Postracial Discrimination

By
Girardeau A. Spann*

Introduction

In one respect, the 2008 election of Barack Obama as the first black President of the United States may turn out to be bad for blacks, and for other racial minorities as well. Some have suggested that the Obama election indicates that we now live in a postracial society, where discrimination based on race has ceased to be a serious problem.[1] Others have strenuously contested that claim, arguing that significant racial discrimination still exists in the United States notwithstanding the election of President Obama.[2] But one thing does seem reasonably clear. The Obama presidency has served to embolden those who wish to deny claims of current racial injustice.

Claims of racial injustice can now be challenged simply by arguing that the culture obviously makes it possible for minorities to compete with whites on a level playing field. Under this reasoning, racial disparities that continue to inhere in the allocation of societal benefits and burdens must be caused by the attributes of individual minority group members themselves, rather than by any invidious consideration of their race. Although the argument is by no means a new one, the election of President Obama now gives that argument more apparent plausibility than it has had in the past. Indeed, if one were inclined to preserve the nation's tradition of privileging white interests over the interests of racial minorities, it would be strategically sensible to frame one's discriminatory impulses in precisely this manner. That way, the nation's evolution to its supposed new postracial maturation could ironically be utilized as an ingenious device for continued racial oppression.

The essence of this postracial form of discrimination would entail the transformation of a conventional discrimination claim asserted by racial minorities into a claim of reverse discrimination asserted by whites. That transformation could be achieved by stressing the absence of any legally cognizable basis for providing remedial resources to the original minority claimants, in order to free up those resource for allocation to worthier whites. The technique would entail more than just the time-honored practice of evading a discrimination claim by blaming the victims. It would also recast the minority victims as shameless perpetrators of discrimination, with all of the negative connotations that an indictment of unlawful discrimination conveys.

It turns out that this postracial discrimination strategy is far from merely hypothetical. Its proponents include a majority of the current Justices on the United States Supreme Court. The Roberts Court, despite its relative youth, has already issued a number of decisions that employ the technique of postracial discrimination to elevate the interests of whites over the interests of racial minorities. The most revealing is its 2009 decision in *Ricci v. DeStefano*,[3] where a divided Court required the City of New Haven to utilize the results of a firefighter promotion exam that benefitted whites, even though the exam had a racially-disparate impact that adversely affected Latinos and blacks. The majority opinion depicted historically advantaged white firefighters as the victims of unlawful discrimination, while depicting historically disadvantaged minority firefighters as the politically powerful perpetrators of invidious discrimination.[4] The governing legal doctrines hardly compelled the Court's result, or the Court's inversion of the customary categories of perpetrator and victim. In fact, both the statutory meaning of Title VII and the Court's own precedents had to be modified so severely that the decision amounts to an exercise in conservative judicial activism.

In Title VII, Congress outlawed racially disparate employment practices unless they could be justified by a showing of job-relatedness, and by the absence of any less discriminatory, job-related alternative. In so doing, Congress struck a political balance between its pragmatic interest in protecting settled white employment expectations and its aspirational interest in dissipating the entrenched advantages that whites continue to have over racial minorities in the employment market. Although this was a quintessentially legislative judgment—made by a politically accountable Congress, operating under a constitutional form of government that assigns democratic policymaking functions to its representative branches—the Supreme Court apparently disagrees with the legislative balance that Congress struck.

The *Ricci* Court not only marginalized the effectiveness of statutory disparate-impact claims, but it also threatened to declare such claims unconstitutional. And the *Ricci* decision does not exist in isolation. When *Ricci* is considered in conjunction with other Roberts Court decisions concerning voting rights, racial profiling, English language education, and school resegregation, the Roberts Court's race cases seem to fit neatly into the pattern of Supreme Court hostility to racial minority interests that is becoming the hallmark of postracial discrimination.

Part I of this Article discusses the Roberts Court's recent *Ricci* decision, highlighting the Supreme Court voting blocs that have developed with respect to the issue of race. Part I.A describes the majority and concurring opinions of the conservative bloc Justices. Part I.B describes the dissenting opinion of the liberal bloc Justices. Part II describes the doctrinal difficulties that are entailed in trying to defend the Court's resolution of the case. Part II.A explains why the decision does not fit comfortably within the dictates of preexisting title VII doctrine. Part II.B explains why the decision does not fit comfortably within the law governing summary judgment. Part III argues that the *Ricci* decision constitutes an exercise in postracial discrimination. Part III.A describes how the Court inverts the categories of perpetrator and victim in a way that ultimately allows it to invert the categories of discrimination and equality. Part III.B argues that the *Ricci* postracial discrimination technique is simply the most recent in a long line of judicial strategies that the Supreme Court has historically used to justify the oppression of racial minorities. The article concludes that the potential effectiveness of genuine antidiscrimination remedies, such as the Title VII remedies that the Court dilutes *Ricci*, may be precisely what attracts the Supreme Court to its practice of postracial discrimination.

The *Ricci* Decision

In *Ricci v DeStefano*,[5] the Supreme Court held 5–4 that the City of New Haven was required by the employment discrimination prohibitions contained in Title VII of the Civil Rights Act of 1964 to utilize the results of a written firefighter promotion exam that the City administered, even though the City chose to reject those results because of the racially disparate impact that the exam produced. Whites generally performed better than blacks and Latinos on the exam, and the City feared that use of the exam would subject the City to potential liability for violating the *disparate-impact* prohibition of Title VII. However, seventeen white firefighters and one Latino firefighter—firefighters who would have been eligible for immediate promotions if the exam results had been certified—threatened to sue the City. They claimed that a decision to disregard the exam results would be racially motivated in a way that would violate the *disparate-treatment* prohibition of Title VII. The City, therefore, believed that it was on the horns of a dilemma. Whatever action it took, it would be subject to a Title VII suit filed by unhappy firefighters. The City chose not to certify the exam results, and the disappointed white and Latino firefighters sued. The United States District Court for the District of Connecticut entered summary judgment for the City, and a panel of the Second Circuit—whose members included then-Judge Sonia Sotomayor—summarily affirmed in a one-paragraph per curiam opinion. The full Second Circuit denied rehearing en banc, by a vote of 7–6. The Supreme Court then reversed the lower courts, finding that the City's actions violated the disparate-treatment provision of Title VII. Although the disappointed firefighters also claimed that the City violated their Fourteenth Amendment Equal Protection rights, the Supreme Court saw no need to reach the constitutional issue in light of its statutory disposition of the case.[6]

The majority opinion detected an internal tension between the disparate-impact and disparate-treatment provisions of Title VII. Justice Kennedy, joined by Chief Justice Roberts, Justices Scalia, Thomas, and Alito, resolved that tension by giving primacy to the disparate-treatment provision, unless there was a "strong basis in evidence" for concluding that disparate-treatment was necessary to avoid a disparate-impact violation.[7] Justice Scalia wrote a concurring opinion, suggesting that the disparate-impact provision of Title VII was itself invalid, because it compelled the consideration of race in a way that violated the Equal Protection principle of the Constitution.[8] Justice Alito wrote a concurring opinion, joined by Justices Scalia and Thomas, arguing that the City's stated desire to avoid a Title VII disparate-impact violation was a mere pretext for the City's actual desire "to placate a politically important racial constituency."[9] Justice Ginsburg wrote a dissenting opinion, joined by Justices Stevens, Souter, and Breyer, arguing that Title VII permitted disparate treatment as long as there was "good cause" to believe that such treatment was necessary to avoid a disparate-impact violation, and stating that there was good cause in *Ricci* because less discriminatory job-related alternatives were available.[10] It is noteworthy that the Justices in *Ricci* voted in ways that are so highly correlated with their votes in other race cases that the Supreme Court can fairly be said to consist of conservative and liberal voting blocs on the issue of race.

A. The Conservative Bloc

The five Justices who joined Justice Kennedy's majority opinion in *Ricci* vote so consistently against the minority interests presented in race cases that they have come to constitute a conservative Supreme Court voting bloc on the issue of race.[11] The members of that voting bloc are Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito. None of those five Justices has ever voted in favor of the racial minority claim at issue in a constitutional affirmative action case, a majority-minority redistricting case, or a racial integration case while sitting on the Supreme Court.[12]

1. Justice Kennedy's Majority Opinion

Justice Kennedy's majority opinion in *Ricci*, joined by the other members of the conservative bloc, held that New Haven's decision not to certify the results of its firefighter promotion exam in order to avoid a potential Title VII *disparate-impact* violation had the effect of itself constituting a Title VII *disparate-treatment* violation.[13] The opinion began with a detailed recitation of the facts as Justice Kennedy viewed them, because the majority's understanding of what it held to be undisputed facts was important to the majority's holding that the case could be resolved on summary judgment.[14]

According to Justice Kennedy, the New Haven City Charter required the City to fill vacancies in its classified civil service jobs through a merit-based system including the use of written examinations. The City hired an Illinois company to serve as an outside consultant, whom it asked to design job-related exams that could be used as part of the process of identifying the most qualified applicants for promotion to lieutenant and captain. The consultant designed multiple-choice exams after a lengthy process that was intended to ensure job-relatedness. That process included an oversampling of minority input in order to guard against unintentional white bias. The consultant also designed oral exams containing hypotheticals that were intended to test for qualities including firefighting, leadership, and management skills. According to the employment contract between the City and the firefighters union, the written exams were to account for 60% of an applicant's total eligibility score, and the oral exams were to account for the remaining 40%.[15]

When the written and oral exams were administered to promotion candidates in December 2003, the written exams turned out to have a racially disparate impact. Although a number of whites, blacks and Latinos had taken the exams, all ten applicants who scored high enough to be eligible for "immediate promotion" to lieutenant were white. Of the nine applicants who scored high enough to be eligible for immediate promotion to captain, seven were white and two were Latino.[16]

The City's legal counsel believed that the results of the written firefighter promotion exams might constitute a violation of the disparate-impact provision of Title VII, and that the need to avoid such a violation might authorize the use of race-conscious remedies for the disparate impact produced by the exams. The legal counsel communicated those views to the New Haven Civil Service Board, which was the municipal agency charged with certifying the results of promotional exams for civil service positions.[17] As a result, the Civil Service Board held a series of

meetings to determine whether it should certify the exam results in light of the disparate impact produced by the exams. At these meetings, some firefighters who took the exams defended the results. They included the named plaintiff Frank Ricci—a dyslexic firefighter who spent considerable time and money preparing for his written exam. Other firefighters who took the exams spoke against certifying the results, describing the exam questions as outdated and not relevant to firefighting practices in New Haven.[18]

The President of the New Haven firefighters union asked the Civil Service Board to conduct a validation study to determine whether the exams were job-related. Representatives of the International Association of Black Professional Firefighters urged the Board to reject the exam results, arguing that the exam was "inherently unfair," that a validation study for the exam was necessary, and that the exam results could be adjusted to avoid their racially disparate impact.[19] The Illinois consultant who developed the exams testified that his company possessed substantial experience developing similar exams in other cities, that it had taken precautions to ensure that the exams were job-related, and that the exams minimized the possibility of any racial bias.[20] Another consultant, who sometimes competed with the consultant who designed the New Haven exams, testified that he was a bit surprised by the degree of disparate impact exhibited in the New Haven exams, but noted that whites generally perform better than minorities on such written exams. The competing consultant also testified that an alternative selection procedure, using "assessment centers" rather than written exams, could better gauge a candidate's reactions to real world firefighting situations. He concluded, however, that the New Haven exam results could be certified as stemming from a "reasonably good test," and that assessment centers might be used in the future.[21] A retired black fire captain, who was a fire program specialist at the Department of Homeland Security, testified that the exam questions seemed relevant, and noted that whites generally perform better than minorities on written tests. A Boston College professor of race and culture also testified that whites typically outperform minorities on written tests, and further stated that the New Haven exams might have been developed in a subtly skewed way that could have favored white candidates.[22]

At the Civil Service Board's final meeting on the issue, the City's legal counsel argued that he now believed that federal law prohibited certification of the exam results because of their disparate impact, which was greater than the disparate impact exhibited in the City's prior exams. He also thought that the testimony compiled by the Board showed that there were less discriminatory alternatives to the New Haven exams that had produced the racially disparate impact. The City's chief administrator, who spoke on behalf of Mayor DeStefano, also argued against certification because less discriminatory alternatives existed. In addition, the City's human resources director argued against certification, favoring the use of a less discriminatory alternative.[23] However, other witnesses at this final meeting favored certification of the results. These included the President of the New Haven firefighters union, who emphasized the evidence showing that the exams were fair and reasonable. The witnesses favoring certification also included plaintiff Ricci, who conceded that assessment centers might be a less discriminatory alternative. However, Ricci emphasized that assessment centers were not available for the 2003 round of promotions, and that assessment center protocols would take several years to develop. After this series of meetings, the Civil Service Board deadlocked 2–2 on the certification question, meaning that the exam results were not certified.[24]

The disappointed firefighter promotion candidates, who were plaintiffs in the District Court and petitioners in the Supreme Court, alleged that the City's refusal to certify the exam results constituted unlawful discrimination that violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964. Of the seventeen whites and two Latinos who were eligible for immediate promotions based on the contested exam results, all but one Latino sued New Haven officials to challenge the City's refusal to certify the exam results. They also alleged a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties filed cross motions for summary judgment, with the City arguing that it had good cause for any disparate treatment in which it had engaged, because the City was trying to avoid a Title VII disparate-impact violation. The United States District Court for the District of Connecticut entered summary judgment for the City, finding that the desire to avoid disparate-impact liability did not establish the discriminatory intent necessary for a Title VII disparate-treatment violation, and that the City's actions did not violate the Equal Protection rights of the plaintiffs. The United States Court of Appeals for the Second Circuit affirmed in a one-paragraph per curiam opinion that adopted the reasoning of the District Court, and denied rehearing en banc by a vote of 7–6 over two written dissents. The Supreme Court then granted certiorari to consider what it viewed as a novel question presented by the interaction between the disparate-treatment and disparate-impact provisions of Title VII.[25] The Solicitor General of the United States participated as amicus curiae, urging affirmance of the lower court decisions.[26]

Justice Kennedy's legal analysis first addressed the Title VII statutory claim asserted by the petitioners, which was ultimately resolved in a way that avoided the need to address the constitutional Equal Protection claim.[27] Justice Kennedy noted that Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin, and that the Title VII prohibition applies to both intentional "disparate-treatment" discrimination and unintentional "disparate-impact" discrimination. As originally enacted in 1964, the language of Title VII prohibited only intentional disparate-treatment discrimination, but the 1971 Supreme Court decision in *Griggs v. Duke Power*[28] interpreted the statute to prohibit unintentional disparate-impact discrimination as well. Under *Griggs*, an employment practice with a racially disparate impact constituted a Title VII violation unless the employer could establish that the practice was sufficiently job related to constitute a "business necessity." In *Albemarle Paper Co. v. Moody*,[29] the Supreme Court further held that even a demonstration of job-related business necessity would not suffice to avoid Title VII disparate-impact liability if the plaintiff could establish that a less discriminatory alternative practice would also serve the employer's legitimate business needs. The *Griggs* reading of Title VII was formally codified by Congress in the Civil Rights Act ofAlthough the firefighter promotion exam results did establish a prima facie Title VII unintentional disparate-impact violation, the City's race-based decision to remedy that prima facie violation by refusing to certify the exam results would also constitute a Title VII intentional disparate-treatment violation, unless the refusal to certify was adequately justified. The District

Court, and the United States as amicus curiae, believed that the motive of preventing a disparate-impact violation could not, as a matter of law, constitute a disparate-treatment violation, but Justice Kennedy concluded that this analysis was wrong because it applied the wrong legal standard. The fact that the City may have had a permissible *objective* in seeking to avoid disparate impact did not establish that race-based *means* of achieving that objective were permissible.[31]

Because Justice Kennedy found the disparate-treatment and disparate-impact provisions of Title VII to be in conflict, he considered possible ways of resolving that conflict while still advancing the ultimate purpose of Title VII, which was to provide a workplace "where race is not a barrier to opportunity."[32] He rejected the petitioners' suggestion that unintentional disparate-impact discrimination could never justify intentional disparate-treatment discrimination, concluding that both statutory goals had to be accommodated if possible. He then rejected the petitioner's argument that disparate treatment should only be permissible if it were first established that a disparate-impact violation actually existed. Justice Kennedy reasoned that such a holding would undermine the desire of Congress to promote voluntary compliance with Title VII, by forcing employers to address ambiguous disparate-impact claims only at their peril.[33]

Justice Kennedy also rejected the suggestion made by the respondent City, and by the United States, that intentional disparate-treatment should be permissible whenever an employer had a good-faith belief that such disparate treatment was necessary to avoid a disparate-impact violation. Justice Kennedy concluded that this good-faith standard would ignore the "foundational prohibition" of Title VII, which bars employers from taking adverse employment actions "because of…race."[34] It would "encourage race-based action at the slightest hint of disparate impact," in a way that "amounted to a *de facto* quota system" that focused unduly on statistics. "Even worse," such reliance on statistical disparities would permit an employer to pursue a desired "racial balance" in violation of Title VII's express disclaimer of any interpretation "calling for outright racial balancing."[35]

Justice Kennedy borrowed what he believed to be the appropriate compromise standard from prior Supreme Court affirmative action cases that addressed the tension between the goals of advancing prospective race neutrality and providing a remedy for past discrimination. In the affirmative action context, the Court previously held that the Equal Protection clause prohibits the use of race-based affirmative action remedies unless there is a "strong basis in evidence" establishing that race-based remedies are necessary.[36] Even though the Title VII statutory constraints might not be parallel in all respects to the constitutional constraints, Justice Kennedy found that the constitutional principles still provided helpful guidance in the statutory context. The "strong basis in evidence" standard gave effect to both the disparate-treatment and disparate-impact provisions of Title VII. It left ample room for voluntary employer compliance efforts, while appropriately constraining employer discretion in making race-based decisions.[37]

Justice Kennedy viewed the "strong basis in evidence" standard as consistent with the Title VII prohibition on making racial adjustments to employment-related test scores, and with the need to protect the "legitimate expectations" of those who would be burdened by the abandonment of such test scores solely because of race-based statistics. He reasoned that, if Title VII prohibited adjusting test scores, it also prohibited "the greater step of discarding the test altogether."[38] The "strong basis in evidence" standard was also consistent with Title VII's protection of bona fide promotional examinations.[39] Because the Court would go on to hold that New Haven did not satisfy the "strong basis in evidence" standard, Justice Kennedy's majority opinion expressly declined to reach the question of whether the Title VII disparate-impact provision itself would be constitutional in a case where the standard had been met.[40] He did, however, emphasize that Title VII did not prohibit an employer from intentionally designing a test or employment practice in a way that would provide a fair opportunity for all individuals to compete regardless of their race.[41]

Justice Kennedy's majority opinion went on to hold that New Haven's decision not to certify the firefighter promotion exam results violated the disparate-treatment provision of Title VII. Whatever the City's subjective motive, the record made it clear that there was no objectively strong basis in evidence to support a disparate-impact violation.[42] Moreover, the disappointed firefighter petitioners were entitled to summary judgment, because this lack of a strong basis in evidence was established by undisputed facts. Even though summary judgment requires the facts to be viewed in the light most favorable to the nonmoving party, here there was no "genuine" dispute about the pertinent facts, because no rational trier of fact looking at the record as a whole could conclude that there was a strong basis in evidence to fear that certification of the exam scores would amount to a disparate-impact violation.[43]

The exam pass rate for minorities, which was approximately 50% of the pass rate for whites, did establish a prima facie racially disparate impact that was well below the 80% standard used by the Equal Employment Opportunity Commission to implement the Title VII disparate-impact provision. That was especially true since no black candidates could have been considered for any of the available promotions if the exam scores were used. However, that threshold statistical disparity was "far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results."[44] Despite the statistical discrepancy, the City would be liable for a disparate-impact violation only if its exams were not job related, or if there were a less discriminatory alternative, and neither condition could be satisfied under the "strong basis in evidence" standard.[45]

There was no genuine dispute concerning whether the exams were job-related and consistent with business necessity, because the City's contrary assertions were "blatantly contradicted by the record."[46] The consultant who designed the exams took great pains to ensure their job-relatedness, and most of the witnesses who testified before the Civil Service Board found the exams to be adequate in this regard. Even the competitor consultant, who had some criticisms of the examination design process, recommended certification after concluding that the exams were "reasonably good.".[47] The City did not even ask the consultant for the technical report to which it was entitled, and which could have explained any of the City's job-relation concerns.[48]

There was also no strong basis in evidence for believing that an equally valid but less discriminatory alternative to the exams might exist. First, although the use of a 30/70 percent weighting of the written and oral exam scores might have reduced the racially disparate impact that was produced by the 60/40 percent weighting that was actually used, the 60/40 weighting was

the weighting specified in the firefighter union contract with the City. In addition, there was no evidence that the 60/40 weighting was arbitrary, or that a 30/70 weighting would produce an equally valid measure of the proper mix between job knowledge and situational skills.[49] Second, although "banding" exam scores could have reduced disparate impact by ranking candidates along fewer categories of scores—and thereby producing more ties among candidates—a state court held that such banding violated the City Charter. Moreover, such banding, motivated by a desire to increase minority promotions, would have violated the Title VII prohibition against adjusting test results on the basis of race.[50] Third, although the competitor consultant suggested that the use of assessment centers instead of written exams could provide a job-related selection method that would have less of a racially disparate impact, there was testimony that assessment centers could not have been used for the 2003 promotions. In any case, the competitor consultant was primarily interested in marketing his own services—a strategy that proved successful, because New Haven did subsequently hire him as a consultant.[51]

Justice Kennedy's opinion concluded by stressing that fear of litigation alone cannot constitute the strong basis in evidence required to permit intentional race-based disparate treatment under Title VII. He characterized the New Haven examination process as a fair and neutral way to determine which firefighters were entitled to promotions based on their qualifications and experience. The City's refusal to certify the results of that examination procedure imposed a burden on those who had participated in the testing process—a burden that was aggravated by the City's reliance on "raw racial statistics." Justice Kennedy went on to state that the Court's decision should make it clear that, if the minority firefighters now filed a disparate-impact suit against the City for certifying the exam results, the City would be able to avoid Title VII disparate-impact liability for its actions.[52] The majority's disposition of the case in favor of the disappointed firefighters made it unnecessary to consider the constitutional Equal Protection claims asserted by the petitioners.[53]

Justice Scalia, alone in his concurring opinion, argued that the Court would eventually have to decide whether the disparate-impact provision of Title VII was itself unconstitutional as a violation of the Equal Protection principle.

2. Justice Scalia's Concurring Opinion

Justice Scalia, alone in his concurring opinion, argued that the Court would eventually have to decide whether the disparate-impact provision of Title VII was itself unconstitutional as a violation of the Equal Protection principle. Although he characterized the question as "not an easy one," Justice Scalia seemed to embrace the argument that he outlined for finding the disparate-impact provision to be unconstitutional.[54] Because the federal government cannot discriminate on the basis of race, it cannot by statute require public or private employers to discriminate on the basis of race.[55] However, Title VII's disparate-impact provision requires employers to "place a racial thumb on the scales" in assessing and remedying the statistical outcomes of their employment policies, and "that type of racial decisionmaking is, as the Court explains, discriminatory."[56]

Justice Scalia believed that the Title VII disparate impact provision did not mandate the use of racial quotas, but that it did compel an employer to "intentionally design his hiring practices to achieve the same end." As a result, Justice Scalia concluded that "[i]ntentional discrimination is still occurring, just one step up the chain."[57] He also stated that it would not matter if Title VII required the "consideration of race on a wholesale, rather than a retail, level," because the Government "must treat citizens as individuals not as simply components of a racial, religious, sexual or national class."[58] He also stressed that "of course the purportedly benign motive for the disparate-impact provisions cannot save the statute."[59]

Justice Scalia thought that it might be theoretically possible to defend a disparate-impact provision as simply an evidentiary tool that could be used to "smoke out" intentional disparate treatment.[60] However, such a theory could not save the constitutionality of the Title VII disparate-impact provision, because it did not recognize an affirmative defense for good faith.[61] Although the majority's disposition precluded the need to rule upon the constitutionality of the Title VII disparate-impact provision in *Ricci*, "the war between disparate impact and equal protection will be waged sooner or later."[62]

3. Justice Alito's Concurring Opinion

Justice Alito's concurrence stated that it was written to address omissions in the dissent's recitation of the facts, and to establish that, even under the dissent's view of the facts, there were factual disputes that precluded summary judgment for the City.[63] Justice Alito's opinion was joined by Justices Scalia and Thomas, but not by Chief Justice Roberts or Justice Kennedy.

Justice Alito believed that an objective and a subjective question had to be answered in order to determine whether an employer could avoid Title VII liability for a disparate-treatment claim such as that filed by the disappointed firefighters. The objective question was whether the stated reason for the disparate treatment was a legitimate reason under Title VII. The subjective question, which implicated the employer's actual intent, was whether the stated legitimate reason was a mere pretext for discrimination.[64]

The stated objective reason for New Haven's race-based disparate-treatment in refusing to certify the firefighter promotion exam results was the legitimate reason of avoiding disparate-impact liability. But as the majority held, no reasonable jury could find that there was a "substantial basis in evidence to find the tests inadequate."[65] That made any inquiry into actual subjective intent unnecessary.[66] However, the dissent argued that the proper standard for resolving the objective question should be whether the evidence provided "good cause" for the City to fear disparate-impact liability. Nevertheless, even the dissent would presumably concede the City's disparate-treatment liability if the asserted disparate-impact concern were a mere pretext for intentional discrimination. As a result, the entry of summary judgment for the City by the lower courts could not be affirmed, because there was ample evidentiary basis for a reasonable jury to find that the City's purported disparate-impact concern was

actually a pretext for political placation of an important racial constituency.[67]

Justice Alito offered several reasons, including appeasement of an important black political leader in New Haven, for believing that such political placation was the City's actual motive. The record demonstrated that City officials worked behind the scenes to avoid certification of the exam results, because certification would have antagonized the black political leader whom Mayor DeStefano did not wish to antagonize. This local black leader had strong personal and political ties with the seven-term Mayor that stretched back for more than a decade, and the Mayor had previously selected the black leader to serve as Chair of the New Haven Board of Fire Commissioners. While serving in that capacity, the black leader once created a political flap by stating that certain new recruits would not be hired because "they just have too many vowels in their name[s]."[68]

The City's political motives did not stop with placation. The record suggested that members of the Mayor's staff had tried to orchestrate the city's response to the promotion exam controversy in part by silencing the City's Fire Chief and Assistant Fire Chief, both of whom favored certifying the exam results. The record further suggested that the Mayor made up his mind to oppose certification of the exam results, but wanted to conceal that fact from the public. In addition, during the Civil Service Board meetings held to resolve the certification issue, local black leaders with strong ties to the Mayor's office tried to exploit racial tensions by threatening ramifications if the exam results were certified. They also accused white firefighters of cheating on the exam, although those accusations turned out to be baseless. In addition, the City relied heavily on testimony of the competitor consultant who offered some criticism of the exams, using him as a conduit for the Mayor's political views. The city, as a reward for his assistance, ultimately hired the competitor consultant. The Mayor decided to overrule the Civil Service Board even if the Board decided to certify the exam results, and after certification failed by a 2–2 vote, the Mayor took credit for scuttling the exam results.

Justice Alito concluded that these facts provided ample basis for a reasonable juror to conclude that the City's stated disparate-impact justification was simply pretextual. He noted that even the United States Solicitor General conceded that the lower courts did not give adequate consideration to the pretext possibility.[69] Justice Alito emphasized that he was not simply equating political considerations with unlawful discrimination. However, he did believe that unlawful discrimination was not a permissible way to win over a political constituency.[70]

Even if the Mayor's decision to overrule any adverse ruling by the Civil Service Board were overlooked, and even if the Civil Service Board were viewed as having made the final certification decision, the Mayor's improperly motivated influence could still taint the Civil Service Board's decision. Although the Supreme Court under Title VII never resolved the question of improper influence on a decisionmaker, the courts of appeals applied a variety of standards to the question. In *Ricci*, a reasonable jury could find that those lower court standards were met in a way that impermissibly tainted the Civil Service Board decision not to certify the exam results. In any event, it was the politically predisposed Mayor, and not the Civil Service Board, who had final decisionmaking authority.[71] The petitioners—such as dyslexic Frank Ricci who had to hire someone at his own expense to prepare for the exam, and Latino Benjamin Vargas who had to give up his part time job to prepare for the exam—deserved more than sympathy. They had a right to evenhanded enforcement of Title VII's prohibition against racial discrimination—a right that the City's refusal to certify denied them.[72]

A. The Liberal Bloc—Justice Ginsburg's Dissenting Opinion

The four Justices who joined Justice Ginsburg's dissenting opinion in *Ricci* vote so consistently in favor of the minority interests presented in race cases that they have come to constitute a liberal Supreme Court voting bloc on the issue of race.[73] The members of that voting bloc are Justices Stevens, Souter, Ginsburg and Breyer. With only minor deviations, those four Justices have almost always voted to uphold the racial minority claims at issue in constitutional affirmative action cases, majority-minority redistricting cases, and racial integration cases while sitting on the Supreme Court.[74]

Justice Ginsburg's dissenting opinion argued that New Haven did not violate Title VII by seeking to avoid the racially disparate impact of its firefighter promotion exam. Justice Ginsburg emphasized that New Haven had a long history of racial discrimination in its fire department, and although blacks and Latinos made up almost 60 percent of the City's population, minorities were still rare in fire department command positions. She conceded that the white firefighters who scored well on the promotion exams "understandably attract this Court's sympathy," but "they had no vested right to promotion." In holding that the City lacked a "strong basis in evidence" for its decision not to certify the exam results, the majority pretended that the City was motivated only by race. However, Justice Ginsburg concluded that there were multiple flaws in the exams that the City used, and that other cities used better selection procedures that yielded less racially skewed outcomes. One could not help but wonder why the City did not use one of the alternatives that would have produced less disparate results. Justice Ginsburg stated that the majority "barely acknowledges the pathmarking decision in *Griggs*," and the centrality that the disparate-impact concept plays in Title VII enforcement. As a result, she believed that the majority's decision in *Ricci* would not have staying power.[75]

Justice Ginsburg believed that the majority's recitation of the facts omitted important details. Firefighting in general was associated with a long legacy of racial discrimination, which Congress recognized in 1972 when it extended Title VII coverage to state and municipal employment—where racial discrimination was even more prevalent than in the private sector. Employment decisions often abandoned merit in favor of nepotism or political patronage, thereby entrenching preexisting racial hierarchies. New Haven illustrated the problem. In the early 1970s, minorities comprised 30% of the population, but only 3.6% of the City's five hundred and two firefighters. Moreover, only one of the Department's one hundred and seven officers was a minority firefighter. It took a lawsuit and subsequent settlement before conditions in the New Haven fire department improved. However, by the time of the 2003 promotions at issue in *Ricci*, minorities still remained badly underrepresented in the senior officer ranks—where only one of the City's twenty one fire captains was black.[76]

The City's promotion exams produced the stark racial disparities that were at issue in *Ricci*, where minority candidates

passed at about half the rate of blacks. In making its 2003 round of promotions, New Haven adhered to the testing regime outlined in the firefighters union contract that it had used for two decades, without closely considering what sort of practical examination would best measure fitness for promotion. Accordingly, when the City asked its consultant to design promotion exams, the consultant was told to adhere to a 60% written component and a 40% oral component, without ever considering other alternative selection regimes. Because those 50% racial disparities fell well below the 80% standard that the Equal Employment Opportunity Commission used for Title VII enforcement, City officials were concerned about the danger of incurring Title VII disparate-impact liability. As a result, the New Haven Civil Service Board held a series of public meetings designed to assess job-relatedness and the availability of less-discriminatory alternatives.[77]

At those meetings, some participants favored certifying the exam results, and some objected to certification. The evidence presented in favor of certification stressed the close relationship between the exams and the assigned study materials, as well as the considerable time and expense that many applicants invested in preparing for the exams. The evidence against certification included questions about the germaneness of the exam to New Haven practices and procedures, as well as racially-correlated unequal access to study materials that was traceable to the fact that white applicants had relatives in the fire service from whom they could obtain materials and assistance.[78]

Other evidence showed that the nearby City of Bridgeport previously used selection procedures similar to the procedures used by New Haven, but reduced the racially-disparate impact of its selection process when it changed the relative weighting of its written and oral exams. The new weighting gave primary weight to the oral exam, which could better test responses to real-life scenarios. A competitor consultant stated that behavioral responses to hypothetical situations presented in "assessment centers" could test for pertinent skills—with less of a disparate impact—in a way that was more valid than mere written multiple choice exams. A Boston College professor of counseling psychology also noted that testing procedures such as those used by New Haven could have certain built-in biases that gave an advantage to white applicants. When the Civil Service Board's 2–2 vote ultimately precluded certification of the exam results, the two Board members who voted against certification stated that they did so because the evidence presented at the public meetings convinced them that the exams were flawed, and that there were better alternatives.[79]

Justice Ginsburg noted that the disappointed firefighters who sued the City for failing to certify the exam results alleged that the City's defense of trying to avoid a Title VII disparate-impact violation was a mere pretext. However, when the District Court entered summary judgment for the City, it merely followed Second Circuit precedent in holding that the intent to remedy disparate impact did not constitute intent to discriminate against nonminority applicants. The District Court also rejected the pretext argument, finding that the exam results were sufficiently skewed to make out a prima facie case of disparate-impact discrimination, and that the City should not be forced to use racially skewed exam results that were presumptively invalid. Although the City was conscious of race, the District Court held that such race consciousness did not amount to racially disparate treatment. The City's actions were race neutral in the sense that the exam results were discarded for all races, and the City's actions were not analogous to a racial quota because everyone was treated uniformly without any individual preference. [80]

Justice Ginsburg observed that when Title VII took effect in 1965, it did not create genuine equal opportunity, because subtle and sometimes unconscious forms of discrimination simply replaced formerly undisguised discrimination. Accordingly, the Supreme Court's 1971 unanimous decision in *Griggs* responded by holding that Title VII embodied a congressional intent to prohibit discrimination through unintentional disparate impact—as well as through intentional disparate treatment—by focusing on the consequences rather than the form of an employer's actions. The Court's 1975 unanimous decision in *Albemarle Paper* then held that even a showing of job-related business necessity could not defeat a disparate-impact claim if the plaintiff could show the existence of an alternative job-related employment practice that had less of a racially disparate impact. Lower courts then began to enforce the Title VII disparate-impact provision in ways that invalidated employment practices, such as the firefighter promotion exams at issue in *Ricci*, by carefully scrutinizing employer claims of business necessity. However, in its 1989 *Wards Cove* decision, the Supreme Court began moving in a different direction. A bare majority of the Court adopted a new standard of proof for business necessity in Title VII disparate-impact cases that was more deferential to employers and less protective of employees seeking to avoid discrimination. Congress responded to *Wards Cove*, and other Supreme Court decisions that cut back on civil rights enforcement, by enacting the Civil Rights Act of 1991, which formally codified the disparate-impact reading of Title VII that was adopted in *Griggs*.[81]

Justice Ginsburg accused the majority of manufacturing a tension between the disparate-treatment and disparate-impact provisions of Title VII that simply did not exist. No previous Supreme Court decisions—including the now-discredited decision in *Wards Cove*—ever detected such a tension, and both provisions sought to promote the same objective of ending workplace discrimination by promoting genuine equal opportunity. Although the task of the Court should be to harmonize statutory provisions, the majority set the two provisions at odds with each other by characterizing actions taken to avoid disparate-impact liability as actions taken "because of race." By codifying *Griggs* and *Albemarle Paper*, Congress adopted a statutory design under which efforts to comply with the law by giving employees an equal opportunity to compete could not constitute a disparate-treatment violation—subject to one condition. The employer taking a race-conscious remedial action must have "good cause" to believe that the racially disparate employment practice being remedied would not withstand scrutiny as a business necessity. Under the facts of *Ricci*, Justice Ginsburg thought that it was hard to see the "business necessity" for the particular exams and 60/40 percent exam weightings that the majority required the City to use.[82]

Justice Ginsburg also noted that the Equal Employment Opportunity Commission interpretive guidelines, which were entitled to judicial deference, would not turn efforts to avoid disparate-impact liability into violations of the very statute with which those efforts were designed to comply. She emphasized that the Supreme Court's own gender discrimination precedent in *Johnson v. Transportation Agency* held that voluntary affirmative action programs for women did not violate the Title VII

disparate-treatment provision. Although *Ricci* was not an affirmative action case, the New Haven effort to avoid actual discrimination would certainly be likewise immune from Title VII disparate-treatment liability.[83]

Justice Ginsburg thought that the "strong basis in evidence" standard that the majority invoked to resolve the statutory tension it invented was too enigmatic. The standard was drawn from "inapposite equal protection precedents," and was not elaborated upon. Equal Protection precedents were inapposite because—unlike Title VII—the Equal Protection Clause was interpreted by *Personnel Administrator v. Feeney* and *Washington v. Davis* as not having a disparate-impact component.[84] Prior to *Ricci*, the Supreme Court never questioned the constitutionality of Title VII's disparate-impact provision, because that provision "calls for a 'race-neutral means to increase minority…participation'—something this Court's equal protection precedents also encourage."[85] "[O]nly a very uncompromising court would issue such a decision."[86] Justice Ginsburg also thought that the cases on which the majority relied most heavily were particularly inapt, because they involved absolute racial preferences. In contrast, an employer's effort to avoid Title VII disparate-impact liability involved no racial preference at all, but rather, involved an effort to rely on job-related qualifications that do not screen out candidates of any race. Even Title VII race- and gender-conscious affirmative action cases used a reasonableness standard, rather than the majority's new "strong basis in evidence" standard.[87]

Although a dominant theme of Title VII has been to encourage voluntary employer compliance, Justice Ginsburg believed that the majority's "strong basis in evidence" standard made voluntary compliance hazardous. *Ricci* illustrated that discarding a dubious selection process would subject an employer to costly disparate-treatment litigation, in which the outcome would be very uncertain. Moreover, under the majority's standard, the showing that an employer would have to make in order to avoid disparate-treatment liability was virtually the same as the showing that would be required to establish an actual disparate-impact violation—thereby undermining an employer's incentive to engage in voluntary Title VII compliance efforts. Even those Equal Protection affirmative action cases from which the majority borrowed its "strong basis in evidence" standard did not apply that standard as harshly as the majority did in *Ricci*. Those cases never suggested that anything more than a prima facie case of prior discrimination would be required to permit the use of race-conscious affirmative action remedies.[88]

Justice Ginsburg found that the majority's desire to protect the "legitimate expectations" of the disappointed firefighters who scored well on the promotion exams was circular, and she proposed her own "good cause" standard. If, as the City feared, the exam failed to constitute the least discriminatory means of testing for pertinent promotion qualities, the disappointed firefighters could have no legitimate expectation of profiting from the results of the exams. That was especially true in *Ricci*, because the prime objective of Title VII was to prevent exclusionary practices from freezing the status quo. In addition, Justice Ginsburg viewed as unfounded the majority's suggestion that the "strong basis in evidence" standard was necessary to avoid de facto quotas that were intended to promote an employer's desired racial balance. Justice Ginsburg believed that her proposed "good cause" standard would guard against racial balance quotas by ensuring the presence of a credible disparate impact claim. Justice Ginsburg also failed to understand why the majority departed from customary practice by refusing to remand the *Ricci* case for District Court application of the new standard that the majority announced. The failure to remand also deprived the City of an opportunity to invoke the statutorily recognized defense of good faith compliance with the interpretive guidelines adopted by the Equal Employment Opportunity Commission.[89]

Justice Ginsburg outlined several factors showing that the City satisfied her "good cause" standard for assessing voluntary efforts to avoid disparate-impact liability. All agree that the New Haven promotion exams had a sufficiently striking disparate impact to establish a prima facie case of Title VII liability. Moreover, the nature of the exams that established this disparate impact was suspect, because the City gave no consideration to anything other than its customary 60/40 percent weighting—even though that weighting produced racially disparate results in the past. Reliance on written exams to assess practical skills is a questionable practice, because such exams do not necessarily identify leadership abilities. In fact, skepticism about the utility of such written exams has been expressed not only by experts who testified at the New Haven Civil Service Board meetings, but by other published experts, by courts, and by the Title VII administrative guidelines as well. Mere pencil-and-paper knowledge of the history and vocabulary of baseball would not qualify one to play for the Boston Red Sox.[90]

Accordingly, it is not surprising that most municipal employers do not evaluate their promotion candidates through written tests or by giving tests the same weight as New Haven did. Two-thirds of the municipalities included in a 1996 study used assessment center simulations rather than written exams to evaluate candidates, and the popularity of assessment centers seems to be increasing over time. Among the municipalities that continue to use written exams, the median weight assigned to those exams is 30%—half the weight that New Haven assigned to its written exams. Therefore, Justice Ginsburg concluded that the prevalence of the assessment-center and modified-weighting alternatives would have made it difficult for New Haven to argue that its selection process was a business necessity. The majority rejected these alternatives, asserting that assessment centers were unavailable in 2003, and that Title VII prohibited the racial adjustment of test scores. However, the only evidence in the record that supported the unavailability of assessment centers in 2003 was an offhand remark made by Frank Ricci—one of the disappointed firefighters—which was belied by the widespread use of assessment centers at the time in other municipalities. And changing the weight of the written and oral exams would not constitute a prohibited racial alteration of test scores, but would rather constitute the substitution of a new selection procedure. Justice Ginsburg thought that the majority's dismissal of any substantial risk of disparate impact liability was reminiscent of the deferential standard accorded employers under *Wards Cove*, but *Wards Cove* was overruled by Congress in the Civil Rights Act of 1991—precisely because it was too protective of employers.[91]

Justice Ginsburg also found the New Haven exams questionable because the City precluded its consultant from getting expert feedback on potential questions from anyone in the New Haven fire department. The restriction was intended to protect the security of the exam questions, but this "very critical" defect resulted in exam questions that were sometimes confusing, irrelevant, spotty in their coverage, and potentially biased

in favor of nonminority firefighters. In addition, the exams had technical defects that undermined the validity of the exam score cutoffs, and the ensuing candidate rankings. Although the majority criticized the City for not requesting a technical report to allay its concerns about job relatedness, the technical report would merely have summarized evidence that was produced at the Civil Service Board meetings, and would not have established the reliability of the exam as an assessment tool. The many defects contained in the exams created at least a triable issue of fact that precluded summary judgment against the City, even under the majority's "strong basis in evidence" standard.[92]

In response to Justice Alito's concurring opinion, Justice Ginsburg stated that she would not have opposed a remand to resolve the factual disputes revealed in the record, but the majority insisted on disposing of the case by summary judgment. Justice Alito's concurring opinion argued that the City's asserted fear of disparate-impact liability was merely a pretext for the desire of certain officials in the mayor's office to placate a politically powerful racial constituency, and that there was a sufficient factual dispute about this to vacate the lower court rulings of summary judgment for the City. Justice Ginsburg also noted that the facts on which Justice Alito drew to support his pretext claim were drawn from the self-serving statement of facts submitted by the petitioners. Moreover, many of those allegations were either misleading or entirely devoid of support in the record. The important point, however, was that the Civil Service Board—not the Mayor's office—made the ultimate decision not to certify the exam results, and there was no evidence of political partisanship on the part of Civil Service Board members. In addition, the New Haven political forces favoring certification of the exam results attempted to exert just as much pressure on the Civil Service Board as did the political forces opposing certification.[93]

Justice Ginsburg went on to question the relevance of Justice Alito's pretext argument, because political considerations alone could not be equated with unlawful discrimination. Politicians commonly respond to racial considerations without engaging in racial discrimination. There is no reason to believe that the Mayor's office wished to exclude white firefighters from promotions, since white firefighters would also be promoted under a nondiscriminatory selection procedure. The District Court found that the presence of political considerations did not negate the City's genuine desire to avoid disparate-impact liability, and it found a total absence of discriminatory animus toward the petitioners. Those findings were "entirely consistent with the record." Moreover, as established by the Court's recent post-9/11 racial profiling decision in *Ashcroft v. Iqbal*, a desire to please political constituents is not inconsistent with a desire to avoid unlawful discrimination. [94]

Justice Ginsburg concluded that the majority forced the City of New Haven to use a flawed promotion exam that would produce racially disparate results without identifying the best-qualified candidates for promotion. The majority decision broke the promise of *Griggs* by denying equal opportunity through use of a test that was "fair in form, but discriminatory in operation."[95]

Doctrinal Strain

The outcome in *Ricci* did not flow naturally from pre-existing Title VII doctrine. Rather, Justice Kennedy's majority opinion constructed a previously undetected tension between the disparate-treatment and disparate-impact provisions of Title VII, and then resolved that tension in a way that strained against the overall antidiscrimination objective that Title VII was enacted to advance. In addition, Justice Kennedy announced the Court's modification of pre-existing Title VII doctrine in the process of granting summary judgment for the disappointed firefighter petitioners, even though significant factual disputes almost certainly made summary judgment for the petitioners improper. It appears that Justice Kennedy did both of these things knowingly, in order to convey the strength of the Court's commitment to a new post-racial conception of employment discrimination law.

Title VIJustice Kennedy's majority opinion in *Ricci* adopted a novel reading of Title VII that rebalanced the competing interests between whites and racial minorities that are at stake in the allocation of limited societal resources. Moreover, it rebalanced those interests in a way that undermined the initial balance struck by Congress in enacting and amending Title VII. The opinion also failed to apply the standing limitations that the Supreme Court has in the past used to defeat minority claims of racial discrimination. In so doing, the Court yet again illustrated a willingness to relax standing requirements for reverse discrimination claims asserted by whites that are strenuously enforced in cases asserting traditional discrimination against racial minorities.

1. Zero Sum Balance

Justice Kennedy's majority opinion asserted that *Ricci* was a case of first impression concerning the divergence between the disparate-treatment and disparate-impact provisions of Title VII.[96] But Justice Ginsburg's dissent pointed out that no such conflict existed, because both provisions of Title VII were designed to advance the same goal—the elimination of employment practices that had commonly produced workplace discrimination in the past.[97]

In one sense, Justice Ginsburg was certainly correct. There was no conflict under pre-existing law, because pre-existing law held that the consideration of race for the sincere purpose of avoiding disparate impact discrimination did not constitute the type of racial consideration that could amount to a Title VII disparate-treatment violation. That is what the District Court held when it followed Second Circuit precedent; that is what the Second Circuit panel held when it summarily affirmed the District Court in its brief per curiam opinion; that is what the full Second Circuit held when it denied rehearing en banc; that is what the Equal Employment Opportunity Commission established when it adopted its Title VII interpretive guidelines; and that is what the Supreme Court itself established in an analogous gender discrimination case holding that the consideration of gender to prevent disparate impact did not amount to a Title VII disparate-treatment violation.[98]

But Justice Kennedy also had a point. Even though Title VII law was settled at the time of the *Ricci* decision, there had long been undercurrents of discontent with that settlement. Individual conservative-bloc Justices in prior Title VII cases expressed the view that racial affirmative action could not be used to benefit minorities who were not themselves actual victims of particularized discrimination, because such affirmative action imposed too great a burden on adversely affected whites.[99] As Justice Kennedy stressed in his *Ricci* opinion, several Supreme

Court constitutional decisions struggled with the issue of when the Equal Protection Clause permitted affirmative action programs to benefit minorities at the expense of so-called innocent whites.[100] Accordingly, what Justice Kennedy was really doing in *Ricci* when he detected and resolved a novel tension between the disparate-treatment and disparate-impact provisions of Title VII was changing the balance that the Supreme Court previously struck between the zero-sum interests of whites and racial minorities in discrimination cases.[101]

In any alleged race discrimination or affirmative action case, a contested societal resource—such as the right to a firefighter promotion—has to be allocated to either a white person or to a racial minority. In order to make that allocation, some way has to be found to balance the competing interests underlying the white and minority claims of entitlement to that resource. Previously, the balance was struck so that close cases would be resolved in favor of racial minorities, in order to compensate for past discrimination or to promote prospective diversity. *Ricci*, however, re-struck the balance so that close cases would now be resolved in favor of whites. It did this by increasing, to a "strong basis in evidence," the standard of proof that had to be met before a resource could be given to a racial minority.[102]

In other words, the five-Justice *Ricci* majority re-struck the balance between white and minority interests in Title VII cases, so that the new balance would mirror the balance that the Supreme Court previously struck in its constitutional affirmative action cases. That might initially appear to create a desirable doctrinal symmetry, but there is an important asymmetry that exists between Title VII and constitutional cases. In Title VII cases the appropriate balance is supposed to be struck by Congress—not by the Supreme Court. It is true that statutes are often ambiguous, and the exercise of loosely constrained judicial discretion is often required for the Supreme Court to announce statutory meaning. But that is not the case with the disparate-impact provision of Title VII.

As Justice Ginsburg pointed out, Justice Kennedy was not writing on a clean slate when he chose to strike a new Title VII balance in favor of whites. The Supreme Court previously tried to strike a similar balance in *Wards Cove* and other decisions that cut back on civil rights enforcement. However, Congress responded by overruling those cases in the Civil Rights Act of 1991.[103] Therefore, when Justice Kennedy rewrote Title VII in *Ricci* to correspond to the Supreme Court's Equal Protection jurisprudence, he was usurping legislative policymaking power from Congress. Congress wanted the close cases to be resolved in favor of racial minorities, believing that to be the best way of reducing employment discrimination. But Justice Kennedy wanted the close cases to be resolved in favor of whites, even if it meant allowing fire department officers to remain overwhelmingly white.

The Supreme Court's usurpation of legislative racial policymaking power in *Ricci* may be difficult to justify in separation-of-powers terms, but it is hardly unprecedented. As a matter of relative institutional competence, it is difficult to see why a politically insulated Supreme Court would view itself as better able than a politically accountable national legislature to balance the subtle and complex competing interests that are necessarily entailed in trying to formulate a coherent national race relations policy. Nevertheless, the Supreme Court seems always to have thought that it could do a better job than Congress in mediating the nation's racial tensions. When the Court invalidated congressional efforts to limit the spread of slavery in *Dred Scott v. Sanford*,[104] Congress overruled that decision by securing the adoption of the Fourteenth Amendment.[105] The Fourteenth Amendment was designed to shift the pre-Civil War federalism balance in matters involving race from the states to the federal government, by giving Congress the power to enforce the equality and antidiscrimination provisions of the Amendment.[106] Nevertheless, the Supreme Court decision in the *Civil Rights Cases*[107] re-struck that balance in favor of state sovereignty by reading a "state action" component into the Fourteenth Amendment, even though Section Five expressly gave *Congress* the power to enforce the Amendment.[108] If judicial activism is defined as the disregard of clearly expressed legislative policy judgments, then *Ricci* entails an exercise in conservative judicial activism.

Justice Kennedy used the new "strong basis in evidence" standard as the doctrinal device that would accord his desired additional weight to the interests of whites in the Title VII balance. Like the lower courts and the Solicitor General, Justice Ginsburg thought that that any genuine desire to avoid a disparate-impact violation would suffice to prevent a disparate-treatment violation. She insisted only on the presence of "good cause" to fear a disparate-impact violation, as a safeguard against frivolous or pretextual disparate-impact claims.[109] Justice Ginsburg also emphasized that the heightened "strong basis in evidence" standard would frustrate the Title VII preference for voluntary compliance, by making it hazardous for employers to implement voluntary remedies for disparate impact. Only a disparate-impact showing that was strong enough to establish an actual Title VII violation would be sufficient to immunize employers from potential disparate-treatment violations.[110]

The law governing contract modifications, as well as the law of accord and satisfaction governing the settlement of legal disputes, supports Justice Ginsburg's view. Reminiscent of Justice Kennedy's approach, classical contract law would not recognize the presence of consideration supporting a modification or accord and satisfaction unless the underlying relinquished claim was in fact a meritorious one.[111] However, such a rule made voluntary modifications and settlements largely worthless, because the underlying legal claim would still have to be adjudicated in order to establish the validity of the modification or settlement. After realizing this, modern contract doctrine dispensed with the need to establish the validity of the underlying claim. It insisted only on "good faith" motivation, and it did so precisely so that voluntary modifications and settlements could become legally enforceable.[112]

Utilization of the "strong basis in evidence" standard, therefore, constitutes another important way in which the *Ricci* majority undermined the thrust of Title VII—by frustrating the congressional desire to rely heavily on voluntary rather than coerced compliance. Justice Kennedy's adoption of a "strong basis in evidence" standard thrusts Title VII voluntary compliance back to the days of classical contract law, and in so doing, undermines the Title VII preference for voluntary compliance. Moreover, the "strong basis in evidence" standard seems to apply in a way that benefits whites more than it benefits racial minorities. Although there is ample reason to find a "strong basis in evidence" supporting the City's fear of disparate-impact liability,[113] there is *not* a "strong basis in evidence" for the Court to have rejected the assessment-center and modified-weighting

alternatives that the city wished to use in lieu of its racially skewed written exams.[114] It seems unlikely that the effect of Justice Kennedy's "strong basis in evidence" standard on voluntary settlements went unnoticed—or was unintended. Without voluntary compliance to supplement formal enforcement of Title VII, there will simply be fewer occasions in which contested resources are given to racial minorities rather than to whites.

The unequal application of discrimination law to whites and racial minorities is illustrated even more clearly by Justice Scalia's concurring opinion. Although Justice Kennedy's majority opinion expressly left open the question of whether the Title VII disparate-impact provision was constitutional,[115] Justice Scalia apparently believed that the provision *did* violate the Equal Protection principle of the Constitution by forcing employers to engage in race-based decisionmaking in order to avoid disparate impact.[116] Justice Scalia then suggested that the disparate-impact provision of Title VII might be saved if it were viewed as an evidentiary tool to "smoke out" intentional discrimination, but that such a saving construction would require recognition of a good faith defense to any disparate-impact claim.[117] This is striking because Justice Scalia also emphasized that a benign motive on the part of Congress in enacting the disparate-impact provision could not save the constitutionality of the provision.[118] This reasoning creates a curious form of discrimination. When Congress acts to *remedy* disparate-impact discrimination, a benign motive will not save the constitutional validity of its actions.But when an employer acts to *create* disparate-impact discrimination, a benign motive will save the validity of the employer's actions. For Justice Scalia, therefore, a good faith, benign motive can be used to permit racial discrimination, but not to prevent it. A legal regime that would permit such an outcome is indeed a noteworthy regime.

Justice Alito too wrote a curious concurrence. By arguing that New Haven's asserted concern with disparate impact was really a politically motivated desire to placate a minority constituency,[119] Justice Alito appears to believe that racial politics is somehow illegitimate. Although he concedes that racial considerations can sometimes play a permissible role in political bargaining, he says that racial discrimination never can.[120] However, the issue to be decided was *whether* the City's decision to forego certification of the firefighter promotion exam results constituted permissible racial *consideration* or impermissible racial *discrimination*. Justice Alito apparently believed that the City's actions constituted a mere pretext for impermissible discrimination,[121] but his reasoning was circular. The only evidence that Justice Alito offered to support his *discrimination* conclusion was that the City *considered* race.[122]

Justice Alito could not have been pleased by his perception of racial politics in New Haven. One of the black leaders, whom Justice Alito viewed as having been placated by the Mayor's administration, once objected to hiring firefighters who "just have too many vowels in their name[s],"[123] an apparent reference to New Haven's long history of hiring white Italian firefighters instead of blacks.[124] This suggests that "racial placation" had long been the norm rather than the exception in New Haven politics. If such ubiquitous racial politics were now to be reconceptualized as unlawful racial discrimination, it is noteworthy that Justice Alito wished to effect that reconceptualization when the long history of New Haven racial politics began to benefit racial minorities rather than whites. It also makes one wonder whether Justice Alito believes that he can realistically exclude his own racial considerations from the adjudicatory process in the way that he apparently believes they should be excluded from the political process.[125]

2. Standing

Although no Justice mentioned it, the disappointed New Haven firefighter petitioners may have lacked standing to challenge the City's failure to certify the promotion exam results. They may have lacked standing because none of the petitioners could be sure of receiving the promotions they sought, even if the exam results had been certified. Under the City's "rule of three," the City Charter required that civil service positions be filled from among the top three exam performers for each position.[126] However, we cannot tell *which* of the top three candidates would have been chosen for any position. There were eight lieutenant vacancies, so only eight of the top ten candidates who qualified for "immediate promotion" to lieutenant under the rule of three would actually be promoted. Furthermore, there were seven captain vacancies, so only seven of the top nine candidates who qualified for "immediate promotion" to captain would be promoted.[127] Collectively, we cannot know which of the eighteen petitioners would have received the fifteen available promotions, but we do know that three of the petitioners would not have received any of the promotions at all.[128]

It may seem silly, but under the Supreme Court's standing jurisprudence, such uncertainty about whether a favorable ruling will actually redress a plaintiff's alleged injury can deprive that plaintiff of standing. Moreover, a plaintiff's failure to establish a redressable injury is not merely a prudential impediment to standing, but rather can amount to a constitutional defect that deprives the Court of jurisdiction under the case-or-controversy provision of Article III.[129] On occasion the Supreme Court has applied this particularized redressability requirement with remarkable stringency. For example, it denied environmental plaintiffs standing to enforce certain financial incentive provisions of the Endangered Species Act, because those incentives might not ultimately result in protection of the endangered species at issue.[130] It also denied other environmentalists standing to challenge mining, oil, and natural gas exploitation of federal lands, because the plaintiffs did not show with sufficient particularity that they would use the precise tracts of land that were being opened up for exploitation.[131] It even denied indigents standing to challenge preferential "charity" tax status for hospitals that refused to provide certain charitable medical care to indigents, because the hospitals might continue to deny such care even if they were denied preferential tax status.[132] In *Ricci*, no petitioner could be certain that a favorable ruling would redress his or her injury, because no petitioner could be certain of getting a promotion. Indeed, three petitioners could be certain that they would *not* get a promotion, although we do not know which three petitioners they would be.

Admittedly, the Supreme Court does not always enforce its standing redressability requirement with such stringency. Sometimes the Court grants standing despite serious redressability problems, as it did when it granted the State of Massachusetts standing to challenge the Environmental Protection Agency's refusal to regulate certain greenhouse gas emissions even though such regulation was not guaranteed to reduce the global warming

injuries that the State alleged.[133] Because the law of standing is in notorious disarray, it is not surprising that Supreme Court standing decisions are often difficult to reconcile.[134] The problem is that there is one overriding principle that *does* seem to reconcile many of the Court's standing cases. The law of standing often protects the interests of whites more than it protects the interests of racial minorities.[135]

In the 1984 case of *Allen v. Wright*,[136] the Supreme Court denied standing to black parents who challenged the allegedly unlawful grant of tax-exempt status to segregated private schools, because those schools might continue to deny admission to blacks even if the tax exempt status of the schools were revoked. In the 1975 case of *Warth v. Seldin*,[137] the Supreme Court denied standing to black and Latino plaintiffs who challenged exclusionary zoning practices alleged to be intentionally discriminatory, because the low and moderate income housing developments that had sought zoning variances still might not ultimately be constructed even if the exclusionary zoning practices were invalidated. In four police and prosecutorial misconduct cases decided between 1974 and 1983, the Supreme Court found that a lack of standing and other justiciability defects barred suits by black victims of allegedly discriminatory police brutality and other official abuses, because prior official misconduct was moot and the threat of future recurrences was too speculative for injunctive relief to redress any current injury.[138]

The Supreme Court has been fairly frequent in its denial of standing to minority plaintiffs who wished to challenge allegedly discriminatory practices that harm racial minorities. However, the Court often grants standing in analogous cases to white plaintiffs who wish to challenge affirmative action or antidiscrimination practices that benefit minorities. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[139] the Court granted standing to a white construction contractor who challenged an affirmative action program designed to benefit minority contractors, even though the white contractor was unlikely to be awarded one of the contracts at issue if the affirmative action program were invalidated. Other Supreme Court cases have similarly granted standing to whites seeking to challenge affirmative action programs,[140] or voter-redistricting programs designed to benefit racial minorities,[141] without requiring the strong redressable injury showings that the Court has demanded of minority plaintiffs. *Ricci* is a case that falls on the permissive white-plaintiff side of the line. It tacitly recognizes the standing of at least three white plaintiffs to challenge an antidiscrimination law that benefits racial minorities, even though they cannot possibly prove redressabiThe one final irony that should be noted in the Supreme Court's tacit grant of standing to the *Ricci* plaintiffs is its effective issuance of an advisory opinion. The purpose of the Article III standing requirement is to help ensure that the federal courts do not issue advisory opinions—opinions that make abstract pronouncements of law that are unnecessary to the resolution of a concrete "case" or "controversy" presented in an adversary context.[142] Because the Supreme Court disposed of the *Ricci* case by granting the motion for summary judgment filed by the petitioners, the Court ended up making abstract pronouncements that were dependent on the resolution of factual issues that seem clearly to have been in dispute. The Court even announced that minority firefighters could not win a hypothetical Title VII disparate-impact suit if they were subsequently to file one.[143] Moreover, the Court did all of this without the vigorous adversary presentation that would have been available if the Court had followed the customary practice of remanding a case with contested facts for trial. The Court's decision to grant the petitioners summary judgment is therefore also quite curious.

Summary Judgment

As Justice Kennedy noted, summary judgment is appropriate only where there is "no genuine issue as to any material fact," and one party is "entitled to judgment as a matter of law."[144] His opinion went on to hold that "there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City."[145] The assertion that there is "no evidence" questioning job-relatedness or supporting the existence of less discriminatory alternatives is simply incorrect. The assertion that there is no "strong basis in evidence" is the very legal issue that is under dispute.

1. No Evidence

Justice Kennedy's assertion that there was "no evidence" supporting the City's disparate impact fears does not withstand scrutiny. His opinion itself described evidence in the Civil Service Board hearing record that both questioned the job-relatedness of the City's promotion exams and suggested the presence of less discriminatory alternatives. Some witnesses testified that the exams were outdated and not relevant to firefighting practices in New Haven.[146] Others called for a validation study to determine job-relatedness, because the exams were "inherently unfair."[147] The competitor consultant testified that "assessment centers" were not only better at assessing job-relatedness, but that they would also constitute a less-discriminatory alternative selection device.[148] A college professor with relevant expertise testified that the New Haven exams may have contained subtle racial biases that favored whites.[149] The City's legal counsel and officials in the Mayor's administration also testified that there were less discriminatory alternatives to the exams.[150]

Justice Kennedy's opinion ignored the additional pertinent evidence highlighted in Ginsburg's dissent. She pointed to testimony establishing that most municipalities do not use pencil-and-paper exams to evaluate promotion candidates because of questions about the sufficiency of those exams in assessing practical job-related skills. She also cited evidence in the record establishing that other municipalities use alternate weighting percentages that place more emphasis on practical skills than on written exam results.[151] Far from containing "no evidence," the record was replete with evidence of less discriminatory alternatives that posed fewer job-relatedness problems. Not only were alternate weightings of exam and practical skills a seemingly better alternative, but the conclusion that assessment centers would have been a better alternative actually seems to have been uncontested. Nevertheless, Justice Kennedy rejected these evidentiary showings out of hand.

Justice Kennedy rejected the alternate weighting option because he viewed it as prohibited by the New Haven firefighter union contract, the New Haven City Charter, and the Title VII prohibition against adjusting test scores "on the basis of race." He also saw no evidence that the original New Haven exam weighting

was arbitrary.[152] The union contract and City Charter were largely irrelevant, because they would simply be unlawful if they compelled a degree of disparate impact that was prohibited by Title VII. Also, the fact that the original exam weighting may not have been arbitrary was simply nonresponsive to the claim that better alternatives existed. However, the question of whether alternate weightings would constitute prohibited race-based adjustment of test scores, as Justice Kennedy argued, or the mere substitution of an alternate selection procedure, as Justice Ginsburg argued,[153] is more serious. Ultimately, however, it simply begs the central question presented in the case. Proper legal characterization of a decision by the City to use an alternate weighting process would turn on whether the City was motivated by genuine disparate-impact concerns when it declined to certify the exam results, or whether that decision was a mere pretext for racial bias. But the question of motive certainly seems like a disputed issue of fact that could have been better resolved by a trial on remand than by Justice Kennedy's ex cathedra determination.[154]

Justice Kennedy rejected the assessment center alternative, even though no one seems to dispute the claim that assessment centers would have been more job-related and less discriminatory than written promotion exams. Justice Kennedy gave only one reason for rejecting the assessment center alternative. He stated that assessment centers would not have been available for the 2003 firefighter promotions.[155] However, that conclusion was based on a single offhand comment made by Frank Ricci—one of the very petitioners challenging the City's failure to certify the exam results.[156] Although Frank Ricci was a firefighter who worked hard to score well on his promotion exam, the record does not suggest that he had any expertise whatsoever in designing, implementing, or evaluating promotion procedures. As Justice Ginsburg pointed out, there was no particular reason to believe that assessment centers—which were in widespread use in other municipalities at the time—were unavailable to the City of New Haven.[157] Moreover, the record does not disclose any reason it was important for promotions to be made in 2003, rather than waiting until assessment center procedures could be established. That is especially noteworthy since the Supreme Court did not finally order the promotion exam results to be certified until 2009. Although Justice Kennedy was unwilling to accord any deference to New Haven's fear of potential disparate-impact liability, he was willing to accord total deference to Frank Ricci's stated basis for opposition to assessment centers.

The racial politics of which Justice Alito apparently disapproved may well have been viewed by minorities as the only alternative available to counteract the more entrenched politics that had caused the City to use its de facto discriminatory promotion procedures for the previous twenty years.[158] In a political climate where a fire department would forego promotion assessment alternatives that were more job-related and less discriminatory than written multiple-choice exams, it is easy to understand how racial politics could become as salient as Justice Alito found them to be.[159] Whether the City's effort to deviate from its previous practices was genuine or pretextual seems at least to be a genuine issue of material fact. Justice Ginsburg notes that it is common practice for the Supreme Court to remand a case in which it has announced a new rule of law, so that the trial court can apply the new rule to the facts.[160] That customary practice certainly seems compelling when factual disputes abound, as they did in *Ricci*, but it was not compelling enough to serve the purposes of the *Ricci* majority.

2. No Strong Basis in Evidence

Although it is difficult to defend Justice Kennedy's assertion that there was "no evidence" of less discriminatory, job-related alternatives, Justice Kennedy also asserted that any evidence that might exist was not sufficient to satisfy the "strong basis in evidence" standard that the Court was announcing as its new disparate-impact rule.[161] It seems clear that there was significant evidence of less discriminatory, job-related alternatives contained in the Civil Service Board hearing record. It also seems clear that any suggestion that such alternatives were lacking was far from undisputed for summary judgment purposes. But Justice Kennedy knew all of this. My suspicion is that Justice Kennedy was not simply making an evidentiary or civil procedure mistake when he decided to enter summary judgment for the petitioners despite the existence of striking factual disputes. I suspect that Justice Kennedy was making a statement about the stringency of the new disparate-impact rule that the Court was adopting.

By deeming a very strong factual showing of better alternatives to be insufficient even to defeat a motion for summary judgment, Justice Kennedy communicated that it would henceforth be very difficult to establish a disparate-impact discrimination claim under Title VII, even when a prima facie case of disparate impact was statistically demonstrated. The Court was reinstituting an era of strong deference to employer discretion, in order to immunize employers from disparate-impact claims. As Justice Ginsburg viewed it, the Court was reverting to the interpretation of Title VII that it had adopted in *Wards Cove*, even though Congress had overruled *Wards Cove* by statutory amendment in the Civil Rights Act of 1991.[162] I believe that Justice Kennedy was conveying the idea that disparate impact claims would now be as difficult to uphold under the Title VII "strong basis in evidence" standard as affirmative action programs have been to uphold under the "strong basis in evidence" Equal Protection standard that Justice Kennedy borrowed.[163]

Since the conservative voting bloc took firm control of the Court in race cases after 1990, the Supreme Court has upheld the constitutionality of a racial affirmative action program in only one case—and even that case seems doctrinally indistinguishable from another case in which the Court invalidated a similar program on the same day.[164] Justice Kennedy's decision to grant the petitioners summary judgment in *Ricci*, despite the existence of important factual disputes suggests that we can expect outcomes in future Title VII disparate-impact cases that are similar to the outcomes we have seen in affirmative action cases. Justice Kennedy himself illustrates this with the "advisory opinion" that he issued to reject the hypothetical claim asserted by minority firefighters in the hypothetical New Haven disparate-impact case that was never even filed.[165] Even though such a hypothetical suit would be filed by different plaintiffs, using legal theories and evidentiary presentations that had not yet been developed—let alone presented to a court—Justice Kennedy was still confident that the minority firefighters would lose their case. He could not have known this unless he had already determined that the "strong basis in evidence" standard was so heavily tilted toward the interest of white firefighters that no hypothetical disparate impact would be sufficient to outweigh the harm to whites.[166] This also suggests

that Justice Ginsburg was correct when she feared that Justice Kennedy's "strong basis in evidence" standard would undermine the congressional preference for voluntary compliance with Title VII.[167] For Justice Kennedy, there appears to be very little gap left to fill between potential liability (under the "strong basis in evidence" standard) and actual liability (under the statutory Title VII standard) for voluntary compliance to fill. He appears to be equally solicitous of white interests under both standards.

The stringency of Justice Kennedy's "strong basis in evidence" standard means that the scales are tipped in Title VII cases before the Court even begins its analysis. Because the Court has now detected a conflict between the statute's disparate-treatment and disparate-impact provisions, the Court must balance competing interests to resolve that conflict. The "strong basis in evidence" standard means that when unclear or disputed evidence is in equipoise, the balance will be struck in favor of protecting the white interest in avoiding disparate-treatment discrimination, rather than in favor of the racial minority interest in avoiding disparate-impact discrimination. It is unclear why a tie should go to the white interests under a statute that was enacted to prevent discrimination against racial minorities—unless the Court believes that times have changed so much that whites are now the primary victims of racial discrimination.

Postracial Discrimination

Postracial discrimination is discrimination against racial minorities that purports to be merely a ban on discrimination against whites. It is premised on the belief that active discrimination against racial minorities has largely ceased to exist, and that the lingering effects of past discrimination have now largely dissipated. As a result, a prospective commitment to colorblind race neutrality is now sufficient to promote racial equality, and any deviation from such neutrality will itself constitute unlawful discrimination. Although versions of this view have been around since the era of official segregation,[168] the claim that we now live in a postracial society has acquired enhanced plausibility from the success of prominent racial minorities in roles that were traditionally reserved for whites. Those successes have ranged from the golfing achievements of mixed-race Tiger Woods in a traditionally white game,[169] to the selection of black politician Michael Steele as head of the Republican Party,[170] to the election of mixed-race Barack Obama as President of the United States.[171]

As recent events have indicated, however, the claim that we now live in a postracial society is quite premature. Black Harvard Professor Henry Louis Gates still believed that he was being racially profiled in 2009 when he was arrested by a white police officer after allegedly breaking into his own house.[172] The suburban Philadelphia Valley Swim Club still thought it was appropriate to exclude black children from its swimming pool in 2009.[173] And the 2009 death of singer Michael Jackson reminded us that the "King of Pop" lived in a culture that caused him to think that he could increase his popular appeal by lightening the color of his skin.[174] Because the culture that we live in is actually far from postracial in nature, supposed efforts to prevent whites from being victimized by racial minorities end up entailing nothing more than a new form of old fashioned discrimination.

The Supreme Court has played its part in this form of postracial discrimination by inverting the traditional concepts of perpetrators and victims in a way that allows the Court ultimately to invert the concepts of discrimination and equality themselves. *Ricci* serves as an example of such postracial discrimination, and other postracial discrimination decisions handed down by the Roberts Court belie any suggestion that *Ricci* was merely an aberration. Moreover, the Roberts Court's postracial discrimination decisions are reminiscent of historical Supreme Court decisions that were issued when the Court was openly hostile to racial minority rights, thereby further calling the legitimacy of those Roberts Court decisions into question.

A. Conceptual Inversion

As Justice Ginsburg pointed out in her *Ricci* dissent,[175] when the City of New Haven decided to forego reliance on the racially disparate results of its firefighter promotion exams, it was not acting in a vacuum. Rather, the decision was part of the City's effort to counteract a long history of racial employment discrimination practiced by the New Haven fire department. Historically, whites were the perpetrators of discriminatory hiring and promotion decisions, and racial minorities were the victims.[176] Justice Kennedy's majority opinion in *Ricci* inverted the concepts of perpetrator and victim in a way that treated minorities as if they were the perpetrators and whites as if they were the victims.[177] Justice Alito's concurring opinion was even more emphatic in its depiction of whites as the victims of partisan racial politics in New Haven.[178] The Court's inversion of the distinction between perpetrators and victims has, in turn, prompted a more fundamental inversion in the core concepts of discrimination and equality themselves, so that contemporary racial discrimination has now come to be viewed as equal, while remedial equality has come to be viewed as discriminatory.[179]

1. Perpetrators and Victims

In a zero-sum resource allocation context, the roles of perpetrator and victim can be initially assigned and subsequently inverted simply by shifting the analytical baseline that is used to conduct a discrimination analysis. A baseline is the thing that separates the propositions that are actively addressed in formulating an analytical argument from the propositions that are simply assumed to be true without any effort to justify their validity. When analytical attention is focused on the issues that lie above the baseline, tacit assumptions that lie beneath the baseline often slip through unnoticed, and are passively accepted without any analytical justification. Indeed, baseline shifting works best as a persuasive technique when its baseline assumptions are able to do their work in a way that is largely undetected.[180]

Justice Kennedy's majority opinion in *Ricci* held that it was unfair to deny the disappointed petitioners the promotions to which they were entitled as a result of their superior performance on the written firefighter exams.[181] That holding rested on the tacit baseline assumption that those who perform well on promotion exams are entitled to merit-based promotions. Therefore, the issue presented in Justice Kennedy's opinion was whether a deviation from the merit-based promotions to which the petitioners were entitled was justified in order to advance the independent goal of reducing the racially disparate impact produced by the promotion exams. Stated in this way, the claims of the disappointed petitioners seem both strong and sympathetic, because it

is common to use promotion exams for the purpose of assessing merit. As a result, the baseline assumption—the assumption that those who scored well on their exams were entitled to promotions—went largely unscrutinized. However, if the analytical baseline is shifted down, so that the baseline assumption is highlighted and actively scrutinized, the claim of the disappointed petitioners loses much of its force.

The assumption that the petitioners were entitled to promotions because they had performed well on their written exams is not a valid assumption under Title VII. Title VII does not even require the use of written exams in awarding promotions. What Title VII *does* require is that promotions be awarded in a way that is not racially discriminatory, and disparate impact is an expressly prohibited form of discrimination under Title VII. Accordingly, even if the petitioners did perform well on their written exams, they still had no right to be promoted when their promotions would produce a racially disparate impact. A non-validated promotion exam that produces a racially disparate impact is simply an unlawful employment practice—especially in a case such as *Ricci*, where less-discriminatory, job-related alternatives exist.

even if the petitioners did perform well on their written exams, they still had no right to be promoted when their promotions would produce a racially disparate impact.

The adoption of an analytical baseline necessarily entails a normative judgment. There is no "natural" baseline that can serve as the foundation for legal analysis, because the instrumental nature of baselines means that they can always be contested by specifying some different instrumental objective.[182] Justice Kennedy's instrumental objective, reflected in the baseline assumption underlying his majority opinion, was to enforce the Title VII requirement of race-neutral fairness to firefighters who performed well on their promotion exams.[183] Justice Ginsburg's instrumental objective, reflected in the baseline assumption underlying her dissent, was that Title VII requires an end to the historic practice of disparate-impact discrimination.[184] There is no way to decide between these competing instrumental objectives without asserting a normative preference for one objective over the other. But the normative preference asserted by Justice Kennedy iIt seems reasonably clear that the enactment of Title VII's prohibitions on employment discrimination rested on the belief that racial and other minorities were the victims of widespread discriminatory practices being perpetrated against them by white employers and labor unions.[185] The United States has had a long history of pervasive—and often violent—white discrimination against racial minorities, but racial discrimination against the white majority has never been a particular problem—at least not until now. Despite the racial history of the United States, Justice Kennedy chose to invert the Title VII concepts of perpetrators and victims, so that whites would be viewed as the victims in *Ricci*, and racial minorities would be viewed as the perpetrators.[186] There is nothing analytically impermissible about this doctrinal maneuver—the Legal Realists have taught us that the job of lawyers and judges is to manipulate legal doctrine for instrumental purposes. However, one cannot help but wonder *why* Justice Kennedy and a majority of the Justices on the Supreme Court would view this inversion of the conventional Title VII understanding as normatively desirable. It is likely that their actions in *Ricci* reflect a more fundamental inversion of the concepts of discrimination and equality themselves.

The view that minorities have become the perpetrators and whites have become the victims of racial discrimination in the United States also inverts the conventional concepts of discrimination and equality by substituting for each the behavior and attitudes that we previously used to define the other.

2. Discrimination and Equality

The view that minorities have become the perpetrators and whites have become the victims of racial discrimination in the United States also inverts the conventional concepts of discrimination and equality by substituting for each the behavior and attitudes that we previously used to define the other. It used to be that the history of racial discrimination in the United States caused us to view existing distributional inequalities as the products of past and present discrimination, and to view racially redistributive efforts as remedial measures that were necessary to move us toward the goal of nondiscriminatory equality. Now, however, we appear to view the existing racially-correlated distribution of resources as something that actually *defines* equality by honoring the individual differences that exist between us, and we view racially-redistributive efforts as discriminatory rather than remedial. If there is no longer any appreciable level of discrimination against racial minorities, race-conscious efforts to benefit racial minorities cannot be justified as remedial. Instead, they are simply a form of "reverse discrimination," that is inconsistent with the constitutional and statutory principles of equality to which we claim an enduring commitment. Inverting the concepts of discrimination and equality in this way might make sense if the United States is now a postracial culture, in which current racial equality has finally triumphed over our long history of prior inequality. If the United States has not yet achieved this postracial status, however, the conceptual inversion simply becomes a new form of racial discrimination—one that insists on the preservation of existing inequalities in order to benefit whites.

It is hard to believe that someone could seriously contend that the problem of discrimination against racial minorities is a problem that is now behind us.[187] Whites still have a significant advantage over racial minorities in the allocation of societal resources,[188] and race obviously remains a salient social category that is often used to disadvantage minorities.[189] However, the election of Barack Obama as President of the United States has nevertheless fueled characterization of the contemporary period as a postracial era in which minorities are able to compete successfully against whites on a level playing field.[190] Under this

view, the real racial problem in the Untied States is the problem of minorities discriminating against whites.

A pertinent *Comment* appeared in *The New Yorker*, shortly after the 2009 Cambridge police arrest of Harvard Professor Henry Louis Gates in his own home.[191]Staff writer Kelefa Sanneh highlighted a number of ways in which minorities have been blamed for racist attitudes toward whites: Obama's former pastor, Reverend Jeremiah Wright, was called racist and anti-white for his sermons; Obama himself was accused of insulting white people when he referred to his grandmother as a "typical white person;" then-Judge Sonia Sotomayor's "wise Latina" remark was referred to as "racist;" and Obama's claim that the Cambridge Police had "acted stupidly" in arresting Professor Gates was characterized as "racial self-aggrandizement," which revealed a "deep-seated hatred for white people" that made Obama himself "a racist."[192] Even discounting for the hyperbole that is often used to score rhetorical points, those accusations do seem to show that many whites have come to feel genuinely aggrieved by current racial politics.

Sanneh then went on to make an important point. He said that the accusations of "reverse racism" that are often used to combat affirmative action in the post-Civil Rights era have been so successful that reverse racism against whites has now come to be viewed as systemic rather than personal. Whites like Frank Ricci do not simply feel that they are occasionally victimized by the isolated deeds of bad actors. They feel as if the whole system is skewed in favor of racial minorities, and is therefore stacked against them.[193] The irony here is striking. Title VII was rooted in the belief that racial equality could be achieved only by neutralizing the systemic discrimination that existed against racial minorities, but the postracial *Ricci* view is that equality can be attained only by reinstituting the institutional practices that used to constitute discrimination. Stated more concretely, under Title VII, a non-validated, multiple-choice exam that had a racially disparate impact used to be viewed as the very definition of systemic discrimination. Now reinstating the results of that exam is necessary to prevent systemic discrimination against whites. Sanneh concluded that aggrieved whites have now commandeered the term "racism". Racial minorities can still talk about isolated issues that affect racial minority interests, but the term "racism" has now acquired a cultural meaning that equates it with mistreatment of the white majority by racial minorities.[194]

The view that contemporary culture now entails this new form of systemic minority discrimination against whites, rather than the more traditional forms of white discrimination against minorities, would seem to be legally irrelevant even if true. The Supreme Court has insisted in its constitutional affirmative action decisions that the Equal Protection principle does not prohibit general "societal discrimination." Particularized acts of identifiable discrimination are illegal, but the subtler forms of cultural behavior and attitudes that have systemically caused whites to do better than racial minorities in most social, political and economic categories are not prohibited by the Court's conception of Equal Protection.[195] That Supreme Court holding has always been problematic,[196] but it nevertheless remained the established law for as long as racial minorities were the ones viewed as the victims of such societal discrimination. If the Supreme Court were to retreat from its refusal to recognize the legal legitimacy of societal discrimination because it now viewed whites as the victims, the Supreme Court would be changing the rules in a racially motivated way. That would, of course, lend credence to the view that we continue to live in a culture that discriminates against racial minorities.

The fact that Justice Kennedy's majority opinion in *Ricci* could be viewed as offering even a credible construction of Title VII shows that the Court's inversion of the traditional discrimination and equality concepts has a receptive audience. However, it is still difficult to take the postracial hypothesis on which that inversion rests seriously. White discrimination against racial minorities remains a serious cultural problem, while minority discrimination against whites seems at best to be merely marginal. The continuing maldistribution of societal resources along racial lines strongly rebuts the validity of any postracial-society claim that one might be inclined to assert. Minorities are disproportionately burdened by high unemployment rates, high levels of poverty and low access to health care. Minority schools remain segregated and they offer educational opportunities that are significantly worse than the opportunities offered in white schools. Minorities are still discriminated against in the job market, in real estate markets, and in consumer transactions. Moreover, when minorities do get jobs they are paid less than whites with equivalent levels of education. The biases that lead to these inequalities are both conscious and unconscious, and they show no signs of abating in the near future.[197] Harvard sociologist William Julius Wilson has stated that we cannot be considered a postracial society as long as so many minorities are disproportionately concentrated at the low end of the socio-economic scale. When economic conditions deteriorate, minorities are always the ones who suffer as the targets of white frustrations.[198]

It is true that the President of the United States is now black, but that does not mean that the society that elected him has become postracial. One could choose to characterize Obama's election in different ways. One could characterize it as demonstrating that minorities can now compete on a level playing field, without the need for affirmative action or serious antidiscrimination measures. Alternatively, one could characterize Obama's election as demonstrating only that a mixed-race, multiple Ivy League graduate, with the intellectual and political skills to become President of the Harvard Law Review can successfully navigate contemporary racial culture—thereby providing little evidence of how less-exceptional racial minority group members are likely to fare on a playing field that is far from level. As Professor Darren Hutchinson has noted, the "postracial" claim may simply illustrate the phenomenon of "racial exhaustion." Whites have simply grown tired of having to deal with the discrimination claims asserted by racial minorities.[199] As a result of this fatigue, whites may now have decided to assert retaliatory discrimination claims of their own.

For me, the claim that our culture is now postracial is seriously undermined by the now-famous Henry Louis Gates arrest in 2009. Black Harvard Professor Henry Louis Gates was arrested by white Cambridge Police Sergeant James Crowley after Professor Gates broke into his own home because the front door was stuck. A neighbor who feared that a criminal might be breaking into the house called the police. The events that followed are disputed, but Professor Gates ended up accusing Sergeant Crowley of racial profiling, and Sergeant Crowley ended up arresting Professor Gates. Because Sergeant Crowley knew that Professor Gates lived in the house at the time that the arrest was made, President Obama stated in response to a news conference

question that the police had "acted stupidly"—a comment that he later "recalibrated." These events attracted an enormous amount of media attention, and things ultimately calmed down after Sergeant Crowley, Professor Gates and President Obama all met for a beer together at the White House.[200] I do not know what actually happened. I suspect that all parties probably "overreacted" in some sense, but that is my point. Racial tensions are still so high in even a northeastern university community that what might have been an innocuous non-event became a hot-button racial issue. Sergeant Crowley may well have thought that he was being verbally abused simply for doing his job, and Professor Gates may well have thought that he was being arrested for acting like an uppity nigger. An environment in which racial nerves are still that raw can hardly be viewed as an environment that is postracial.

Perhaps the strongest argument against the claim that we now live in a postracial society—a society where our most pressing discrimination problem is the problem of racial discrimination against the white majority—comes from the Supreme Court itself. The current Supreme Court commonly rules in favor of whites and against racial minorities in contemporary race cases. Moreover, it rules this way even though it has had to strain prior antidiscrimination doctrine to do so. When the Supreme Court goes out of its way to favor white interests over the interests of racial minorities, the culture in which that Court operates can hardly be said to be postracial in any meaningful sense of the term. The Supreme Court favored the interests of whites over the interests of racial minorities in *Ricci*, and it has done so in a host of other race cases as well. When viewed in the context of these collective racial decisions, the Supreme Court emerges as an institution that facilitates discrimination against racial minorities rather than an institution that promotes equality.

B. Context

The *Ricci* decision did not occur in isolation. It was a 5–4 decision handed down by the conservative voting bloc of the Roberts Court, which in its brief history has already issued a number of decisions that favored the interests of whites over the interests of racial minorities. Some of those decisions were issued the same Term as *Ricci*, and some were issued in prior Terms. But the racial tenor of all those decisions suggests a general hostility to the enforcement of antidiscrimination laws and precedents that were initially adopted to protect the interests of racial minorities from continued oppression by whites. Unfortunately, the racial tenor of those Roberts Court decisions is also reminiscent of decisions issued by the Supreme Court in earlier eras, when the Court was openly antagonistic to the rights of racial minorities. Consistent with the theory of postracial discrimination, what emerges from the Roberts Court decisions is a Supreme Court that views its function to be that of protecting the white majority from discrimination claims asserted by racial minorities.

1. Roberts Court Discrimination

John Roberts was confirmed as Chief Justice of the United States in 2005.[201] Since his confirmation, the Roberts Supreme Court has issued decisions that favored the interests of whites over the interests of racial minorities in a number of cases. In addition to *Ricci*, those cases include decisions that have rejected minority allegations of racial discrimination in the areas of voting rights, racial profiling, English language education, and school resegregation.

a. Voting Rights.

Ricci was probably the most significant race case that the Roberts Court decided during its 2008 Term, but another closely watched case was *Northwest Austin Municipal Utility District Number One v. Holder*.[202] In *Northwest Austin*, the Supreme Court addressed the issue of whether Section 5 of the Voting Rights Act of 1965 remained constitutional in light of the increased minority voting participation that has occurred since 1965. Section 5 seeks to prevent future voting discrimination against racial minorities by requiring jurisdictions with a history of prior voting discrimination to obtain federal preclearance from the Department of Justice or from a three-judge Federal District Court in the District of Columbia for any changes that they wish to make in their voting practices or procedures. In 2006, Congress voted overwhelmingly to reauthorize Section 5 for another twenty five years. This was the fourth time the Act had been reauthorized by Congress since 1965. However, the plaintiff utility district argued that Section 5 could not constitutionally be applied to it because there was no evidence that the utility district had ever engaged in voting discrimination. A three-judge district court rejected the claim, but the Supreme Court avoided the constitutional question by holding that the utility district could apply for a Section 5 waiver under the statute's "bailout" provision.[203]

It might at first seem as if *Northwest Austin* was decided in a way that was favorable to the interest of racial minority voters, because the Court declined to hold Section 5 unconstitutional.[204] However, the majority opinion of Chief Justice Roberts left little doubt that he believed Section 5 to be unconstitutional in light of the increased minority participation in voting that occurred since the original adoption of the Voting Rights Act in 1965. Discussing two potentially applicable constitutional standards, he concluded that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test."[205]

Northwest Austin and *Ricci* are alike in at least two important respects. First, in both cases the Court practiced postracial discrimination by supplanting an unambiguous statutory effort to protect racial minorities with a dubious judicial effort to protect whites.[206] In *Northwest Austin*, Congress decided as recently as 2006 that minority voters still needed the voting rights protections of Section 5. It did so by a vote of 390-33 in the House and 98-0 in the Senate, after extensive legislative hearings, and a voluminous legislative record.[207] In *Ricci*, Congress not only adopted Title VII in 1964 to protect racial minorities from employment discrimination at the hands of whites, but it amended Title VII in the Civil Rights Act of 1991 in order to overrule prior Supreme Court decisions that proved excessively protective of white employer interests, and insufficiently protective of racial minority rights.[208] Both cases, therefore, illustrate the Court's propensity to undermine congressional antidiscrimination initiatives when the Court disagrees with the racial policies that they embody.

Second, both *Northwest Austin* and *Ricci* sought to engage in racial policymaking through the technique of regulatory "chill," rather than through the process of direct adjudication.

Because the race relations issues that underlie the Voting Rights Act and Title VII are pure legislative policy issues, the Supreme Court was understandably reluctant to invalidate the two statutes directly. To have done so would have subjected the Court to a potential political backlash, and to questions about the Court's usurpation of legislative policymaking powers in a way that was inconsistent with separation of powers principles. In both cases, what the Court did instead was to issue *in terrorem* dicta that was designed to advance the Court's postracial policy agenda without forcing the Court to internalize the attendant political costs. Therefore, in *Northwest Austin*, the Court threatened to hold Section 5 unconstitutional in the future, so that Congress might be chilled into adopting "saving" modifications of the statute that better protected the interests of the Court's white constituents.[209] Similarly, in *Ricci*, the Court tacitly threatened to hold Title VII unconstitutional in the future, so that Congress might be chilled from once again overruling by statute the Court's postracial administration of Title VII.[210]

It is not clear how successful these dictum threats will prove to be, but they will almost certainly contribute to a political climate in which the representative branches will have to consider rejuvenated reverse discrimination claims that are asserted by whites. The problem is likely to be particularly acute in the voting rights context. If the *Northwest Austin* decision causes the upcoming 2010 census to be followed by a plethora of Voting Rights Act redistricting challenges such as those that arose after the 1990 census,[211] racial minorities are likely to end up suffering new forms of vote dilution. After the 1990 census, the Justice Department was able to negotiate redistricting plans that did not unduly dilute minority voting strength by threatening to withhold Section 5 preclearance under the Voting Rights Act.[212] Now, however, the Supreme Court decision in *Northwest Austin* may not only encourage whites to file redistricting challenges to efforts aimed at protecting minority voting strength, but it may also reduce the Justice Department's negotiating leverage to resist such challenges. If a covered jurisdiction wishes to engage in redistricting that will increase relative white voting strength, by diluting minority voting strength, that jurisdiction can simply thumb its nose at Justice Department threats to deny preclearance. Defiant jurisdictions will now have every incentive to risk litigation, gambling that the Supreme Court will simply declare Section 5 to be unconstitutional the next time a Section 5 challenge is presented to the Court.

The Roberts Court also decided a second voting rights case during its 2008 Term. *Bartlett v. Strickland*,[213] was itself a redistricting case, in which the conservative bloc held 5–4 that the Voting Rights Act prohibitions on minority vote dilution did not apply to so-called "crossover districts." A crossover district is a district in which minorities do not comprise a majority of the voting population, but comprise a large enough percentage to elect a candidate of their choice by forming political coalitions with whites. The issue presented was whether splitting a crossover district in a way that deprived its minority voters of a realistic chance to elect the candidate of their choice constituted vote dilution of minority voting strength that was prohibited by the Voting Rights Act.[214] In announcing the judgment of the Court, Justice Kennedy's plurality opinion held that splitting the district did not violate the Voting Rights Act, because minorities had to comprise at least 50% of the voting population in a district in order to qualify for vote dilution protection under the Act.[215]

Justice Souter's dissent not only disagreed with the 50% requirement, but argued that reading such a requirement into the Act perversely encouraged racial bloc voting rather than interracial voting coalitions. Justice Souter believed that the majority provided an incentive for states to pack minority voters into fewer majority-minority voting districts. It also punished minorities who were able to form voting coalitions with whites, by denying them statutory protections from vote dilution.[216] Justice Souter stressed that minority vote dilution could be accomplished not merely by minority vote dispersion, but also by the very minority vote packing that the Court's holding encouraged.[217]

Although the *Bartlett* decision is in many respects technical, the ultimate effect of the decision is to increase white voting strength by decreasing minority voting strength. By denying statutory vote dilution protections to crossover districts, minorities will have less influence in the electoral process than they would have had if crossover districts were protected, because minorities will be able to control the electoral outcome in fewer voting districts. Once again, Justice Kennedy's opinion argued that granting vote dilution protections to racial minorities that white voters did not have would discriminate against whites.[218] As in *Ricci*, he indicated that reading the statute to compel such racial considerations might make the statute unconstitutional.[219] Also reminiscent of *Ricci*, he viewed the society as postracial, because the existence of crossover districts now showed that the Voting Rights Act had "by definition" been successful in reducing racial discrimination in voting.[220] But as in *Ricci* as well, Justice Kennedy's postracial opinion seems to ignore the fact that it is racial minorities rather than whites who suffer the types of historical discrimination that the pertinent statutes were intended to remedy.[221]

b. Racial Profiling.

The Roberts Court conservative bloc issued another 5–4 decision during its 2008 Term in the racial profiling case of *Ashcroft v. Iqbal*.[222] In *Iqbal*, Justice Kennedy's majority opinion held that a Pakistani Muslim immigrant who was detained after the September 11, 2001 terrorist attacks did not adequately state a cause of action when he claimed that high level Justice Department officials, including the Attorney General and the Director of the FBI, singled him out for "harsh confinement" because of his religion and ethnicity.[223] Iqbal's complaint alleged that the defendants "each knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh treatment, and that they did so "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint further alleged that the Attorney General was the "principal architect" of the policy, and the FBI Director was "instrumental in [its] adoption, promulgation, and implementation."[224] Although the lower courts upheld the adequacy of the complaint,[225] Justice Kennedy's opinion stated that the allegations in the complaint were too conclusory and insufficiently plausible. They were too conclusory because they did not contain specific factual allegations, but rather were nothing more than "a 'formulaic recitation of the elements' of a constitutional discrimination claim."[226] They were insufficiently plausible because there were legitimate, nondiscriminatory reasons why law enforcement officials would have focused on Arab Muslims following a terrorist attack by Arab Muslim hijackers.[227] Moreover, because the high level Justice Department officials were not subject to vicarious

liability, any plausible misconduct by lower level officials would not prevent dismissal of Iqbal's complaint against the high level officials.[228]

The *Iqbal* Court's dissatisfaction with "conclusory" pleadings, and its insistence on a stringent "plausibility" standard, seem inconsistent with the idea of notice pleading that was incorporated into the Federal Rules of Civil Procedure.[229] The Court, however, also held "implausible" an Arab Muslim's allegation that discriminatory racial profiling caused him to be targeted for post-9-11 harsh confinement. To me, it is the Court's holding that seems "implausible." Given the nation's current anxieties and fears about Arab and Muslim terrorism, and the alleged involvement of high level federal officials in formulating United States torture policy,[230] racial profiling seems more likely than not. As in *Ricci*, however, Justice Kennedy once again gave the benefit of the doubt to white claims of legitimacy rather than to racial minority claims of discrimination. As in *Ricci*, Justice Kennedy seemed intent on precluding any opportunity for an inquiry into the actual facts—entering summary judgment in *Ricci* and dismissing the complaint in *Iqbal*. And as in *Ricci*, Justice Kennedy had to strain the meaning of existing law in order effectuate his inversion of the perpetrators and the victims.

c. English Language Education.

Yet another Roberts Court 2008 Term decision that disadvantaged racial minorities was *Horne v. Flores*.[231] In an opinion by Justice Alito, the conservative bloc voted 5–4 to reverse the District Court and Court of Appeals holdings that Arizona was violating the Equal Educational Opportunities Act of 1974 by failing to provide adequate educational opportunities for students with limited English language proficiency. The Equal Educational Opportunities Act is an antidiscrimination statute that prohibits the denial of "equal educational opportunity on account of race, color, sex or national origin." It further prohibits "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[232] In 1992, the plaintiffs filed a class action challenging the State's alleged failure to provide adequate educational opportunities for minority at-risk and limited English proficient children. Beginning in 2000, the lower courts began issuing a series of orders that required the adoption of minimal educational standards and increased funding to comply with the Act. The State's repeated failures to comply ultimately led to contempt citations. The lower courts also denied the State's Rule 60(b)(5) motion for relief from the compliance order, which the State argued had become inequitable in light of changed circumstances.[233]

Justice Alito's opinion reversed, stating that the lower courts should have been more flexible in ruling on the Rule 60(b)(5) motion, because such motions perform a particularly important function in "institutional reform litigation" where "sensitive federalism concerns" are involved.[234] Here the lower courts had been insufficiently flexible, because they focused too much attention on whether the prior funding orders had been complied with, and not enough attention on the question of whether changed circumstances brought the State into compliance with the Act in a way that made enforcement of the original order inequitable.[235] Justice Alito therefore stated that a remand was necessary to determine if changed circumstances were provided by factors including new educational strategies adopted by the State, and congressional enactment of the No Child Left Behind statute.[236] Justice Breyer's dissent argued that the lower courts adequately considered the factors relevant to a changed-circumstances inquiry, and that adequate funding was essential to compliance with the Act.[237] Justice Breyer concluded that the Court's decision would hinder congressional efforts to ensure that Spanish-speaking students will learn the English skills necessary to participate in a society where English is the predominant language.[238]

Commentators have viewed *Horne* as establishing a new Rule 60(B)(5) standard for relief from court orders in institutional litigation that will undermine finality by permitting litigants to reopen remedial injunctions that have been issued to control their conduct.[239] For present purposes, however, Justice Breyer's concern that the decision will frustrate congressional efforts to provide equal educational opportunities to Spanish-speaking minorities is particularly pertinent. Among the allegations made by the plaintiffs was the claim that Arizona's school finance scheme "is just sufficient to let less distressed, predominantly Anglo districts impart State-mandated essential skills to their mainstream student bodies" without providing sufficient funds for minority students to acquire the same skills.[240] Although this claim was first asserted in 1992, by 2009 the plaintiffs had still not received the relief they requested. Despite lower court decisions and contempt citations ordering such relief, the Roberts Court simply remanded for yet another round of proceeding. Moreover, it did so in an opinion whose tone suggested that the Court disfavored granting any relief. Consistent with its postracial orientation, the Roberts Court again appears to believe that there is no longer any real discrimination problem to remedy, and that racial minorities are simply asking for more than they are entitled to receive. And again, it adopted this position despite the existence of a federal statute that seems designed to remedy the precise problem of which the plaintiffs complained.

d. Resegregation.

In its 2006 Term, the conservative bloc of the Roberts Court issued a 5–4 decision in the school *Resegregation Cases*.[241] The majority opinion written by Chief Justice Roberts invalidated voluntary race-conscious efforts by the Seattle and Louisville school boards to prevent the resegregation of public schools that was occurring as a result of residential resegregation.[242] In previous years, both school districts eventually achieved integration after making strenuous efforts to comply with the Supreme Court decisions in *Brown*.[243] When population shifts began to produce resegregation, the school boards became convinced that only race conscious student assignment could preserve the integrated nature of the schools. Accordingly both school boards adopted narrow integration plans, affecting a small number of students, that considered race when a student's desired school assignment would force a school's racial makeup to fall outside of a predetermined integration range.[244] White parents who did not receive their desired school assignments challenged the plans. [245] The Court then reversed the lower courts and held the plans to be unconstitutional because they were not narrowly tailored to advance the interest of the schools in promoting student diversity.[246]

Although *Brown* was issued to desegregate public schools, Chief Justice Roberts read the *Brown* decision itself as invalidating the integration plans that were adopted to prevent

resegregation.[247] He justified this conclusion by asserting that a school board was prohibited from considering race regardless of its benign motive.[248] He concluded his opinion by stating that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[249] Justice Breyer's dissent argued that the Court's decision was inconsistent with *Brown,* and with a range of other Supreme Court precedents. He stressed that because other race neutral ways of addressing the problem proved inadequate, the Court's decision left school districts with no effective way to prevent resegregation.[250]

The Court's decision in the *Resegregation Cases* seems to epitomize the conceptual inversion of discrimination and equality that animates the Court's postracial view of contemporary culture.[251] When the decision in the *Resegregation Cases* is juxtaposed to the 5–4 conservative bloc decision in 2009, denying a black defendant post-conviction access to evidence for DNA testing,[252] it appears that white parents have a stronger constitutional right to send their children to segregated schools than post-conviction criminal defendants have to test the evidence offered against them in a way that could establish their innocence. It takes quite a stretch of the legal imagination to conclude that *Brown v. Board of Education* requires the resegregation of public schools. Yet the aphorism with which Chief Justice Roberts ends his *Resegregation* opinion attests to his possession of such an imagination. The Chief Justice, and the other members of the Supreme Court conservative voting bloc on race, appear to believe that the nation's racial problems can be solved by a mere commitment to prospective race neutrality. The Roberts Court's recent race decisions turn a blind eye to the continuing effects of prior discrimination, and to the structural forces that continue to perpetuate subtle forms of institutional discrimination. In cases ranging from firefighter promotions to school resegregation, the Court seems to care very little about the interests of racial minorities—and very much about the interests of the white majority. Inequalities suffered by racial minorities simply do not seem to count when the Court submits to the lure of postracial discrimination. Unfortunately, this aligns the Roberts Court with prior Supreme Courts that were more transparently committed to the practice of racial minority oppression.

2. Historical Discrimination

The postracial discriminatory decisions of the Roberts Court are reminiscent of the overt discriminatory decisions issued by prior Supreme Courts. There is now a fairly standard litany of infamous decisions in which historical Supreme Courts have openly sacrificed the interests of racial minorities to advance the interests of white slave holders, segregationists, and other white supremacists. Traces of those historical decisions can also be found in more recent contemporary cases, including those that have imposed constitutional limits on school desegregation, racial redistricting, and racial affirmative action. The Roberts Court's postracial discrimination cases can be easily aligned with those prior decisions, in terms of both tone and outcome. Accordingly, one cannot help but wonder why the Roberts Court has not felt a need to distance itself from those historical and contemporary decisions, rather than risk being aligned with them. I fear that the reason may be that the conservative bloc Justices on the Roberts Court actually favor such an alignment.

There is now a fairly standard litany of infamous decisions in which historical Supreme Courts have openly sacrificed the interests of racial minorities to advance the interests of white slave holders, segregationists, and other white supremacists.

The historical Supreme Court was no friend to racial minorities. In the 1823 case of *Johnson v. McIntosh*,[253] the Supreme Court upheld the seizure of indigenous Indian lands by the United States. In the 1857 case of *Dred Scott v. Sanford*,[254] the Supreme Court held unconstitutional the Missouri Compromise Act of 1820, which Congress enacted in an effort to limit the spread of slavery in new United States territories. The Court not only held that the statute interfered with the property rights of white slave owners, but it also held that blacks could not be citizens within the meaning of the United States Constitution.[255] The Fourteenth Amendment overruled *Dred Scott*[256] after the Civil War, when other Reconstruction constitutional amendments and implementing legislation were also enacted to promote equal rights for former black slaves. Nevertheless, the Supreme Court began limiting the remedial scope of the amendments, and even invalidated some of their implementing legislation.[257] In the 1896 case of *Plessy v. Ferguson*,[258] the Supreme Court upheld the constitutionality of Jim Crow official segregation in public facilities. Despite some formal minority victories, the Court commonly capitulated to Southern white supremacist attitudes. It acquiesced to Southern evasion efforts to deny blacks the right to vote, to replace slavery with peonage, to preserve segregated transportation, and to preserve housing segregation.[259] The Court also often capitulated to Southern racism in the criminal justice system by permitting racial segregation in the jury box and on the witness stand. It sometimes allowed apparently innocent black defendants to be imprisoned or even executed, rather than interfere with the procedural sovereignty of Southern state courts.[260]

In the mid-Twentieth Century, the Supreme Court's racial performance was little better. In the 1944 case of *Korematsu v. United States*,[261] the Court upheld the constitutionality of a World War II order excluding Japanese-American citizens from their own homes on the West Coast, which led to the internment of Japanese-Americans in detention centers. After the official segregation doctrine of *Plessy* was invalidated by the 1954 *Brown* school desegregation case,[262] the Court still refused to order immediate desegregation. Instead, *Brown II* required desegregation "with all deliberate speed," which permitted *Brown* to be evaded by massive Southern resistance for nearly a decade.[263] Then, when the school desegregation effort moved out of the South, the Court articulated a distinction between de facto and de jure discrimination—a distinction that has permitted most schools in the United States to remain de facto segregated even today.[264] The year after *Brown* was decided, the Supreme Court also declined to invalidate a Virginia miscegenation statute in *Naim v. Naim*,[265] even though *Brown* almost certainly rendered the statute unconstitutional. More recently, *Brown* has been read as establishing a colorblind race-neutrality requirement that the Court now uses to invalidate race-conscious affirmative action and redistricting programs.[266]

The tone and outcomes of the historical Court's decisions sometimes made the Court's hostility to racial minority interests unmistakable. In frequently quoted language from his opinion in *Dred Scott*, Chief Justice Taney described the framers' view of black slaves. Not only could blacks not be citizens, but

> they were at the time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[267]

Chief Justice Taney went on to say that blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[268] Hopefully, that is no longer a widely shared view of racial minorities, and it is certainly not a view that is often expressed in polite company. Nevertheless, the tone of Roberts Court race cases sometimes reflects a disregard of racial minority interests that strikes me as similarly callous.

Justice Kennedy's opinion in *Ricci* displays an understandably sincere concern for the interests of white firefighters who scored well on their promotion exams. However, it displays a near total lack of concern for the interests of racial minorities, who daily suffer the relentless disparate-impact harms that Title VII was adopted and amended to prevent.[269] Moreover, by adopting an unrealistically high standard for the avoidance of disparate-impact injuries, Justice Kennedy's opinion seems to place any meaningful remedy for such harms beyond the practical reach of Title VII, and perhaps beyond the reach of the Constitution as well.[270] The position of the disappointed New Haven firefighters seems to be that abandoning a resource allocation criterion that favors whites constitutes racial discrimination against the white majority, and that seems to be the way the Roberts Court views thinJustice Alito's refusal to uphold equal educational funding in the *Horne* English Language Education case also seems unnecessarily to disregard the interests of racial minority students. The seventeen years that elapsed between the time the plaintiffs filed their class action and the time the Supreme Court remanded without a remedy for yet additional proceedings, has a disquieting similarity to the long period of time that elapsed after *Brown*, when the Supreme Court first acquiesced in Southern evasion of the *Brown* desegregation mandate but ultimately refused to desegregate Northern and Western schools.[271] *Horne* has a disquieting similarity to the Roberts Court's more recent refusal to permit voluntary efforts to maintain hard-won integration in the *Resegregation Cases*.[272]

The dictum suggestion of Chief Justice Roberts in *Northwest Austin*, that Section 5 of the Voting Rights Act might be unconstitutional despite its recent overwhelming reauthorization by Congress, suggests a similar callousness to the interests of racial minorities.[273] By its terms, the Voting Rights Act applies only to jurisdictions that have a history of minority voter disenfranchisement. And by its terms the Act permits those jurisdictions to make any changes they desire to their voting practices and procedures, provided they can first demonstrate that they are not perpetuating the sorts of past discrimination that caused them to become covered jurisdictions.[274] Rather than acquiesce in the need for suspect jurisdictions to make that showing, however, Chief Justice Roberts preferred to subject racial minorities to the danger of continued voter discrimination. Moreover, he did so in a political climate involving recent presidential elections that were rife with allegations of politically-partisan, minority voter disenfranchisement.[275]

The aphorism with which Chief Justice Roberts chose to end his opinion in the *Resegregation Cases*—"[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[276]—conveys what is perhaps the most disturbing tone of all of the Roberts Court's post racial discrimination cases. Chief Justice Roberts appears to suggest that the problem of racial discrimination in the United States—a problem that has plagued the nation for hundreds of years, since before the nation's inception—is really not such a difficult problem after all. All we have to do to solve the pesky problem of racial discrimination is ignore the continuing legacy of past discrimination, and prospectively behave in a colorblind, race neutral manner. Imagine how insulting it must be for racial minorities to be told that their problem can be solved in such a simple-minded manner.

There remains an enduring sense of white entitlement, highlighted by Cheryl Harris in *Whiteness As Property*,[277] pursuant to which whites have traditionally thought it *natural* to exploit racial minorities in order to advance white interests. Hillary Jordan's novel *Mudbound*[278] illustrates this nicely. In the novel, post-slavery Southern white planters—who commonly cheated and abused their black workers—sat around vilifying the "niggers" for moving North and leaving the planters with no one to harvest their crops, other than workers who would demand market rates for their labor. The novel was set in the post-World War II era, but I fear that the attitude of entitlement that it captures is both less fictitious and less dated than one would hope.

I doubt that the conservative bloc members of the Roberts Court share the racial sentiments expressed by Chief Justice Taney in *Dred Scott*.[279] Still, there is an aspect of Roberts Court postracial discrimination that *Dred Scott* renders hauntingly familiar. *Dred Scott* entailed the Supreme Court's invalidation of a congressional effort to solve a serious racial problem. As the subsequent Civil War indicates, the Court's invalidation of that congressional effort did not work out well. During Reconstruction, the Supreme Court also engaged in efforts to limit or invalidate congressional efforts to solve our continuing racial problems. Again, the Supreme Court often chose to limit or invalidate those efforts. [280] Unfortunately, Roberts Court efforts to treat racial minorities as if they are no longer victims of discrimination, in order to protect the interests of whites instead, share the historical Court's propensity to marginalize or overrule congressional policies that have been adopted to help remedy racial discrimination. The Roberts Court Justices certainly understand this facet of Supreme Court history, but the conservative bloc Justices have chosen to align themselves with those historical practices nevertheless. Separation of powers considerations aside, it is simply not clear to me why the Roberts Court thinks it can do a better job of formulating race relations policy than the politically accountable, representative branches of government, or why the Roberts Court would want to align itself with the darker strands of Supreme Court racial history. I fear that the conservative bloc Justices on the Roberts Supreme Court

may actually consider themselves to be proud heirs of the racial attitudes that they seem to have inherited from their predecessors.

Conclusion

The view that the Roberts Court seems to have of racial minorities is disheartening. The *Ricci* firefighters decision suggests that the Court's conservative bloc majority favors the interests of whites over the interests of racial minorities. Moreover, the intensity of that favoritism is strong enough to prompt the Court to circumvent statutory protections that Congress enacted precisely to prevent such racial favoritism. Because other Roberts Court race decisions exhibit a similar favoritism, the Court's preference for whites seems intentional and persistent, rather than incidental or sporadic. The tone and outcome of the Court's decisions are reminiscent of earlier Supreme Court decisions that were openly hostile to racial minority rights. This suggests that contemporary racial attitudes may be more firmly rooted in the past than we would like to admit. The Roberts Court's race decisions seem premised on the view that we now live in a postracial culture, where discrimination against racial minorities has largely ceased to exist, and our most serious racial problem is the problem of minorities discriminating against whites. The election of Barack Obama notwithstanding, the systemic disadvantages that minorities continue to suffer relative to whites makes the assertion of that view seem disingenuous. It is as if the Supreme Court were simply looking for a novel justification to continue its time-honored practice of sacrificing racial minority rights for the benefit of whites.

Endnotes

* Professor of Law, Georgetown University Law Center. I would like to thank James Forman, Jody Franklin, Steven Goldberg, Patricia King, Mike Seidman, and David Vladeck for their help in developing the ideas expressed in this article. Research for this article was supported by a grant from the Georgetown University Law Center.

[1] *See, e.g.*, Peter Baker, *Court Choice Pushes Issue of "Identity Politics" Back to Forefront*, N.Y. Times, May 31, 2009, at A20 (discussing claim that Obama election "was supposed to usher in a new post-racial age"); Krissah Thompson, *100 Years Old, NAACP Debates Its Current Role*, Wash. Post, July 12, 2009, at A3 (quoting historian David Garrow's suggestion that the election of President Obama marked the end of the traditional civil rights era by signifying "the complete inclusion of black people at all levels of politics."); *id*. (reporting Professor Darren Hutchinson's suggestion that we are now in a period of "racial exhaustion," when "[a] lot of people are tired of talking about race," and "[t]hey have to find a new language for dealing with these issues."); Jeffrey Toobin, *Comment: Answers To Questions*, New Yorker, July 27, 2009, at 19 (noting that Obama's election has been invoked to argue that we have now achieved a level playing field that precludes the need for remedial racial measures).

[2] *See* Baker, *supra* note 1 (suggesting that nomination of then-Judge Sotomayor for the Supreme Court shows that we have not yet reached a post-racial age). *See, e.g.,* Sheryl Gay Stolberg, *Obama Tells Fellow Blacks: 'No Excuses' for Any Failure*, N.Y Times, July 16, 2009, at A14 (President Obama addressing NAACP 100 anniversary convention, stating that racial discrimination continues to exist despite civil rights gains); Krissah Thompson & Cheryl W. Thompson, *Obama Speaks of Blacks' Struggle: Disparities Remain, He Says to NAACP*, Wash. Post, July 17, 2009, at A1. *See also* Krissah Thompson, *Obama Addresses Race and Louis Gates Incident*, Wash. Post, July 23, 2009, at A4 (President Obama stating that racially charged arrest of Henry Louis Gates illustrates that racial profiling still exists); Krissah Thompson & Cheryl W. Thompson, *After Arrest, Cambridge Reflects on Racial Rift: Forum To Explore Deep-Seated Issues*, Wash. Post, July 26, 2009, at A1 (Gates arrest illustrates continued existence of deep-seated racial tensions); Toobin, *supra* note 1 (rejecting claim that Obama's election has leveled the playing field in a way that now precludes need for remedial racial measures); Henry Louis Gates, *A Conversation with William Julius Wilson on the Election of Barack Obama*, 6 Du Bois Review 15, 15-23 (2009) (disputing postracial claim).

[3] 129 S. Ct. 2658 (2009).

[4] *See id*. at 2673-77, 2681 (depicting white firefighters as victims and minority firefighters as perpetrators of discrimination).

[5] *See id.* at 2658.

[6] *See id*. at 2664-72 (describing the facts and procedural history of case).

[7] *See id*. at 2664-65, 2672, 2673-77 (finding conflict between disparate-treatment and disparate-impact provisions of Title VII, and giving primacy to disparate-treatment provision).

[8] *See id*. at 2681 (Scalia, J., concurring).

[9] *See id*. at 2683-84 (Alito, J., concurring).

[10] *See id.* at 2689, 2699, 2703-07 (Ginsburg, J., dissenting).

[11] *See* Girardeau A. Spann, *The Conscience of a Court*, 63 Miami L. Rev. 431, 437-38 (2009) (discussing the conservative Supreme Court voting bloc on the issue of race).

[12] *See id.*

[13] *See Ricci*, 129 S. Ct. at 2664-65.

[14] *See id*. at 2665-73.

[15] *See id*. at 2665-66.

[16] *See id*. at 2666.

[17] *See id.*

[18] *See id*. at 2667.

[19] *See id*. at 2667-68.

[20] *See id*. at 2668.

[21] *See id*. at 2668-69.

[22] *See id*. at 2669.

[23] *See id*. at 2670.

[24] *See id*. at 2669-71.

[25] *See id*. at 2671-72.

[26] *See id*. at 2673-74.

[27] *See id*. at 2672, 2681.

[28] 401 U.S. 424, 431-32 (1971).

[29] 422 U.S. 405, 425 (1975).

[30] *See Ricci*, 129 S. Ct. at 2672-73.

[31] *See id.* at 2673-74.

[32] *See id*. at 2674.

[33] *See id.*

[34] *See id*. at 2674-75.

[35] *See id*. at 2675.

[36] *See id*. (citing Richmond v. J.A. Croson, Co., 488 U.S. 469, 500 (1989) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion of Powell, J.)).

[37] *See id*. at 2675-76.

[38] *See id*. at 2676.

[39] *See id.*

[40] *See id.*

[41] *See id*. at 2677.

[42] *See id.*

[43] *See id.*

[44] *See id.* at 2677-78.

[45] *See id.*

[46] *See id.* at 2678 (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)).

[47] *See id.* at 2678-79.

[48] *See id.*

[49] *See id.* at 2679.

[50] *See id.* at 2679-80.

[51] *See id.* at 2680-81.

[52] *See id.* at 2681.

[53] *See id.*

[54] *See id.* at 2681-82 (Scalia, J., concurring).

[55] *See id.* at 2682 (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954), and Buchanan v. Warley, 245 U.S. 60, 78-82 (1917)).
[56] *See id.* (citing *Ricci*, 129 S. Ct. at 2673, and Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
[57] *See id.*
[58] *See id.* (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).
[59] *See id.* (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).
[60] *See id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1998) (plurality opinion), and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).
[61] *See id.* at 2682-83 (Alito, J., concurring).
[62] *See id.* at 2683.
[63] *See id.*
[64] *See id.*
[65] *See id.* (quoting *Ricci*, 129 S. Ct. at 2677).
[66] *See id.*
[67] *See id.* at 2683-84.
[68] *See id.* at 2684.
[69] *See id.* at 2685-87.
[70] *See id.* at 2688.
[71] *See id.* at 2688-89.
[72] *See id.* at 2689.
[73] *See* Spann, *supra* note 11, at 441-42 (discussing the liberal Supreme Court voting bloc on the issue of race).
[74] *See id.*
[75] *See Ricci*, 129 S. Ct. at 2689-90 (Ginsburg, J., dissenting).
[76] *See id.* at 2690-91.
[77] *See id.* at 2691-92.
[78] *See id.* at 2692-93.
[79] *See id.* at 2693-95.
[80] *See id.* at 2695-96.
[81] *See id.* at 2696-99 (citing, inter alia, Griggs v. Duke Power, 401 U.S. 424, 428-32 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); and Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989)).
[82] *See id.* at 2699.
[83] *See id.* at 2699-2700 (citing Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 638, 642 (1987)).
[84] *See id.* at 2700 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) and Washington v. Davis, 426 U.S. 229, 239 (1976)).
[85] *See id.* at 2700 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 238 (1995) (quoting City of Richmond v. J.A. Croson Co., 448 U.S. 469, 507 (1989))).
[86] *See id.* at 2700-01 (quoting Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003)).
[87] *See id.* at 2701 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); *Croson*, 448 U.S. at 499-500; *Johnson*, 480 U.S. at 637; and Firefighters v. Cleveland, 478 U.S. 501, 516 (1986)).
[88] *See id.* at 2701-02. This argument is strengthened by Justice Kennedy's issuance of an "advisory opinion" that shows the stringency of his "strong basis in evidence" standard; *see also infra* text accompanying notes 165-167.
[89] *See Ricci*, 129 S. Ct. at 2702-03.
[90] *See id.* at 2703-04.
[91] *See id.* at 2704-06.
[92] *See id.* at 2706-07.
[93] *See id.* at 2707-09.
[94] *See id.* at 2709-10 (citing Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)).
[95] *See id.* (citing Griggs v. Duke Power, 401 U.S. 424, 431 (1971)).
[96] *See id.* at 2672, 2673-74.
[97] *See id.* at 2699 (Ginsburg, J., dissenting).
[98] *See id.* at 2695-96, 2699-2700 (discussing pre-existing Title VII law). The issue attracted national attention during the July 2009 Senate confirmation hearings for Justice Sotomayor, when opponents attempted to paint then-Judge Sotomayor as an unsympathetic judicial activist because of her membership on the three-judge Second Circuit panel that summarily affirmed the District Court decision in *Ricci*. *See, e.g.*, Neil A. Lewis, *Senate Likely to Vote on Sotomayor in August*, N.Y. TIMES, July 16, 2009, at A11 (discussing opposition to panel ruling in firefighter case); Amy Goldstein & Paul Kane, *Democrats Rally for Sotomayor; Backers Dismiss GOP Resistance*, WASH. POST, Aug. 6, 2009, at A0; Joseph Williams, *Committee Endorses Sotomayor Bid; Latino Groups Angry at GOP for Opposition*, BOSTON GLOBE, July 29, 2009, at 6. The panel's actions can easily be viewed as the routine application of existing law—albeit existing law that the *Ricci* Supreme Court subsequently decided to change in Justice Kennedy's majority opinion.
[99] See GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 31-43 (2000) (discussing Title VII cases in which the Supreme Court sought to find the proper balance between helping women and minorities, and burdening white males).
[100] *See Ricci*, 129 S. Ct. at 2675-76.
[101] *Cf. id.* at 2681 (framing his opinion as resolving "competing expectations under the disparate-treatment and disparate-impact provisions" of Title VII).
[102] *See id.* at 2675-76.
[103] *See id.* at 2696-99 (Ginsburg, J., dissenting); *see also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA, 173-75 (1993) (discussing the Civil Rights Act of 1991 and some of the Supreme Court cases that lead to its enactment).
[104] 60 U.S. (19 How.) 393, 451-52 (1857).
[105] U.S. CONST. amend XIV.
[106] *See* GEOFFREY STONE ET AL, CONSTITUTIONAL LAW 451-52 (6th ed. 2009) (discussing post-Civil War shift in federalism balance).
[107] 190 U.S. 3, 8-19 (1883).
[108] *See* U.S. CONST. amend XIV, § 5; *see also* STONE ET AL, *supra* note 106, at 453-56 (discussing Supreme Court dilution and invalidation of Reconstruction Amendments and legislation).
[109] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2699 (2009) (Ginsburg, J., dissenting).
[110] *See id.* at 2701-02. This argument is strengthened by Justice Kennedy's issuance of an "advisory opinion" that shows the stringency of his "strong basis in evidence" standard*; see infra* text accompanying notes 165-167.
[111] *See Ricci*, 129 S. Ct. at 2703-04, 2706-07 (Ginsburg, J., dissenting).
[112] *See id.* at 2704-06.
[113] *See id.* at 2703-07.
[114] *See id.* at 2705.
[115] *See id*. at 2676.
[116] *See id.* at 2682 (Scalia, J., concurring).
[117] *See id.*
[118] *See id.*
[119] *See id.* at 2687-88 (Alito, J., concurring).
[120] *See id.* at 2688.
[121] *See id.* at 2687-88.
[122] *See id.* at 2684-88.
[123] *See id.* at 2684.
[124] *Cf. id.* at 2690-91 (Ginsburg, J., dissenting).
[125] *See supra* text accompanying notes 11-12 (discussing Justice Alito's membership in the Supreme Court conservative voting bloc on race).
[126] *See Ricci*, 129 S. Ct. at 2665 (discussing "rule of three"); *see also* Ricci v. DeStefano, 554 F. Supp.2d 142, 145 (2006) (discussing "rule of three"). *See id.* at 160-61 (considering the issue of standing and ruling that the petitioners possessed standing to challenge the City's failure to certify the exam results).
[127] *See Ricci*, 129 S. Ct. at 2666 (discussing the number of promotion vacancies); *see also id.* at 2664 (noting that the suit was filed by "[c]ertain white and Hispanic firefighters who *likely* would have been promoted based on their good test performance") (emphasis added).
[128] Although nineteen candidates would have been considered for the fifteen available promotions under the rule of three, only eighteen of those nineteen candidates chose to sue. One of the disappointed Latino candidates was therefore not a petitioner in the case. *See Ricci*, 129 S. Ct. at 2666, 2671 (discussing the number of candidates and number of petitioners).
[129] *See* Massachusetts v. EPA, 549 U.S. 497, 517-18 (2007); *see also id.* at 536 (Roberts, C.J., dissenting); Ne. Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 663-64 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992); Allen v. Wright, 468 U.S. 737, 752-53 (1984); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37-39 (1976).
[130] *See Defenders of Wildlife*, 504 U.S. at 568-71.
[131] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-89 (1990).

[132] *See Simon*,, 426 U.S. at 40-46.
[133] *See EPA,* 549 U.S. at 517-18, 525-26 (finding standing despite redressability problems); *cf. id*. at 536; 540-49 (Roberts, C.J., dissenting) (arguing that Massachusetts lacked standing because of redressability problems).
[134] *See* Girardeau A Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 n.1 (1995) (quoting comments concerning disarray of standing doctrine).
[135] This argument is developed more fully in *id.*
[136] 468 U.S. 737, 756-61 (1984); *see also* Spann, *supra* note 134, at 1456 (discussing *Allen v. Wright*).
[137] 422 U.S. 490, 502-08 (1975); *see also* Spann, *supra* note 134, at 1455-56 (discussing *Warth v. Seldin*).
[138] *See* Spann, *supra* note 134, at 1457-58 (discussing Los Angeles v. Lyons, 431 U.S. 95, 97-104 (1983); Rizzo v. Goode, 423 U.S. 362, 366-73 (1976); O'Shea v. Littleton, 414 U.S. 488, 490-93 (1974); Spomer v. Littleton, 414 U.S. 514, 519-23 (1974)).
[139] 508 U.S. 656, 663-64 (1993); *see also* Spann, *supra* note 134, at 1426-27; 1446-52 (discussing *Northeastern Florida*).
[140] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 210-12 (1995) (granting standing to white plaintiff).
[141] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 909 (1995) (granting standing to whites who challenged redistricting of voter district in which they resided, where challenged redistricting increased minority voting strength); *cf*. Shaw v. Reno, 509 U.S. 630 (1993) (permitting white challenge to redistricting plan that increased minority voting strength without discussing issue of standing); *but see* United States v. Hays, 515 U.S. 737, 744-47 (1995) (denying standing to whites who challenged redistricting of voting district in which they did not reside).
[142] *See e.g.,* Flast v. Cohen, 392 U.S. 83, 95-97 (1968) (discussing Article III restriction on advisory opinions); Massachusetts v. E.P.A., 549 U.S. 497, 516 (2007).
[143] *See* Ricci v. DeStefano 129 S. Ct. 2658, 2681 (2009) (noting that no complaint was filed in such a hypothetical suit, no discovery was conducted concerning job-relatedness or the existence of less discriminatory alternatives, no subsidiary legal issues were identified or briefed, and of course, no trial was conducted).
[144] *See id.* at 2677 (quoting FED. R. CIV. P. 56(c)).
[145] *See id.* at 2681.
[146] *See id.* at 2667.
[147] *See id*. at 2667-68.
[148] *See id*. at 2668-69.
[149] *See id*. at 2669.
[150] *See id*. at 2670.
[151] *See id.* at 2702-07 (Ginsburg, J., dissenting).
[152] *See id.* at 2679-81.
[153] *See id.* at 2705 n.15 (Ginsburg, J., dissenting).
[154] *Cf. id.* at 2683-88 (Alito, J., concurring) (highlighting the factual disputes concerning the City's motive that should have precluded summary judgment for the City).
[155] *See id.* at 2680.
[156] *See id.* at 2670-71.
[157] *See id.* at 2705 (Ginsburg, J., dissenting).
[158] *See id.* at 2691 (Ginsburg, J., dissenting) (noting that the procedures specified in the union contract had been used for two decades).
[159] *See id*. at 2683-88 (Alito, J., concurring) (discussing racial politics).
[160] *See id.* at 2702-03 (Ginsburg, J., dissenting); *see also id.* at 2703 n.9 (noting that the majority's failure to remand deprived the City of the opportunity to raise a statutory defense that was available for good faith compliance with a written interpretation of the Equal Employment Opportunity Commission).
[161] *See id.* at 2681.
[162] *See id.* at 2698-99 (Ginsburg, J., dissenting) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60).
[163] *See id.* at 2675-76 (borrowing the "strong basis in evidence" standard from the Supreme Court's Equal Protection jurisprudence).
[164] After the Supreme Court upheld the constitutionality of a congressionally enacted broadcast affirmative action plan in Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990), the Court did not uphold the constitutionality of another racial affirmative action plan until it's 2003 decision upholding the University of Michigan Law School plan in Grutter v. Bollinger, 539 U.S. 306 (2003). However, that same day, the Court invalidated the University of Michigan's undergraduate affirmative plan in Gratz v. Bollinger, 539 U.S. 244 (2003), even though the two plans are difficult to distinguish. *See, e.g.*, Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 227-29, 242-49 (2004) (discussing Supreme Court voting blocs, and the difficulty distinguishing between *Grutter* and *Gratz*); SPANN, *supra* note 99, at 159-63 (discussing Supreme Court outcomes and voting blocs in racial affirmative action cases).
[165] *See Ricci*, 129 S. Ct. at 2681.
[166] *See id.*; *see also id.* at 2681 (noting that Justice Kennedy's "advisory opinion" was explicitly articulated in terms of interest balancing. Justice Kennedy states: "Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. 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.").
[167] *See id.* at 2701-02 (Ginsburg, J., dissenting); *see also supra* text accompanying note 88 (discussing Justice Ginsburg's fear of impeding voluntary compliance).
[168] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (asserting that official segregation did not stamp blacks with a badge of inferiority unless blacks chose to interpret segregation in that manner).
[169] *See, e.g.*, ROBERT GOLDMAN & STEPHEN PAPSON, NIKE CULTURE: THE SIGN OF THE SWOOSH 113-17 (Sage Publications) (1998) (discussing Nike's use of Tiger Woods as a post-racial, multicultural icon).
[170] *See* Leonard Pitts, *It's Not the End of Race—Just a Big Step Forward*, ORLANDO SENTINEL, Jan. 18, 2009, at A19 (discussing whether black politicians, including Michael Steele, are "post-racial").
[171] *See* sources cited *supra* note 1 (suggesting that Obama's election as president indicates shift to postracial culture).
[172] *See* Cheryl W. Thompson, et al., *Gates, Police Officer Share Beers and Histories with President*, WASH. POST, July 31, 2009, at A3 (discussing Gates arrest by Cambridge police officer).
[173] Ann Gerhart, *Alleged Prejudice Starts Probe at Club: Pa. Organization Revoked Swim Contract for Day Camp that Included Minorities*, WASH. POST, July 11, 2009, at A2 (discussing exclusion of minority children from swim club).
[174] *See* DeNeed L. Brown, *Through the Past, Darkly: The Legacy of Colorism Reflects Wounds of Racism that Are More than Skin-Deep*, WASH. POST, July 12, 2009, at E1 (discussing Michael Jackson's transformed skin color).
[175] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2689-91 (2009) (Ginsburg, J., dissenting).
[176] *See id.*
[177] *See id*. at 2673-77, 2681.
[178] *See id*. at 2683-87 (Alito, J., concurring).
[179] *See* Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 645-52 (2007) [hereinafter *Affirmative Inaction*] (noting the author's inversion arguments in the context of criticizing the Supreme Court's hostility to affirmative action, , and the author's efforts to deconstruct the very distinction between affirmative action and discrimination); *see also* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 63-76 (1995).
[180] *See* Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709, 722-29 (2005) [hereinafter *Constitutionlization*] (describing baseline shifting as a strategic analytical technique).
[181] *See Ricci*, 129 S. Ct. at 2673-77, 2681 (depicting white firefighters as victims, and minority firefighters as perpetrators of discrimination).
[182] *See Constitutionalization*, *supra* note 180, at 721-23 (discussing Realist insight that there is no natural baseline).
[183] *See Ricci*, 129 S. Ct. at 2673-77, 2681 (discussing the need to avoid disparate-treatment discrimination, and to avoid burden on high scoring firefighters).
[184] *See id.* at 2689-90, 2696-700 (Ginsburg, J., dissenting) (discussing the need to avoid disparate-impact discrimination).
[185] *See id.* at 2696-99 (discussing Title VII's goal of preventing disparate-impact discrimination).
[186] *See id.* at 2673-77, 2681.
[187] *See* sources cited *supra* note 2 (citing commentators who are skeptical of the postracial claim).

[188] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 299-301 (2003) (Ginsburg, J., dissenting) (discussing the striking racial disparities that continue to exist in distribution of societal resources).
[189] *See supra* text accompanying notes 172-174 (discussing the contemporary significance of race).
[190] *See* sources cited *supra* note 1 (citing commentators who suggest that contemporary culture is now postracial).
[191] *See* Kelefa Sanneh, *Comment: Discriminating Tastes*, THE NEW YORKER, Aug 10 & 17, 2009, at 21.
[192] *See id.*
[193] *See id.*
[194] *See id.*
[195] This prohibition on the use of legal remedies to redress general societal discrimination, as opposed to identifiable acts of particularized discrimination, was articulated by Justice Lewis Powell in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978), and reasserted by Justice Powell in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-78 (1986) (Powell, J., plurality). Led by Justice Sandra Day O'Connor, this view has now been adopted by a majority of the full Supreme Court. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 323-25 (2003) (citing *Bakke* as rejecting interest in remedying societal discrimination); Shaw v. Hunt, 517 U.S. 899, 909-10 (1996) (rejecting societal discrimination); Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 610-14 (1990) (O'Connor, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496-98 (1989) (plurality opinion of O'Connor, J.); Johnson v. Transp. Agency, 480 U.S. 616, 647-53 (1987) (O'Connor, J., concurring); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (O'Connor, J., concurring). *See generally* SPANN, *supra* note 99, at 168-69 (discussing general societal discrimination).
[196] *See* Spann, *Affirmative Inaction*, *supra* note 179, at 636-39 (criticizing the societal discrimination rule).
[197] *See* Gratz v. Bollinger, 539 U.S. at 299-304 (Ginsburg, J., dissenting) (discussing the striking racial disparities that continue to exist in distribution of societal resources).
[198] *See* Gates, *supra* note 2, at 15-23 (2009) (discussing Wilson's rejection of the postracial claim).
[199] *See* Thompson, *supra* note 1, at A3 (discussing Darren Hutchinson's concept of "racial exhaustion").
[200] *See* Thompson et al., *supra* note 172, at A3 (citing discussions of Gates' arrest).
[201] *See* STONE ET AL., *supra* note 106, at lxxi (discussing the confirmation of Chief Justice Roberts).
[202] 129 S. Ct. 2504 (2009).
[203] *See id.* at 2508-11, 2513-17.
[204] *See id.* at 2513 (declining to address the constitutional question).
[205] *See id.* at 2511-13 (suggesting that Section 5 would now be unconstitutional). Justice Thomas expressed similar sentiments, stating that "[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional." *See id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part).
[206] *See* David S. Broder, *For Obama, Court Cases That Matter*, WASH. POST, July 2, 2009, at A19 (arguing that *Northwest Austin* and *Ricci* reflect the Supreme Court view "that racial discrimination is no longer as big a problem as we thought").
[207] *See* Adam Cohen, *The Supreme Court's Hostility to the Voting Rights Act*, N.Y. TIMES, May 13, 2009, at A30 (discussing congressional vote, hearings and legislative record).
[208] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2696-99 (2009) (Ginsburg, J., dissenting).
[209] *See Northwest Austin*, 129 S. Ct. at 2511-13 (suggesting that Section 5 would now be unconstitutional); *see also id.* at 2519, 2526-27 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that Justice Thomas expressed similar sentiments and would have declared Section 5 to be unconstitutional in *Northwest Austin* itself, stating that "[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional."); *see also* E.J. Dionne, Jr., *Courtly Politics: A Compromise Sustains the Voting Rights Act*, WASH. POST, June, 25, 2009, at A19 (commenting on threatened future invalidation of Voting Rights Act).
[210] *See Ricci*, 129 S. Ct. at 2676, 2681 (expressly raising and reserving the question of Title VII constitutionality).
[211] *See* SPANN, *supra* note 99, at 180-89 (discussing the redistricting cases that the Supreme Court decided after 1990 census); *see also* Bush v. Vera, 517 U.S. 952, 956-57 (1996) (plurality opinion of Justice O'Connor, J.) (citing a series of Supreme Court redistricting cases decided "in the wake of 1990 census").
[212] *See, e.g.,* Lawyer v. Dep't. of Justice, 521 U.S. 567, 569-75 (1997) (discussing a redistricting plan that was modified after preclearance denial and subsequent negotiations with Justice Department); Miller v. Johnson, 515 U.S. 900, 905-10 (1995); Shaw v. Reno, 509 U.S. 630, 633-39 (1993).
[213] 129 S. Ct. 1231 (2009).
[214] *See id.* at 1238-40 (plurality opinion of Kennedy, J.).
[215] *See id.* at 1241-1246 (rejecting the vote dilution protections for crossover districts).
[216] *See id.* at 1250 (Souter, J., dissenting) (discussing perverse incentives).
[217] *See id.* at 1251 (Souter, J., dissenting).
[218] *See id.* at 1243.
[219] *See id.* at 1245, 1247-49.
[220] *See id.* at 1249 (suggesting that racism in voting was waning); *but see id*. (suggesting that much still remains to be done).
[221] *Cf. id*. at 1255 (Souter, J., dissenting).
[222] 129 S. Ct. 1937 (2009).
[223] *See id.* at 1942-43 (holding that the allegations in the complaint were insufficient to survive a motion to dismiss).
[224] *See id.* at 1943-44.
[225] *See id.* at 1944-45.
[226] *See id.* at 1951 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (1950)).
[227] *See id.* at 1951.
[228] *See id.* at 1948-49, 1952.
[229] *See* Melinda Hanson, *Term in Review: Civil Cases*, 78 U.S.L.W. 3025, 3025-27 (July 21, 2009) (discussing the tension between *Iqbal* and notice pleadings).
[230] *See, e.g.*, Editorial, *Illegal, and Pointless*, N.Y. TIMES, July 17, 2009, at 22 (discussing possible involvement of high level government officials in torture of terrorist suspects); Doyle McManus, *Tortuous Road to the Truth*, L.A. TIMES, July 19, 2009, at A31; Michael Muskal, *What and Why Behind CIA Counterterror Issue*, CHI. TRIB., July 26, 2009, at 30.
[231] 129 S. Ct. 2579 (2009).
[232] *See id.* at 2588-89.
[233] *See id.* at 2590-92.
[234] *See id.* at 2593-95 (discussing FED. R. CIV. P. 60(b)(5) standards).
[235] *See id.* at 2595-2600 (discussing the need for flexibility, and deemphasizing the importance of complying with lower court funding orders).
[236] *See id.* at 2600-2606.
[237] *See id.* at 2607-08, 2613-15, 2621-28 (Breyer, J., dissenting).
[238] *See id.* at 2631 (expressing concern for Spanish-speaking students).
[239] *See, e.g.,* Thomas D. Edmondson & Melinda Hanson, *High Court Gives Arizona Another Crack At Doffing Language Program Injunction*, 77 U.S.L.W. 1825 (June 30, 2009) (discussing the finality problem).
[240] *See* State English Language Learners' Program Triggers Debate on Funding, Remedial Orders, 77 U.S.L.W. (April, 28, 2009).
[241] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
[242] *See id.* at 709-10 .
[243] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) (rejecting the separate-but-equal doctrine and declaring official school segregation to be unconstitutional); *see also* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (tempering the effect of *Brown* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed").
[244] *See Parents Involved*, 551 U.S. at 709-18.
[245] *See id.* at 710-11, 715-18.
[246] *See id.* at 711, 722-25.
[247] *See id.* at 745-48 (plurality opinion of Roberts, C.J.) (invoking *Brown*).
[248] *See id.* at 741-48 (plurality opinion of Roberts, C.J.) (ignoring motive).
[249] *Id.* at 748.
[250] *See id.* at 803-04, 823-30, 858-63 (Breyer, J., dissenting) (arguing that *Brown* and other precedents permitted plans).

[251] *See, e.g.*, Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431 (2009) (noting the author's vigorous criticisms of the *Resegregation Cases* arguing that the Supreme Court is serving as the judicial arm of the "movement conservative" effort to dismantle the New Deal welfare state); Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565 (2009) (arguing that the Supreme Court is constitutionalizing school segregation).
[252] *See* District Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2319-23 (2009) (denying post-conviction access to DNA testing).
[253] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing the European discovery of the land now constituting the United States, the conquest of indigenous Indian inhabitants, and divesting Indians of title to that land).
[254] 60 U.S. (19 How.) 393 (1857).
[255] *See id.* at 407 (holding that blacks could not be citizens within the meaning of the United States Constitution for purposes of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).
[256] U.S. CONST. amend. XIV, § 1 (granting citizenship to blacks); *cf. id*. amend. XIII (abolishing slavery).
[257] *See, e.g.*, Civil Rights Cases, 109 U.S. 3, 8-19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875 and imposing "state action" restriction on congressional antidiscrimination legislation); United States v. Cruikshank, 92 U.S. 542, 551-59 (1876) (refusing to apply criminal provisions of Enforcement Act of 1870 to Ku Klux Klan lynching of black freedmen); *see also* STONE ET AL., *supra* note 106, at 453-56 (describing the Supreme Court's restrictions on Reconstruction legislation).
[258] 163 U.S. 537, 548, 551-52 (1896) (upholding the constitutionality of separate-but-equal regime of racial discrimination in public facilities by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).
[259] *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61-97, 135-70 (2004) (discussing formal minority victories in the Supreme Court that made little practical difference in preventing actual discrimination).
[260] *See id.* at 117-35 (discussing formal minority victories in the criminal justice system that had little practical consequence in preventing discrimination).
[261] 323 U.S. 214, 215-19 (1944) (upholding the World War II exclusion order that led to Japanese American internment).
[262] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) (rejecting the separate-but-equal doctrine and declaring official school segregation to be unconstitutional).
[263] *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (tempering the effect of *Brown* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed"); *see also* STONE ET AL., *supra* note 106, at 473-79 (discussing delay in implementation of *Brown*).
[264] *See, e.g.,* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208-09 (1973) (adopting expansive interpretation of de jure segregation, but reaffirming the prohibition of race-conscious remedies to eliminate de facto segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971); *cf.*, Washington v. Davis, 426 U.S. 229, 238-48 (1976) (reading the Equal Protection Clause to permit racially disparate impact that is not directly caused by intentional discrimination); Milliken v. Bradley, 418 U.S. 717, 732-36, 744-47 (1974) (refusing to allow inter-district judicial remedies for de facto school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority); *see also* STONE ET AL., *supra* note 106, at 479-88 (discussing the current de facto school segregation).
[265] 350 U.S. 891, 891 (1955) (per curiam) (considering the constitutionality of aVirginia miscegenation statute that was upheld by the Virginia Supreme Court of Appeals, vacating the Virginia decision, and remanding for clarification of the record); Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956) (per curiam) (reaffirming its earlier decision and refusing to clarify the record); Naim v. Naim, 350 U.S. 985, 985 (1956) (per curiam) (declining to recall or amend the mandate, finding that the constitutional question had not been "properly presented," which allowed the Virginia Court's decision to remain in effect). Because the neutrality principle announced in *Brown* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court's failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court's actions in *Naim* have been vigorously criticized. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"–A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) ("[T]here are very few dismissals similarly indefensible in law."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (noting that dismissal of the miscegenation case was "wholly without basis in the law"). The Supreme Court ultimately invalidated the Virginia miscegenation statute as a manifestation of white supremacy eleven years later in Loving v. Virginia, 388 U.S. 1, 6, 11-12 (1967), when only sixteen states still had miscegenation statutes on the books.
[266] *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293-95, 307 (1978) (controlling opinion of Powell, J.) (reading *Brown* to prohibit affirmative action that benefits racial minorities at the expense of whites); *see also* Spann, *supra* note 99, at 156-89 (discussing affirmative action and redistricting cases).
267 *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404-05 (1857).
[268] *See id.* at 407.
[269] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2673-77, 2681 (2009) (depicting white firefighters as victims, and minority firefighters as perpetrators of discrimination).
[270] *See id*. at 2664-65, 2672, 2673-77 (finding conflict between the disparate-treatment and disparate-impact provisions of Title VII, and adopting a "strong basis in evidence standard" to give primacy to the disparate-treatment provision).
[271] *See supra* text accompanying notes 262-264 (discussing the Supreme Court's failure to enforce *Brown*).
[272] *See supra* text accompanying notes 241-251 (discussing the *Resegregation Cases*).
[273] *See* Northwest Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2511-13 (2009) (suggesting that Section 5 would now be unconstitutional); *id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part) ("[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional.").
[274] *See id.* at 2508-10.
[275] *See, e.g.*, RONALD W. WALTERS, FREEDOM IS NOT ENOUGH: BLACK VOTERS, BLACK CANDIDATES, AND AMERICAN PRESIDENTIAL POLITICS 96-105, 180-81 (2007) (discussing black disenfranchisement in recent presidential elections).
[276] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion of Roberts, C.J.).
[277] *See* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1710-15 (1993) (discussing white entitlement).
[278] *See* HILLARY JORDAN, MUDBOUND 61-62 (2008) (conveying white entitlement).
[279] *See supra* text accompanying notes 267-268 (quoting from *Dred Scott*).
[280] *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 551-59 (1876) (refusing to apply the criminal provisions of the Enforcement Act of 1870 to Ku Klux Klan lynching of black freedmen); Civil Rights Cases, 109 U.S. 3, 8-19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875 and imposing "state action" restriction on congressional antidiscrimination legislation); *see also* STONE ET AL., *supra* note 106, at 453-56 (describing the Supreme Court's restrictions on Reconstruction legislation).

(*back row, from left to right*) Ya-Wen Chang—Marketing Editor, *The Modern American*; Emma Nelson-Munson—Articles Editor, *The Modern American*; Tatiana Miranda—Editor-in-Chief, *The Modern American*; Heron Greenesmith—Senior Articles Editor, *The Modern American*; and Shiwali Patel—Senior Staff Editor, *The Modern American*

(*front row, from left to right*) Brenda Harkavy—President, Women's Law Association; Michelle Benitez—Managing Editor, *The Modern American*; and Diana Mendez—Executive Editor, *The Modern American*

(*from left to right*) Jamie R. Abrams—WCL Legal Rhetoric Instructor and Women's Bar Association Secretary; Consuela Pinto—President, Women's Bar Association; and The Hon. Judge Ruiz—Associate Judge, District of Columbia Court of Appeals