1, 4-11 (Katherine Magnuson & Jane Waldfogel eds., 2008 [hereafter STEADY GAINS AND STALLED PROGRESS]).

<sup>9</sup> See, e.g., Keith Hatrup & Brandon G. Roberts, *What Are the Criteria for Adverse Impact?*, in ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION 161, 162 (James L. Outtz ed., 2010) [hereafter ADVERSE IMPACT]; Leatta M. Haugh, Frederick L. Oswald & Robert E. Ployhart, *Determinants, Detection and Amelioration of Adverse Impact in Personnel Selection Procedure: Issues, Evidence, and Lessons Learned*, 9 INT'L J. OF SELECTION & ASSESSMENT 152, 153-54 (2001); Philip L. Roth et al., *Ethnic Group Differences in Cognitive Ability and Employment and Educational Settings: A Meta-Analysis*, 54 PERS. PSYCHOL. 297, 301-03, 310-17 (2004); Paul R. Sackett, Matthew J. Borneman & Brian S. Connelly, *High-Stakes Testing in Higher Education and Employment*, 63 AM. PSYCHOL. 215, 222 (2008).

<sup>10</sup> See, e.g., Bagenstos, *supra* note 7, at 5-9; Katherine T. Bartlett, *Making Good as Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Bias*, 95 VA. L. REV. 1893, 1904-20 (2009); Tristan K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95-99 (2003); Anthony G. Greenwald & Linda Hamilton Kreiger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 955-67 (2006); Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implied Bias and the Law*, 58 UCLA L. REV. 465, 468-70 (2010); Linda Hamilton Kreiger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-217 (1995); Charles A. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Discrimination*, 39 STAN. L. REV. 317, 339-44 (1987); Ann C. McGinley, *¡Viva la Evolución! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 421-46 (2000); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900-17 (1993); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 9-28 (2011); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1284-89 (1995); Sperino, *supra* note 7, at 81-84; Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1135-38 (1999).

<sup>11</sup> See Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 86-100 (2010). For arguments that at least as a matter of statutory construction, claims of unconscious or implicit bias can be fit within Title VII's prohibition on disparate-treatment discrimination, see Linda Hamilton Kreiger

for example, does not realize that she is more likely to assess the performance of an African American subordinate critically, it is far from clear that a theory of liability requiring proof of intentional racial discrimination will be able to smoke out implicit or unconscious forms of discrimination. Even if disparate-treatment liability could theoretically reach this type of discrimination, it is far from clear that in actual practice employment-discrimination plaintiffs could assemble adequate proof of this type of implicit bias; even the advocates of this understanding of disparate-treatment discrimination acknowledge that it relies on essentially the same types of proof now required in disparate-treatment litigation.<sup>12</sup> Disparate impact liability, in contrast, offers considerable promise in combatting what is likely the most prevalent form of discrimination in the contemporary workplace by forcing employers to justify employment practices that have demonstrably inhibited the advancement of protected groups.<sup>13</sup> Indeed, even before its codification in the Civil Rights Act of 1991, the Court had held that disparate-impact liability can be used to attack subjective processes for assessing candidates for employment or promotion in which subtle forms of discrimination produce disparate outcomes.<sup>14</sup>

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& Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1053-56 (2006); and Rich, *supra* note 10, at 44-69.

<sup>12</sup> See, e.g., Kreiger & Fiske, *supra* note 11, at 1058-61. For a skeptical assessment of the efficacy of this approach to disparate-treatment discrimination, see Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 946-52 (2005).

<sup>13</sup> For an extensive and powerful argument along these lines, see Sullivan, *supra* note 12, at 968-1000. For a helpful discussion of the breadth of disparate-impact liability after the Civil Rights Act of 1991, see Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L. REV. 473, 488-507 (1999). For a more general argument for the superiority of disparate-impact liability as compared to disparate-treatment liability, see David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1648-52 (1991).

<sup>14</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-91 (1987). See also Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 484-89 (2001) (discussing the implications of *Watson*); Sullivan, *supra* note 12, at 985-87 (same). To be sure, Title VII requires that the complaining party identify “a particular employment practice,” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006), and adds that the complaining party “shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a . . . decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” *Id.* § 2000e-2(k)(B)(i). The Court understands this requirement to forbid class-action disparate-impact claims based on broad delegations of discretion of authority to managers absent

Yet, a cloud hangs over disparate impact liability. It was Richard Primus who first observed that because disparate impact liability is triggered by the racial identity of those who are hired or promoted, it could be regarded as creating a form of racial classification subject to the “strict scrutiny” test that the Supreme Court applies to such classifications by virtue of the constitutional guarantee of equal protection of the law.<sup>15</sup> Strict scrutiny, in turn, requires that a challenged law be narrowly tailored to achieve a compelling governmental interest.<sup>16</sup> Although Professor Primus thought it “unlikely that disparate impact law will actually be held unconstitutional,”<sup>17</sup> that judgment may have been premature.

In *Ricci v. DeStefano*,<sup>18</sup> described by one commentator as “one of the most important race discrimination cases in the Court’s history,”<sup>19</sup> nonminority applicants for promotion in the City of New Haven’s Fire Department alleged that they had been subject to unlawful disparate-treatment discrimination after the City declined to utilize the results of promotional examinations that had produced significant disparate impact on minority candidates, creating potential disparate-impact liability.<sup>20</sup> Writing that “the original, foundational prohibition of Title VII bars employers from taking adverse action ‘because of . . . race,’”<sup>21</sup> the Court concluded that “[a]llowing employers to violate the disparate-treatment prohibition on a mere good-faith fear of disparate-impact liability

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evidence that managers exercise that discretion on a uniform basis. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011). See also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-58 (1989) (statistically significant underrepresentation of minorities is insufficient to demonstrate actionable disparate impact absent proof that it is caused by a specific employment practice). Thus, there are some limits on the ability of disparate-impact liability to attack subjective decisionmaking through class actions that endeavor to challenge the decisions of many supervisors, at least absent proof of a common pattern or practice in the exercise of discretion. Even so, given the Court’s endorsement of disparate-impact liability in cases involving subjective employment practices as well as the breadth of the statutory language, there is ample reason to believe that disparate-impact liability can reach patterns reflecting unconscious or implicit bias. See Sullivan, *supra* note 12, at 976-81.

<sup>15</sup> See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494-508 (2003).

<sup>16</sup> *E.g.*, *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Johnson v. California*, 543 U.S. 499, 505 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996); *Adarand Constructors Co. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>17</sup> Primus, *supra* note 15, at 495.

<sup>18</sup> 129 S. Ct. 2658 (2009).

<sup>19</sup> Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Analysis*, 33 HARV. J.L. & GENDER 581, 582 (2010).

<sup>20</sup> *Ricci*, 129 S. Ct. at 2665-71.

<sup>21</sup> *Id.* at 2675 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006) (ellipsis in original)).

would encourage race-based action at the slightest hint of disparate impact.”<sup>22</sup> Drawing on equal protection precedents, the Court held that an employer may abandon an employment practice on the basis of its disparate racial impact only when “there is a strong basis in evidence of disparate impact liability . . . .”<sup>23</sup> The Court then concluded that “the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results . . . . The City’s discarding the test results was [therefore] impermissible under Title VII . . . .”<sup>24</sup>

Having resolved the case on this basis, the Court added that it “need not decide the underlying constitutional question.”<sup>25</sup> Yet, by holding that an employer’s abandonment of an employee selection mechanism because it produces too many successful nonminority candidates amounts to disparate-treatment discrimination against the nonminority candidates, *Ricci* treated disparate-impact liability is itself a form of racial discrimination. Contemporary equal protection jurisprudence, in turn, requires strict scrutiny whenever the government acts on the basis of race, even when the challenged action has a remedial or otherwise ostensibly benign justification.<sup>26</sup> Thus, the Court tells us that it “insist[s] on strict scrutiny . . . even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.”<sup>27</sup> Because strict scrutiny forbids Congress from authorizing consideration of race except as a narrowly tailored means of achieving a compelling governmental interest,<sup>28</sup> *Ricci* means that disparate-impact liability is vulnerable to constitutional attack. After all, *Ricci* characterizes a decision to abandon a promotional practice because of the race of successful candidates as a form of racial discrimination, meaning that disparate-impact liability, triggered as it is by the race of successful candidates, is a type of racial classification subject to strict scrutiny, which Gerald Gunther once famously labeled “‘strict’ in theory and fatal in fact.”<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2676.

<sup>24</sup> *Id.* at 2681.

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.,* Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 741-42 (2007) (plurality opinion); *id.* at 783-84 (Kennedy, J., concurring in part and concurring in the judgment); Johnson v. California, 543 U.S. 499, 505-06 (2003); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Shaw v. Hunt, 517 U.S. 899, 904-05 (1996); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227-29 (1995).

<sup>27</sup> *Johnson*, 543 U.S. at 505 (citations omitted).

<sup>28</sup> *E.g., Adarand*, 515 U.S. at 213, 226-27, 235-37.

<sup>29</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a*

In his separate opinion in *Ricci*, Justice Scalia made the point explicit; he wrote that the Court’s “resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution’s guarantee of equal protection?”<sup>30</sup> He reasoned: “[I]f the Federal Government is prohibited from discriminating on the basis of race, then it is surely prohibited from enacting laws mandating that third parties – *e.g.*, employers, whether private, State, or municipal – discriminate on the basis of race.”<sup>31</sup> Yet, “Title VII’s disparate impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies . . . . That type of racial discrimination is, as the Court explains, discriminatory.”<sup>32</sup> He concluded: “[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how – and on what terms – to make peace between them.”<sup>33</sup>

Thus, by holding that an employer’s decision to abandon an employee selection mechanism because of the race of successful candidates amounts to discrimination on the basis of race, *Ricci* establishes that disparate-impact liability is vulnerable to challenge. The fact that the discriminatory acts are committed by an employer rather than the federal government itself is of little moment. After all, an employer engages in what *Ricci* characterized as a discriminatory act by abandoning a challenged selection mechanism after it has produced disparate racial impact. The concept of equal protection, in turn, has long been understood not only to forbid the government from discriminating in its own actions, but also to forbid the government from taking actions that encourage or compel others to engage in racial discrimination.<sup>34</sup>

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*Changing Court: A Newer Model for Equal Protection*, 88 HARV. L. REV. 1, 8 (1972)).

<sup>30</sup> *Ricci*, 129 S. Ct. at 2681-82 (Scalia, J., concurring).

<sup>31</sup> *Id.* at 2682 (citations omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2683.

<sup>34</sup> *See, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151-52 (1970) (“Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation.” (footnote omitted)); *Robinson v. Florida*, 378 U.S. 153, 156-57 (1964) (“While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races . . . . [T]he State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants’ trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment.”); *Peterson v. City of*

Because disparate-impact liability encourages – if not compels – employers to abandon practices that produce disproportionate numbers of successful nonminority candidates, it is subject to constitutional attack as a form of governmental compulsion to engage in racial discrimination.

If a court were to order the abandonment of a selection mechanism that produced unlawful disparate impact, the constitutional issue would be no different. On each of the occasions that the Supreme Court confronted the question, a majority has concluded that the constraints of equal protection apply to the exercise of judicial power even for remedial purposes.<sup>35</sup> Indeed, the requirement of equal protection has always been thought fully applicable to the orders of courts no less than any other governmental action.<sup>36</sup> Thus, if Congress cannot require employers to engage in what amounts to an impermissible form of racial favoritism, it cannot empower courts to order employers to do the same.

Nor are *Ricci*'s implications confined to race. From *Ricci*, it logically follows that a disparate-impact claim attacking an employment practice that disproportionately disadvantages women amounts to discrimination against men. This too creates a serious constitutional problem. Although the Court has never adopted strict scrutiny as the test for assessing whether sex discrimination can survive equal protection attack, it has stressed that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification for that action,’” involving a showing “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”<sup>37</sup> Thus, *Ricci*'s conception

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Greenville, 373 U.S. 244, 248 (1963) (“When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.”).

<sup>35</sup> See *United States v. Paradise*, 480 U.S. 149, 166-67 (1987) (plurality opinion); *id.* at 195 n.4 (Stevens, J., concurring in the judgment); *id.* at 199-200 (O'Connor, J., dissenting); *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 479-81 (1986) (plurality opinion); *id.* at 484-85 (Powell, J., concurring in the judgment).

<sup>36</sup> See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984) (invalidating court's consideration of race in child custody proceeding under equal protection); *Shelley v. Kraemer*, 334 U.S. 1, 13-21 (1948) (holding that equal protection prevents a court from enforcing a racially restrictive covenant governing transfer of property).

<sup>37</sup> *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) (quoting *Mississippi Univ. Women v. Hogan*, 458 U.S. 718, 724 (1982) (brackets in

of discrimination renders disparate-impact liability vulnerable to constitutional attack as applied to both sex and race-based disparate-impact claims.<sup>38</sup>

*Ricci* has provoked a torrent of criticism in the academy from scholars who regard it as an indefensible limitation on the ability of the civil rights laws to remediate discrimination.<sup>39</sup> Others have expressed doubt about how its holding is likely to be applied.<sup>40</sup>

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original)).

<sup>38</sup> For a more extensive discussion of the potential of *Ricci* and contemporary equal protection jurisprudence to inhibit efforts to remediate discrimination against women, see Rosalie Berger Levenson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1 (2011). Although the discussion below will primarily address issues of race, it accordingly has application to disparate-impact sex discrimination claims as well.

<sup>39</sup> See, e.g., Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case and the Triumph of White Privilege*, 20 S. CAL. REV. L & SOC. JUST. 161, 171-80 (2011); Henry L. Chambers, Jr., *The Wild West of the Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 582-88 (2010); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 157-65 (2010); Allen R. Kamp, *Ricci v. DeStefano and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. L. REV. 1, 32-38 (2011); Ann C. McGinley, *Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment*, \_\_ NEV. L. REV. \_\_, \_\_ (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924533); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1145-49, 1154-56 (2010); Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833, 849-54 (2011); Leland Ware, *Ricci v. DeStefano: Smoke, Fire, and Racial Resentment*, 8 RUTGERS J.L. & PUB. POL'Y 1, 49 (2011); Nancy L. Zisk, *Failing the Test: How Ricci v. DeStefano Failed to Clarify Disparate Impact and Disparate Treatment Law*, 34 HAMLINE L. REV. 27, 50 (2010-11).

<sup>40</sup> See, e.g., Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 858-63 (2011); Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 993-95 (2010); Drew S. Days III, *Employment Discrimination Cases from the October 2008 Term*, 26 TOURO L. REV. 491, 496-98 (2010); Melissa Hart, *From Wards Cove to Ricci: Struggling against the "Built-in Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 276-79 (2011); Norton, *supra* note 7, at 229-48; Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1362-75 (2010); Rich, *supra* note 10, at 69-77; Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2201-13 (2010); Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn in the Disparate Impact Road?*, 104 NW. U. L. REV. 411, 426 (2010); Luke Appling, *Recent Development, Ricci v. DeStefano*, 45 HARV. C.R.-C.L. L. REV. 147, 158-60 (2010); Nathan L. Barrett, *Recent Decision, Civil Rights-Employment-Before an Employer May Lawfully Take Race-Based Action to Remedy a Practice that Has a Disparate Impact, the Employer Must Have a Strong Basis in Evidence to Believe that It Will Be Subject to Disparate-Impact Liability if It Fails to Take that Action*, 79 MISS. L.J. 467, 481-82 (2009); Kathy DeAngelo, *Recent Development, Title VII's Conflicting "Twin Pillars" in Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), 33 HARV. J.L. & PUB. POL'Y 361, 370-74

The literature does not yet contain, however, an account that endeavors to harmonize disparate-impact liability with contemporary equal protection jurisprudence.<sup>41</sup> The task of this article is to provide that account.<sup>42</sup>

Part I below demonstrates that the holding in *Ricci* was essentially compelled by the structure of contemporary equal protection jurisprudence. Permitting employers to utilize what they have ample reason to know are unlawful promotional procedures and then use what amounts to a racial preference to remediate their own conduct is inconsistent with current equal protection doctrine, which permits the use of racial preferences only as a last resort. Indeed, even as a matter of policy, it is hard to understand why employers should be permitted to utilize practices that are likely to produce unlawful adverse impact as long as they repudiate those practices after-the-fact.

Part II then offers a road map for reconciling disparate-impact liability with the dictates of equal protection. This road map preserves disparate-impact liability, while creating an incentive for employers to make greater use of employment practices unlikely to create unwarranted disparate impact rather than using and abandoning them, as pre-*Ricci* law seemed to contemplate.

Part III concludes that the effort to save disparate-impact liability tells us much about the character of contemporary equal protection jurisprudence, as well as its future course. Asking the question whether disparate impact can be saved ultimately tells us

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(2010); Note, *The Supreme Court, 2008 Term*, 123 HARV. L. REV. 153, 290-92 (2009).

<sup>41</sup> To date, the only commentators to express a definitive view have concluded that disparate impact liability cannot be squared with contemporary equal protection jurisprudence. See Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 78-83; Eang L. Ngov, *When “The Evil Day” Comes, Will Title VII’s Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Challenge?*, 60 AM. U.L. REV. 535, 586-88 (2011); Kristina Campbell, Note, *Will “Equal” Again Mean Equal? Understanding Ricci v. DeStefano*, 14 TEX. R.L. & POL. 385, 407-20 (2010). One commentator has offered a brief defense of the constitutionality of disparate-impact liability. See Michael Evan Gold, *Disparate Impact Is not Unconstitutional*, 16 TEX. J. C.L. & C.R. 171, 185-86 (2011). For a critical discussion of this effort, see *infra* note 104.

<sup>42</sup> The discussion that follows assumes that strict scrutiny will continue to apply to all race-conscious governmental action even if remedial or otherwise benign in character, as this rule appears at present to be fairly firmly entrenched doctrinally. See, e.g., *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors Co. v. Peña*, 515 U.S. 200, 227-29 (1995). Part III.B below considers the problems that inhere in an effort to depart from strict scrutiny.

whether equal protection jurisprudence is to embody a conception of a colorblind Constitution so robust that it prevents the government from addressing racially skewed inequality of opportunity. While it proves difficult to disentangle race-conscious governmental action, even for remedial purposes, from the rigors of strict scrutiny, Part III contends that there is good reason to resist the view that the government must always remain colorblind, even in the face of demonstrable inequality of opportunity that locks racial minorities into a position of economic disadvantage. Moreover, disparate-impact liability is likely the most defensible form of race-conscious governmental action, since it involves little if any tension with the view that economic opportunities should be distributed on the basis of merit. If disparate-impact liability cannot survive equal protection attack, it is likely that no other form of affirmative action can do so.

### I. *RICCI'S* GENESIS IN EQUAL PROTECTION JURISPRUDENCE

Although *Ricci* signals a significant shift in Title VII jurisprudence, the Court's approach was effectively compelled by the contours of contemporary equal protection jurisprudence.

#### A. *Ricci's Treatment of Remedial Objectives as Discriminatory*

Prior to *Ricci*, the Court had interpreted Title VII to permit an employer to adopt goals for selecting members of protected groups in the face of a manifest imbalance in the demographic composition of its workforce as a means of promoting voluntary compliance with Title VII.<sup>43</sup> Beyond that, a majority of the Court had repeatedly concluded that an interest in complying with federal law provides a constitutionally sufficient basis for undertaking even race-conscious remedial action.<sup>44</sup> Moreover, in its equal protection jurisprudence, the Court had characterized an intention to discriminate as involving not mere disparate impact but rather an intention to act because rather than in spite of the effect of a

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<sup>43</sup> See *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 627-40 (1987); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-24 (1986); *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201-08 (1979).

<sup>44</sup> See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., concurring in part and dissenting in part); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part); *id.* at 518-19 (Scalia, J., concurring in the judgment in part and dissenting in part); *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *id.* at 1030 (Stevens, J., dissenting); *id.* at 1046 (Souter, J., dissenting). See also *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (assuming there is a compelling governmental interest in compliance with the Voting Rights Act); *Bush v. Vera*, 517 U.S. at 977 (plurality opinion) (same); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (same).

challenged decision on an identifiable group.<sup>45</sup> Thus, *Ricci*'s critics claim that New Haven's refusal to utilize the results of its promotional examinations reflects not an intention to discriminate against nonminorities but instead an entirely lawful effort to comply with Title VII.<sup>46</sup> Other critics deny that New Haven's decision reflects anything other than race neutrality because the examinations' use was rejected for all racial groups.<sup>47</sup>

This critique is far from unanswerable. After all, New Haven did not act on the basis of some nonracial criterion that nevertheless had a disparate impact on an identifiable group, such as the use of a veteran's preference that disproportionately disadvantaged women,<sup>48</sup> a refusal to rezone property for affordable housing that had a racially disproportionate effect,<sup>49</sup> or the results of an employment examination with a disparate impact on Blacks.<sup>50</sup> It was the racial identity of the successful applicants that triggered New Haven's decision to reassess use of the promotional examinations.<sup>51</sup> It is far from clear that the cancellation of an exam that produced what the employer regarded as too many successful nonminority candidates should be regarded as race-neutral; surely an employer hostile to minorities who discarded the results of an examination on which minority candidates did well would not be regarded as having acted in a race-neutral fashion. Yet, as we have seen, contemporary equal protection jurisprudence treats any racial classification as triggering strict scrutiny, even if done for benign or remedial purposes.<sup>52</sup> Thus, the fact that there may have been no animus toward or intent to harm nonminorities

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<sup>45</sup> See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Auth.* 252, 264-67 (1977); *Washington v. Davis*, 426 U.S. 229, 238-41 (1976).

<sup>46</sup> See, e.g., Sullivan, *supra* note 40, at 416-17; Ware, *supra* note 39, at 20-21; Michael J. Zimmer, *Ricci's "Color Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257, 1264-65, 1268-70.

<sup>47</sup> See, e.g., William M. Carter, *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 17-18 (2011); Harris & West-Faulcon, *supra* note 39, at 106-07; Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, \_\_ LEWIS & CLARK L. REV. \_\_, \_\_ (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1950342](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950342).

<sup>48</sup> See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 264-71 (1977).

<sup>49</sup> See *Vill. of Arlington Heights v. Metro. Hous. Dev. Auth.* 252, 268-71 (1977).

<sup>50</sup> See *Washington v. Davis*, 426 U.S. 229, 233-36 (1976).

<sup>51</sup> See *Ricci*, 129 S. Ct. at 2673. Accordingly, although one can speculate that *Ricci* is hospitable to evidence of implicit bias as cognizable disparate-treatment discrimination, see Rich, *supra* note 10, at 77-78, there is little support in the opinion for that view. There was, after all, nothing implicit or unconscious about New Haven's reliance on the race of the successful candidates as the basis for discarding the examination results.

<sup>52</sup> See *supra* text accompanying notes 26-27.

who had succeeded on the examination was legally irrelevant. Nor was discarding the examination results inconsequential; at a minimum, it substantially delayed the date at which applicants could receive promotions, at worst, it would prevent some successful applicants from ever obtaining promotions.<sup>53</sup> For their part, even the dissenters in *Ricci* made no claim that discarding the examination results could be defended as race-neutral. Instead, they defended it as an effort to comply with Title VII's prohibition on disparate-impact discrimination.<sup>54</sup>

Beyond this, a focus on New Haven's purpose to comply with Title VII necessarily raises the question whether Congress can constitutionally compel employers to adopt this type of racial objective in their employment practices. The cases in which the Court had interpreted Title VII to permit remedial preferences for minorities and women predated its holding that congressional authorization for race-based remedial action are subject to strict scrutiny under the Fifth Amendment's guarantee of equal protection of the law in *Adarand Constructors, Inc. v. Peña*.<sup>55</sup>

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<sup>53</sup> This point accordingly answers the novel suggestion that New Haven's decision to discard the examination results can be defended as an example of "government speech" reflecting the city's assessment of the flaws in the examinations. See Carter, *supra* note 47, at 36-46. Whatever the merits of this view as a general matter, it is difficult to understand how it could apply to *Ricci* or other decisions involving the allocation of scarce resources, such as promotions. The government speech doctrine offers no defense for discrimination in the "redistribution of limited resources, disparate treatment, or other racialized tangible harm . . ." *Id.* at 43. Delaying if not depriving applicants of promotions seems plainly to fall within this limitation on the power of the government to defend its action as involving no more than its own speech.

<sup>54</sup> As Justice Ginsburg wrote in dissent:

A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict. I would therefore hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe that the device would not withstand examination for business necessity.

*Id.* at 2699.

<sup>55</sup> 515 U.S. 200, 213, 226-27, 235-37 (1995) (adopting strict scrutiny for race-based federal legislation even when justified on remedial grounds). Although some members of the Court had earlier advocated strict scrutiny for remedial racial classification by state and local governments under the Fourteenth Amendment, see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion); *Reg. of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287-99 (1978) (opinion of Powell, J.), before *Adarand*, the Court had taken the position that a more lenient standard applied to federal legislation under the Fifth Amendment. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563-66 (1990). Even with respect to review of state and local governmental action

Since the Court's adoption of strict scrutiny for all racial preferences, equal protection jurisprudence has required "a 'strong basis in evidence' that the remedial actions were necessary."<sup>56</sup> When considering the use of racial considerations in legislative redistricting, for example, the Court has held that a governmental objective to comply with the Voting Rights Act's prohibition on the dilution of minority voting power will not save a redistricting plan from constitutional attack unless there is a "strong basis in evidence" for the conclusion that the use of race was required to avoid statutory liability.<sup>57</sup> If a desire to comply with the Voting Rights Act unsupported by sufficiently strong evidence of a statutory violation cannot justify a race-conscious remedy, it is hard to understand how a desire to comply with Title VII's disparate-impact test could be treated any differently.

Moreover, the Court's interpretation of Title VII's disparate-treatment provision to incorporate equal protection standards had precedential support. Title VI, which prohibits racial discrimination in federally funded programs and activities in terms that track the disparate-treatment prohibition in Title VII,<sup>58</sup> has been interpreted to prohibit all race-conscious action that is not

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under the Fourteenth Amendment, a majority of the Court did not conclude that remedial programs benefiting minorities should be assessed under strict scrutiny until 1989, and that decision did not alter the standard for assessing federal legislation. See *Adarand*, 515 U.S. at 221-23 (discussing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). For a helpful discussion of the evolution in the Court's equal protection jurisprudence with respect to congressional power to authorize race-based remedial action, see 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.10(b)(iii) (4th ed. 2009). For helpful discussions of the manner in which the evolution in the Court's equal protection jurisprudence has influenced Title VII jurisprudence, see Adams, *supra* note 40, at 851-63; and Bradley A. Airheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. \_\_, \_\_ (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1887772](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1887772); and Norton, *supra* note 7, at 215-23.

<sup>56</sup> *Ricci*, 129 S. Ct. at 2675 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion) (further internal quotations omitted)).

<sup>57</sup> See, e.g., *Bush v. Vera*, 517 U.S. 952, 976-78 (1996) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4, 915 (1996); *Miller v. Johnson*, 515 U.S. 900, 920-22 (1995); *Shaw v. Reno*, 509 U.S. 630, 656-58 (1993).

<sup>58</sup> Compare 42 U.S.C. § 2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance."); with *id.* § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, sex, or national origin . . .").

otherwise consistent with equal protection standards.<sup>59</sup> If Title VI tracks equal protection standards, it is natural that Title VII's analogous disparate-treatment provision would do likewise. If anything, *Ricci*'s strong-basis-in-evidence test affords employers more leeway to engage in race-conscious remedial action in order to avoid a disparate-impact violation than can be found in the Court's Title VI jurisprudence.<sup>60</sup> In any event, once Title VI's prohibition on discrimination was read to import equal protection standards, it is difficult to conclude that Title VII could be read any differently.

Accordingly, equal protection jurisprudence effectively compelled use of the "strong basis in evidence" test to justify race-conscious remedial action. Indeed, any approach to Title VII that would have given employers greater leeway to engage in race-conscious remedial action than is permitted by contemporary equal protection jurisprudence. For that reason, such an approach would also have provided a recipe for Title VII's invalidation as compelling employers to engage in what is regarded as unconstitutional discrimination under contemporary equal protection jurisprudence.<sup>61</sup> Thus, the Court's approach in *Ricci*

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<sup>59</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 280-82 (2001); *Guardians' Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 610-11 (1983) (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting); *Reg. of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.); *id.* at 328 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

<sup>60</sup> The difference may lie in the fact that *Ricci* endeavored to harmonize the disparate-treatment and disparate-impact provisions of Title VII, whereas the Court has read Title VI to contain no disparate-impact prohibition, which is instead derived from Title VI's implementing regulations. See *Alexander v. Sandoval*, 532 U.S. at 281-82; *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Guardians*, 463 U.S. at 591-92 (opinion of White, J.); *id.* at 616-24 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, J., dissenting). Even so, in an appropriate case the Court could well hold that in light of the Title VI disparate-impact regulations, the "strong-basis-in-evidence" test governs an affirmative action plan under Title VI as well as Title VII if undertaken to avoid a probable disparate-impact violation.

<sup>61</sup> See *supra* text accompanying note 34. This point also addresses a related criticism that *Ricci* effectively preferred Title VII's prohibition on disparate-treatment discrimination to its disparate-impact prohibition. See, e.g., Brodin, *supra* note 39, at 173; Harris & West-Faulcon, *supra* note 39, at 111-12; Kamp, *supra* note 39, at 9-12; McGinley, *supra* note 39, at \_\_\_. The question begged by this criticism, of course, is why the prohibition on disparate-impact discrimination should be preferred to the disparate-treatment prohibition which, as we have seen, is properly interpreted to track equal protection standards. To the extent that the prohibition on disparate-impact discrimination permits what would otherwise be impermissible disparate-treatment discrimination, an employer should be facing an actual, or at least probable violation of the disparate-impact provision before it is permitted to engage in what would

was all but dictated by contemporary equal protection jurisprudence.<sup>62</sup>

*B. Ricci's Treatment of the "Strong Basis In*

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otherwise be unlawful disparate-treatment discrimination. One could argue that even *Ricci's* use of the "strong basis in evidence" test is overly protective on the prohibition on disparate-impact discrimination:

If, as the Court reasoned, the city engaged in intentional discrimination by rejecting the test results because of their racially adverse impact, then why allow a defense of a "strong basis in evidence" for finding disparate impact? The Court allows the *certainty* of intentional discrimination to be offset by the *probability* of an illegal disparate impact.

George Rutherglen, *Ricci v. DeStefano: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 95 (emphasis in original). In any event, an interpretation of the disparate-impact provision that permitted what amounts to unconstitutional discrimination under contemporary equal protection jurisprudence, as we have seen, would likely have necessitated the invalidation of that provision.

<sup>62</sup> In a related vein, Professor Primus noted that the constitutional backdrop to *Ricci* explains why the Court did not concern itself with the question whether discarding a promotional examination is a sufficiently adverse employment action to fall within the scope of Title VII's prohibition on discrimination in terms, conditions, and privileges of employment since a decision that Title VII did not reach this practice would merely raise the question whether discarding the examination results violated equal protection. See Primus, *supra* note 40, at 1356-58. The constitutional backdrop similarly addresses another line of attack on *Ricci* that observes that the Court held that Title VII's disparate-treatment provision prohibited the examinations' use even though some of the successful candidates were minorities, making implausible, in view of these critics, a characterization of the City's decision to discard the results as a disparate-treatment violation under Title VII. See Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action after Ricci*, 31 BERK. J. EMP. & LAB. L. 288, 319-27 (2010); Kerri Lynn Stone, *Ricci Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 751, 765-68 (2009). Title VII's disparate-treatment provision forbids discrimination against any individual "because of such individual's race," 42 U.S.C. § 2000e-2(a)(2) & (2) (2006), and therefore, at first blush, discarding the results of the examination for all successful candidates regardless of race does not seem to amount to discrimination on the basis of the race of the successful candidates who were minorities. Yet, if discarding the results of the examinations in order to avoid a disparate-impact violation amounted to an unconstitutional racial preference in favor of unsuccessful minority candidates, then a decision to construe Title VII to sustain New Haven's decision would have required the Court to confront its constitutionality. Moreover, this critique does not question that discarding the results amounted to discrimination against successful nonminority candidates on account of their race, and had the Court held that Title VII's disparate-treatment provision forbade the City to discard the examination results only with respect to successful nonminority candidates, the resulting differential treatment between successful candidates on the basis of race would itself appear to violate both Title VII's disparate-treatment provision and the Constitution. To avoid these problems, the Court unsurprisingly chose to construe Title VII's disparate-impact provision in a manner consistent with contemporary equal protection jurisprudence.

*Evidence” Requirement*

*Ricci* is notable as well for its handling of the “strong basis in evidence” test with respect to the evidence of unlawful disparate impact on which New Haven had relied when it rejected use of the promotional examinations at issue.

Title VII places the burden to the employer to justify disparate impact in terms of job-relatedness and business necessity.<sup>63</sup> In *Ricci*, the Court acknowledged that “[t]he racial adverse impact here was significant,” and accordingly “the City was faced with a prima facie case of disparate impact liability.”<sup>64</sup> Prior to *Ricci*, the Court had suggested that a “strong basis in evidence” was evidence “approaching a prima facie case of a constitutional or statutory violation . . . .”<sup>65</sup> In *Ricci*, however, the Court wrote that “a prima facie case of disparate impact liability – essentially, a threshold showing of significant statistical disparity and nothing more – is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results.”<sup>66</sup> Thus, *Ricci* seems to have worked a significant reformulation of the “strong basis in evidence” test.<sup>67</sup>

Yet, holding that evidence of disparate impact without more would supply the requisite “strong basis in evidence” for a remedial racial preference would be impossible to square with contemporary equal protection jurisprudence. The Court has held that a statistical disparity between the racial composition of successful applicants and the outside population cannot justify the use of a racial preference absent evidence that minority and nonminority applicants are equally qualified.<sup>68</sup> Thus, treating disparate impact as offering an employer a sufficient basis to undertake a race-conscious remedy without proof that the disparate impact has occurred among applicants of equivalent qualifications is inconsistent with equal protection jurisprudence. In contrast, requiring some inquiry into job-relatedness and business necessity

<sup>63</sup> See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

<sup>64</sup> 129 S. Ct. at 2677.

<sup>65</sup> *City of Richmond v. J.A. Croson Co.*, 489 U.S. 469, 500 (1989). For an argument that the strong-basis-in-evidence test should be considered relatively undemanding, see Herman N. (“Rusty”) Johnson, *The Evolving Strong-Basis-in-Evidence Standard*, 32 BERK. J. EMP. & LAB. L. 347, 375-79 (2011).

<sup>66</sup> 129 S. Ct. at 2678 (citation omitted).

<sup>67</sup> For discussions of *Ricci*’s apparent departure from prior law with respect to the “strong basis in evidence” test, see Brodin, *supra* note 39, at 195 n.231; Erica E. Hoodhood, Note, *The Quintessential Employer’s Dilemma: Combatting Title VII Litigation By Meeting the Elusive Strong Basis in Evidence Standard*, 45 VAL. U.L. REV. 111, 143-48 (2010); and D’Ontae D. Sylvertooth, Comment, *Untangling Ricci v. DeStefano: The Wards Cove of the Twenty-First Century*, 41 N.M. L. REV. 295, 316-26 (2011).

<sup>68</sup> See *Croson*, 488 U.S. at 501-02.

before an employer can undertake a race-conscious remedy is consistent with equal protection jurisprudence's insistence that even statistically significant racial disparities be interrogated before they can be the basis for race-conscious remedial action.

Beyond that, if disparate impact alone could justify a racial preference, then disparate-impact liability would place considerable pressure on employers to adopt a quota system. After all, validation of an employment practice for job-relatedness and business necessity is no simple matter.<sup>69</sup> The Equal Employment Opportunity Commission's disparate-impact regulations, which are entitled to deference,<sup>70</sup> require the use of validation techniques demonstrating that a selection device accurately tests for a representative sample of the knowledge, skills and abilities required for the position in question.<sup>71</sup> The regulations also require evidence of the validity of both passing scores and ranking successful candidates by their scores.<sup>72</sup> Applying the guidelines, the Court has held that a validation study is defective if it does not correlate performance on an examination with performance for all types of positions for which the examination is used, it may not measure performance by reference to supervisory performance evaluations when adequate measures to identify supervisory subjectivity are not taken, and if it is not validated for typical applicants and, when feasible, validated separately for minority candidates.<sup>73</sup> Moreover, employee selection mechanisms are unlawful when undertaken "without meaningful study of their relationship to job-performance ability,"<sup>74</sup> with only a possible exception when a selection mechanism has as "manifest relationship" to job performance.<sup>75</sup>

Given the burdens of validation, employers might rationally elect to eliminate disparate impact by affording minority candidates a preference – in effect a quota requiring that minorities be selected in proportion to nonminorities – rather than undertaking efforts at validation. Indeed, the classic objection to

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<sup>69</sup> For helpful discussions of what is involved in the process of validating an employee selection mechanism, see 1 EQUAL EMP. OPPORTUNITY COMM., ABA, EMPLOYMENT DISCRIMINATION LAW 185-218 (rev. 2007); and Amy S. Rominger & Pamela Sandoval, *Employee Testing: Reconciling the Twin Goals of Productivity and Fairness*, 10 DEPAUL BUS. L.J. 299, 314-21 (1998).

<sup>70</sup> See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

<sup>71</sup> See 41 C.F.R. §§ 60.314(C)(4), 60-3.5(A), 60-3.6 (2010).

<sup>72</sup> *Id.* § 60-3.5(G)-(H).

<sup>73</sup> See *Albermarle Paper*, 422 U.S. at 431-36.

<sup>74</sup> *Griggs*, 401 U.S. at 431.

<sup>75</sup> See *Fort Worth Bank & Trust Co. v. Watson*, 487 U.S. 977, 997-99 (1989) (plurality opinion); *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1977).

the disparate-impact theory is that it tends to produce quotas.<sup>76</sup> Under contemporary equal protection jurisprudence, moreover, a remedial preference must be flexible and lack the character of a quota.<sup>77</sup> Thus, in *Ricci*, had the Court construed Title VII to grant employers a safe harbor by using quotas or their like to eliminate disparate impact, that construction would likely have proven constitutionally untenable.

The constitutional backdrop to *Ricci*, moreover, does much to explain the Court's handling of the evidence of validity on which New Haven had relied when it discarded the examination results. For example, the Court concluded that there was no genuine dispute in the record about the validity of the examinations, noting that they were developed after thorough analyses of the positions of captain and lieutenant, utilizing source material provided by the fire department, as well as the testimony in the record that supported validity, and added that the city had not requested a technical report from the developer that might have supported the examinations' validity.<sup>78</sup> Critics of *Ricci* have attacked this reasoning, arguing that it was clear that the examinations could not have satisfied legal requirements for validation as job-related – not only was the conclusory opinion testimony on which the Court relied insufficient under settled Title VII standards,<sup>79</sup> but, the critics add, it is reasonably clear that the tests' design was inconsistent with the requirements for examination validity because the tests failed to test for critical elements of job performance, did not endeavor to weigh the written and oral components of the examinations properly, and involved use of a passing score and then making successful candidates eligible for promotion in rank order without any effort to validate this methodology for use of the results.<sup>80</sup>

All of these flaws identified by the critics, however, were perfectly apparent before the exams were given. It was equally apparent that the examination was likely to have a disparate racial

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<sup>76</sup> See, e.g., *Ricci*, 129 S. Ct. at 2675; *Watson*, 487 U.S. at 992 (plurality opinion); 137 CONG. REC. E3939-01 (1991) (speech of Rep. Doolittle); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW 232-36 (1992); Gold, *supra* note 4, at 457-63; Marcus, *supra* note 41, at 74-75.

<sup>77</sup> See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

<sup>78</sup> 129 S. Ct. at 2678-79.

<sup>79</sup> See Brodin, *supra* note 39, at 214-17; Harris & Faulcon-West, *supra* note 39, at 143.

<sup>80</sup> See Harris & Faulcon-West, *supra* note 39, at 143-54. For criticisms alone the same lines if somewhat less comprehensive, see Brodin, *supra* note 39, at 219-20; McGinley, *supra* note 39, at \_\_\_; and Zisk, *supra* note 39, at 38-39.

impact; as we have seen, the literature suggests that a cognitive ability test is likely to have about one standard deviation of adverse racial impact.<sup>81</sup> Indeed, a psychologist consulted by New Haven when it considered whether to use the examination results “stated that adverse impact in standardized testing has been in existence since the beginning of testing . . . .”<sup>82</sup> Moreover, there have long been doubts about the ability of such tests to predict job performance.<sup>83</sup> The data shows as well that the statistical difference in performance on cognitive ability tests substantially exceeds the observed difference in job performance.<sup>84</sup> This account, in other words, means that New Haven decided to give what it had ample reason to know was a flawed test that would produce disparate impact, and then was faced with remediating the predictable consequences. The narrow tailoring prong of the strict scrutiny inquiry, however, requires that adequate consideration be given to race-neutral means before the use of race-based remedial action.<sup>85</sup> Indeed, the constraints of equal protection are applicable “when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently.”<sup>86</sup> If one takes seriously the notion that the government should resort to race-based remedial action only as a last resort, New Haven’s course of conduct becomes hard to defend.

This same point applies to the Court’s handling of New Haven’s failure to utilize an equally valid but less discriminatory alternative. Under Title VII, even a properly validated selection mechanism may not be lawfully used if an employer fails to utilize “an equally valid, less-discriminatory testing alternative . . . .”<sup>87</sup>

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<sup>81</sup> See *supra* text accompanying note 9.

<sup>82</sup> *Ricci*, 129 S. Ct. at 2680 (internal quotations omitted).

<sup>83</sup> See, e.g., Rominger & Sandoval, *supra* note 69, at 334-45; Selmi, *supra* note 10, at 1261-76; Robert J. Sternberg et al., *Testing Common Sense*, 50 AM. PSYCHOL. 912, 923-25 (1995).

<sup>84</sup> See, e.g., James L. Outtz & Daniel A. Newman, *A Theory of Adverse Impact*, in *ADVERSE IMPACT*, *supra* note 9, at 53, 54-57; Greg A. Chung-Yan & Steven F. Cronshaw, *A Critical Re-Examination and Analysis of Cognitive Ability Tests Using the Thorndike Model of Fairness*, 75 J. OCCUPATIONAL & ORG. PSYCHOL. 489, 500-03 (2002); Sackett, Borneman & Connelly, *supra* note 9, at 223-24; Alexandra K. Wigdor & Paul R. Sackett, *Employment Testing and Public Policy: The Case of the General Aptitude Test Battery*, in *PERSONNEL SELECTION AND ASSESSMENT: INDIVIDUAL AND ORGANIZATIONAL PERSPECTIVES* 183, 196-97 (Heinz Schuler, James L. Farr & Mike Smith eds., 1993).

<sup>85</sup> See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 339-40 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

<sup>86</sup> *Enquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 605 (2008).

<sup>87</sup> *Ricci*, 129 S. Ct. at 2679 (discussing 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006)).

On this point, the Court held that New Haven had failed to adduce evidence that New Haven's 60-40 weighting of the results of the written and oral examination components as required by a collective bargaining agreement was arbitrary or that the use of different weights would have been equally valid.<sup>88</sup> The Court added that the use of a "banding" procedure in which scores were rounded to the earliest whole number to mitigate disparate impact would have violated Title VII's prohibition on "adjusting test scores on the basis of race."<sup>89</sup> Nor did the Court find sufficient evidence that the use of an assessment center procedure that evaluated candidates' performance would have been an equally valid means of reducing disparate impact.<sup>90</sup> Critics have derided the Court's failure to take these potentially less discriminatory and equally valid alternatives with what they regard as sufficient seriousness.<sup>91</sup> But, even if the Court had been more impressed with the evidence of potential alternative promotional mechanisms, equal protection jurisprudence would have foreclosed abandonment of the test results in favor of these alternatives.

The alternative promotional methods favored by the Court's critics were available to New Haven long before it administered its promotional examinations. Banding, for example, is a well-known method of grouping statistically indistinguishable scores in a manner that does not reduce their validity,<sup>92</sup> and it has long been known to reduce the disparate impact otherwise common in cognitive ability tests.<sup>93</sup> Thus, had New Haven decided in advance that it would promote on the basis of bands, not only would this scoring mechanism have avoided the need for race-based remediation as required by Title VII, but it would have also avoided any after-the-fact alteration of test scores in violation of Title VII.<sup>94</sup> As for assessment center techniques, their use had also

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<sup>88</sup> *Id.* at 2679.

<sup>89</sup> *Id.* at 2680 (citing 42 U.S.C. § 2000e-2(l) (2006))

<sup>90</sup> *Id.* at 2680-81.

<sup>91</sup> *See, e.g.*, Brodin, *supra* note 39, at 225-29; Harris & West-Faulcon, *supra* note 39, at 154-57; Ware, *supra* note 39, at 45-46; Zisk, *supra* note 39, at 40-42.

<sup>92</sup> *See, e.g.*, Wayne F. Cascio et al., *Social and Technical Issues in Staffing Decisions*, in TEST-SCORE BANDING IN HUMAN RESOURCE SELECTION 7, 10-11 (Herman Aguinis ed., 2004) [hereafter "TEST-SCORE BANDING"].

<sup>93</sup> *See, e.g.*, Wayne F. Cascio, Rick Jacobs & Jay Silva, *Validity, Utility, and Adverse Impact: Practical Implications of 30 Years of Data*, in ADVERSE IMPACT, *supra* note 9, at 271, 281; Haugh, Oswald & Ployhart, *supra* note 9, at 182-83; Roxanne M. Laczko & Paul R. Sackett, *Effects of Banding in Performance and Minority Hiring: further Monte Carlo Simulations*, in TEST-SCORE BANDING, *supra* note 92, at 133, 144-49.

<sup>94</sup> The Civil Rights Act of 1991, which added the prohibition on alteration of test scores to Title VII, also provided: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law." Civil Rights

been well-documented long before New Haven's exams,<sup>95</sup> and there had long been evidence that these techniques produce less disparate racial impact than traditional examinations.<sup>96</sup> There is as well considerable evidence in the literature that these techniques generate better evidence of validity than traditional cognitive ability tests.<sup>97</sup> The use of structured interviews has similarly been shown to mitigate disparate impact,<sup>98</sup> as has supplementation of a cognitive ability test with assessments of important noncognitive abilities.<sup>99</sup> Indeed, a wide variety of strategies have emerged to reduce the disparate impact of traditional selection mechanisms.<sup>100</sup>

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Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079. Courts have held that banding, when the bands themselves are constructed identically for all races, is a form of affirmative action in accordance with law. *See, e.g.*, *Chicago Firefighters Local 2 v. City of Chicago*, 256 F.3d 649, 655-56 (7th Cir. 2001); *Boston Superior Off. Fed. v. City of Boston*, 147 F.3d 13, 23-24 (1st Cir. 1998); *San Francisco Police Off. Ass'n v. City & County of San Francisco*, 979 F.2d 721, 728 (9th Cir. 1992); *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1148 (2d Cir. 1991); Rominger & Sandoval, *supra* note 69, at 322-24. Nevertheless, with respect to the savings clause in the 1991 Act, one scholar has argued that it is ambiguous and might preserve only "court-ordered" affirmative action. *See* Lund, *supra* note 4, at 121-22. The EEOC, however, has interpreted the savings clause to apply to voluntary as well as court-ordered affirmative action. *See* EEOC Decision No. 915-002, *Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 189008 \*9-11 (July 14, 1992). The EEOC's position on ambiguous statutory language, even when not embodied within a formal regulation within its statutory power to issue, is entitled to deference. *See, e.g.*, *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399-400 (2008).

<sup>95</sup> *See, e.g.*, GEORGE C. THOMPSON, *ASSESSMENT CENTERS IN HUMAN RESOURCES MANAGEMENT* 4-6 (1992).

<sup>96</sup> *See, e.g.*, Michelle A. Dean, Philip A. Bobko & Philip L. Roth, *Ethnic and Gender Subgroup Differences in Assessment Center Ratings: A Meta Analysis*, 93 J. APP. PSYCHOL. 685, 689 (2008); Haugh, Oswald & Ployhart, *supra* note 9, at 166.

<sup>97</sup> *See, e.g.*, THOMPSON, *supra* note 95, at 187-200; Winifred Arthur Jr. et al., *A Meta-Analysis of the Criterion-Related Validity of Assessment Center Dimensions*, 56 PERS. PSYCHOL. 125, 145-46 (2003); Barbara C. Gauger et al., *Meta-Analysis of Assessment Center Validity*, 72 J. APPLIED PSYCHOL. 493, 503-07 (1987); Diana F. Krause et al., *Incremental Validity of Assessment Center Ratings over Cognitive Ability Tests: A Study at the Executive Management Level*, 14 INT'L J. OF SELECTION & ASSESSMENT 360, 367-69 (2006). There is, however, some reason to be concerned that assessment centers may disadvantage women in traditionally male professions such as firefighters unless appropriate precautions are taken in the design of assessment mechanisms. *See* McGinley, *supra* note 19, at 621-23.

<sup>98</sup> *See, e.g.*, Alison I. Huffut & Philip L. Roth, *Racial Group Differences in Employment Interview Evaluations*, 83 J. APPLIED PSYCHOL. 179, 184-85 (1998); Philip L. Roth et al., *Correcting for Range Restriction in Structured Interview Ethnic Group Differences: The Values May Be Larger than Researchers Thought*, 87 J. APPLIED PSYCHOL. 369, 373-75 (2002).

<sup>99</sup> *See, e.g.*, Elaine D. Pulakos & Neal Schmitt, 9 HUM. PERFORMANCE 241, 254-55 (1996).

<sup>100</sup> *See, e.g.*, Cascio, Jacobs & Silva, *supra* note 93, at 285-87; Neal Schmitt

All of these race-neutral strategies were available to New Haven from the start; rather than relying on a selection mechanism that was likely to produce disparate impact that would trigger the need for a race-based remedy. Yet, New Haven offered no explanation for its decision to utilize cognitive ability examinations with a long and well-documented history of disparate impact rather than these alternative techniques.

As we have seen, the constitutional requirement of narrow tailoring requires that race-neutral alternatives receive adequate consideration before the government can undertake use of a racial preference as a remedial measure. New Haven, however, never offered any explanation for its decision to use cognitive ability tests that were likely to produce disparate impact that could only be remedied through a racial preference.<sup>101</sup>

Strict scrutiny's requirement that race-neutral alternatives receive adequate consideration likely does not permit an employer to give a bad examination likely to produce disparate impact that can only be ameliorated by a race-based response.<sup>102</sup> Beyond this, as a matter of civil-rights policy, it is surely difficult to understand the justification for a regime that permits employers to continue to utilize employment practices likely to produce unjustifiable disparate racial impact as long as it is remediated after the fact. Such a regime seems likely to produce racial resentment while suggesting that minorities cannot compete for jobs on the same terms as nonminorities. There is accordingly little to commend this approach in terms of either equal protection jurisprudence or

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& Abigail Quinn, *Reductions in Measured Subgroup Differences: What Is Possible?*, in ADVERSE IMPACT, *supra* note 9, at 425, 445-47; James Clevenger et al., *Incremental Validity of Situational Judgment Tests*, 86 J. APP. PSYCHOL. 410, 415-16 (2001); Robert E. Ployhart & Bruce E. Holtz, *The Diversity-Validity Dilemma: Strategies for Reducing Racioethnic and Sex Subgroup Differences and Adverse Impact in Selection*, 61 PERS. PSYCHOL. 153 (2008); Paul R. Sackett et al., *High-Stakes Testing in Employment, Credentialing, and Higher Education*, 56 AM. PSYCHOL. 302, 315-26 (2001); Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1068-72 (2011)..

<sup>101</sup> Perhaps reweighing the examination components could have reduced disparate impact, but this race-neutral alternative, if indeed it were an equally valid and less discriminatory alternative, was plainly not adopted, and there is no indication that it was given the consideration that the constitutional requirement of narrow tailoring demands. Moreover, as the Court noted, reweighing the components might have also violated Title VII's prohibition on race-based alteration of examination results. *Ricci*, 129 S. Ct. at 2679.

<sup>102</sup> For a judicial opinion reflecting these concerns with respect to a consent decree that seemingly permitted a public employer to continue to administer exams with a disparate impact as long as it were remedied through a racial preference, see *Ensley Branch, NAACP Seibels*, 31 F.3d 1548, 1571-75 (11th Cir. 1994).

sound policy. Even so, the vices of remedying disparate impact only after-the-fact also suggest a route that can save disparate impact doctrine from constitutional attack. It is to that route that we now proceed.

## II. RECONCILING DISPARATE IMPACT AND EQUAL PROTECTION JURISPRUDENCE

As a matter of statutory construction, *Ricci* holds that an employer can abandon an employee selection mechanism that has produced disparate impact when “there is a strong basis in evidence of disparate impact liability,”<sup>103</sup> but, as we have seen, the question remains whether Title VII, even as construed, is constitutional.<sup>104</sup> Despite the Court’s effort to harmonize

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<sup>103</sup> *Ricci*, 129 S. Ct. at 2676.

<sup>104</sup> See *supra* text accompanying notes 25-38. One commentator has argued that a decision to discard an employment practice that has produced unlawful disparate impact should not be regarded as discrimination on the basis of race subject to strict scrutiny because Title VII requires proof not merely of disparate racial impact but also that an employment practice is not job-related. See Gold, *supra* note 41, at 185-86. Title VII, however, requires no inquiry into job-relatedness unless an employment practice has a racially disparate impact. Indeed, in *Ricci*, New Haven was evidently content with the job-relatedness of its examinations until it learned of the race of the successful candidates. Strict scrutiny is required, however, not merely when “the challenged action rested solely on racially discriminatory purposes,” but whenever “a discriminatory purpose has been a motivating factor in the decision . . . .” *Vill. of Arlington Heights v. Metro. Hous. Dev. Auth.* 429 U.S. 252, 265-77 (1977). Accordingly, when an employer is satisfied with an employment practice until learning of its racially disparate impact, under contemporary equal protection jurisprudence, an employer’s decision to discard an employee selection is regarded as a race-conscious decision subject to strict scrutiny. Charles Sullivan, in contrast, has argued that disparate-impact liability could be saved from equal protection attack by construing Title VII to permit nonminorities to make disparate-impact claims on the same terms as protected groups. See Charles A. Sullivan, *The World Turned Upside Down? Disparate Impact Claims by White Males*, 98 *Nw. U. L. REV.* 1505, 1544-55 (2004). This view, however, seems inconsistent with *Ricci*’s subsequent holding that whenever a selection device is discarded because of its disparate racial impact, this amounts to disparate-treatment discrimination against the successful candidates on the basis of race. The Court long ago held that the disparate-treatment provisions of Title VII forbid disparate treatment on the basis of race of both minorities and nonminorities. See *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 278-80 (1976). Moreover, as we have seen, under contemporary equal protection jurisprudence, all race-conscious governmental action triggers strict scrutiny, regardless of motive. Accordingly, when an employer abandons a promotional practice because of its racially disparate effects, whether favoring minorities or nonminorities, strict scrutiny is seemingly required under contemporary equal protection standards. Indeed, making disparate-impact claims available to minorities and nonminorities alike, rather than making Title VII race-neutral, would mean that Title VII would require employers to make even more race-conscious judgments, presumably giving rise to even more disparate-treatment claims as a consequence. In that sense, Professor Sullivan’s suggestion fails to

disparate-impact and disparate-treatment liability, the Court's interpretation of the statute does not eliminate legal pressure on employers to engage in what the Court has held to be intentional racial discrimination by abandoning employee selection mechanisms based on the racial composition of the pool of successful candidates, at least when the requisite "strong basis in evidence" is present. And, if an employer does not abandon an employment practice based on a threat of disparate-impact liability, in ensuing litigation a court may order the employer to abandon a selection mechanism that has produced unlawful disparate impact. In either case, the threat or reality of disparate-impact liability involves race-conscious governmental action, and therefore, as we have seen, triggers strict scrutiny, whether an employer voluntarily remediates disparate impact or is ordered to do so by a court.

Accordingly, Title VII's disparate-impact provision can withstand constitutional attack only if it satisfies strict scrutiny – that is, if it is narrowly tailored to achieve a compelling governmental interest.<sup>105</sup>

#### A. *Compelling Governmental Interest*

The governmental interest that is most frequently invoked to support disparate-impact liability is evidentiary in nature – the government's interest in identifying instances in which a discriminatory motive for a challenged employment practice is likely to be present, but may be difficult to establish if actual proof of intentional discrimination is required.<sup>106</sup> The governmental interest in using a prophylactic rule to identify discrimination is all the stronger since it seems that subtle and even unconscious forms of discrimination are those most common in contemporary society,

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produce race neutrality as that concept is generally understood in contemporary equal protection jurisprudence. *Cf.* *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.").

<sup>105</sup> See *supra* text accompanying notes 16, 28.

<sup>106</sup> See, e.g., Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1167 (2002); Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 358 (1987); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 645, 652 (2001); Marcus, *supra* note 41, at 78-79; Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 30-33 (2010); Jennifer L. Peresie, *Toward A Coherent Test for Disparate Impact Litigation*, 84 IND. L.J. 773, 779 (2009); Primus, *supra* note 15, at 520-23, 532-36; George Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1302-07 (1987).

as we have seen.<sup>107</sup>

Equal protection jurisprudence informs us that a governmental interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, “identified discrimination”; second, the State “must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary, “before it embarks on an affirmative action program.”<sup>108</sup>

The evidentiary justification for disparate-impact liability does not rest on the presence of identified discrimination, but instead on a likelihood of or proxy for such discrimination. For this reason this argument for disparate-impact liability might be found wanting. Yet, this view may give insufficient weight to the difficulties of establishing a discriminatory motive. As we have seen, strict scrutiny does not require a certainty that discrimination is present, but only a “strong basis in evidence.”<sup>109</sup> Given the difficulties in proving intentional discrimination, perhaps the presence of an unlawful disparate impact, or merely a “strong basis in evidence” for believing such discrimination is present, creates a sufficient likelihood of a discriminatory motive to justify remedial action. Indeed, when it codified disparate-impact liability in the Civil Rights Act of 1991, Congress found that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.”<sup>110</sup> Beyond that, it has long been settled that congressional power to enforce the Fourteenth Amendment includes the power to enact prophylactic prohibitions on ostensibly neutral practices that have been used to facilitate discrimination. For example, the Court upheld the prohibition on enforcement of literacy tests in the Voting Rights Act of 1965 because of their tendency to facilitate discrimination.<sup>111</sup> Similarly, the Court upheld the statutory entitlement to family and medical leave in the Family and Medical Leave Act even as applied to state governments because of the history of employers using leave policies in a manner that facilitated sex discrimination.<sup>112</sup>

Nevertheless, in *Ricci*, Justice Scalia was skeptical of the evidentiary justification for disparate-impact liability as a means

<sup>107</sup> See *supra* text accompanying note 10.

<sup>108</sup> *Bush v. Vera*, 517 U.S. 952, 982 (1996) (plurality opinion) (quoting *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (internal quotations omitted)).

<sup>109</sup> See *supra* text accompanying notes 56-57.

<sup>110</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(a), 105 Stat. 1071, 1071.

<sup>111</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966).

<sup>112</sup> See *Nevada v. Hibbs*, 538 U.S. 721, 729-39 (2003).

“to identify genuine, intentional discrimination – to ‘smoke out,’ as it were, disparate treatment,” not because it is based on a proxy for intentional discrimination, but because Title VII “fail[s] to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable.”<sup>113</sup> He added: “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.”<sup>114</sup>

It is not clear, however, that this skepticism is warranted. Just as prophylactic regulation may be appropriate given the difficulties of establishing an invidious motive, an affirmative defense of the type Justice Scalia suggested might eviscerate the efficacy of prophylaxis in light of the difficulties of countering an employer’s profession of good faith and reasonableness. Indeed, when the Court has upheld prophylactic regulation, it had not required the type of affirmative defense envisioned by Justice Scalia. The Voting Rights Act, for example, provided that no one who had completed sixth grade in any accredited public school in any state, territory, or the District of Columbia in which the predominant language was other than English could be denied the right to vote on the basis of English literacy, without affording an affirmative defense for jurisdictions that could establish that a literacy requirement had been adopted reasonably and in good faith.<sup>115</sup> The Family and Medical Leave Act entitled all covered employees to specified family and medical leave from without any affirmative defense for employers who could establish that their policies were nondiscriminatory and reasonable.<sup>116</sup>

The more serious problem with the evidentiary justification for disparate-impact liability, however, follows from the character of strict scrutiny. Any prophylactic regulation is likely to overenforce the underlying right. Indeed, overenforcement is thought to be the virtue of this kind of regulation; as one scholar put it: “The theory of disparate impact results in some over-enforcement of the prohibition against intentional discrimination, but it yields the corresponding advantage of avoiding underenforcement.”<sup>117</sup> As a matter of congressional power to enforce the Fourteenth Amendment’s guarantee of “equal protection of the law,”<sup>118</sup> prophylactic legislation is uncontroversial. It is settled that Congress has authority, as an incident of its power to enforce the

<sup>113</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

<sup>114</sup> *Id.* at 2683.

<sup>115</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 643, 648-58 (1966).

<sup>116</sup> See *Hibbs*, 538 U.S. at 737-38.

<sup>117</sup> Rutherglen, *supra* note 61, at 99.

<sup>118</sup> U.S. CONST. amend. XIV, § 1.

Fourteenth Amendment,<sup>119</sup> to enact prophylactic legislation if it is congruent to a pattern of constitutional violations and a proportional response.<sup>120</sup> The cases upholding prophylactic legislation on this basis, however, were not subject to strict scrutiny because they did not involve racial classifications. As we have seen, the Voting Rights Act suspended literacy tests for everyone in covered jurisdictions regardless of race, and the Family and Medical Leave Act granted all covered employees a substantive entitlement to leave regardless of sex. Accordingly, neither statute utilized racial classifications that trigger strict scrutiny. Disparate-impact liability, in contrast, affords a remedy to applicants defined by race, sex, or other protected characteristics. What is more, congressional power to enforce the Fourteenth Amendment is irrelevant to the validity of Title VII's application to private employers because Congress has no power to enforce the Fourteenth Amendment against nongovernmental actors.<sup>121</sup> This leaves Title VII's disparate-impact provisions vulnerable to constitutional attack because, as we have seen, equal protection forbids the government from taking action that amounts to encouraging, if not compelling, private parties to engage in acts of racial discrimination.<sup>122</sup>

Since *Ricci* holds that the abandonment of a selection mechanism because of the racial composition of the pool of successful candidates is a form of racial discrimination, strict scrutiny is constitutionally required for disparate-impact law because it encourages, if not compels, abandonment of employment practices based on their racial consequences. Moreover, although it appears that “the ‘narrow tailoring’ requirement of strict scrutiny allows the States a limited degree of leeway,”<sup>123</sup> strict scrutiny is usually thought to forbid regulations that are significantly over- or underinclusive.<sup>124</sup> Thus, the overinclusiveness of a conclusive presumption that employment practices with unjustifiable disparate impact were adopted with no intent to discriminate may run afoul of the constitutional

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<sup>119</sup> See *id.* § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

<sup>120</sup> *E.g.*, *Hibbs*, 538 U.S. at 727-28.

<sup>121</sup> See *United States v. Morrison*, 529 U.S. 598, 619-24 (2000).

<sup>122</sup> See *supra* text accompanying notes 30-34.

<sup>123</sup> *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion).

<sup>124</sup> See, *e.g.*, *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2738-42 (2011); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 792-94 (1978). For an expression of one scholar’s skepticism that the overinclusiveness of Title VII’s evidentiary justification could satisfy strict scrutiny, see Sullivan, *supra* note 105, at 1552-53.

requirement of narrow tailoring. Although equal protection doctrine has yet to work out the degree of prophylaxis permitted in a regulation creating a race-conscious remedy, defending disparate-impact liability in these terms, while promising given current thinking about the prevalence of subtle forms of discrimination, nevertheless entails some peril of fatal over-inclusiveness.<sup>125</sup> Even so, if strict scrutiny is to accommodate the realities of discrimination, perhaps it must acknowledge that some degree of prophylaxis is essential to combat forms of discrimination that are so subtle, even unconscious, in character.

The second governmental interest that has been advanced in support of disparate-impact liability is the interest in achieving equality of opportunity by removing unjustifiable barriers to the employment of protected groups.<sup>126</sup> Because this interest does not involve remediating intentional discrimination, it might be regarded as constitutionally suspect because it is not directed at combatting employment practices premised on discriminatory motivation.<sup>127</sup>

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<sup>125</sup> This same point reflects the problem with efforts to justify disparate-impact liability as a remedy for unconscious discrimination because this once again involves the imposition of liability in cases in which an employer may have no intent to discriminate. *See, e.g.,* Marcus, *supra* note 41, at 81-83; Ngov, *supra* note 106, at 36-44; Primus, *supra* note 15, at 532-35.

<sup>126</sup> *See, e.g.,* Greenberger, *supra* note 4, at 306-08; Ngov, *supra* note 106, at 80-86; Primus, *supra* note 15, at 523-32; Rutherglen, *supra* note 61, at 102-04.

<sup>127</sup> *See* Marcus, *supra* note 41, at 81-83. Beyond that, Professor Sullivan has rejected this justification as rooted in a general interest in remediating societal discrimination that the Supreme Court regards as inadequate to survive strict scrutiny, while leaving open the possibility that disparate-impact liability could be justified in terms of promoting diversity. *See* Sullivan, *supra* note 104, at 1553-54. Indeed, the Court has reasoned that the government may not utilize racial preferences to remediate “societal discrimination” because this interest is too amorphous to justify racial preferences. *See, e.g.,* Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731-32 (2007) (plurality opinion); Shaw v. Hunt, 517 U.S. 899, 909-10 (1996); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-500 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (plurality opinion). An interest in promoting diversity, however, likely fares no better. Although the Court has held that institutions of higher education have a compelling interest in obtaining a racially diverse study body, *see* Grutter v. Bollinger, 539 U.S. 3-6, 328 (2003), since Professor Sullivan’s article, the Court has held that the compelling interest in promoting diversity is limited to higher education, and even then only when racial diversity is part of a broader program seeking diversity in the student body. *See* Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-25 (2007). Thus, defending disparate-impact liability by reference to a governmental interest in promoting diversity is subject to the same objections that can be made to any form of racial preference. *See* Ngov, *supra* note 106, at 52-60. Yet, these observations do not doom disparate-impact liability in terms of removing unjustified barriers to the employment of protected minorities. The disparate-impact theory focuses only on the consequences and justification of a

There is, however, reason to believe that eliminating discriminatory barriers to the advancement of women and minorities in the workforce could be regarded as a compelling governmental interest. In *Roberts v. United States Jaycees*,<sup>128</sup> the Court, considering the constitutionality of a Minnesota statute that prohibited private organizations from discriminating on the basis of sex,<sup>129</sup> concluded that “Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”<sup>130</sup> To support this conclusion, the Court invoked “the State’s strong historical commitment to eliminating discrimination *and assuring its citizens equal access to publicly available goods and services*,”<sup>131</sup> objectives that the Court added “plainly serves *compelling state interests of the highest order*.”<sup>132</sup> With respect to the denial of equal opportunities in particular, the Court noted “the importance, both to the individual and society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”<sup>133</sup> The Court concluded: “Assuring women *equal access to goods, privileges, and advantages clearly furthers compelling state interests*.”<sup>134</sup> In a subsequent case involving the Rotary Club, the Court added that “*the State’s compelling interest in assuring equal access extends to the acquisition of leadership skills and business contacts as well as tangible goods and services*.”<sup>135</sup>

Although the civil rights laws upheld in *Roberts* and its progeny prohibited intentional discrimination, *Roberts* is nevertheless quite clear in identifying a compelling governmental interest in removing obstacles to equal economic opportunity for women and minorities. This is precisely the governmental interest at the heart of disparate-impact liability. When the Court outlined the rationale for treating unwarranted disparate impact as a form of

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particular employment practice, and therefore does not create the threat of an unbounded racial preference justified solely in terms of remediating societal discrimination or promoting diversity. Instead, this form of liability is directed at a specific employment practice that acts as an unjustifiable barrier to equal employment opportunity. Indeed, as we have seen, disparate-impact liability requires proof linking the disparate impact to a specific employment practice. *See supra* note 14.

<sup>128</sup> 468 U.S. 609 (1984).

<sup>129</sup> *Id.* at 618.

<sup>130</sup> *Id.* at 623.

<sup>131</sup> *Id.* at 624 (emphasis supplied).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 626.

<sup>134</sup> *Id.* (emphasis supplied).

<sup>135</sup> *Bd. of Directors of Rotary Club Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (emphasis supplied).

discrimination in *Griggs*, it identified Title VII's objective as "to achieve equalities of employment opportunities . . . ." <sup>136</sup> The African American candidates who had been unable to satisfy the high-school graduation requirement or pass the intelligence tests at issue, the Court observed, "have long received inferior education in segregated schools . . . ." <sup>137</sup> Although "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications," it did require "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate . . . ." <sup>138</sup> Thus, "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." <sup>139</sup> The legislative history of the Civil Rights Act of 1991, in turn, makes plain that Congress's intent was to endorse the rationale of *Griggs*. <sup>140</sup>

Accordingly, Title VII's disparate impact theory of liability is premised upon the very interest in securing equality of opportunity by removing unjustified barriers to economic advancement that the Court identified as compelling in *Roberts* and its progeny. <sup>141</sup> Even if one were determined to set aside *Roberts* and its progeny as involving only laws directed at intentional discrimination, it is entirely unclear why the government should not have been deemed to have a compelling interest in addressing the kind of obstacles to equality of opportunity identified in *Griggs*. To be sure, one could object that a governmental interest in ensuring equality of opportunity only for groups defined by race, sex, or national origin is itself tainted by a discriminatory objective, although *Roberts* and its progeny view such an objective as permissible. Beyond that, however, seeking to ensure equality of opportunity is much different than the kind of boundless and ill-defined racial favoritism that the contemporary equal protection jurisprudence finds objectionable.

The Court has rejected preferences designed to remediate "societal discrimination" as unacceptable because it has "no logical stopping point." <sup>142</sup> Societal discrimination is also considered too

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<sup>136</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

<sup>137</sup> *Id.* at 430.

<sup>138</sup> *Id.* at 420, 421.

<sup>139</sup> *Id.* at 421.

<sup>140</sup> *See, e.g.*, 137 CONG. REC. S15285-86 (1991) (remarks of Sen. Seymour); *id.* at S15316 (remarks of Sen. Hatch); *id.* at S15445-02 (remarks of Sen. Robb).

<sup>141</sup> *See, e.g.*, 137 CONG. REC. S15239 (1991) (remarks of Sen. Gorton) ("In articulating the rationale of the [*Griggs*] decision, Chief Justice Burger clarified that the holding was one of equal opportunity, not proportionality of results.").

<sup>142</sup> *See* *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731-32 (2007) (plurality opinion); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 498 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-

amorphous a basis to justify a race-conscious remedy because it is not linked to discrete and identifiable discriminatory acts.<sup>143</sup> Disparate-impact liability, in contrast, is neither unbounded nor amorphous. It is directed at a discrete employment practice that produces an unjustified disparate impact, and this rationale for race-conscious action disappears when a challenged practice fails to produce a significant disparate impact, or when it is demonstrably job-related.

To be sure, disparate-impact liability concerns itself only with practices that deny equality of opportunity to identifiable groups, but in this respect it is no different than the civil rights laws upheld in *Roberts* and its progeny, which also addressed discrimination that denied equality of opportunity only to particular groups. Still, it is undeniable that disparate-impact liability is race-conscious in a way that other civil rights laws are not. It is, at best, unclear whether nonminority males can ever advance disparate-impact claims.<sup>144</sup> Even if they can, as we have seen, disparate-impact violations can be redressed only by taking what *Ricci* holds is race-conscious action. There is, however, ample reason for the government to pay particular concern to inequality of opportunity with a racial dimension, rather than requiring employers to justify as job-related all employment practices, even if they do not produce results that are skewed by race, sex, or other protected criterion.<sup>145</sup> In other words, the government has ample reason to craft disparate-impact law in a race-conscious rather than a race-

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76 (1986) (plurality opinion).

<sup>143</sup> See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Croson*, 488 U.S. at 499; *Wygant*, 476 U.S. at 276 (plurality opinion).

<sup>144</sup> Although the statute is ambiguous and there are good arguments on both sides, likely the better interpretation of the statutory codification of the *Griggs* theory of liability is that it applies only to practices that have a disparate impact on protected groups and not nonminority males. See Sullivan, *supra* note 104, at 1543-44. Even if nonminority males can advance disparate-impact claims, however, as we have seen, remedying even these disparate-impact violations would still require race-conscious governmental action that demands strict scrutiny under contemporary jurisprudence. See *supra* note 104.

<sup>145</sup> One could imagine an approach that protects all employees from unwarranted employment actions without requiring membership in a protected group. For an example, see Anne C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1511-24 (1996). Of course, such an approach increases the litigation risks and transaction costs associated with all employment decisions, rather than only those thought to present special risks because of the possibility of discrimination. There are, of course, powerful arguments in favor of preserving employer discretion. For some of the relevant considerations, see, for example, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); and Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989).

neutral fashion.

Although a complete survey of the socioeconomic conditions facing racial minorities is well beyond the scope of this project, the key points can be briefly made. As we have seen, African Americans continue to score below nonminorities on both standardized tests in school and cognitive ability tests.<sup>146</sup> The magnitude of the gap is comparable between standardized achievement tests and employment-related tests.<sup>147</sup> Although the cause of the test-score gap is elusive, many of the leading studies have concluded that a complex mix of socioeconomic factors explains the bulk of the gap.<sup>148</sup> Moreover, levels of racial segregation in schooling remain high, with African-Americans disproportionately confined to schools with high concentrations of impoverished students.<sup>149</sup> Studies have consistently found, in turn,

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<sup>146</sup> See *supra* text accompanying notes 8-9.

<sup>147</sup> See Paul R. Sackett & Winny Shen, *Subgroup Differences on cognitive Tests in Contexts Other Than Personnel Selection*, in ADVERSE IMPACT, *supra* note 9, at 323, 338-44.

<sup>148</sup> See, e.g., JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 105-10 (1990); JAMES S. COLEMAN, ERNEST Q. CAMPBELL, CAROL J. HOBSON, JAMES MCPARTLAND, ALEXANDER M. MOOD, FREDERIC D. WEINFELD & ROBERT L. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITY 290-302 (1966); David Grissmer & Elizabeth Eiseman, *Can Gaps in the Quality of Early Environments and Noncognitive Skills Help Explain Persisting Black-White Achievement Gaps?*, in STEADY GAINS AND STALLED PROGRESS, *supra* note 8, at 139, 151-62; Outtz & Newman, *supra* note 84, at 67-81; Michael Hout, *Test Scores, Education and Poverty*, in RACE AND INTELLIGENCE: SEPARATING SCIENCE FROM MYTH 329, 329-54 (Jefferson M. Fish ed. 2002) [hereafter RACE AND INTELLIGENCE]; Katherine Magnuson, Dan T. Rosenbaum & Jane Waldfogel, *Inequality and Black-White Achievement Trends in the NAEP*, in STEADY GAINS AND STALLED PROGRESS, *supra* note 8, at 33, 56-59; Meredith Phillips et al., *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in THE BLACK-WHITE TEST SCORE GAP 103, 137-38 (Christopher Jencks & Meredith Phillips eds., 1998) [hereafter THE BLACK-WHITE TEST SCORE GAP]; W. Jean Yeung & Dalton Conley, *Black-White Achievement Gap and Family Wealth*, 79 CHILD DEVEL. 303, 312-14 (2008). There has been a rather notorious claim that the bulk of the achievement gap is attributable to genetic factors, see RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269-315 (1994), but it has been rather thoroughly debunked. See, e.g., John L. Horn, *Selecting of Evidence, Misleading Assumptions, and Oversimplifications: The Political Significance of The Bell Curve*, in RACE AND INTELLIGENCE, *supra* at 297, 297-325; Leon J. Kamin, *Lies, Damned Lies, and Statistics*, in THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, AND OPINIONS 81 (Russell Jacoby & Naomi Glauberman eds., 1995); Richard E. Nisbett, *Race, Genetics, and IQ*, in THE BLACK-WHITE TEST SCORE GAP, *supra* at 86, 89-101.

<sup>149</sup> See, e.g., GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, UCLA, HISTORIC REVERSALS: ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 24-26 (Aug. 2007); GARY ORFIELD, CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, UCLA, REVIVING THE GOAL OF AN

a relationship between the extent of segregation and Black students' performance on standardized tests.<sup>150</sup> This should be unsurprising; as one scholar observed, “[t]he conditions common to low-income neighborhoods and their schoolchildren . . . often overwhelm efforts for effective schooling.”<sup>151</sup> Moreover, in recent decades, standardized test scores reflecting levels of educational achievement have come to reliably predict future income.<sup>152</sup> In light of this, it should also be unsurprising that substantial gaps remain between the races in terms of income and wealth. In 2010, for example, the median income of White households was \$51,846, compared to \$32,068 for Black households.<sup>153</sup> For non-Hispanic Whites, in 2010 the poverty rate was 9.9 percent, compared to 27.4 percent for Blacks.<sup>154</sup> In the same year, the unemployment rate for Blacks was 16.0 percent, compared to 8.7 percent for Whites.<sup>155</sup> Perhaps most striking, in 2009, the median wealth of White households was twenty times that of Black households.<sup>156</sup> This income disparity, in turn, reinforces the achievement gap; in recent decades, family income has become an increasingly reliable predictor of children's educational attainment.<sup>157</sup> Parental unemployment also has a significant adverse effect on children's

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INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 9-15 (Jan. 2009).

<sup>150</sup> See, e.g., Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53, 65-67 (Gary Orfield & Susan E. Eaton eds., 1996) [hereafter *DISMANTLING DESEGREGATION*]; Jacob L. Vigdor & Jens Ludwig, *Segregation and the Test Score Gap*, in *STEADY GAINS AND STALLED PROGRESS*, *supra* note 8, at 181, 199-206; Mark Berends & Roberto Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-Year Perspective*, 112 *TEACHERS COLL. REC.* 978, 994-96 (2010); Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 *N.C. L. REV.* 993, 1032-33 (2010).

<sup>151</sup> Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, in *DISMANTLING DESEGREGATION*, *supra* note 150, at 73, 83.

<sup>152</sup> See, e.g., Curto, Fryer & Howard, *supra* note 8, at 484; Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 148, at 1, 3-7; Sackett, Borneman & Connelly, *supra* note 9, at 219.

<sup>153</sup> CARMEN DE NAVAS-NALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. DEP'T OF COMM., *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010*, at 6 tbl. 1 (Sep. 2011).

<sup>154</sup> *Id.* at 17.

<sup>155</sup> U.S. BUR. OF LAB. STATS., U.S. DEP'T OF LABOR, *LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2010*, at 2 (Aug. 2011).

<sup>156</sup> PEW RESEARCH CENTER, *TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 1* (July 26, 2011).

<sup>157</sup> See Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?*, *supra* note 8, at 91, 94-110.

educational achievement.<sup>158</sup>

To the extent that these disparities reflect differences in occupational qualifications, disparate-impact liability can do nothing about them. But to the extent that they reflect the unjustifiable reliance on cognitive ability tests and other employment practices that produce disparity as a consequence of the more limited opportunities facing impoverished and segregated racial minorities without fairly measuring qualifications, the government surely has a compelling interest in removing these unwarranted barriers to the upward economic mobility of racial minorities. *Roberts* and its progeny offer at least qualified support for this conclusion; and there is nothing in contemporary equal protection doctrine that precludes its acceptance. Moreover, given the consequences of racially-skewed inequality of opportunity, the government has ample reason to regard it as of urgent concern. After all, racial and sexual inequality call into question the legitimacy of a multitude of social arrangements.

As it upheld a race-conscious law school admission plan against equal protection attack in *Grutter v. Bollinger*,<sup>159</sup> for example, the Court wrote: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>160</sup> The point is readily generalized to all paths to economic opportunity. It should be reason enough for the government to concern itself specially with racially-skewed inequality of opportunity. The burden of requiring employers to validate all employment practices as job-related would be considerable. There is ample reason for Congress to conclude that only employment practices that undermine equality of opportunity for disadvantaged minorities or women should be the subject to a burden of validation for job-relatedness. Indeed, this is presumably the reason that civil rights laws typically prohibit only discrimination involving identifiable groups, rather than all arbitrary or unjustified discrimination. And, as we have seen in our consideration of *Roberts* and its progeny, this approach is generally regarded as unproblematic.

Of course, even if one accepts that the government has a compelling interest in eliminating unjustifiable barriers to the economic advancement of women and minorities, it is difficult to know how much disparate-impact liability can contribute to the

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<sup>158</sup> See Phillip B. Levine, *How Does Parental Unemployment Affect Children’s Educational Performance?*, in *WHITHER OPPORTUNITY?*, *supra* note 8, at 315, 317-20, 326-32.

<sup>159</sup> 539 U.S. 306 (2003).

<sup>160</sup> *Id.* at 332.

amelioration of those disparities. There is good evidence that the enactment of antidiscrimination laws produced significant gains in wages and employment for Blacks relative to Whites,<sup>161</sup> but it is difficult to know what proportion of these gains can be fairly attributed to disparate-impact liability. There is little reason to doubt the conclusion of one of the most comprehensive reviews of the question: “It has not proven possible to identify the specific contributions of the various civil rights programs and policies . . . [S]tudies have not been able to disentangle the effects of the[] different types of civil rights activities.”<sup>162</sup>

Nevertheless, as we have seen, the emergence of disparate-impact liability caused employers to reform personnel practices that had erected barriers to the employment of women and minorities.<sup>163</sup> Advocates of what became the Civil Rights Act of 1991 placed considerations of this nature before Congress as it deliberated on the proposed legislation.<sup>164</sup> Moreover, as we have also seen, there is good reason to believe that disparate-impact liability remains important given the continued disparate impact of cognitive ability tests,<sup>165</sup> and the likely prevalence of unconscious or subtle forms of discrimination difficult to reach with disparate-treatment liability alone.<sup>166</sup> Precisely because disparate-impact liability does not require proof of intentional discrimination, it will in many cases provide a far more powerful tool to attack inequality of opportunity than disparate-treatment liability. The advantages of disparate-impact liability have been made plain even since *Ricci*, when Justice Scalia authored a unanimous opinion holding that as long as an employer continues to use a challenged promotional practice, a challenge based on disparate impact is timely, even though a disparate-treatment violation requires proof of the adoption of an employment practice with discriminatory

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<sup>161</sup> See, e.g., JAMES P. SMITH & FINIS R. WELCH, RAND CORP., CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS 85-93 (Feb. 1986); U.S. COMM’N ON CIVIL RIGHTS, THE ECONOMIC PROGRESS OF BLACK MEN IN AMERICA 102-09 (Oct. 1986); Donald Tomaskovic Dewey & Kevin Stainback, *Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces Since the Civil Rights Act*, 609 ANN. AM. ACAD. POL. & SOC. SCI. 49, 63-77 (2007).

<sup>162</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 161, at 109.

<sup>163</sup> See *supra* text accompanying note 7.

<sup>164</sup> See, e.g., *Civil Rights Act of 1990: Hearings on H.R. 4000 Before the Subcomm. on Civil and Const’l Rights, H. Educ. & Labor Comm.*, 101st Cong. 599–608 (1990) (statement of John E. Jacob, Pres. and CEO, Nat’l Urban League) (discussing the extent of racial inequalities in employment and the persistence of discrimination); *id.* at 697–704 (statement of David L. Rose, frmr. Chief, Employment Litigation, Civil Rights Div., Dep’t of Just.) (discussing the importance of disparate-impact liability).

<sup>165</sup> See *supra* text accompanying notes 8-9, 81-84, 140-41.

<sup>166</sup> See *supra* text accompanying notes 10-14.

intent within the limitations period.<sup>167</sup>

To be sure, given the myriad of variables in play, it is impossible to know how much more difficult it would be to remediate inequality of opportunity without disparate-impact liability. The Court has repeatedly announced, however, that strict scrutiny of race-conscious governmental action is not invariably fatal.<sup>168</sup> If that is true, it would be quite an anomaly to insist on an empirical showing that is beyond the abilities of contemporary social science. Because disparate-impact liability represents a more powerful tool to remove unwarranted barriers to economic opportunity than is available by virtue of disparate-treatment liability alone, it seems inescapable that disparate impact enhances equality of opportunity by removing barriers to the employment of women and minorities unrelated to ability. If the government has a compelling interest in fostering equality of economic opportunity for women and minorities, it seems hard to deny that disparate-impact liability furthers that purpose.

### *B. Narrow Tailoring*

In assessing whether a race-conscious remedy for employment discrimination is sufficiently tailored to survive strict scrutiny, the Court looks to the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; the extent to which the objective of the remedy mirrors minority representation in the relevant labor market; and the impact of the relief on the rights of third parties.<sup>169</sup>

The relief for a disparate-impact violation at issue in *Ricci* – abandonment of a selection mechanism that has produced unwarranted disparate impact – fits comfortably within this framework. As for the necessity of a race-conscious remedy, while, as we have seen, there is some doubt about whether a race-conscious remedy might be thought impermissibly overinclusive if

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<sup>167</sup> See *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2198-200 (2010).

<sup>168</sup> See, e.g., *Johnson v. California*, 543 U.S. 499, 514-15 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

<sup>169</sup> See, e.g., *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 478-81 (1986) (plurality opinion); *id.* at 484-86 (Powell, J., concurring in part and concurring in the judgment). For more general discussions of the narrow tailoring requirement not specifically linked to the context of employment but which also stress the necessity of race-conscious action, its flexibility, consideration and race-neutral alternatives, and whether the action at issue is proportioned to the compelling governmental interest at issue, see, for example, *Grutter v. Bollinger*, 539 U.S. 306, 333-43 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

justified in terms of smoking out intentional discrimination,<sup>170</sup> if the government has a compelling interest in eliminating unwarranted disparate impact either as means of combating a likelihood of intentional discrimination or to achieve equality of opportunity, then what *Ricci* characterized as the race-conscious remedy of discarding a selection mechanism based on the racial composition of the group of successful candidates is nevertheless the only means available to eliminate this unwarranted disparate impact. To be sure, narrow tailoring likely prohibits a public employer from utilizing a selection procedure likely to have unjustifiably disparate impact and then repudiate or otherwise alter the procedure because the racial composition of the pool of successful candidates,<sup>171</sup> but once the selection procedure is implemented and unlawful disparate impact results, a court considering a remedy has no alternative but to enjoin use of the procedure.<sup>172</sup> Although narrow tailoring may authorize no more than equitable relief requiring the use of an alternate procedure, if there is a pressing need to fill vacancies, an equitable remedy requiring the hiring of minorities in sufficient numbers to avoid unlawful disparate impact may be necessary.<sup>173</sup>

Nevertheless, as we have also seen, discarding the results of an examination may be impermissible when voluntarily undertaken by an employer rather than ordered by a court if the employer has failed to give adequate consideration to race-neutral means of avoiding the disparate impact.<sup>174</sup> Thus, the view advanced here, at first blush, creates an apparent anomaly when it comes to an employer's voluntary efforts to remediate unlawful disparate impact. Although *Ricci* holds that an employer, whether public or private, may repudiate a selection mechanism if it satisfies the "strong-basis-in-evidence" test, at least as a matter of statutory construction, as we have seen, if the employer has utilized a selection mechanism likely to cause unlawful disparate impact without giving adequate consideration to race-neutral alternatives,

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<sup>170</sup> See *supra* text accompanying notes 117-25.

<sup>171</sup> See *supra* text accompanying notes 93-103.

<sup>172</sup> Cf. *Paradise*, 480 U.S. at 171-74 (plurality opinion) (district court's order requiring promotion of blacks upheld after employer had failed to comply with prior injunctions against discrimination in promotions); *Local 28*, 478 U.S. at 480-81 (plurality opinion) (district court's order requiring union to increase nonwhite membership upheld in light of union's long record of resistance to efforts to end discrimination); *id.* at 486-87 (Powell, J., concurring in part and concurring in the judgment) (same).

<sup>173</sup> In the principal opinion in *Paradise*, for example, the plurality stressed the operational need for immediate promotions when explaining the necessity for race-conscious relief involving promotions rather than waiting for a valid selection mechanism. See 480 U.S. at 175-76.

<sup>174</sup> See *supra* text accompanying notes 101-02.

the narrow tailoring requirement may well mean that an employer's decision to abandon the mechanism may violate the equal protection rights of nonminorities. It follows that an employer that utilizes an employment practice that predictably creates unlawful disparate impact could violate the law no matter what it does – if the employer abandons the employment practice after it produces disparate impact, it could be guilty of an equal protection violation of the rights of nonminorities, and if it refuses to abandon the practice, it could be guilty of a disparate-impact violation of the rights of minorities.<sup>175</sup>

Conversely, if the employer concludes that it lacks a “strong basis in evidence” to believe that the employment practice at issue produces unlawful disparate impact, it could still face liability. Such a determination can be challenged in a subsequent disparate-impact suit, since Title VII rights cannot be lost by an employer's unilateral decision to adopt an employment practice.<sup>176</sup> As it happens, New Haven may be facing an outcome along just these lines as a consequence of *Ricci*. The Second Circuit has held that despite the Supreme Court's decision, New Haven faces potential disparate-impact liability to minority applicants for its use of the contested promotional examinations.<sup>177</sup>

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<sup>175</sup> Potentially, however, an employer could escape this dilemma through some form of negotiated consent decree or a contested judgment following a proceeding at which all affected employees have an opportunity to be heard. *Cf.* 42 U.S.C. § 2000e-2(n) (2006) (binding nonparties to judgments if they have received noticed and a reasonable opportunity to present objections).

<sup>176</sup> *See* *Martin v. Wilks*, 490 U.S. 755, 761-69 (1989).

<sup>177</sup> *See* *Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2011). This point also bears on a puzzling dictum in *Ricci* suggesting that minority disparate-impact plaintiffs could be prevented from challenging a selection mechanism if the employer lacked a strong-basis-in-evidence to believe that it was unlawful when it decided to implement the mechanism: “If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.” *Ricci*, 129 S. Ct. at 2681. Some believe that this dictum suggests a defense for employers even if a plaintiff could otherwise establish a disparate-impact violation when the employer nevertheless reasonably believed at the time it used an employment practice that it did not have unlawful disparate impact, at least with respect to retrospective liability. *See* *Seiner & Gutman*, *supra* note 40, at 2204-09. This view, however, seems at odds with the rule that nonparties cannot lose legal rights except in a proceeding to which they can be bound. *See* *Martin v. Wilks*, 490 U.S. at 761-69. The rule seems to have special force in this context, in which statutory rights could otherwise be lost by an employer's determination that no strong basis to believe an employment practice was unlawful even though the employer, in order to minimize potential liability, might have an inadequate incentive to fully investigate the potential flaws in the employment practice at issue. This view is inconsistent as well with the settled standards for assessing disparate-impact claims codified in Title VII itself, which provides

The seeming anomaly that may sometimes prevent an employer from abandoning an employment practice likely to create unlawful disparate impact, however, is the natural consequence of the prong of the narrow tailoring inquiry that requires adequate consideration of race-neutral alternatives. As we have seen, an employer that uses a selection mechanism that it has good reason to know will create unlawful disparate impact may not turn to a race-conscious remedy when a race-neutral alternative was never given adequate consideration. This restriction on the ability of employers to leap to a race-conscious remedy is justified as well by the practical concern that in communities where minorities exercise significant political power, employers may be too quick to sacrifice the rights of nonminority employees.<sup>178</sup> Moreover, this apparent anomaly actually harmonizes disparate-impact and equal protection jurisprudence by creating a salutary incentive to design employment practice not likely to create unlawful disparate impact, rather than use practices that create a predictable need for a race-conscious remedy for unlawful disparate impact. If an employer faces liability no matter what it does when it utilizes a promotional device likely to produce unlawful disparate impact, and without having afforded adequate consideration to race-neutral alternatives that would avoid the need for a race-conscious remedy, employers are encouraged to avoid the use of personnel practices likely to produce unlawful adverse impact altogether. That approach achieves the objectives of both disparate-impact and equal protection jurisprudence.

Beyond the complications that develop when an employer voluntarily endeavors to remediate a likely disparate-impact violation that it should have seen coming, a race-conscious remedy for unlawful disparate impact seems eminently well tailored. By its nature, such a remedy is limited to the use of a particular employment practice,<sup>179</sup> and is directed only at employment practices that create significant disparate impact and use

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that if the plaintiff can establish disparate impact, the burden shifts to the employer to establish job-relatedness and business necessity. *See supra* text accompanying note 6. Accordingly, the Second Circuit held that despite the *Ricci* dictum, the Supreme Court's decision cannot foreclose minority plaintiffs from pursuing a disparate-impact challenge to the promotional examinations at issue in that case. *See Briscoe*, 654 F.3d at 203-08.

<sup>178</sup> In *Ricci*, three Members of the Court expressed concern that New Haven's decision to abandon the promotional tests at issue may not have been a genuine remedy, but rather a pretext produced in response to the political influence of the African American community. *See* 129 S. Ct. at 2687-88 (Alito, J., concurring). Part III.B below considers the significance of the increasing political influence of women and minorities for equal protection jurisprudence.

<sup>179</sup> *Cf. Grutter v. Bollinger*, 539 U.S. 306, 341-43 (2003) (a narrowly tailored remedy must be terminated when its justification ceases).

unjustifiable methods for assessing the qualifications of applicants in the relevant labor market.<sup>180</sup> Disparate-impact liability therefore leaves nonminorities free to compete under selection criteria that are consistent with their ability to perform the job at issue. Even Justice Scalia, in the course of an opinion endorsing the proposition that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens,"<sup>181</sup> nevertheless acknowledged that the government "may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him – for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant . . . ."<sup>182</sup> It seemingly follows that if the government has a compelling interest in treating unjustifiable disparate impact as a form of unlawful discrimination, a remedy that undoes the disparate impact by enjoining use of the invalid employment practices would be narrowly tailored.<sup>183</sup>

There are, however, additional complexities when a court issues relief for a disparate-impact violation that goes beyond merely enjoining the use of a challenged employment practice. Title VII not only provides that "the court may enjoin the [employer] from engaging in [an] unlawful employment practice," but also authorizes courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ."

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<sup>180</sup> To establish disparate-impact liability, a plaintiff must demonstrate statistically significant underrepresentation of a protected group when compared to the qualified labor pool. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 649-52 (1989).

<sup>181</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (brackets in original)).

<sup>182</sup> *Id.* at 526.

<sup>183</sup> *See supra* text accompanying notes 69-77. One related argument against the constitutionality of disparate-impact liability is that the Equal Opportunity Employment Commission's administrative guideline treating any selection mechanism in which the success rate of a protected group is less than four-fifths of the nonminority success rate is sufficiently inflexible and statistically dubious as to amount to a forbidden quota. *See Ngov, supra* note 41, at 556, 567-72. A response, of course, is that this administrative interpretation should be replaced by an alternative method for gauging disparate impact of greater statistical reliability as a means for identifying practices that amount to unjustifiable barriers to the employment of protected groups. For a discussion of alternative approaches to disparate impact of greater statistical reliability, see Joseph L. Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences than the U.S. Government's 'Four Fifths' Rule: An Examination of the Record in Ricci v. DeStefano*, 8 *LAW, PROB. & RISK* 171, 187-80 (2009); Peresie, *supra* note 106, at 793-801; and Amy L. Wax, *Disparate Impact Realism*, 53 *WM. & MARY L. REV.* 621, 662-93 (2011).

or any other equitable relief as the court deems appropriate.”<sup>184</sup> As we have seen, a principal objection to disparate-impact liability is its tendency to produce a form of quota hiring, which is considered indefensible under contemporary equal protection doctrine. Halting the use of an employment practice that produced unlawful disparate impact is difficult to characterize as a quota; such a practice is unlawful not merely because of its racial consequences, but because it lacks sufficient job-relatedness. Moreover, discarding a practice that has produced unlawful disparate impact requires the hiring or promotion of no one, on the basis of an effective quota or otherwise. Indeed, the employer remains free to utilize an alternative practice even if it produces comparable disparate impact as long as it has a sufficient relation to merit. But, when a court goes beyond merely enjoining the use of an employment practice that produces unlawful adverse impact and awards additional relief to plaintiffs based on their race, additional issues of narrow tailoring will arise.

The narrow-tailoring requirement that a race-based remedy be flexible and avoid the character of a quota means that race may not become the sole effective criterion for decisionmaking.<sup>185</sup> If an applicant can establish that he would have received a position but for an employment practice that violated Title VII, however, the statute may require an award of backpay.<sup>186</sup> And, if operational needs require that positions immediately be filled, a court may issue a remedial order governing the manner in which vacancies will be filled.<sup>187</sup> Yet, if applicants are awarded backpay or selected for instatement in a position as a form of injunctive relief on the basis of their race, without consideration of the possibility that equally qualified nonminority candidates are being denied equal treatment, the resulting remedy begins to look much like an impermissible quota.<sup>188</sup> For this reason, if a court goes beyond an injunction against future use of an unlawful employment practice and awards minority candidates backpay or instatement, narrow tailoring may require use of banding or a similar mechanism to ensure that relief is awarded to minority candidates whose qualifications do not meaningfully differ from those of successful nonminority candidates.

Accordingly, the narrow tailoring requirement likely limits the scope of relief available for a Title VII disparate-impact violation. It does not, however, foreclose this form of liability altogether.

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<sup>184</sup> 42 U.S.C. § 2000e-5(g)(1) (2006).

<sup>185</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 270-75 (2003).

<sup>186</sup> See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-22 (1975).

<sup>187</sup> See *supra* note 173.

<sup>188</sup> For an argument against the constitutionality of the disparate-impact theory that proceeds along these lines, see Ngov, *supra* note 41, at 553-83.

The narrow tailoring inquiry, after all, merely requires a close fit between governmental means and ends. If the government's end is justifiable, there is presumably some appropriate means for achieving it. Thus, if the government has a compelling interest in remediating unjustifiable disparate impact, some remedy is constitutionally permissible. Indeed, as Adam Winkler has demonstrated in his survey of the case law, strict scrutiny is not invariably fatal,<sup>189</sup> as the Court itself has claimed.<sup>190</sup> In particular, his survey of strict scrutiny jurisprudence demonstrates that federal statutes involving remedial racial classifications are particularly likely to survive strict scrutiny.<sup>191</sup> There is indeed good reason to believe that the disparate-impact theory of liability can similarly survive, unless equal protection is understood to forbid all forms of race-conscious governmental decisionmaking. It is to this question that we finally turn.

### III. DISPARATE-IMPACT LIABILITY AND THE FUTURE OF EQUAL PROTECTION

The view advanced above contends that contemporary equal protection jurisprudence requires that disparate-impact liability be subjected to strict scrutiny, while also contending that it can survive such scrutiny. This is far from the narrowest possible reading from *Ricci* which, after all, never announces that disparate-impact liability must survive the crucible of strict scrutiny. Nevertheless, the narrower readings of *Ricci* proposed to date are largely untenable, although they make useful contributions to creating the road map for saving disparate impact. Indeed, this road map for saving disparate impact under strict scrutiny is likely the only tenable one, given the difficulties in disentangling race-conscious governmental action from strict scrutiny. Still, the road map must also contend with the broadest possible reading of *Ricci*, which regards all forms of race-conscious governmental decisionmaking as constitutionally impermissible. Accordingly, it is necessary to consider the possibility of narrower readings of *Ricci* that might avoid strict scrutiny, as well as its broadest possible reading, which would doom disparate-impact law and, indeed, any race-conscious form of affirmative action.

#### A. *Saving Disparate Impact Under a General Reading of Ricci*

In his consideration of the implications of *Ricci*, Professor Primus suggested three possible readings of the opinion. What he

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<sup>189</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812-13 (2006).

<sup>190</sup> See *supra* text accompanying note 168.

<sup>191</sup> See Winkler, *supra* note 189, at 834-42.

called the “general reading” understands *Ricci* to require strict scrutiny for any race-conscious governmental action, which, in Professor Primus’s view, “augurs poorly” for the future of disparate-impact liability.<sup>192</sup> On the “institutional reading,” Title VII is understood to offer courts greater freedom to engage in race-conscious remedial action than an employer because, at least in jurisdictions in which racial minorities exercise significant political power, employers “might have incentives to engage in race-conscious decisionmaking beyond that which a court would order to remedy authentic disparate impact violations.”<sup>193</sup> Finally, the “visible victims” reading understands *Ricci* to prohibit race-conscious action only when it creates identifiable nonminority “victims,” such as those who were poised for promotion in *Ricci*, because “[v]isible victims lend themselves to easily understood narratives of injustice, as every good plaintiffs’ lawyer knows.”<sup>194</sup>

There are formidable doctrinal obstacles to both the institutional and visible-victims readings of *Ricci*. As to the former, although it represents the view once taken by Justice Stevens,<sup>195</sup> as we have seen, the Court has applied strict scrutiny to race-conscious judicial action no less than legislative, and has rejected the view that judicial scrutiny ought to be more charitable when race-conscious action is said to have a remedial justification.<sup>196</sup> As to the latter, although there is plainly concern expressed in *Ricci* about the reliance interests an employer creates when it implements an employment practice only to repudiate it later,<sup>197</sup> the existence of something approaching a vested or reliance interest in obtaining a governmental benefit is not required to attack a race-conscious remedial program as violative of equal protection. In a line of cases in which it has invalidated challenged governmental action under strict scrutiny, the Court has

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<sup>192</sup> Primus, *supra* note 40, at 1363.

<sup>193</sup> *Id.* at 1369.

<sup>194</sup> *Id.* at 1372. For other accounts sympathetic to the visible-victims reading, see Norton, *supra* note 7, at 235-36; and Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1346-48 (2011).

<sup>195</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in the judgment); *United States v. Paradise*, 480 U.S. 149, 193-95 (1987) (Stevens, J., concurring in the judgment).

<sup>196</sup> See *supra* text accompanying notes 55-57.

<sup>197</sup> See, e.g., *Ricci*, 129 S. Ct. at 2676 (“Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.”); *id.* at 2677 (“[O]nce th[e] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race.”).

consistently held that even when a litigant cannot prove that he will receive a concrete benefit absent the use of race-conscious criteria – in other words, even absent a “visible victim” – the litigant nevertheless may challenge the practice because being subjected to a discriminatory competitive process is a legally cognizable injury.<sup>198</sup> Thus, the presence of a “visible victim” seems not to be the *sine quo non* of an equal protection violation. The account advanced above, in contrast, accepts the “general reading” of *Ricci*, while denying that it is a recipe for invalidation of disparate-impact liability.

Nevertheless, the account advanced above embraces important aspects of both the institutional and visible-victims readings. As we have seen, narrow tailoring requires that a public employer give adequate consideration to race-neutral means of addressing disparate impact, and this means that a public employer will have less freedom to repudiate an employment practice it has already implemented than a court, that will have no race-neutral alternative to eliminate unlawful disparate impact and instead must enjoin its future use to secure compliance with Title VII.<sup>199</sup> In this sense, the account advanced above reflects the institutional reading of *Ricci*. For the same reason, this account embraces aspects of the “visible victims” reading. As a consequence of narrow tailoring principles, once an examination is administered and “visible victims” are created, a public employer will have less freedom than a court to fashion a race-conscious remedy. An employer that utilizes a practice likely to create unlawful adverse impact will have, by definition, failed to give adequate consideration to race-neutral alternatives, and hence the “visible victims” created by such a practice will be entitled to a remedy, even if minority plaintiffs may also be able to prevail in a disparate-impact action under Title VII.

If one believes that equal protection embodies a conception of a colorblind Constitution so robust that the government may never concern itself with the racial consequences of employment practices, however, then the “general reading” of *Ricci* would doom disparate-impact liability. To be sure, no one thinks that equal protection forbids any governmental awareness of race; as we have seen, even Justice Scalia believes that equal protection permits a remedy that takes the race of a victim of intentional racial discrimination into account, but this is only to restore the victim to the position he would have occupied but for an action of

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<sup>198</sup> See *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 260-62 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

<sup>199</sup> See *supra* text accompanying notes 171-78.

intentional discrimination.<sup>200</sup> In this sense, a race-conscious remedy for a disparate-treatment violation restores a colorblind status quo ante. Disparate-impact law, in contrast, cannot claim the same fealty to the concept of governmental colorblindness; it is only the racial identity of the successful candidates that triggers inquiry into job-relatedness and business necessity under disparate-impact law. Disparate-impact liability, in other words, attaches even to an employer who has never breached the colorblind principle, but which has instead used an employment practice for entirely nonracial reasons that nevertheless produced disparate racial impact, without adequate justification. Such an employer may be inefficient or even inept, but it can also be entirely colorblind, and still face disparate-impact liability.

The view that the government can never concern itself with race, however, is in the teeth of the Court's repeated announcements that strict scrutiny of race-conscious remedial action is not invariably fatal.<sup>201</sup> It is also inconsistent with *Ricci* itself, which takes pains to cast no doubt on an employer's efforts to design selection mechanisms unlikely to produce unlawful disparate impact.<sup>202</sup> As a number of scholars have observed, *Ricci* only constrains an employer's ability to address disparate impact after an employment practice has been implemented.<sup>203</sup> Indeed, Justice Kennedy, the author of *Ricci*, while advocating the use of strict scrutiny for any race-conscious governmental action,<sup>204</sup> has rejected the view that race can never be a factor in governmental decisionmaking.<sup>205</sup>

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<sup>200</sup> See *supra* text accompanying note 181-82.

<sup>201</sup> See *supra* text accompanying note 168.

<sup>202</sup> See, e.g., 129 S. Ct. at 2677 (“[W]e [do not] question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions are made . . . Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practiced in order to provide a fair opportunity for all individuals, regardless of their race.”).

<sup>203</sup> See, e.g., Adams, *supra* note 40, at 861; Roberto L. Corrado, *Ricci’s Dicta: Signaling a New Standard for Affirmative Action under Title VII?*, 46 WAKE FOREST L. REV. 241, 255-56 (2011); Siegel, *supra* note 194, at 1326-31; Sullivan, *supra* note 40, at 419-20, 420-21.

<sup>204</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518-19 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>205</sup> See *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-90 (2007) (Kennedy, J., concurring in part and concurring in the judgment). In particular, in the context of school desegregation, Justice Kennedy wrote that short of racial attendance quotas,

[s]chool 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

Perhaps most important, a conclusion that the government can never use race-conscious criteria is inconsistent with the character of strict scrutiny, which endeavors to ensure that there is a close relationship between governmental means and ends, rather than making substantive judgments about what type of classifications or objectives are constitutionally impermissible.<sup>206</sup> Moreover, locating within the concept of equal protection a substantive judgment that the government may never concern itself with the racial consequences of employment practices – or any other vehicle by which society distributes important goods – is not easy. To be sure, from the concept of equal protection, it necessarily follows that the government can never have a compelling interest in favoring some at the expense of others; if it did, the government could always evade the dictates of equal protection by proclaiming an interest in discriminating on behalf of the favored class. Disparate-impact liability, however, is aimed at producing equality of opportunity and not at producing a favored class. The law of disparate impact makes no war with the conception that jobs should be awarded on the basis of merit. Disparate-impact law values merit, and questions only whether employers have too quickly seized on employment practices that assess merit only imperfectly, and at considerable cost to racial equality of opportunity.<sup>207</sup> Accordingly, disparate-impact liability is not simply an exercise in racial favoritism; it protects all who are qualified for a particular employment benefit equally. For that reason, it is likely the most defensible form of race-conscious governmental action because it stands in little, if any, tension with the conception that economic opportunities ought to be distributed on the basis of individual merit and not group membership.

The Court tells us that equal protection requires the government to treat individuals as such, rather than as members of racial groups.<sup>208</sup> Disparate-impact law treats all qualified

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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.

*Id.* at 789.

<sup>206</sup> For a more elaborate discussion along these lines, see Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 436-44 (1997).

<sup>207</sup> For a more elaborate argument reconciling disparate-impact law with meritocratic principles, see Mark Kelman, *the Concept of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1204-45 (1991).

<sup>208</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a

individuals with equality; its concern is with employment practices that inadequately measure individual merit. For that reason, it is easily reconciled with the concept of equal protection. Disparate-impact liability offers “equal protection of the law” for all those who are qualified for employment.

To this, one might object that because disparate-impact liability concerns itself with inequality of opportunity only when it involves women or minorities, it fails to offer “equal protection” for all. As we have seen, however, there is ample reason for the government to be specially concerned with the types of inequality of opportunity addressed by disparate-impact law.<sup>209</sup> Indeed, a colorblindness principle so robust as to forbid any governmental consideration of race would invalidate even laws that identify only discrimination against discrete groups defined by race, ethnicity, or sex as prohibited – the same kind of laws upheld in *Roberts* and its progeny. It seems, however, that no one is willing to take colorblindness that far. The concept of “equal protection” can accordingly be reconciled with laws that focus on forms of inequality or discrimination of special concern. This is surely at least a plausible understanding of the concept of equal protection, which is doubtless a more pliable formulation than an express textual prohibition on racial classification, such as the Fifteenth Amendment’s admonition that “[t]he right of citizens to vote shall not be denied or abridged by the United States on account of race, color, or previous condition of servitude.”<sup>210</sup> In the face of the less

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racial, religious, sexual or national class.” (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (199) (O’Connor, J., dissenting)); *Adarand Constructors Co. v. Peña*, 515 U.S. 200, 230 (1995) (“[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.”); *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual.” (citations omitted)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

<sup>209</sup> See *supra* text at notes 142-60.

<sup>210</sup> U.S. CONST. amend. XV, § 1. For a useful and mercifully brief summary of the drafting history of the Fourteenth Amendment concluding that the decision to utilize a guarantee of “equal protection” rather than a more sweeping prohibition on all racial discrimination left the amendment no better than ambiguous, see ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 67-87 (1992). This conclusion is consistent with that of one of the first and still one of the best assessments of the drafting history, that of Alexander Bickel. See Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60-63 (1955). Locating within equal protection a prohibition on any race-conscious governmental action also seems difficult to square with framing-era practice – even in the era in which the guarantee of

precise concept of equal protection, the argument for adopting a prohibition on any race-conscious governmental action no less robust than is associated with the more explicit Fifteenth Amendment is unsatisfying at best.

To be sure, disparate-impact liability could be structured in ways that pay insufficient protection to merit. The account of narrow tailoring advanced above, however, minimizes that danger by requiring employers to exercise greater sensitivity in the design of employment practices, and by requiring that remedies be tailored to minimize deviation from merit when fashioning remedies for unlawful employment practices.

### *B. Disparate Impact and the Anti-balkanization Principle*

Surveying the landscape of contemporary equal protection jurisprudence, Reva Siegel has argued that rather than reflecting unyielding hostility toward any form of racial classification, the contemporary law of equal protection embodies what she calls an “antibalkanization principle” that acknowledges the need for race-conscious remedies that “ameliorate racial wrongs without unduly aggravating racial resentments.”<sup>211</sup> As she points out, given the enormous racial resentments produced by New Haven’s decision to repudiate a promotional procedure that it had previously endorsed, seemingly based solely on the race of the successful candidates, it is easy to understand how the Court might have concluded that the application of disparate-impact law to those particular facts could stir undue racial resentments.<sup>212</sup> The account of disparate-impact law advanced above, in contrast, can be readily harmonized with the anti-balkanization principle by permitting race-conscious remedies, but only when the government has utilized available alternatives, and only to the extent consistent with meritocratic principles.

Professor Siegel’s account of an anti-balkanization principle is nevertheless far from a complete answer to the challenge to the constitutionality of disparate-impact law represented by *Ricci*. Doctrine remains important to constitutional adjudication, and Professor Siegel advances no doctrinal defense of disparate-impact liability under strict scrutiny. Moreover, she admits that the opinions that reflect an anti-balkanization principle “have yet

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equal protection was added to the Fourteenth Amendment, race-conscious remedial legislation was regarded as an appropriate exercise of congressional power. For detailed examinations of this question, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); and Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U.L. REV. 477 (1998).

<sup>211</sup> Siegel, *supra* note 194, at 1302.

<sup>212</sup> *See id.* at 1338-45.

clearly to articulate how anti-balkanization is connected to equality.”<sup>213</sup> On Professor Siegel’s account, it is far from clear that the anti-balkanization principle represents anything more than an effort by some Members of the Court to locate what they regard as a sensible middle ground on matters of racial remediation. One might object that regardless of whether this view represents wise policy, it seems inadequately rooted in constitutional law.

Indeed, the most obvious route for saving disparate-impact liability, rather than laboring to reconcile it with the demands of strict scrutiny, is to repudiate strict scrutiny for remedial legislation such as Title VII. Nearly four decades ago, John Hart Ely first advanced the position that the Constitution should not view race-conscious affirmative action with suspicion when it represents an effort by a majority to discriminate against itself rather than disadvantage a discrete and insular minority.<sup>214</sup> This view is echoed by critics of contemporary equal protection jurisprudence, who argue that programs produced by a properly functioning political process that endeavor to remediate the harms done to a subordinated or disadvantaged class fundamentally differ from those that create or perpetuate subordination.<sup>215</sup>

In response to the view that equal protection jurisprudence should not concern itself with discrimination that benefits racial minorities, Justice Powell cautioned that “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments.”<sup>216</sup> Time seems to have vindicated this assessment. With the growth of the political power of African Americans in the wake of the Voting Rights Act, for

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<sup>213</sup> *Id.* at 1351.

<sup>214</sup> See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728-35 (1974). See also JOHN HART ELY: DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 169 (1980) (“There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect.”).

<sup>215</sup> See, e.g., Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1229-37 (2002); Carter, *supra* note 47, at 44-46; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1700-07 (2005); Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1780-93 (1989); Jed Rubenfeld, *The Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1168-71 (2002); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1141-44 (1997); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 665-71.

<sup>216</sup> *Reg. of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978) (opinion of Powell, J.).

example, this once politically impotent minority now often enjoys political influence in a manner quite inconsistent with its onetime characterization as a discrete and insular minority whose interests are all too likely to be slighted in the political process.<sup>217</sup> One can accordingly no longer say with confidence that racial preferences necessarily are premised on a “remedial” or “benign” rationale as opposed to simple pork-barrel politics. For example, in *City of Richmond v. J.A. Croson Co.*,<sup>218</sup> the lead opinion noted that arguments favoring deference to programs that aid minorities had little application to the decisions of the Richmond City Council given that Blacks constituted 50 percent of Richmond’s population and held five of its nine council seats.<sup>219</sup> Even Justice Stevens, generally sympathetic to affirmative action,<sup>220</sup> agreed that Richmond’s contracting preference for minority-owned businesses was invalid, noting that while it was defended as a legislative effort to fashion a remedy for prior discrimination, it benefited a class of those most likely to have prospered despite past discrimination and therefore least in need of a remedy.<sup>221</sup> Justice Stevens earlier voted to strike down the Small Business Act’s minority contracting preferences after reviewing its legislative history and concluding that the Act was more likely an effort by powerful legislators to reward influential constituents than a remedy for discrimination.<sup>222</sup>

The point is not that Justice Stevens’ assessment of these programs was indisputable; but rather that in contemporary politics, one cannot be confident that preferential treatment for racial minorities invariably rests on remedial or otherwise benign rationales. Indeed, Justice Stevens’ view is not unique; even those Members of the Court most inclined to endorse remedial race-conscious preferences have acknowledged the need for heightened scrutiny in these cases because of the danger of abuse.<sup>223</sup> At a

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<sup>217</sup> See Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 47-50 (2003).

<sup>218</sup> 488 U.S. 469 (1989).

<sup>219</sup> *Id.* at 495-96 (plurality opinion). See also *id.* at 524 (Scalia, J., concurring in the judgment) (characterizing the minority contracting preference at issue as “the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group”).

<sup>220</sup> See, e.g., *Adarand Constructors Co. v. Peña*, 515 U.S. 200, 243-49 (1995) (Stevens, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-17 (1986) (Stevens, J., dissenting).

<sup>221</sup> *Croson*, 488 U.S. at 513-15 (Stevens, J., concurring in part and concurring in the judgment).

<sup>222</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 538-39, 541-42 (1980) (Stevens, J., dissenting).

<sup>223</sup> See, e.g., *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 831-37 (2007) (Breyer, J., dissenting); *Adarand*, 515 U.S. at 275-76 (Ginsburg, J., dissenting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 358-62 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the

minimum, given the political power that women and minorities have acquired in recent years, it seems likely that heightened scrutiny will remain necessary to determine whether a program has a sufficiently compelling remedial justification or instead reflects a kind of demographic logrolling that would be unacceptable if directed against women or minorities.<sup>224</sup>

Thus, unless one is prepared to endorse any kind of preference for women or minorities, no matter what the justification, it is extraordinarily difficult to disentangle such preferences from strict scrutiny. Slapping the label “remedial” on a program, after all, does not necessarily make it so – some sort of heightened scrutiny is necessary to determine whether the label is accurate. To be sure, close scrutiny of this character may require difficult judgments about the purpose and effect of a challenged governmental action; but equal protection doctrine frequently demands such difficult judgments, as when a court must determine whether a legislative redistricting plan is based on racial or political consideration.<sup>225</sup> The Court has acknowledged that in undertaking this inquiry, “the legislature ‘must have discretion to exercise political judgment necessary to balance competing interests,’ and courts must ‘exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.’”<sup>226</sup> Close scrutiny of race-conscious remedial action to assess the merits of that justification may be no less difficult, but it also seems to present no greater challenge to the ability of the judiciary to assess racially fraught decisionmaking.

To avoid the demands of strict scrutiny, one might instead conclude that any preference favoring women or minorities is constitutionally unobjectionable, but a jurisprudence willing to uphold any kind of racial preference favoring minority groups has no logical stopping point – precisely the reason the Court has rejected preferences designed to remediate societal discrimination.<sup>227</sup> Even if one understands equal protection as containing an anti-subordination rather than an anti-classification principle when it comes to race, a jurisprudence that would place no boundaries on preferences favoring minorities – that would

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judgment in part and dissenting in part).

<sup>224</sup> See David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 25-31 (exploring how concerns that affirmative action may reflect a form of interest-group politics shape equal protection jurisprudence).

<sup>225</sup> See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001).

<sup>226</sup> *Id.* at 242 (quoting *Miller v. Johnson*, 515 U.S. 900, 915, 916 (1995) (emphasis in original and citations omitted)).

<sup>227</sup> See *Parents Involved*, 551 U.S. at 731-32 (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Croson*, 488 U.S. at 498-500; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality opinion).

effectively permit minorities to erect a set of Jim-Crow-in-reverse laws – would surely run afoul of even an anti-subordination rule.<sup>228</sup> In short, jurisprudence that permits discrimination without limit in favor of women and minorities seems difficult to square with the Constitution’s guarantee of “equal protection of the law.”<sup>229</sup> Moreover, linking the standard of scrutiny to the existence of an intent to subordinate protected groups is fraught with difficulties given the character of contemporary discrimination. As we have seen, there is at present good reason to believe that implicit or unconscious discrimination is far more prevalent than deliberate efforts to subordinate minorities or women.<sup>230</sup> Thus, there is much to criticize in legal doctrine that turns on whether an employer or other actor intends to subordinate or disadvantage women and minorities that does not interrogate more subtle influences on judgment.<sup>231</sup> This is not to suggest that it is impossible to determine whether a challenged program is remedial or instead premised on stereotypical assumptions about the ability of women and minorities to compete in the absence of affirmative action; but the prevalence of subtle forms of discrimination suggests that searching judicial scrutiny is required to ascertain the true character of a challenged program.

The account advanced here, in contrast, accepts the inevitability of strict scrutiny. At the same time, it endeavors to link anti-balkanization to the concept of equality through the vehicle of narrow tailoring. As we have seen, when particularly sensitive classifications are at issue that are thought especially likely to reflect unjustifiable discrimination, the narrow tailoring requirement insists on a close fit between means and ends. As embodied by narrow tailoring’s demand for flexibility and aversion to quotas, it demands as well moderation in any preference granted on the basis of race. After all, if disparate impact liability is to be defended based on the government’s interest in ameliorating inequality of opportunity without unduly compromising merit, any preference that departs too far from merit comes to resemble a quota and suggests that the government is pursuing a purely racial agenda.

One may believe that by using strict scrutiny in a fashion that so greatly circumscribes the role that race may play in

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<sup>228</sup> For what is likely the best exploration of the contrasting anti-classification and anti-subordination understandings of equal protection, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

<sup>229</sup> U.S. CONST. amend. XIV, § 1.

<sup>230</sup> See *supra* text accompanying note 10.

<sup>231</sup> See, e.g., Kreiger & Fiske, *supra* note 11, at 1057-59; Rich, *supra* note 10, at 93-101.

governmental decisionmaking, the account advanced above unduly blunts the efficacy of remedial efforts. One may also believe that the anti-balkanization principle places too high a value on the sensibilities of nonminorities. Yet, a law of disparate impact that demands less rigorous tailoring necessarily sacrifices a correspondingly greater measure of merit for a racial agenda without a logical stopping point. And, as we have seen, a jurisprudence that tolerates essentially unlimited racial favoritism stands in considerable tension with the concept of equal protection. Perhaps more important for the pragmatists among us, an insufficiently tailored law of disparate impact would likely be a political dead end; a law authorizing what looks like raw racial preference is likely, in the long run, to turn majorities against the disparate-impact enterprise root and branch, with Title VII undone in the legislature rather than the Court. The reform in disparate-impact liability that *Ricci* may well produce could therefore spawn a disparate-impact law that offers a more secure route to racial justice. Unless, of course, the Court concludes that the government may not concern itself with racial justice beyond prohibiting intentional racial discrimination.

Accordingly, the future of disparate impact is also the future of equal protection jurisprudence. If the Court ultimately holds that the government can never concern itself with the racial consequences of employment practices, the Court will have embraced not strict scrutiny, but instead a substantive judgment that the government cannot address the racial consequences of employment practices, at least when not provably the consequence of intentional discrimination. Employment practices that lock in the preexisting racial inequalities in society will, as a consequence, be difficult if not impossible to attack. It is surely hard to understand, however, how a law of disparate impact that insists on no more than equality of opportunity offends “equal protection of the law.” It is on that proposition that the future of the law of disparate impact necessarily will rest.