The Way Forward: Racial Integration After *Ricci*, a Response to Michelle Adams

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INTRODUCTION

Michelle Adams and I share the same vision on the importance of advancing racial integration. Because she is one of the leading scholars on the subject,[1] however, I am concerned about her article's central conclusion that the Supreme Court in *Ricci v. DeStefano*[2] "finds that action taken to avoid disparate-impact liability and integrate the workforce is a form of presumptively impermissible race-based action."[3] This conclusion has immense practical significance. Under this interpretation, public actors could be constitutionally barred from pursuing integration even if they employ race-neutral means to reach that goal.

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1. *See, e.g.*, Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937 (2008); Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261 (2006); Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729 (2001).

2. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

3. Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 841 (2011) [hereinafter "*Discriminatory Purpose*"]. Adams also asks "[w]hether the government's voluntary attempt to integrate the races, *even in the absence of a racial-classification scheme*, is action taken 'because of' race and therefore is presumptively unconstitutional." *Id.* at 839.

To be clear, I am sympathetic to criticism of *Ricci*. Although the Court ducked the constitutional question and ultimately resolved the case on statutory grounds,[4] I agree with Professor Adams that *Ricci* may have further expanded the already highly elastic constitutional boundaries of "reverse-discrimination" claims.[5] Cheryl Harris and Kimberly West-Faulcon persuasively demonstrate that the Supreme Court in *Ricci* ratified a selection process that "unfairly and unnecessarily" perpetuated racial caste in the City of New Haven's fire department.[6] In doing so, the Court hampered Title VII's effectiveness as a measure for excavating racial disadvantage—all while privileging a narrative of white victimization.[7] By striking down the City of New Haven's good-faith efforts to comply with the disparate-impact provisions of Title VII—and to integrate the predominantly white upper ranks of its fire department—the Court suggests that modest, "racially attentive" measures, even those that do not actually inure to the benefit of specific candidates of color, may be impermissible.[8]

That said, this Essay takes aim at two arguments that undergird Adams's *Ricci* critique. My first point of disagreement is about whether *Ricci* can be interpreted to mean that racial integration as a government goal is presumptively unconstitutional.[9] I take the view that *Ricci* did not decide this question, but that Justice Kennedy's majority opinion in *Ricci* can be interpreted nonetheless to support integrative objectives. I define an "integrative objective" as one that seeks to promote racial inclusion and social belonging, including an opportunity to "connect" to a broader, racially heterogeneous community.[10] Specifically, I suggest that after *Ricci*

4. *Ricci*, 129 S. Ct. at 2681 ("Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question.").

5. *See Discriminatory Purpose*, *supra* note 3, at 859. As Adams and others have noted, *Ricci* appears to be a stealth constitutional decision.

6. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 79 (2010).

7. *Id.*

8. *Id.* at 81, 85.

9. Richard Primus also raised this question before *Ricci* was decided. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 538 (2003) ("Even if deemed a facially neutral law rather than one that uses express racial classifications, it would be—on the interpretation here considered—a law with a racially allocative motive and therefore subject to strict scrutiny under *Arlington Heights*."); *see also* Kim Forde–Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2346–48 (2000) (contending that some Supreme Court precedent can be read to suggest that the use of race-neutral means for a benign racial purpose is "discriminatory").

10. *See generally* Aderson Bellegarde François, Only Connect*: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN. ST. L. REV. 985 (2008) (discussing the foundational support for the individual right to community in the Supreme Court's substantive-due-process jurisprudence). This Essay rests on the premise that integration is an important tool for "redress[ing] self-perpetuating patterns of racial hierarchy inherited from a time of de jure discrimination." Primus, *supra* note 9, at 538; *see also* Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After* Ricci *and* PICS, 16 MICH. J.

the government may seek to promote integration without triggering strict scrutiny, provided that the means used toward this end are facially race neutral. "Facially race-neutral means" refers to government actions that on their face do not rely on individualized considerations of race to distribute burdens or benefits.[11] Significantly, facially race-neutral means may still include some *generalized* consideration of race without inviting strict scrutiny.[12] Again, the key is that the state's action does not target or "define" an individual "by race" in the course of allocating some government service or good.[13]

Second, related to my first point, I disagree with Adams's premise that *Ricci* found that the challenged government action was "facially race neutral."[14] I suggest that the Supreme Court's difficulty in *Ricci* was not with the government's race-conscious goal of integrating its workforce, as Adams proposes, but with the City of New Haven's failure to certify the exam results based on the race of the high-scoring candidates. If the top-scoring candidates had been racially diverse, the City would have certified the exam.[15] Race, in this sense, was a predominant motivating factor for the City's decision,[16] a fact the Court relied upon to conclude on Title VII grounds that the City had "intentionally discriminated" against the white

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GENDER & L. 397, 422 n. 132 (2010) (describing the role of integration in reducing "structural racial inequality"); Goodwin Liu, Seattle *and* Louisville, 95 CALIF. L. REV. 277, 282–99 (2007) (discussing studies documenting extensive benefits of racial integration in the educational context).

11. This includes the use of race as a predominant factor in ways that approximate individual racial classifications. The conventional example involves state reapportionment. *See* Liu, *supra* note 10, at 301–09 (discussing predominance test); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 786 (2006) ("Government affords individualized consideration in the context of reapportionment by determining whether individuals meet the selection criteria for inclusion in a given district based on their relevant characteristics . . . . [T]he de facto prohibition on using race as 'the predominant factor' functions as an individualized consideration requirement because it polices the extent to which government may deem racial criteria to be relevant criteria."); *see also* Shaw v. Hunt, 517 U.S. 899, 904 (1996) (analogizing a "racially gerrymandered districting scheme" to "laws that classify citizens on the basis of race").

12. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (observing that race-conscious means that "do not lead to different treatment based on a [racial] classification" are "unlikely . . . [to require] strict scrutiny to be found permissible" because they do not "define[]" the individual by race (citing Bush v. Vera, 517 U.S. 952, 958 (1996))).

13. *Id.*

14. *See Discriminatory Purpose*, *supra* note 3, at 841 ("[I]n *Ricci*, a majority of the Court ruled that facially neutral governmental action taken to avoid disparate-impact liability is 'race-based,' and can only be justified if the 'employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.'").

15. Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006).

16. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2681 ("The problem . . . is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results.").

candidates.[17] *Ricci*, therefore, is better understood as a case about the Court's skepticism of government action that relies on race when making decisions that affect particular individuals' opportunities,[18] rather than about skepticism of government's general efforts to achieve integration.[19]

My reading of Adams's article suggests that this is ultimately where she lands too.[20] But in the interim, her article raises the spectre of the equivalence doctrine[21]—the notion advocated by a minority of Supreme Court Justices that all uses of race, even for benign, racially inclusive purposes, are unconstitutional, with certain very narrow exceptions.[22] I suggest that we need not dwell on the equivalence idea because even the minority of Justices who categorically reject the use of race for racially inclusive purposes appear to endorse the pursuit of such objectives through facially race-neutral means.[23]

Part I of this Essay revisits *Ricci*. Part II returns to *Ricci* to offer some guidance to public actors who want to pursue racial integration through government policies.

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17. *Id.* ("On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results.").

18. *See, e.g.*, *Parents Involved*, 551 U.S. 701 at 720 ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." (citing Johnson v. California, 543 U.S. 499, 505–06 (2005); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)).

19. Indeed, the *Ricci* Court concluded that the City could have refused to certify the scores if it had a "strong basis in evidence" that doing so would have subjected it to Title VII liability for disparate impact. *Ricci*, 129 S. Ct. at 2681. Reva Siegel explains that "[i]n *Ricci*, Justice Kennedy seems equally concerned that government abate racial stratification in ways that respect individual dignity and do not inflame racial balkanization." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1333 (2011).

20. *See Discriminatory Purpose*, *supra* note 3, at 881 (describing the National Opportunity Voucher Program as "consistent with Justice Kennedy's approval of facially race-neutral, yet race-conscious, mechanisms for enhancing diversity and eradicating de facto segregation in *Parents Involved*").

21. *Id.* at 841–44, 850–53.

22. Of the current Justices, only Thomas and Scalia appear to have clearly adopted the equivalence principle that all uses of race, except in certain narrow contexts, are unconstitutional, an approach that Chief Justice Roberts appears to endorse in his plurality opinion in *Parents Involved*. *See* 551 U.S. at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Justices Scalia and Thomas apparently would make exceptions for certain "cataclysmic events." *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1305 (2007); *see also Johnson*, 543 U.S. at 524–50 (Thomas, Scalia, JJ., dissenting) (rejecting strict scrutiny for racial classification in the prison-administration context).

23. *See infra* Part II.

I. REVISITING *RICCI*

Understanding my disagreement with Professor Adams requires a brief return to the facts of *Ricci* and the district court's opinion. In 2003, the City of New Haven administered a civil-service exam to determine eligibility for promotion to senior positions within its fire department.[24] Pursuant to a city-charter mandate, only those scoring in the top three of the exam pool were eligible for a promotion.[25] Blacks and Latinos passed both exams, but no blacks and at most two Latinos scored high enough to be a promotion candidate.[26] City officials asserted that the use of an exam with adverse impact on candidates of color could subject the City to disparate-impact liability under Title VII of the Civil Rights Act of 1964.[27] There was also some concern that the selection process would undermine efforts to diversify the upper ranks of the fire department and would subject the City to unwelcome political pressure[28] Due to a split vote by the City's Civil Service Board on whether to certify the exam results, the promotion lists were not approved.[29] A group of whites and one Latino, who were among the highest scoring candidates, sued the City under Title VII and the Equal Protection Clause.[30] Plaintiffs asserted that the City's failure to certify—and its consequent rejection of—the promotion lists was intentionally racially discriminatory as a matter of law.[31] Plaintiffs' claim set Title VII's disparate-impact and disparate-treatment provisions on a collision course that threatened to undermine the statute's original framework and purpose.[32]

On cross motions for summary judgment, the district court found for the City on both its statutory and constitutional claims.[33] Its decision appears to have rested on two conclusions. First, the City had not relied on any racial classifications in its failure to certify the promotion lists. By this, the court meant that the exam had been "administered and scored in an identical

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

25. *Id.*

26. *Id.* at 154 (indicating that the "rank of the minority applicants [was] also a key factor" in the disparate outcomes).

27. *See* Defendants' Memorandum in Support of Motion for Summary Judgment at 4, *Ricci*, 554 F. Supp. 2d 142 (D. Conn. 2006) (No. 3:04-cv-1109 (MRK)), 2005 WL 3236826.

28. *Ricci*, 554 F. Supp. 2d at 162.

29. *Id.* at 150.

30. *Id.* at 144.

31. *Id.* at 151.

32. *Id.*; *see* Barry Goldstein & Patrick O. Patterson, Ricci v. DeStefano*: Does It Herald an "Evil Day," or Does It Lack "Staying Power"?*, 40 U. MEM. L. REV. 705, 741 (2010) ("The majority in *Ricci* did not acknowledge that the purpose of Congress in enacting Title VII . . . was to achieve equality of opportunity not only through the prohibition of intentional discrimination but also through the removal of unnecessary barriers that disproportionately exclude minorities and women regardless of the employer's intent.").

33. *Ricci*, 554 F. Supp. 2d at 160–62.

fashion for all applicants."[34] In addition, discarding the exam results had affected all the candidates equally, without regard to race. Because no one had been promoted[35] and all of the candidates received a "do-over," the effect was race neutral.[36]

Second, the City's desire to avoid exacerbating racial disparities in the workplace—by using an exam that clearly disadvantaged people of color—did not constitute racial animus against whites.[37] The City's "intent" was to help people of color, not to harm whites. In the district court's reading of Title VII and equal-protection doctrine, these were two distinct motives, not one in the same.[38] The court concluded that "[d]efendants' motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent."[39] Therefore, the City's failure to certify the promotion list was lawful.

However, another finding by the district court complicated its legal conclusion, laying the grounds for reversal in the Supreme Court. As Adams explains, the district court also determined that the City's action was "race-dependent."[40] According to the district court, a jury could reasonably have concluded that the City had rejected the exam results because "too many whites and not enough minorities would be promoted were the lists to be certified."[41] "Had the tests not yielded what [the City] perceived as racially disparate results," the court found, the City "would not have advocated rejecting the tests, and plaintiffs would have had an opportunity to be promoted."[42]

This leads me to the modest, principal point of this Essay—that the problem for the Supreme Court was not that the City's motives were aimed in some measure at integration but that it had relied on the race of the high-scoring candidates to make its decision. As Justice Kennedy wrote in his majority opinion, "[a]ll the evidence demonstrates that the City chose not to certify the examination results *because of* the statistical disparity based on

34. *Id.* at 161 (internal quotation marks omitted).

35. *Id.*

36. The court reasoned that the City's noncertification of the exam results was no different than purposefully designing an exam to minimize the adverse impact on candidates of color, another race-conscious action that the Second Circuit had upheld in an earlier decision. *Id.* (citing Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999)).

37. *Id.* at 160.

38. It is unclear whether the desire to avoid disparate impact referred to a desire to avoid *liability* or to avoid certifying the results of a test that led to racially disparate results because of concerns about integration and diversity. The district court seemed to accept both versions as a legitimate, i.e. nondiscriminatory, justification. *Id.* at 162.

39. *Id.* at 160 (referencing *Hayden*, 180 F.3d at 51).

40. *See Discriminatory Purpose*, *supra* note 3, at 858.

41. *Ricci*, 554 F. Supp. 2d at 152.

42. *Id.*

race—*i.e.*, how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"[43]

This is where my analysis of *Ricci* diverges from that of Professor Adams. Our interpretive differences point to a fault line in equal-protection doctrine itself and, in particular, the ambiguous meaning of Justice Kennedy's use of the phrase "because of." Adams's argument rests on one interpretation—that the City's goal of creating a racially integrated fire department was impermissible because it was motivated by race. Stated differently, the City would not have rejected the exam results "but for" its desire to diversify its workforce. Adams writes that "[f]acially race-neutral government action is immunized from constitutional attack unless the Court can draw an inference of discriminatory purpose."[44] The use of racially neutral means, in other words, could not insulate government action that is otherwise motivated by a "discriminatory" objective. Adams argues that the City's action was facially neutral, and, therefore, that its desire to integrate the senior personnel in the fire department must have been racially discriminatory. I argue just the opposite—that the City's constitutional problem was not its desire to integrate its workforce, but rather that its decision to cancel the exam scores hinged on the race of the individual candidates.

A. "DISCRIMINATORY" MOTIVE?

Thus, Adams makes two critical moves. One move is to characterize the City's action as facially race neutral. The second is to characterize its motive as discriminatory. I will return to the race neutrality point shortly. For now I want to focus on her interpretation of discriminatory motive. She writes that "[i]f the constitutional prerogative for government action is 'racial neutrality,' then one might argue that *any action* taken by the government to eradicate racial segregation is race-based."[45] Here, Adams is channeling the equivalence idea, expressed perhaps most forcefully by Justice Thomas,[46] which equates race-conscious government action for "benign" (i.e., racially inclusive) purposes with race-conscious action that is taken for "invidious"

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43. Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (emphasis added) (quoting *Ricci*, 554 F. Supp. 2d at 152).

44. *See Discriminatory Purpose*, *supra* note 3, at 850.

45. *Id.*

46. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." (footnote omitted)).

(i.e., segregative) ends.[47] Within this equivalence framework, the City's failure to certify the promotion list because of its desire to avoid using an exam that had a disparate adverse impact on blacks and Latinos (either to comply with federal law or to achieve some measure of racial integration in its fire department) is substantively no different from a policy that is intended to segregate.

This explanation, however, fails to account for one important distinguishing factor: the equivalence idea itself emerged from cases that challenged the constitutionality of racial classifications for integrative purposes, suggesting that the constitutional problem lies with the use of racial classifications itself rather than the simple pursuit of an otherwise benign racial purpose.[48] The Court has yet to consider whether the pursuit of racial integration alone is "discriminatory" and, therefore, presumptively unconstitutional[49] because its benign-motive cases have all involved government affirmative-action policies[50] that used race to confer a benefit on individual members of historically disadvantaged racial groups.[51] As in *Ricci*, some of the Justices on the Court have expressed skepticism about racially integrative goals. But skepticism about whether a benign racial motive justifies the use of race in the form of a racial classification is not the same as deciding that the benign racial motive *itself* is presumptively unconstitutional.

In fact, Justice Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1* illustrates this point.[52] *Parents Involved* considered the constitutionality of the use of race in student assignment to promote diversity and reduce racial isolation. On a 5-4 vote, the Court struck down the school districts' particular assignment plans, but Kennedy declined to join Chief Justice Roberts's plurality opinion insofar as it held that student diversity and alleviating racial isolation could never be compelling government interests.[53] Kennedy specifically denounced the plurality's ahistorical, decontextualized reading of *Brown v. Board of Education*, which equated the school districts' racially integrative goals with purposeful segregation.[54] Emphasizing, "the real world" consequences of "color blindness," Kennedy refused to endorse a constitutional principle

47. *See id.* at 240–41; *see, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

48. *See Adarand*, 515 U.S. at 240–41.

49. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

50. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); *Adarand*, 515 U.S. 200; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *Wygant*, 476 U.S. 267; *Bakke*, 438 U.S. 265.

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

52. *Id.* at 788 (Kennedy, J., concurring).

53. *Id.*

54. *Id.*

that ignores the continuing problem of racial isolation and, at least in the school context, lack of equal opportunity.[55]

Significantly, for Kennedy, whether policies that pursue integrative objectives are unconstitutional in fact depends on *how* they are implemented.[56] The presumptively constitutional policies that Kennedy identified in *Parents Involved* included "drawing attendance zones with general recognition of the demographics of neighborhoods."[57] While Kennedy acknowledged that this mechanism was "race conscious,"[58] importantly, the attendance zones would "not lead to different treatment based on a classification that tells each student he or she is to be defined by race," making it "unlikely [it] would demand strict scrutiny to be found permissible."[59] On the other hand, he continued, "[a]ssigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly."[60]

Although *Parents Involved* focuses on racial segregation in education, *Ricci* suggests that Kennedy would endorse general considerations of race in employment for integrative purposes.[61] Measures that are facially race neutral but race conscious in their objective, such as the *ex ante* redesign of a civil-service promotion exam that is shown to have a disparate impact on candidates of color, would be presumptively constitutional. While Kennedy plainly thinks that there is an "equivalence" between *uses* of race that burden people of color based on racial animus and policies that burden whites, race-conscious integration in the absence of racial classifications is different. The

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55. *Id.* ("[A]s an aspiration, Justice Harlan's axiom ['Our Constitution is color-blind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle." (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

56. *Id.* at 788–89 ("The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken. . . . If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.").

57. *Id.* at 789.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See generally* Siegel, *supra* note 19, at 1332–37 (suggesting that Kennedy's majority opinion in *Ricci* and concurrence in *Parents Involved* should be understood as an effort to guard against racial balkanization, rather than as an endorsement of "colorblindness" in all circumstances).

key to Kennedy, the perennial swing Justice, therefore, lies in the ends versus the means.

This then brings us back to Kennedy's use of "because of" in his majority opinion in *Ricci*. Recall his key language:

> "[a]ll the evidence demonstrates that the City chose not to certify the examination results *because of* the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"[62]

Adams argues that Kennedy's opinion could be interpreted to mean that the pursuit of integration is "because of" race and is, therefore (if it were a constitutional case), presumptively unconstitutional. Yet other language in Kennedy's opinion suggests that he had something different in mind. He uses the phrase "because of" again, but this time casts its meaning in a different light, indicating that the legitimacy of "the City's objective [of] avoiding disparate-impact liability" turns in part on "[its] conduct in the name of reaching that objective"[63]:

> Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.[64]

Here Justice Kennedy distinguishes between the objective and the means used to reach the objective. The City's goal of avoiding liability for disparate impact had to be differentiated from its "conduct" in implementing its goal. Read this way, the desire to avoid disparate impact could theoretically be nondiscriminatory, but whether it was so in fact depended on how the City carried it out.

As just mentioned, Kennedy later suggests that the City's actions would have been lawful had it merely designed the test to minimize its adverse racial impact in advance, rather than cancelling the exam results after the scores were in.[65] Therefore, the district court was half right in its conclusion. The problem was not that the City espoused the race-conscious objective of avoiding policies that negatively affected the employment prospects of

62. Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (emphasis added) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006)).

63. *Id.* at 2674.

64. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 11, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428 and 08-328)).

65. *Id.* at 2677.

people of color, but that it implemented its objectives using racial criteria that eclipsed the specific promotions of the *Ricci* plaintiffs. Thus, Kennedy treats race-conscious means (race-determinative cancellation of test scores) and race-conscious ends (purposeful test design to promote integration) differently, suggesting that the former is discriminatory and the latter is non-discriminatory.[66] Taken with his *Parents Involved* concurrence, Kennedy's *Ricci* opinion indicates that a majority of the Court, including the four dissenting Justices, regards racially inclusive objectives secured through facially race-neutral means as presumptively constitutional. This suggests that benign, integrative motives alone are not "discriminatory" and, therefore, should not trigger strict scrutiny.

B. Facially Race Neutral?

This takes us back to the second thorny question raised in *Ricci*—whether the City of New Haven's failure to certify the promotion lists was "facially race neutral," as Professor Adams and other legal scholars have argued.[67] Once again, it is useful to return to the decision in the district court. Although the court did not explicitly describe the City's action as "race neutral,"[68] it emphasized that the City had not used different criteria for different racial groups in either its scoring or administration of the exam. Moreover, the failure to certify the exam results affected whites and people of color equally because no one actually received a promotion.[69]

Before we move on, a quick word is in order about terminology. In using the terms "race neutral" and "race conscious" it is important to distinguish between race as an instrument toward some race-conscious objective and race as a factor in the objective itself. Take the phrase "facially race neutral." I have already defined it for my purposes,[70] but in other contexts the phrase suffers from some ambiguity. This is because although the consideration of race may not be apparent from the face of the challenged policy or law, it may still espouse a race-conscious goal.

The "percentage plans" that Adams discusses in her article are an example.[71] Under these plans, a state with highly competitive public universities grants automatic admission to the top ten percent of every state high-school graduating class. The policy is "facially race neutral" because it does not explicitly allocate benefits or burdens to individuals on the basis of race. The distinguishing factor, rather, is class rank. Yet the policy has an undoubtedly race-conscious objective, which is to diversify the state's

66. *Id.*
67. *See* Harris & West-Faulcon, *supra* note 6, at 88.
68. Ricci v. DeStefano, 554 F. Supp. 2d 142, 161 (D. Conn. 2006).
69. *Id.*
70. *See supra* notes 11–13.
71. *See Discriminatory Purpose*, *supra* note 3, at 869–75.

flagship institutions.[72] The policy works because the state's high schools are highly racially segregated.[73] Race, therefore, factors into the state's end goal even if it does not explicitly factor into the criteria used to determine university admissions. A "facially race neutral" policy, therefore, may be race neutral in its application but race conscious in its objective. The distinction matters since the use of race as a means correlates to different "adjudicative presumptions" than the pursuit of race-conscious integrative ends.[74]

Returning to *Ricci*, it is hard to know what racial neutrality ("facial" or otherwise) would mean in this context. While it is true that the City did not use a "racial quota, a race-based set-aside or presumption, or a multivariate selection process" that considered race as a factor,[75] the City quite candidly admitted to considering the race of individual promotion candidates as a means toward its broader goal.[76] Its argument that the cancellation of the exam scores was in effect race neutral turned on an important assumption that the plaintiffs were not entitled to the promotions after scoring high enough to make them promotion-eligible.[77] Once the Supreme Court rejected this assumption,[78] it paved the way for a finding that whites (and the one top-scoring Latino candidate) had in fact been differently treated "because of" race. Recall the district court's finding that the City had not certified the exam results based on its concern "that too many whites and not enough minorities would be promoted" if the lists were adopted.[79] This meant that a different racial distribution on the promotion list would have led to a different outcome. Had more African Americans and/or Latinos scored in the top three, the City would have certified the list because its goal of complying with Title VII and/or achieving some measure of integration and diversity in the fire department would have been satisfied.[80] In equal-protection terms, race was a predominant motivating factor in the decision

72. *See* Gratz v. Bollinger, 539 U.S. 244, 297–98 (2003) (Souter, J., dissenting).

73. *See Discriminatory Purpose*, *supra* note 3, at 873–74.

74. *See id.* at 848.

75. *Id.* at 845.

76. Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006).

77. Ricci v. DeStefano, 129 S. Ct. at 2671–72 (referring to the district court's conclusion that the City's "actions were not 'based on race' because 'all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted.'") (quoting *Ricci*, 554 F. Supp. 2d at 161)).

78. *Id.* at 2674 ("The City rejected the test results solely because the higher-scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.").

79. *Ricci*, 554 F. Supp. 2d at 152.

80. On appeal, the City appears to have emphasized its efforts to comply with federal law. *See* Ricci v. DeStefano, 530 F.3d 88, 88–89 (2d Cir. 2008). This cast its use of race in a different light. If the goal was legal compliance, then there was no racial "motivation" per se, only a sterile judgment about the need to avoid legal trouble. Race was part of this calculus, but only because consideration of the racial makeup of the high-scoring candidates is what disparate-impact law under Title VII requires.

to cancel the scores.[81] Therefore, the City's action was not facially race neutral.

II. THE WAY FORWARD: INTEGRATION AFTER *RICCI*

When it comes to race, therefore, means matter. The Court is skeptical of measures that rely on race to allocate government goods or services to individuals. But it appears that no Justice—including those who most reliably oppose the use of race for purposes of affirmative action—has concluded that strict scrutiny should apply to the goal of racial integration where facially race-neutral means are used.[82] This suggests that the real controversy in the future will not be whether integration counts as a discriminatory motive but how courts understand and define facial race neutrality. I have offered one definition here that focuses on the absence of any individualized consideration of race. Importantly, this definition acknowledges, as a majority of Justices have, that some "general awareness" of race is permissible and may even factor, on some aggregate level, into the means used to achieve racial integration.

Specifically, racial neutrality appears to have a particular meaning after *Ricci*. Applying the same selection criteria to individuals of different racial backgrounds does not necessarily mean that a government action is race neutral. Recall that in *Ricci*, whites and candidates of color took the same exam, and the City of New Haven used the same criteria to score and administer it. Nor can a state actor insulate itself from liability because people of color have not benefited directly from the government's decision. By cancelling the exam, neither whites nor candidates of color were promoted. Therefore, the policy in *Ricci* did not in fact benefit individual black or Latino candidates, although their chances of being promoted as a group would (arguably) have been enhanced by the City's efforts to minimize adverse racial impact.

Again, *Ricci* was a Title VII case. But if we interpret it through the lens of equal-protection law, it appears consistent with prevailing doctrine. It suggests that the distribution of benefits or burdens to individuals on the

81. *Ricci*, 129 S. Ct. at 2681.

82. Even the most conservative Justices, including those who have embraced the equivalence doctrine, have endorsed the use of facially race-neutral means to advance racially inclusive objectives. In *Croson*, for example, Justice Scalia rejected the use of minority set-asides to improve public-contracting opportunities for minority contractors, but he approvingly cited the use of race-neutral means to achieve the same goal. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526–27 (1989) (Scalia, J., concurring). And Justice Thomas in *Grutter v. Bollinger* argued that the University of Michigan was constitutionally free to abandon its use of admissions criteria that otherwise disadvantaged people of color in order to create a law school that was racially diverse. 539 U.S. 306, 355–74 (2003) (Thomas, J., concurring in part and dissenting in part). Therefore, even die-hard racial formalists like Scalia and Thomas have acknowledged that race-conscious objectives are permissible, provided that nonindividualized, i.e., facially race-neutral, means are used to implement them.

basis of race at any stage of a government decision-making process is likely to trigger strict scrutiny. The key for government employers then is to design policies and procedures that seek to maximize integration and diversity and to assess their effectiveness (as much as practicable) before they are implemented. The lesson here is that government employers may have a difficult time constitutionally unwinding selection processes that yield racially disparate results.[83]

CONCLUSION

Professor Adams is right to be vigilant in her support for racial integration and in her insistence that we create space for public conversation about its importance. Our interpretive differences are about whether there is cause for cautious pessimism or cautious optimism about its prognosis under existing equal-protection doctrine. I conclude that there is some bad news for racial integration, but there is also some good news. Kennedy's opinion in *Ricci*, together with his concurrence in *Parents Involved*, reframes equal-protection doctrine. Assuming, as others have,[84] that *Ricci* is a stealth constitutional decision, it suggests that the distinction between benign and invidious objectives may matter more than the Court's earlier equal-protection cases have suggested. The Court has consistently concluded that strict scrutiny applies to government programs that use racial classifications to award benefits notwithstanding the government's racially inclusive goals.[85] The Court chose this path ostensibly because it could not tell the difference between a "'No Trespassing' sign" and a "welcome mat."[86] But Kennedy's opinions in *Ricci* and *Parents Involved* suggest differently: they intimate that the Court will tolerate and even (perhaps) embrace racially inclusive goals, as long as individualized considerations of race are not used as a means to that objective.

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83. However, if there is a "strong basis in evidence" that use of such processes would have an unjustifiable adverse impact, government employers may be justified in cancelling the results of such processes under Title VII. *Ricci*, 129 S. Ct. at 2677.

84. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354 (2010).

85. *See Grutter*, 539 U.S. at 326 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)). *But see* Fallon, *supra* note 22 (arguing that the Court has in practice applied different variations of strict scrutiny).

86. *See Adarand*, 515 U.S. at 245 (Stevens, J., dissenting).