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From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases"

by

Reva B. Siegel

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REVA B. SIEGEL

From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases

ABSTRACT. For decades, the Supreme Court has sharply divided in equal protection race discrimination cases. As commonly described, the Justices disagree about whether the Equal Protection Clause is properly interpreted through a colorblind anticlassification principle concerned with individualism or through an antisubordination principle concerned with inequalities in group status. This Article uncovers a third perspective on equal protection in the opinions of swing Justices who have voted to uphold and to restrict race conscious remedies because of concern about social divisiveness which, they believe, both extreme racial stratification and unconstrained racial remedies can engender. The Article terms this third perspective on equal protection concerned with threats to social cohesion the antibalkanization perspective.

Employing this triadic model of equal protection, the Article demonstrates how Justice Kennedy reasons from antibalkanization values in the recent cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Ricci v. DeStefano*. There Justice Kennedy affirms race-conscious facially neutral laws that promote equal opportunity (such as disparate impact claims in employment discrimination laws) so long as the enforcement of such laws does not make race salient in ways that affront dignity and threaten divisiveness.

The Article's triadic model identifies alternative directions equal protection doctrine might develop, and enables critique. A final section raises questions concerning the principle's logic and application. Have those who interpret equal protection with attention to balkanization enforced the principle in an effective and evenhanded way? In this spirit, the Article concludes by suggesting that the antibalkanization principle could be applied to cases of concern to minority communities that do not involve challenges to civil rights laws (for example, government use of race in suspect apprehension).

AUTHOR. Nicholas deB. Katzenbach Professor of Law, Yale University. This Article commemorates the fortieth anniversary of the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), recognizing disparate impact liability in federal employment discrimination law. I thank Bruce Ackerman, Jack Balkin, Ariela Dubler, Dov Fox, Linda Greenhouse, Lani Guinier, Ian Haney López, Christine Jolls, Frank Michelman, Martha Minow, Richard Pildes, Robert Post, Richard Primus, Judith Resnik, Cristina Rodríguez, Patrick Weil, Kenji Yoshino, and the participants in the Harvard Public Law Workshop, the New York University Law School Constitutional Law Colloquium, and the Yale Law School Faculty Workshop for comments on a draft of this Article. For wide-ranging conversation and wonderful research assistance, I am especially indebted to Jennifer Bennett, as well as to Manav Bhatnagar, Valarie Kaur, Jeff Love, and Hunter Smith.



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Whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man is entering the starting line in a race 300 years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.

—Dr. Martin Luther King, Jr. (1964)¹

We believe, like Dr. Martin Luther King, Jr. in a colorblind, post-racial society.

—Tea Party Petition to the NAACP (2010)²

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

—Justice Anthony M. Kennedy (2007)³

INTRODUCTION

At the dawn of the Second Reconstruction, Martin Luther King, Jr., warned not only of the need to rectify centuries of discrimination but also of the resentment among whites that claims for racial repair provoked. To persuade white Americans of the justice of Negro claims, King invoked a simple but effective sports metaphor: a race was not fair if one runner left the starting line three hundred years before the other. The “starting line” story vividly put in issue the structural discrimination that results from unequal baselines and resources and so helped justify the Great Society and civil rights

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1. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 147 (1964).
 2. *No Racism Petition*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/petition> (last visited Sept. 1, 2010) (“We believe . . . that the NAACP should be embracing the individual freedom and responsibility promoted by the [Tea Party Patriot] movement. It is nothing less than ‘hate speech’ for the NAACP to be smearing us as ‘racists’ and ‘bigots.’ We believe, like Dr. Martin Luther King, Jr., in a colorblind, post-racial society. And we believe that when an organization lies and resorts [to] the desperate tactics of racial division and hatred, they should be publicly called on it.”).
 3. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

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programs in the early decades of the Second Reconstruction.⁴ But, as King appreciated, these programs prompted many whites to “recoil in horror” and provoked a backlash that has fatefully shaped our constitutional politics and law. This Article explores the conflict as it plays out a half-century after King spoke, in the Supreme Court’s recent decisions addressing race-conscious efforts to ensure integration in school districting and government employment—*Parents Involved*⁵ and *Ricci*.⁶ Racial conflict has helped define the composition of the Supreme Court and now is a matter not only of pragmatic but also of principled concern in its civil rights decisions.

Important questions of law are at stake in how we describe divisions on the Court in the race equality cases. Over the decades, observers of the Court have come to describe the dispute in binary terms. The Justices who vote against affirmative action and other race-conscious civil rights policies are said to reason from a colorblind anticlassification principle, premised on the belief that the Constitution protects individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing. The Justices who vote to uphold affirmative action policies as constitutional are said to reason from an antisubordination principle that identifies racial stratification (rather than classification) as the wrong and endeavors to rectify the forms of group inequality that race-based and race-salient policies have caused.⁷

Describing disagreement in the race discrimination cases in this binary framework obscures the views of the Justices who, over the years, have voted to uphold *and* to limit affirmative action policies. This Article focuses on the views of Justices in the middle of Supreme Court conflicts over race equality and demonstrates that, in voting to uphold and to limit affirmative action policies, they reason from an emergent independent view more concerned with social cohesion than with colorblindness—a position that this Article analyzes as the “antibalkanization” perspective. Abstracting from the complex logic of the case

4. See President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp> (“You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair. . . . This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity[,] . . . not just legal equity but human ability, . . . not just equality as a right and a theory but equality as a fact and equality as a result.”).

5. 551 U.S. 701.

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

7. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470–78 (2004).

law unfolding in history, I model division on the Court in a triadic framework that recognizes three voting blocs in the equal protection cases concerning race in the last several decades. I term “race conservatives” the Justices who strike down civil rights initiatives on the ground that law should be colorblind, “race progressives” the Justices who would allow (or require) government to remedy practices that entrench historic inequalities among racial groups, and “race moderates” the Justices who allow and limit civil rights initiatives in order to preserve social cohesion. Attending to the forms of reasoning that (1) differentiate race moderates from race conservatives and progressives and (2) link the opinions of moderates preserving and limiting civil rights initiatives, the Article asks whether we can read race moderates’ opinions as interpreting equal protection in light of a mediating principle concerned with social cohesion, a concern analytically distinct from the value of individualism associated with colorblindness and the concern to remedy group inequality associated with antisubordination.⁸

The first project of this Article, then, is to show the emergence and development of the antibalkanization perspective in the opinions of race moderates—and thus to demonstrate how a triadic framework better describes historic divisions on the Court than a dyadic framework that depicts the swing Justices as ambivalently tacking between the views of race conservatives and race progressives. The Article’s second project is to employ this triadic account of divisions in the race cases to make sense of the shape and trajectory of the Court’s most recent cases. Attending to the antibalkanization values that led Justice Kennedy to write separately from conservatives and progressives in *Parents Involved* in turn illuminates these same concerns in the opinion Justice Kennedy authored for five members of the Court in *Ricci*, and so identifies a basis, grounded in the text of the decision and in several decades of constitutional history, for reading *Ricci* as vindicating antibalkanization—rather than colorblindness—values.

In analyzing the Court’s past and current race cases, the Article’s third aim is to explore how the framework that we have long used to map conflicts over colorblindness is evolving in new challenges to race-conscious, facially neutral civil rights initiatives. Race conservatives first invoked colorblindness in cases involving the constitutionality of “benign” racial classifications, where they

8. A mediating principle interprets a clause purposively to vindicate one particular understanding of the concept or value the clause expressly guarantees, here the equal protection of the laws. On the concept of mediating principles for the Equal Protection Clause, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); for one history of the conflict between anticlassification and antisubordination as mediating principles for the Clause, see Siegel, *supra* note 7.

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insisted that the Constitution's injunction against classifying on the basis of race vindicated values of individualism. But Justice Scalia is now encouraging proponents of colorblindness to question the constitutionality of the disparate impact provisions of federal employment discrimination law;⁹ others question the constitutionality of race-conscious but facially neutral practices that remedy effects of past discrimination and promote integration, such as race-conscious siting of school districts and admissions strategies that use facially neutral criteria to increase student diversity.¹⁰ If race conservatives are beginning to attack such race-conscious, facially neutral initiatives as unconstitutional, it is not because the laws classify but because the laws violate colorblindness in some other way. These new constitutional claims throw into question the values colorblindness is serving (individual or group?) and diverge dramatically from antibalkanization's concern with social cohesion. Antibalkanization understands that race-conscious, facially neutral interventions may promote social cohesion by promoting equal opportunity, as Justice Kennedy demonstrates in *Parents Involved* and *Ricci* when he discusses permissible forms of race-conscious, facially neutral action by administrators siting school districts and employers complying with the disparate impact provisions of federal employment discrimination law. In distinguishing among the colorblindness, antibalkanization, and antisubordination perspectives, the Article demonstrates that there are several distinct yet overlapping frameworks in which to analyze the constitutionality of race-conscious, facially neutral civil rights initiatives. The Article's analysis of disparate impact's constitutionality from this triadic perspective is especially timely as we mark the fortieth anniversary of the Court's decision in *Griggs v. Duke Power Co.*,¹¹ which recognized disparate impact claims under federal employment discrimination law.

As this Article uncovers the antibalkanization perspective in the Court's cases, yet a fourth aim emerges: to undertake critical evaluation of the antibalkanization perspective—both as the Justices have applied it, and as it might be applied. Recognizing antibalkanization as a perspective distinct from anticlassification and antisubordination makes possible debate about what it

9. See *infra* notes 143-144 and accompanying text.

10. See, e.g., *infra* notes 15, 73 and accompanying text; cf. *Parents Involved*, 551 U.S. at 787-88 (Kennedy, J., concurring in part and concurring in the judgment) ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases." (alteration in original) (citation omitted)).

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

means to vindicate this commitment in a plausible and principled way and thus allows even those who do not believe concerns about social cohesion are a proper basis for interpreting the Equal Protection Clause to enter into dialogue with those who do.

Critical conversation of this kind would begin by clarifying the content of the principle that is emergent in the Court's cases. Do antibalkanization opinions only impose a side constraint on the pursuit of equality (that is, government may pursue equality, however equality is understood, so long as government acts in ways that do not unduly threaten social cohesion)? Or do the antibalkanization opinions offer a substantive account of equality (that is, government may act to ensure that no group is so deeply marginalized as to feel an outsider or a nonparticipant, so long as government combats group marginalization by means that do not unduly stimulate group resentment)? Once clarified, we can evaluate the principle's application in particular cases. Do the Court's cases vindicate antibalkanization values effectively and evenhandedly? What new conversations might antibalkanization enable if we were to apply the principle in new contexts, in cases that do not involve challenges to civil rights initiatives but instead concern laws and practices that are estranging to minority communities? The Article concludes by imagining a revised equal protection framework in which the antibalkanization principle constrains government consideration of race in the apprehension of criminal suspects.

Part I of the Article derives the antibalkanization perspective from constitutional history, from the opinions of race moderates on the Court who have refused wholly to adopt an anticlassification or antisubordination approach to the analysis of affirmative action but instead have enforced the Equal Protection Clause with attention to the forms of social estrangement that extremes of racial stratification and unconstrained racial remedies can engender. As Part II of this Article shows, a tripartite framework attentive to concerns of balkanization captures concerns moving the center of the Court more faithfully than one focused solely on the conventional distinction between anticlassification and antisubordination. Justice Kennedy demonstrated as much in his concurrence in *Parents Involved*, when he voted to strike down an expressly race-based public school admissions policy intended to preserve school integration because it used racial classifications he thought likely to offend and polarize—while emphasizing that schools could pursue integration by race-conscious but facially neutral means, such as the siting of school attendance zones.¹²

12. See *infra* Part II.

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Attending to the concerns about balkanization that Kennedy expressed in his *Parents Involved* concurrence in turn suggests a principled basis for reading Kennedy's majority opinion in *Ricci*, as Part III of this Article shows. In *Ricci*, the Court held unlawful New Haven's decision to readminister a civil service exam for fire department officers because the City was concerned that the original examination identified a pool for promotion that included scarcely any minority candidates. While the City justified its decision as avoiding a potential violation of Title VII of the 1964 Civil Rights Act, which prohibits practices with a racial disparate impact,¹³ Justice Kennedy held for a bitterly divided court that New Haven's action instead violated Title VII's prohibition on racial disparate treatment in a decision that rested on statutory grounds to avoid the constitutional question – yet resonated with constitutional implications.¹⁴

Conservatives are rushing to read *Ricci* as suggesting that there might be constitutional limits on disparate impact law emanating from colorblindness values that would call into question the constitutionality of other facially neutral laws that promote integration.¹⁵ But if we read Justice Kennedy's majority opinion in *Ricci* as responsive to concerns of balkanization rather than colorblindness, we arrive at a very different understanding of the decision's reach and scope. The action that *Ricci* holds unlawful may not be New Haven's effort to identify a test for selecting employees without racial disparate impact but instead the particular way in which the City pursued this aim: throwing out a promotion test after administering it for publicly announced reasons associated with the race of those who passed the exam.¹⁶ Not only does a

13. Federal employment discrimination law, under Title VII of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2006)), prohibits practices involving racial disparate treatment and, as codified by subsequent statutory provisions, facially neutral practices that have a racial disparate impact not justified by business necessity. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2.

14. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009). *Ricci* asserts, for the first time since the Court first recognized the disparate impact cause of action under Title VII in its 1971 *Griggs* decision, that there are potential conflicts between the disparate treatment and disparate impact liability frameworks under Title VII. *Id.* at 2676. The decision further intimates that some disparate impact challenges to facially neutral rules might raise questions of constitutional magnitude. *Id.* (“Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.”); see *infra* Part III.

15. See, e.g., Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 CATO SUP. CT. REV. 53, 73 (2009).

16. See *Ricci*, 129 S. Ct. at 2664 (“When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a

concern with racial balkanization identify a ground of liability distinct from the City's effort to avoid promotion tests with unjustified racial disparate impact; the same concern with balkanization provides an affirmative reason for the City to avoid promotion tests with unjustified racial disparate impact. After all, using a facially neutral promotion test that excludes virtually all minority candidates to lead a fire department that has a history of race conflict¹⁷ and serves a majority-minority community¹⁸ *also* has the potential to estrange and balkanize, if the test is not plainly testing for skills needed to do the job. Antibalkanization thus provides a principled basis for limiting *Ricci* to similar cases of retesting and for preserving the disparate impact framework itself.

In a concluding Part IV, I raise questions about the antibalkanization standpoint as it has thus far been vindicated in the Court's cases. Can we understand antibalkanization as having its own substantive account of equality? What explains antibalkanization's preoccupation with managing the social form of government interventions in race relations? Does the requirement that government structure its interventions in race relations so as to minimize the salience of race necessarily work to preserve the racial status quo? If not, under what conditions might it prove transformative? Is the antibalkanization inquiry designed only for constraining civil rights initiatives, or might the principle have more wide-ranging application, to forms of government action of concern to minority communities? Might antibalkanization help us imagine a different developmental trajectory for equal protection law than proponents of colorblindness contemplate?

I. THE EMERGENCE OF THE ANTIBALKANIZATION PRINCIPLE

Debate between the anticlassification and antistatutory understandings of equal protection grew out of social struggle over *Brown*.¹⁹ The debate emerged from two kinds of conflicts. In the decades after *Brown*, civil rights lawyers challenged the constitutionality of facially neutral policies with an assertedly unjustified racial disparate impact, while supporting the constitutionality of "benign" race classifications in affirmative action policies; they understood the Equal Protection Clause to prohibit policies that enforced group subordination. Their critics, however, argued that under the Clause,

public debate that turned rancorous. . . . In the end the City took the side of those who protested the test results. It threw out the examinations.").

17. See *infra* notes 175-183 and accompanying text.

18. See *infra* note 173.

19. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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strict judicial oversight of government action should be reserved only for policies that employed racial classifications (unless plaintiffs could prove racially discriminatory purpose) and insisted that any use of racial classifications, even to integrate, was unconstitutional. This “anticlassification” position viewed the paradigmatic harm not as group subordination but rather the classification of any individual by race. On the conventional account, the anticlassification understanding of equal protection ultimately prevailed; in fact, as I have elsewhere chronicled, neither understanding of our tradition has ultimately proven powerful enough wholly to displace the other from our law.²⁰

Discussion of balkanization in our constitutional case law begins in the opinions of the swing Justices who refused completely to align themselves with an anticlassification or an antisubordination approach to equal protection and voted instead to uphold, yet restrict, benign race-conscious policies. In what follows, I briefly review this debate and focus on the distinctive set of concerns about social cohesion the race moderates discussed as they endeavored to bridge dispute on the Court and in the nation.

A. Mapping Equal Protection: The Anticlassification and Antisubordination Principles

What does the Equal Protection Clause require of government in matters of race discrimination? In constitutional law, this long-running debate has, since the 1970s, been described as a debate between the anticlassification principle and the antisubordination principle.

In this debate, proponents of the anticlassification principle associate the rule against classifying by race with a value commonly associated with colorblindness claims: protecting individuals from the harm of categorization by race. As Justice Thomas has explained:

Brown I itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. . . . At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious

20. I tell this story at greater length in a history of conflict over *Brown*, written on the half-century anniversary of the decision. See Siegel, *supra* note 7.

groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny²¹

Focused on the wrongs of classification, the anticlassification principle tolerates practices that are facially neutral but have a disparate impact on minorities; but it is intolerant of any use of racial classification, and hence it views benign discrimination as just a fancy name for plain old discrimination.²²

By contrast, the antistatification principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification.²³ It is concerned with practices that disproportionately harm

21. *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in judgment) (“[E]ven ‘benign’ racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. . . . The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, ‘created equal,’ who were discriminated against.”).

The anticlassification principle, however, does not always vindicate individualism. It does so only in a very specialized sense: by maintaining the irrelevance of formal racial classifications. Many advocates of the anticlassification principle as applied to race do not object to classification by other characteristics they consider “socially relevant.” *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000) (analyzing the concept of individualism in colorblindness discourse).

22. *See* Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) (“By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.”).

23. For example, Owen Fiss called his version of the antistatification principle the “group-disadvantaging principle,” and he defined it as the principle that laws may not “aggravate[]” or “perpetuate[] . . . the subordinate position of a specially disadvantaged group.” Fiss, *supra* note 8, at 108, 157. Many others have urged that equal protection is best understood as concerned with group subordination. *See, e.g.*, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 162 (1987) (invoking the understanding that “[t]he Court must review with great care laws that burden a racial minority”); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987) (repudiating a model of equality focused on “difference” in favor of one that analyzes “dominance”); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979) (arguing that courts should inquire “whether [a]

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members of marginalized groups and so condemns facially neutral practices that have a racial disparate impact when such practices are not justified by a weighty public purpose. Because the antistatutory principle focuses on practices that disproportionately harm members of marginalized groups, it can tell the difference between benign and invidious discrimination.

B. The Case Law: Two Principles and a Puzzle

This debate does not originate in *Brown* but in debates over what it means to interpret the Equal Protection Clause in fidelity to *Brown*, decades later.²⁴ In fact, early equal protection cases reflect both anticlassification and antistatutory concerns. *Brown* does not discuss classifications but contains language that resonates with both principles, declaring, for example: “To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be

policy or practice . . . integrally contributes to the maintenance of an underclass or a deprived position because of gender status”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1514-21 (2d ed. 1988); *id.* § 16-21, at 1520 (advocating that facially neutral state action be analyzed in accordance with an antistatutory principle, such that “strict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group”); Charles R. Lawrence III, *Two Rivers of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 *COLUM. L. REV.* 928, 951 (2001) (arguing for a consideration of “the constitutional and moral command of equal protection” as requiring “ridding society of racial subordination” rather than “mandating equal treatment as an individual right”); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 336 (2006) (“Critical Race Theory’s . . . stance is one of ‘antistatutory.’”).

For my own writing in this tradition, see Siegel, *supra* note 21; Siegel, *supra* note 7; Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 29 (Robert Post & Michael Rogin eds., 1998) [hereinafter Siegel, *Colorblind Constitutionalism*]; and Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*]. For additional background, see Jack M. Balkin & Reva B. Siegel, *Remembering How To Do Equality*, in *THE CONSTITUTION IN 2020*, at 93 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter Balkin & Siegel, *Remembering How To Do Equality*]; and Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 *U. MIAMI L. REV.* 9 (2003) [hereinafter Balkin & Siegel, *The American Civil Rights Tradition*].

24. See Siegel, *supra* note 7.

undone.”²⁵ In the 1960s, in cases like *McLaughlin v. Florida*²⁶ and *Loving v. Virginia*,²⁷ the Supreme Court adopted the general presumption that racial classifications are unconstitutional under the Fourteenth Amendment.²⁸ But *Loving*, like *Brown*, promiscuously employed both antistatutory and anticlassification discourses: the decision explained the racial wrong of Virginia’s antimiscegenation law using the presumption that racial classifications are unconstitutional, and it condemned Virginia’s law using the language of “White Supremacy.”²⁹ (In the 1960s, at the time the Court adopted the strict scrutiny framework in its Fourteenth Amendment equal protection cases, it was a common understanding that school districts could take race into account for purpose of achieving school integration;³⁰ this use of

25. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). For a recent analysis of the theories underlying the *Brown* decision at the time it was argued, see Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008). Schmidt shows that while the NAACP lawyers who argued *Brown* did use the language of colorblindness, they believed that segregation inflicted the harm of subordination as well as classification, and they believed that color-conscious remedies were necessary for racial repair.

26. 379 U.S. 184 (1964).

27. 388 U.S. 1 (1967).

28. *Id.* at 10-11.

29. *Id.* at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”). See Siegel, *supra* note 7, at 1503-05 (locating the Court’s opinion in *Loving* within the legacy of *Brown* and on the anticlassification-antistatutory spectrum).

30. For discussion of the 1960s cases, see Siegel, *supra* note 7, at 1515-17 & n.162. Supreme Court Justices in the 1970s acknowledged this understanding. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.”).

Ensuing cases display this common understanding. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) (“[L]ocal school authorities have the power to voluntarily remedy *de facto* segregation existing in schools and, indeed, such integration serves important societal functions.”); *id.* at 752 (“The absence of a duty [to desegregate] sheds little light on the constitutionality of a voluntary attempt.”); *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102 (6th Cir. 1992) (“This authority [afforded to local school officials] includes the power to prescribe a ratio of white to minority students that reflects the composition of the overall school district, particularly when such a policy is implemented in order to prepare students for life in a pluralistic society.”).

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race was not considered a “racial classification” within the meaning of the framework.³¹)

It was in the 1970s that the Court decided the cases that seemed to split apart concerns with anticlassification and antisubordination. During the 1970s, in cases such as *Keyes v. School District No. 1*,³² *Washington v. Davis*,³³ and *Personnel Administrator v. Feeney*,³⁴ the Court decided that facially neutral practices with a disparate racial impact did not violate the Constitution unless such practices were adopted with discriminatory purpose. Increasingly, the Court conflated *Brown*’s holding with the presumption against racial classifications and treated government use of racial classifications as a necessary condition for heightened judicial scrutiny under the Equal Protection Clause;³⁵ government actions not containing racial classifications thus did not provoke the presumption of unconstitutionality, even if such facially neutral policies tended to bear more harshly on one group than another. During this same period, the Court began to insist that the presumption against racial

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31. See Norman Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1616-17 (1969) (analyzing different forms of race-conscious state action). For a more sustained discussion of Vieira’s argument, see Siegel, *supra* note 7, at 1529 n.205.
32. 413 U.S. 189, 198 (1973) (“[P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.”).
33. 426 U.S. 229, 240 (1976) (explaining “the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).
34. 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”); see also *id.* at 271-72 (“The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.” (citations omitted)).
35. See *id.* at 272 (“Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954))); see also *Harris v. McRae*, 448 U.S. 297, 322 (1980) (“This presumption of constitutional validity . . . disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, ‘suspect,’ the principal example of which is a classification based on race.” (citing *Brown*, 347 U.S. 483)); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (“Not all legislation . . . is entitled to the same presumption of validity. The presumption is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently ‘suspect.’” (citing *McLaughlin*, 379 U.S. 184; *Brown*, 347 U.S. 483)).

classifications impugned the constitutional validity of benign, race-conscious efforts to integrate. In a series of cases ranging from *Regents of the University of California v. Bakke*³⁶ and *Metro Broadcasting, Inc. v. FCC*³⁷ to *City of Richmond v. J.A. Croson Co.*³⁸ and *Adarand Constructors, Inc. v. Peña*,³⁹ the Court became ever more clear that it would apply strict scrutiny to affirmative action in a variety of settings. Only with these debates concerning the application of the Equal Protection Clause to “facially neutral” school assignment policies and “benign” race-based admissions policies do anticlassification and antisubordination assume shape as competing principles with concrete stakes that seem to settle practical questions of law: it is at that point that the emphasis on *classification* as an element of the harm is taken to answer decisively questions about the constitutional status of particular practices under *Brown*.

Yet, there are important features of our law that the anticlassification principle cannot explain. Most strikingly, strict scrutiny is no longer “fatal in fact” but allows government to consider race, in terms implicitly sensitive to majority and minority status.⁴⁰ While Justice Powell supplied the crucial fifth vote in *Bakke* to reject an antisubordination (or “two-class”⁴¹) reading of the Equal Protection Clause, he allowed consideration of race in admissions for purposes of promoting student “diversity,” if admissions were administered through a process that gave individualized consideration to each applicant and considered race as one of multiple diversity criteria⁴² – a framework that a five-

36. 438 U.S. 265 (1978).

37. 497 U.S. 547 (1990).

38. 488 U.S. 469 (1989).

39. 515 U.S. 200 (1995).

40. See *id.* at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980))). In *Adarand*, Justice O’Connor insisted that her view of consistency did not “equate[] remedial preferences with invidious discrimination” or “ignore[] the difference between ‘an engine of oppression’ and an effort ‘to foster equality in society,’ or, more colorfully, ‘between a “No Trespassing” sign and a welcome mat.’” *Id.* at 229 (quoting *id.* at 246, *id.* at 243, *id.* at 243, *id.* at 245 (Stevens, J., dissenting)).

41. *Bakke*, 438 U.S. at 295 (opinion of Powell, J.) (“The Fourteenth Amendment is not directed solely against discrimination due to a “two-class theory” – that is, based upon differences between “white” and Negro.” (quoting *Hernandez v. Texas*, 347 U. S. 475, 478 (1954))).

42. *Id.* at 315, 318; see also Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1751 (1996) (discussing Powell’s view that “a university could not use a strict quota or a rigid set-aside in an attempt to enhance diversity” but “must look instead to the whole person”); Siegel, *supra* note 7, at 1538 (discussing “the rationale of Justice Powell’s *Bakke* opinion . . . that public universities could promote the diversity of their student bodies by

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Justice majority of the Court adopted in *Grutter*⁴³ and that Justice O'Connor there explained in terms even more wide-ranging than Justice Powell's.⁴⁴

A similarly asymmetric understanding of race may guide discriminatory purpose doctrine as well. Even as the Rehnquist Court continued to restrict affirmative action programs employing racial classifications through the 1980s and 1990s, the Court tolerated and even encouraged race-conscious interventions of a different form by imposing a "narrow-tailoring requirement" that asked the government to show it had exhausted facially neutral means of promoting minority participation before it employed racial classifications to achieve the same end.⁴⁵ The narrow-tailoring constraint on affirmative action created incentives to develop facially neutral programs designed to increase minority participation, such as ten-percent plans.⁴⁶ If these plans are constitutional, they too seem to require differentiating between benign and invidious purpose in government consideration of race.

C. *Race Moderates and Concerns of Balkanization*

While race conservatives emphasizing themes of colorblindness have succeeded in applying strict scrutiny to affirmative action, they have done so with the help of "swing" Justices who voted to preserve these policies but sharply limit their scope. For example, in *Bakke*, four members of the Court opposed an admissions policy that took applicant race into account in order to

considering race as one factor in the admissions process, so long as the admissions officers continued to evaluate every applicant as an individual").

43. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (citing Justice Powell's opinion in *Bakke* and endorsing the proposition that diversity is a compelling interest sufficient to justify race-conscious admissions processes "so long as a race-conscious admissions program uses race as a 'plus' factor in the context of individualized consideration").
44. See *infra* note 63 and accompanying text.
45. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (holding that a city's race-conscious action was not narrowly tailored in part because "there [did] not appear to have been any consideration of the use of race-neutral means to increase minority . . . participation" and approving the use of race-neutral policies to facilitate racial equality); *id.* at 528 (Scalia, J., concurring in judgment) ("Racial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.").
46. See *infra* notes 100, 104 and accompanying text.

increase minority representation in a state medical school;⁴⁷ but with Justice Powell casting the deciding vote, the Court sanctioned affirmative action in education, so long as it assumed a particular form. Justice Powell rejected affirmative action to rectify societal discrimination as resting on what he termed a problematic “two-class theory” of equal protection that he feared would stimulate racial resentment because many of those “dispreferred” had their own histories of disadvantage.⁴⁸ He warned: “Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.”⁴⁹ Yet Justice Powell then proceeded to assert that consideration of race in admissions to increase “diversity” was permissible so long as race was not the sole criterion of diversity and all applicants received individualized consideration.⁵⁰ While not a majority opinion for the Court, the Powell diversity framework has been widely adopted, and, with Justice O’Connor’s vote, was ratified by a majority of a bitterly divided Court in *Grutter*.⁵¹

In the *Bakke* era, Justice Brennan and other race liberals on the Court began to discuss the potential risks of race-conscious interventions—including “the social reality that even a benign policy assignment by race is viewed as unjust

47. See *Bakke*, 438 U.S. at 271-72.

48. See, e.g., *id.* at 295 (opinion of Powell, J.) (“The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments. As observed above, the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.”).

49. *Id.* at 298-99. Justice Powell states:

All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.

Id. at 294 n.34.

50. *Id.* at 318; see also Amar & Katyal, *supra* note 42, at 1751 (discussing Powell’s view that “a university could not use a strict quota or a rigid set-aside in an attempt to enhance diversity” but “must look instead to the whole person”).

51. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (citing Justice Powell’s opinion in *Bakke* and endorsing the proposition that diversity is a compelling interest sufficient to justify race-conscious admissions processes “so long as a race-conscious admissions program uses race as a ‘plus’ factor in the context of individualized consideration”).

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by many in our society, especially by those individuals who are adversely affected by a given classification.”⁵² But in *Bakke* the liberal wing of the Court voted to reserve strict scrutiny for race-based state action that burdened and stigmatized minorities and to apply intermediate scrutiny to race-based remedies that burdened whites, a framework in which courts would oversee, with a presumption of deference, government efforts to promote racial integration.⁵³

It was Justice O’Connor who followed Justice Powell in extending strict scrutiny to affirmative action and threatening to invalidate race-based efforts to integrate unless the effort assumed judicially sanctioned form. Like Justice Powell, Justice O’Connor applied strict scrutiny emphasizing the risks of “racial hostility” that racial remedies posed.⁵⁴ In *Shaw v. Reno*,⁵⁵ Justice O’Connor asserted that race-conscious remedies threatened to “balkanize us into competing racial factions”:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the

52. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 174 (1977) (Brennan, J., concurring in part) (upholding against constitutional challenge a redistricting plan under the Voting Rights Act); *id.* at 172-76 (discussing potential harms of race-based remedial interventions). I am indebted to Rick Pildes for drawing my attention to Justice Brennan’s opinion in *United Jewish Organizations*.

53. *Bakke*, 438 U.S. at 357-62 (Brennan, J., concurring in part and dissenting in part).

54. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of California Regents v. Bakke*, 438 U. S., at 298 (opinion of Powell, J.) (“[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth’.” (alteration in original)).

55. 509 U.S. 630 (1993).

Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.⁵⁶

Since Paul Mishkin elucidated the complex character of Justice Powell's reasoning in *Bakke*,⁵⁷ there has been growing attention to the ways in which the Court's cases constraining the so-called benign uses of race are concerned about the risk of racial resentment that policies of racial rectification engender. Racial balkanization is a theme in the voting rights literature.⁵⁸ Most recently,

56. *Id.* at 657; see also *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion of O'Connor, J.) (arguing that excessively gerrymandered districts "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial").

57. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 927-28 (1983) ("Even when the net operative results may be the same, the use of euphemisms may serve valuable purposes; as do legal fictions, they may facilitate the acceptance of needed measures." (footnote omitted)). Mishkin argues:

Indirectness may also have significant advantages in muting public reactions to, and possible resentment of, the granting of preference on racial lines. The use of overt numbers, whether stated as literal quotas or as "set-asides" for qualified applicants, greatly tends to trigger the symbolism of the infamous "numerus clausus" and other exclusionary devices of past invidious religious, ethnic, and racial discrimination. The incorporation of such features in an institutional admissions program continuing indefinitely from year to year, tends continually to keep alive consciousness of the program and the relevance of race therein; it tends to maintain and exacerbate latent and overt hostility to these effects to overcome the efforts of past racial discrimination. A program formulated along the lines Justice Powell's opinion approves would, by the very lack of "sharp edges," avoid such visibility in its operations and tend to enhance the acceptability of the program.

Id. at 928; see also Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1493-97 (2007).

58. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 634-39 (1993); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 224-25, 238-39; Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83; Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2537 (1997) ("[G]enuine 'expressive harms' might legitimately be thought to arise from the highly visible political manipulation of electoral structures, particularly when done selectively for racial purposes."); Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 503 (1993) ("Justice O'Connor's opinion in *Shaw* . . . permits noninvidious uses of race, as long as policymakers do not allow race to become—or appear to be—paramount to all other relevant values."); see also *id.* at 526 ("Government cannot redistrict in a way that conveys the social

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Sam Issacharoff, Robert Post, and Neil Siegel have discussed concerns about racial balkanization underlying the requirement of individualized consideration in the Court's affirmative action cases.⁵⁹ The concept of balkanization seems sufficiently grounded in the cases and commentary that it can serve as a framework for exploring the trajectory of equal protection law more generally.

In what follows, I adopt the term "balkanization" from the voting rights and affirmative action cases and commentary, where it is employed to discuss the rationale for restrictions imposed on benign race-conscious state action and situate it in the anticlassification/antisubordination debate. If we examine concerns articulated by the Justices who have voted to allow yet restrict affirmative action, it is immediately apparent that the votes and views of race moderates do not conform to the anticlassification or the antisubordination position. Of course, race moderates might simply be ambivalent in their

impression that race consciousness has overridden all other, traditionally relevant redistricting values.").

59. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4, 74 (2003) ("In such circumstances, the fear of racial "balkanization" is most pronounced." (quoting Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 691 (1998))); Post & Siegel, *supra* note 57, at 1494-95 ("Mishkin's scrutiny of this issue is nothing short of brilliant. . . . It elucidates why in dealing with questions involving the intersection of race and electoral design the Court has explicitly concluded that 'appearances do matter.' It anticipates the work of a later generation of scholars who interpret the Court's equal protection decisions as driven by the necessity of shaping interventions to an expressive form that will allay 'the fear of racial "balkanization"' while simultaneously sustaining the constitutionality of legislative redress for the present effects of past discrimination." (quoting *Shaw*, 509 U.S. at 647; Issacharoff, *supra*, at 691)); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 787 (2006) ("My scrutiny of the case law suggests that the type of individualized consideration required in a given context turns on the Court's judgment about how the use of racial criteria is likely to impact racial balkanization in America over the long run."); *see also* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005) ("Our country is more ethnically, religiously, and ideologically heterogeneous now than at any previous time in its history—and that diversity is a source of potential instability. The possibility of exit and collapse is not, however, the only or even the most important challenge. A pluralist democracy needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes."); Siegel, *supra* note 7, at 1530-32; *id.* at 1532 ("In quiet ways, Justice Powell understood that members of superordinate and subordinate groups were differently situated, and in constitutionally significant ways. Even as he rejected a race-asymmetric or antisubordination framework for interpreting the presumption against racial classifications, Justice Powell offered the nation a master compromise in the concept of 'diversity' itself—a framework that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles.").

commitments and lack distinct views of their own. But before concluding as much, this Article explores the possibility that there might be an analytically distinct set of concerns shaping their decisions—concerns obscured so long as we continue to model division on the Court in the anticlassification/antisubordination framework. If we examine the concerns expressed by Justices Powell and O'Connor as they voted to allow affirmative action and to constrain it under a strict scrutiny framework, we can appreciate that they have not called for a wholly colorblind jurisprudence, appearances to the contrary notwithstanding.⁶⁰

As we have seen, both Justice Powell and Justice O'Connor cite the resentment of the “dispreferred” as a reason to impose restrictions on race-conscious remedies. Yet, unlike strict proponents of a colorblind anticlassification principle who would limit race-conscious remedies to repairing past identified, intentional discrimination, Justices Powell and O'Connor permit race-conscious government action for other purposes, so long as it is subject to judicial restraint.⁶¹ Why? The diversity rationale for allowing affirmative action that Justice Powell proposed and Justice O'Connor embraced is specifically concerned with promoting social cohesion. As Justice Powell expressed it, “[I]t is not too much to say that the ‘nation’s future

60. Justice O'Connor called for doctrinal “consistency” in the treatment of minority and majority discrimination claims in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Yet in response to Justice Stevens’s objection that “[t]he consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat,” *id.* at 245 (Stevens, J., dissenting), Justice O'Connor insisted that her view of consistency did not “equate[] remedial preferences with invidious discrimination” or “ignore[] the difference between ‘an engine of oppression’ and an effort ‘to foster equality in society,’ or, more colorfully, ‘between a “No Trespassing” sign and a welcome mat,’” *id.* at 229 (majority opinion) (quoting *id.* at 246, *id.* at 243, *id.* at 243, *id.* at 245 (Stevens, J., dissenting)). For Justice Kennedy’s account of the limits of the colorblindness approach, see *infra* notes 83-85 and accompanying text.

61. Although Justice O'Connor’s and Justice Powell’s opinions in *Bakke*, *Croson*, and *Adarand* are often remembered for imposing strict scrutiny and other restrictions on the use of benign racial classifications, these opinions also endorsed the constitutionality of some forms of affirmative action for reasons other than correcting the wrong of past intentional discrimination. In *Croson*, for instance, Justice O'Connor wrote that, in certain cases, “some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion” and that a state or local government may adopt such preferences, subject to judicial supervision to ensure they are “taken in the service of the goal of equality itself.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509, 510 (1989). While Justice O'Connor would allow government to pursue “equality itself,” Justice Scalia reasoned in much narrower, corrective justice terms, insisting that “there is only one circumstance in which the States may act *by race* to ‘undo the effects of past discrimination’: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.” *Id.* at 524 (Scalia, J., concurring).

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depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."⁶² In *Grutter*, Justice O'Connor announced:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts."⁶³

On closer examination, the reason that Justice O'Connor has given for recognizing that government has a compelling purpose in promoting diversity in education is related to her reason for restricting affirmative action. In both contexts, Justice O'Connor interprets equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion. Concern with balkanization thus supplies affirmative reason to allow affirmative action *and* to limit it—to allow certain race-conscious efforts to integrate institutions so as to assure members of underrepresented groups that they have an opportunity to participate, while doing so in ways designed to reassure majority groups that their participation is not thereby unjustly constrained.⁶⁴

I term this third vantage point on the Equal Protection Clause the antibalkanization perspective. In what follows, I identify the understandings that seem to guide the antibalkanization perspective, relating and differentiating antibalkanization from the anticlassification and antisubordination principles from which it emerged in dialogue.

62. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

63. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). In *Bakke*, Justice Powell's justification for diversity focused on the First Amendment and educational concerns, 438 U.S. at 312-14; by contrast, Justice O'Connor's restatement in *Grutter* focused on concerns of social cohesion more generally.

64. See Siegel, *supra* note 7, at 1532.

D. The Antibalkanization Perspective

In prohibiting race-based civil rights initiatives, race conservatives are conventionally understood as reasoning from the anticlassification principle concerned with threats to individualism,⁶⁵ while race progressives who uphold affirmative action and other race-conscious civil rights initiatives are understood to reason about equality with attention to subordination or group status. As this analysis has shown, the Justices at the center of the Court who have cast the deciding votes to uphold and limit race-conscious civil rights initiatives often explain their position in opinions concerned with threats to social cohesion. Justices reasoning from this antibalkanization perspective enforce the Equal Protection Clause with attention to the forms of estrangement that both racial stratification and practices of racial remediation may engender.

Because Justices reasoning from an antibalkanization perspective understand that pervasive racial stratification can engender anomie and leave some groups feeling like outsiders or nonparticipants, the Justices permit and sometimes encourage government to act in ways that promote racial integration (a form of equality realized through social cohesion). Because Justices reasoning from an antibalkanization perspective understand that interventions promoting racial integration can become a locus of racial conflict, they insist that race-conscious interventions undertaken for compelling public-regarding purposes must nonetheless anticipate and endeavor to ameliorate race-conscious resentments. Race-conscious resentments among the racially privileged matter because, if ignored, they may inhibit the amelioration of racial stratification and because these resentments may reflect displaced expressions of other forms of inequality.

Antibalkanization takes from the antisubordination principle an attention to historical and social context. Reasoning from history and social structure, the antibalkanization perspective does not view all government use of race as the same and cannot be reduced to colorblindness. Antibalkanization recognizes that the nation has a history of racial wrongs that it seeks to transcend—a history that has shaped endowments and baselines in ways that confound efforts to attain race neutrality. Reasoning from history, Justices employing the antibalkanization perspective are capable of differentiating

65. See *supra* text accompanying note 21. *But cf.* Siegel, *supra* note 21, at 92-93 (analyzing the concept of individualism in colorblindness discourse).

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between government policies that entrench and repair race inequality.⁶⁶ Like antisubordination, the antibalkanization perspective thinks about equal protection purposively and structurally: it assesses the constitutionality of government action by asking about the kind of polity it creates. The opinions preserving and limiting race-conscious remedies have emphasized the importance of cultivating social bonds that enable groups to relate and identify across difference if citizens are to feel that they live in an equal opportunity society.⁶⁷

Yet this same attention to social structure and social meaning leads proponents of antibalkanization to break with proponents of antisubordination over the use of race-conscious remedies. Proponents of antibalkanization are concerned that the pursuit of racial justice itself poses threats to community and are prepared to subordinate the pursuit of racial justice to the preservation of social cohesion. Antibalkanization takes from the anticlassification principle attention to the claims of those aggrieved by benign race-conscious interventions. It attends to the concerns of the dispreferred, channeling their concerns into limits on race-conscious remedies, which it often justifies in the name of individualism.⁶⁸ In the interests of avoiding conflict and

66. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980))). In *Adarand*, Justice O’Connor insisted that her view of consistency did not “equate[] remedial preferences with invidious discrimination” or “ignore[] the difference between ‘an engine of oppression’ and an effort ‘to foster equality in society,’ or, more colorfully, ‘between a “No Trespassing” sign and a welcome mat.’” *Id.* at 229 (quoting *id.* at 246, 243, 243, 245 (Stevens, J., dissenting)).

67. Consider the justifications that Justice Powell and Justice O’Connor offered for recognizing the pursuit of diversity as a compelling purpose that can justify government consideration of race under the Equal Protection Clause. See *supra* note 63 and accompanying text. For a critical analysis of the role that multicultural education might play in promoting integration (where integration is understood as a polity in which members have a sense of belonging and identify with the polity’s major institutions and practices and feel at home in them), see ANDREW MASON, *COMMUNITY, SOLIDARITY AND BELONGING* 148-70 (2000). Identification across difference plays an important role in enabling a commitment to equality. Cf. Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 567, 587 (2007) (“[U]nless people share an underlying moral bond sufficiently strong to shore up an ethos of sharing, public institutions will be without compelling moral reason for the less advantaged to make claims on the social and economic resources of the more advantaged.”).

68. See *Grutter*, 539 U.S. at 334 (observing that in a narrowly tailored plan, “[a]s Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way” and “universities cannot establish quotas for members of

estrangement, the antibalkanization perspective privileges race-conscious interventions that interact with the public in forms that affirm commonality rather than difference.⁶⁹ This concern with the form and “appearance”⁷⁰ of lawmaking is pragmatic, purposive, and contextual—providing socially situated rather than formalist reasons for employing the authority of colorblindness discourse. Proponents of antibalkanization recognize that, to get beyond race, it may be necessary to take race into account; but, for them, taking race into account means crafting interventions that ameliorate racial wrongs without unduly aggravating racial resentments. The goal of promoting social cohesion may provide a motivation to intervene in race relations, as well as to require limitations on racial interventions; the antibalkanization perspective, by its very terms, requires attention to social context and social meaning.

The antibalkanization perspective understands the repair of racial injustice as fundamentally political, a responsibility of representative institutions of government as well as courts. Unlike the anticlassification and antistatutory principles, which were articulated as courts were striking down openly segregative laws, the antibalkanization principle emerged later, as courts grappled with challenges to the constitutionality of civil rights laws. Where the anticlassification and antistatutory principles have been articulated in ways that presuppose that the judiciary is the branch of government primarily responsible for vindicating equality values, the antibalkanization perspective emerged in answer to the question of whether courts would allow representative government to rectify race inequality. In the cases that we have examined, questions of constitutional permission predominate (that is, government is permitted but not required to promote integration; government may engage in affirmative action for certain purposes but not others). Antibalkanization vindicates constitutional values by

certain racial groups or put members of those groups on separate admissions tracks”); *id.* at 341 (“To be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups.’” (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting))).

69. Consider, for instance, Justice Powell’s insistence that all seats must be open to competition and his requirement of individualized consideration. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978).
70. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[W]e believe that reapportionment is one area in which appearances do matter.”). Race progressives have criticized race moderates’ attention to appearance as lacking forthrightness. See *Gratz v. Bollinger*, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting) (“If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”).

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authorizing representative institutions to promote equality, while imposing on courts responsibility for constraining the form of political interventions so as to ameliorate resentments they may engender. Antibalkanization thus understands the judicial role not as mandating or managing, but as channeling constitutional politics that vindicate equality values.⁷¹ Discharging this responsibility entangles proponents of antibalkanization in the necessarily messy project of line-drawing. These concerns distinguish Justice Kennedy's concurring opinion in *Parents Involved*.

II. PARENTS INVOLVED AND ANTIBALKANIZATION

Revisiting debates over the core principle of equal protection helps make sense of the divisions among the Justices in *Parents Involved*. Chief Justice Roberts and Justice Thomas write on the anticlassification understanding of *Brown*. Justices Breyer and Stevens write on the antisubordination understanding of *Brown*. Justice Kennedy stakes out a position in the tradition of Justices Powell and O'Connor that is responsive to the tug of each vision, while refusing cleanly to adopt either.

In *Parents Involved*, Chief Justice Roberts writes for a five-Justice majority to emphasize that the Court's past cases had recognized the Constitution as permitting government consideration of race only for two compelling purposes: remedying "the effects of past intentional discrimination" and promoting diversity in education, under *Grutter*, as "part of a broader assessment of diversity, and not simply an effort to achieve racial balance."⁷² Then, in a plurality opinion that Justice Kennedy does not join, Chief Justice Roberts proceeds to impugn any nonremedial consideration of race that does not meet *Grutter's* requirements for diversity, attacking in particular government consideration of race to promote integration without a predicate finding of constitutional violation, an aim he pejoratively condemns as "racial balancing."⁷³ Chief Justice Roberts acknowledges that it was once a

71. Cf. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 430 (2007) (observing "how judges can use flexible constitutional standards to channel and mediate conflict, guiding public dialogue about hotly controverted social practices and endeavoring to shape the social meaning of competing claims"). For discussion of antibalkanization and the judicial role, see *infra* Part IV.

72. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 723 (2007).

73. *Id.* at 725-33 (plurality opinion). Chief Justice Roberts explains:

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our

commonplace understanding that school boards were permitted to consider race in order to reduce de facto segregation even if they were not constitutionally required to do so—an understanding the Court expressed in *Swann*.⁷⁴ But Chief Justice Roberts dismisses Chief Justice Burger’s language in *Swann* as mere dicta, which in any event, he argues, had no bearing on the use of racial classifications of the kind at issue in the instant case, which involved individualized admissions policies.⁷⁵ Chief Justice Roberts famously concludes his opinion in *Parents Involved* by invoking the colorblindness reading of *Brown*⁷⁶: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁷⁷ Justice Thomas is even more emphatic: “Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education* This approach is just as wrong today as it was a half century ago.”⁷⁸

repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”

....

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from “patently unconstitutional” to a compelling state interest simply by relabeling it “racial diversity.” While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.

Id. at 730-32 (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

74. *Id.* at 721 n.10 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).
75. *Id.* (“The districts point to dicta in a prior opinion [*Swann*] in which the Court suggested that, while not constitutionally mandated, it would be constitutionally permissible for a school district to seek racially balanced schools as a matter of ‘educational policy.’”); *id.* at 738 (“*Swann* addresses only a possible state objective; it says nothing of the permissible means—race-conscious or otherwise—that a school district might employ to achieve that objective.”). For case law reflecting the common understanding that government is permitted to consider race in the design of school attendance zones to promote integration, see *supra* note 30 and accompanying text.
76. *Id.* at 747-48 (“For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way ‘to achieve a system of determining admission to the public schools on a nonracial basis’ is to stop assigning students on a racial basis.” (citation omitted) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955))).
77. *Id.* at 748.
78. *Id.* (citation omitted) (Thomas, J., concurring); see also *id.* at 778 (“What was wrong in 1954 cannot be right today.”). For an account of the theories underlying *Brown*, see Schmidt,

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The four dissenting Justices in *Parents Involved* express key tenets of the antisubordination understanding of *Brown*. Justice Stevens attacks the formalism of the colorblindness creed, invoking antisubordination's race-conscious concern with group inequality and emphasizing that the constitutionality of governmental uses of race depends on whether they perpetuate or alleviate segregation: "I have long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason."⁷⁹ Justice Breyer grounds his lengthy dissent in some fifty years of race-conscious efforts to bring about integration that the Supreme Court had "repeatedly required, permitted, and encouraged local authorities to undertake," pointing to that history to demonstrate that "the Constitution permits local communities to adopt desegregation plans even where it does not require them to do so."⁸⁰

In *Parents Involved*, Justice Kennedy casts the deciding vote to strike down the use of race classifications in admissions policies, authoring an opinion that stakes out a position between the anticlassification and antisubordination visions of *Brown*. Justice Kennedy agrees with Chief Justice Roberts's plurality opinion that government policies employing racial classifications for benign purposes are subject to strict scrutiny⁸¹ and that the schools' use of racial classifications in the instant case is not narrowly tailored.⁸² But he then proceeds to emphasize his differences with the Chief Justice, attending both to questions of ends and of means.

Justice Kennedy insists that colorblindness cannot be construed as a rule that inhibits government from acting to promote its legitimate interest in the racial integration of schools. In a crucial passage of his opinion, Justice Kennedy explains:

[P]arts of the opinion by [Chief Justice Roberts] imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. *The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.* The plurality's postulate

supra note 25, and for an account of their subsequent renegotiation, see Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599 (2008); and Siegel, *supra* note 7.

79. *Parents Involved*, 551 U.S. at 799 n.3 (Stevens, J., dissenting).

80. *Id.* at 803 (Breyer, J., dissenting).

81. *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment).

82. *Id.* at 787.

that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” is not sufficient to decide these cases.⁸³

Justice Kennedy is clear why government has a legitimate interest “in ensuring all people have an equal opportunity regardless of their race.” “The enduring hope is that race should not matter,” Justice Kennedy emphasizes, but “the reality is that too often it does.”⁸⁴ Race matters, Justice Kennedy explains, because of the long history of government-sanctioned racial inequality:

The statement by Justice Harlan that “[o]ur Constitution is color-blind” was most certainly justified in the context of his dissent in [*Plessy*]. The Court’s decision in that case was a grievous error it took far too long to overrule. . . . [A]s an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.⁸⁵

In order to ensure that citizens have equal opportunity regardless of race, Justice Kennedy emphasizes in *Parents Involved* that government may employ race-conscious but facially neutral policies designed to integrate: “[S]trategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”⁸⁶ A district that selects a site of a new school or draws its attendance zones with “general recognition of the demographics of neighborhoods” may make decisions in which race is a but-for cause of the allocation of resources and opportunities, yet Justice Kennedy emphasizes that such decisions do not ordinarily warrant close judicial oversight. As he explains it: “These mechanisms are race-conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”⁸⁷ He goes on to observe:

83. *Id.* at 787-88 (third alteration in original) (emphasis added) (citation omitted).

84. *Id.* at 787.

85. *Id.* at 788 (first alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)).

86. *Id.* at 789; *see also id.* at 788 (“In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”).

87. *Id.* at 789.

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Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.⁸⁸

Why does Justice Kennedy join four Justices in declaring unconstitutional the government's use of racial classifications to promote diversity in admissions but then distance himself in order to affirm government efforts to pursue the same ends by facially neutral means? In these passages, Justice Kennedy seems to distinguish between government's race-conscious ends and its race-conscious means. Kennedy goes out of his way to emphasize that the government need not ignore race but that, if government does intervene in race relations, it must proceed with care. Kennedy warns that the practice of classifying individuals by race implicates concerns of human dignity and consequently threatens social divisiveness. Because government interventions can encourage more constructive or corrosive kinds of political interchange, the form of race-conscious interventions matter:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.⁸⁹

88. *Id.*

89. *Id.* at 797. Dignity is a key constitutional value for Justice Kennedy and is of wide-ranging significance in his opinions. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1736-45 (2008) (demonstrating that Justice Kennedy invokes dignity to refer sometimes to the value of life, sometimes to a Kantian notion of autonomy, and sometimes to equality).

Justice Kennedy does not object to all forms of race-conscious government action. Instead, he emphasizes that the school assignment policies allocated opportunities by individualized racial classification of applicants—intervening in a form that in Justice Kennedy’s judgment is especially likely to affront individual dignity and so to exacerbate group division. Had the school districts simply relied on race-conscious but facially neutral attendance zones to promote integration—rather than using race to evaluate individual student applications to magnet schools—Justice Kennedy emphasizes that he would have upheld the policy.

The position that Justice Kennedy stakes out is not intelligible within a framework that treats government efforts to integrate as morally indistinguishable from government efforts to segregate. If a race-conscious purpose is unconstitutional, how does concealing the aim enhance its legitimacy? Nor does Justice Kennedy’s position make sense within the antisubordination framework. If government may act to alleviate racial stratification, why should the form of the intervention matter?

But if social cohesion is the concern, Justice Kennedy’s position in *Parents Involved* makes more sense. Vindicating equal protection in ways that promote social cohesion—a sense of attachment shared by all in the community—entails practical, contextual judgments attentive to the concerns of differently situated members of the polity. In Justice Kennedy’s view, both racial stratification and its repair each have the potential to balkanize. Left uncorrected, extreme racial stratification threatens the attachment and sense of membership of minority citizens—while racial redistribution can excite the aggrievement and resentment of those who perceive themselves unjustly affected. Justice Kennedy’s opinion in *Parents Involved* seems responsive to both these concerns. Citing the long history of Jim Crow, Justice Kennedy rejects colorblindness as a workable constitutional rule and interprets the Equal Protection Clause to allow government to alleviate racial stratification, subject to the constraint that government employ facially neutral rather than race-based means.

* * *

To this point, we have focused on the different grounds that the plurality and Justice Kennedy offer for limiting the use of racial classifications in individual admissions policies. Where the plurality emphasizes colorblindness, Justice Kennedy’s concurring opinion points to concerns of balkanization and emphasizes that form matters. In his view, certain race-conscious interventions—such as race classifications in individualized admissions decisions—may affront individual dignity and exacerbate group division in a way that race-conscious, facially neutral policies may not. To make clear that

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his objection to race classifications does not preclude all forms of race-conscious state action, Justice Kennedy emphasizes that there are race-conscious, facially neutral policies, such as school districting with attention to integration, that remain constitutional:

Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.⁹⁰

Justice Kennedy reasons about constitutional restrictions on racial classifications of individual applicants in terms that suggest the constitutionality of facially neutral strategies to integrate, such as “percent plans” that admit the top high school students across the state to public universities in order to achieve diversity without affirmative action.

Does disagreement between moderates and conservatives extend to the kinds of race-conscious but facially neutral policies that Justice Kennedy expressly affirmed in *Parents Involved*? In fact, it is not entirely clear whether and, if so, on what grounds race conservatives oppose such policies. Reflecting briefly on this puzzle about the constitutionality of race-conscious, facially neutral policies illuminates ambiguities in the colorblind anticlassification principle and, in the process, highlights the distinct analytic orientation of the antibalkanization inquiry.

Proponents of a colorblind Constitution did not originally and may still not oppose many forms of race-conscious, facially neutral action.⁹¹ As we have seen, battle lines in the dispute between anticlassification and antisubordination were initially drawn in two classes of constitutional cases—affirmative action cases and disparate impact cases. In these cases, race conservatives insisted that (1) all laws using racial classifications should be subject to strict scrutiny because they violate colorblindness and that (2) laws with racial disparate impact that do not use racial classifications are presumptively constitutional, unless plaintiffs could prove discriminatory purpose.⁹² The anticlassification principle focused on the *form* of state action; colorblindness meant that government could not classify by race. While race progressives worried about the constitutionality of laws adopted in awareness

90. *Parents Involved*, 551 U.S. at 789.

91. See *infra* note 107 and accompanying text.

92. See *supra* Section I.B.

of their disparate group impact,⁹³ conservative proponents of a colorblind anticlassification principle invoked as fundamental the distinction between laws that classified and those that did not (“the Fourteenth Amendment guarantees equal laws, not equal results”⁹⁴) and allowed state action with a disparate group impact—even state action undertaken in awareness that it would have disparate group impact—so long as the policy was not intended to inflict “adverse effects upon an identifiable group.”⁹⁵

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93. Proponents of the antistatutory principle advocated judicial oversight of policies with a disparate racial impact. See *supra* note 23. In *Feeney*, progressives on the Court reasoned that foreseeable disparate impact was relevant in establishing discriminatory purpose. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 283 (1979) (Marshall, J., dissenting) (“To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available.”).
94. *Feeney*, 442 U.S. at 273 (observing that the Court’s decision in *Washington v. Davis* allowing plaintiffs to challenge facially neutral laws on the ground that they were motivated by discriminatory purpose “signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results”); see also *id.* at 272 (“The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.”); *Washington v. Davis*, 426 U.S. 229, 245 (1976) (“As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory . . .”).
95. The Court first defined discriminatory purpose under the Equal Protection Clause in a case involving sex discrimination. Conservatives on the Court adopted a narrow definition of discriminatory purpose in rejecting an equal protection challenge to a law giving preferences to military veterans in civil service hiring despite the facially neutral policy’s plainly foreseeable adverse impact on women. Even if legislators understood that they were enacting a preference that would foreseeably steer civil service jobs away from women, the Court reasoned, legislators had not allocated the jobs with the purpose of inflicting harm on women. See *Feeney*, 442 U.S. at 279 (“[D]iscriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (footnote omitted) (citation omitted)).

The Court then applied *Feeney*’s definition of discriminatory purpose to a case involving race discrimination. See *McCleskey v. Kemp*, 481 U.S. 279, 297-98 (1987) (rejecting an equal protection challenge to the death penalty that relied on a study documenting racial disparities in application); *id.* at 298 (“[D]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group. For this claim to prevail, *McCleskey* would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.” (alteration in original) (citations omitted) (quoting *Feeney*, 442 U.S. at 279)). Courts have invoked this narrow definition of discriminatory purpose to uphold sentencing guidelines that impose dramatically different sentences for crack and

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At the same time, proponents of a colorblind anticlassification principle seemed to authorize race-conscious, facially neutral state action undertaken for the purpose of promoting integration⁹⁶—the very position that Justice Kennedy endorsed in *Parents Involved*—when the Court imposed a narrow tailoring requirement in affirmative action cases that asked government officials to undo effects of past discrimination by facially neutral means before government could adopt affirmative action programs employing racial classifications.⁹⁷ As Justice Scalia observed in *Croson*:

A State can, of course, act “to undo the effects of past discrimination” in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.⁹⁸

Conservatives urged government to adopt facially neutral programs as an alternative to affirmative action;⁹⁹ some conservatives even proposed that

cocaine possession. See *United States v. Clary*, 34 F.3d 709, 712 (8th Cir. 1994) (“Discriminatory purpose ‘implies that the decisionmaker, in this case [Congress], selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.” (alteration in original) (quoting *United States v. Lattimore*, 974 F.2d 971, 975 (8th Cir. 1992))). See generally Siegel, *Why Equal Protection No Longer Protects*, *supra* note 23, at 42 (discussing how the *Feeney* standard is applied by appellate judges).

96. See Siegel, *supra* note 7, at 1512 (describing the understanding, held by proponents of the anticlassification view, that “a state or local government might adopt race-conscious districting plans to alleviate de facto segregation, when courts had not construed the Constitution to require them”).
97. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (holding that a city’s race-conscious action was not narrowly tailored in part because “there [did] not appear to have been any consideration of the use of race-neutral means” and endorsing the use of race-neutral policies to facilitate racial equality).
98. *Id.* at 526 (Scalia, J., concurring).
99. On facially neutral means of achieving diversity, see Brief for the United States as Amicus Curiae Supporting Petitioners at 25, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908), which posits that “[s]chool districts have a strong interest in providing a high quality education to all students, and should continue to seek innovative solutions to improve educational opportunities for all children, including race-neutral choice and open enrollment programs”; and Letter from Kenneth L. Marcus, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Leaders of the Education Community (Feb. 2004), in OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION*, at ii, v (2004), which

governments admit the top percentage of high school graduates to increase the diversity of undergraduate enrollment.¹⁰⁰

And so, reasoning from constitutional precedents and positions that they have supported since the 1970s, race conservatives might well agree with

describes “race-neutral means to achieve diversity in educational institutions” and states that “President George W. Bush has challenged the education community to develop innovative ways to achieve diversity in our schools without falling back upon illegal quotas.” *But see* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1791-93 (1996) (arguing that if affirmative action programs are subject to strict scrutiny, so too must be race-neutral programs aimed at benefiting historically oppressed groups, for these programs are “motivated by race”); Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1310 (1997) (“[C]lass-based preferences that violate the principle against subterfuge are an unconstitutional alternative to the race-based preferences it is presently denouncing.”).

100. See Brief for the United States as Amicus Curiae Supporting Petitioners at 22-23, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (advocating race-neutral alternatives to affirmative action or “quotas”); Brief for the United States as Amicus Curiae Supporting Petitioners at 17-21, *Gutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (same); Marcus, *supra* note 99, at 6.

In 1997, in response to *Hopwood v. Texas*, 78 F.3d 932, 945-46 (5th Cir. 1996)—a Fifth Circuit decision holding that the University of Texas could not, consistent with the Equal Protection Clause, give a preference to black and Mexican-American applicants to achieve diversity in its student body—the Texas legislature passed, and then-Governor George W. Bush signed into law, a bill guaranteeing admission to any state university to all students graduating in the top ten percent of their high school class. TEX. EDUC. CODE ANN. § 51.803(a) (West 2006); see also Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 252-62 (1996) (examining the legislative history of the bill to demonstrate that the intent of the legislature was to respond to *Hopwood*).

In 1999, as part of his “One Florida Initiative,” Governor Jeb Bush signed an executive order ending affirmative action in state employment and education. See Executive Order Regarding Diversity, Fla. Exec. Order No. 99-281 (Nov. 9, 1999). Governor Bush implemented in its stead a “Talented Twenty Program,” which guaranteed that students with grade point averages in the top twenty percent of their respective classes would be admitted to a state university. See William Yardley, *Bush Details Anti-Bias Plan*, ST. PETERSBURG TIMES, Nov. 10, 1999, at 1A.

The Fifth Circuit recently considered a challenge to the University of Texas’s use of race as one of several factors in admissions. This suit, funded by conservative advocates, assumed the constitutionality of percent plans. See *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587 (W.D. Tex. 2009), *affirmed*, 631 F.3d 213 (5th Cir. 2011); Morgan Smith, *Affirmative Action Suit Challenges UT Admission Policy*, TEX. TRIB., July 21, 2010, <http://www.texastribune.org/texas-education/higher-education/affirmative-action-suit-challenges-ut-policy>. The lawsuit—funded and spearheaded by the Project for Fair Representation, a conservative organization founded to challenge affirmative action—argues that the Ten Percent Plan currently in place at UT obviates any need explicitly to consider race in admissions decisions, making such consideration impermissible under the Equal Protection Clause. See Smith, *supra*.

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Justice Kennedy's claim that "a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races."¹⁰¹ Or, race conservatives might object and advance colorblindness objections to race-conscious, facially neutral practices whose constitutionality they have long sanctioned.

Were conservatives to draw on colorblindness to fashion constitutional objections to facially neutral laws, differences between colorblindness and antibalkanization would once again come into view. Where antibalkanization sees in race-conscious, facially neutral policies an opportunity to promote social cohesion—by repairing de facto segregation, by undoing effects of past or ongoing discrimination, and by promoting diversity without classifying individuals by race—race conservatives might object to race-conscious, facially neutral policies on the ground of purpose, for example, arguing that facially neutral policies promote "racial balancing"¹⁰² or are motivated by race. Because policies that do not employ racial classifications are presumptively constitutional and subject to rational basis review only, challengers would face the difficult task of demonstrating discriminatory purpose under prevailing doctrine, which requires proof that the government acted at least in part to inflict adverse effects on an identifiable group.¹⁰³

There is a small but growing number of race conservatives who argue for liberalizing proof of discriminatory purpose, in order to attack percent plans and other facially neutral statutes in which they claim "racial motive" predominates. (It is not clear whether they mean to liberalize the standard for proving discriminatory purpose for all plaintiffs or only for those plaintiffs challenging civil rights initiatives.¹⁰⁴) When proponents of colorblindness

101. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

102. See *supra* note 73 and accompanying text.

103. See *supra* notes 93-95 and accompanying text.

104. See, e.g., Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 292 (2001) ("[T]here is something wrong, indeed, unconstitutional, with a legislative motive to increase the percentage of one racial group in a state university at the expense of another."); Marcus, *supra* note 15, at 73 ("Under *Ricci* and *Parents Involved*, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas's racial motivations predominated in the institution of the plan."). Many conservatives in government have advocated for percentage plans and other race-neutral means of integration, see *supra* notes 99-100 and accompanying text; to this point, opposition to the plans seems primarily to be expressed by a small group of commentators and movement conservatives. See, e.g., William Casement, *Percentage Plans and College Admissions*, ACAD. QUESTIONS, Dec. 2001, at 8; Editorial, *Negative Reaction*, NAT'L REV., Feb. 10, 2003, at 12; Shelby Steele, *X-Percent Plans: After Preferences, More Race Games*, NAT'L REV., Feb. 7, 2000,

contest the constitutionality of race-conscious but facially neutral laws that employ no racial classifications, the claim is potentially vast in reach (does it reach all civil rights laws? the census?), and the value that colorblindness vindicates is by no means clear: in these circumstances, the claim to vindicate the value of individualism is more attenuated,¹⁰⁵ and colorblindness may just as easily protect racial group differences (and the distributions that result from them) from government interference.¹⁰⁶ In these contexts, colorblindness is vindicating very different visions and values from those associated with antibalkanization. As Justice Kennedy made plain in *Parents Involved*, antibalkanization understands race relations as an expression not of nature but of history and allows race-conscious government action that promotes equal opportunity for all, so long as government acts in ways that promote cohesion.

In the end, Chief Justice Roberts avoided squarely facing the question of race-conscious, facially neutral state action in his *Parents Involved* decision,¹⁰⁷

at 22, 24 (arguing that percentage plans “pursue[] equality in education more by engineering unequals into institutions than by insisting on their development to parity with others”).

To date, conservative critics of percent plans have not argued their constitutional claims through existing discriminatory purpose doctrine but seem to be arguing for a new standard of “racial motivation” borrowed from the Voting Rights Act context. See *Miller v. Johnson*, 515 U.S. 900 (1995). In appealing to *Miller* rather than *Feeney*, conservative critics of the percent plans seem to be advocating a change in the law. Either they are proposing to make it easier for members of the majority to prove reverse discriminatory purpose claims than it is now for minorities to prove traditional discriminatory purpose claims, or they are proposing to alter the standard for proving discriminatory purpose for all plaintiffs.

105. But see Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010), which is discussed *infra* text accompanying notes 194-199.

106. See Siegel, *Colorblind Constitutionalism*, *supra* note 23, at 48-59 (analyzing a long-running tradition of colorblindness arguments devoted to preserving racial difference and protecting against government social engineering what are deemed to be natural differences in taste and talent among groups).

107. In *Parents Involved*, Chief Justice Roberts questions whether language in the *Swann* majority decision permitting school boards, in cases where there is no showing of constitutional violation, voluntarily to design school attendance zones with the race-conscious goal of increasing racial integration is appropriately treated as part of the holding of the *Swann* decision; he then argues that even if it is, the language in question does not go so far as to authorize the use of racial classifications in individual admissions decisions—the policy challenged in *Parents Involved*. Chief Justice Roberts explains:

The dissent’s characterization of *Swann* as recognizing that “the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals” is—at best—a dubious inference. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann*, it also does not address the question presented in these cases—whether the school districts’ use of racial classifications to achieve their stated goals is permissible.

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but it was soon to reappear in *Ricci*, a case in which firefighters challenged the City of New Haven's decision to set aside a promotion test because of concerns about its racially disparate effects—effects that the City was concerned might put the municipality in violation of the prohibition on employment practices with a racial disparate impact under Title VII of the Civil Rights Act. In oral argument in *Ricci*, Chief Justice Roberts seemed in fact to suggest that he had accepted as constitutional race-conscious school siting decisions in *Parents Involved*:

Can I get back just—just—since I don't understand it yet, the distinction between intentional racial discrimination and race conscious action. I thought both the plurality and the concurrence in *Parents Involved* accepted the fact that race conscious action such as school siting or drawing district lines is—is okay, but discriminating in particular assignments is not.¹⁰⁸

If the Constitution allows “race conscious action such as school siting or drawing district lines,” was New Haven's concern about the disparate impact of its promotion exam a sufficient reason to readminister the test? If not, why not? The answer to this question changes shape when analyzed with attention to values of colorblindness and antibalkanization.

III. RICCI AND ANTIBALKANIZATION

In *Ricci v. DeStefano*,¹⁰⁹ white firefighters and one Hispanic firefighter sued the City of New Haven, alleging that the City violated the Equal Protection Clause and federal employment discrimination law (Title VII of the 1964 Civil Rights Act¹¹⁰) when the City threw out the results of a civil service exam upon learning that the exam would preclude promoting virtually all minorities for two years, citing concern that its use of this test might have a racial disparate

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 738 (2007) (plurality opinion). This passage leaves unsettled the question of whether Chief Justice Roberts would allow the traditional forms of race-conscious, facially neutral state action, such as drawing school district lines with attention to their effects on integration, that Justice Kennedy's concurring opinion expressly affirms.

¹⁰⁸. Transcript of Oral Argument at 54, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

¹⁰⁹. 129 S. Ct. 2658.

¹¹⁰. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (2006)).

impact in violation of Title VII.¹¹¹ The Court ruled that the City had engaged in impermissible disparate treatment in violation of Title VII, in a five-to-four decision written by Justice Kennedy that expressly avoided reaching the constitutional question. Declaring for the first time that there was a tension between Title VII's prohibition of racial disparate treatment and its prohibition of practices with a racial disparate impact, the Court then drew on its constitutional affirmative action decisions to hold that an employer needed a strong basis in evidence that the statute was violated before it could throw out a test which applicants such as the plaintiffs had taken.¹¹²

On an initial reading, Justice Kennedy's opinion is ambiguous, unclear in its implications for disparate impact law and for equal protection. Does *Ricci* restrict disparate impact law generally—or only in cases where employers, for expressly racial reasons, decline to hire or promote on the basis of scores earned on employment tests that they have already administered? Further, does *Ricci* address Title VII only, or might the decision have constitutional implications?¹¹³ If so, has Justice Kennedy changed course from his position in *Parents Involved*, when he held that government could act to promote integration where it acted by facially neutral means? Or is Justice Kennedy responding to particular features of the *Ricci* case—New Haven's decision to readminister a civil service exam for the publicly stated reason that scarcely any minority candidates would have been promoted under the first exam?

In what follows, I briefly review disparate impact law, which, like equal protection law, has been the locus of conflict between race conservatives and race progressives in the last several decades. I then turn to the *Ricci* decision itself, identifying ambiguities in the scope and grounds of the Court's holding. Finally, I read *Ricci* in light of the concerns with balkanization at the heart of Justice Kennedy's *Parents Involved* concurrence. The antibalkanization reading identifies the race dynamics of retesting rather than disparate impact law itself as the locus of liability in the case. As importantly, the antibalkanization reading provides independent reason for the preservation of disparate impact inquiry. The disparate impact framework encourages employers to avoid using promotion tests with racial disparate impact unless such tests are warranted by business needs; the facts of *Ricci* vividly illustrate how use of employment tests

111. *Ricci*, 129 S. Ct. at 2664. Implemented in accordance with the city's promotion procedures, the exam would have resulted in the promotion of two Latino and no African-American firefighters. See *infra* Section III.B.

112. See *Ricci*, 129 S. Ct. at 2676.

113. See *id.* at 2675 (“Our cases discussing constitutional principles can provide helpful guidance in this statutory context.”).

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with racial disparate impact that are not clearly justified by business necessity can exacerbate workplace polarization.

A. A Short Primer on the Law and Politics of Disparate Impact Law

As the Supreme Court first recognized in *Griggs v. Duke Power Co.*,¹¹⁴ federal employment discrimination law makes unlawful facially neutral employment practices with a racial disparate impact, unless an employer can show that the practice is justified by business necessity.¹¹⁵ As the Court reasoned, Title VII respects employers' freedom to organize their business as they see fit but requires employers to ensure that any selection criteria that entrench minority exclusion in fact serve business needs.

The disparate impact claim is designed to counteract several kinds of bias: (1) to smoke out covert discriminatory purpose; (2) to challenge subconscious employer bias; and (3) to challenge structural discrimination—discrimination that arises from the interaction of workplace criteria with other race-salient social practices. For example, in *Griggs*, the plaintiffs challenged job requirements of a high school diploma and scores on a standardized test on the grounds that these requirements had a racial disparate impact and did not test skills needed to perform the jobs in question.¹¹⁶ The defendant employer had engaged in openly race-based hiring until the effective date of the 1964 Civil Rights Act;¹¹⁷ yet in requiring the employer to show that the facially neutral

^{114.} 401 U.S. 424 (1971).

^{115.} See *id.* at 431 (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

^{116.} *Id.* at 425-26.

^{117.} The *Griggs* opinion observes:

When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the “operating” departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had

but racially exclusionary requirements were job-related, the Court did not emphasize themes of covert discriminatory purpose. Instead, in holding that the employer could not use a selection criterion such as a standardized test with a racial disparate impact unless the exam tested for skills needed to do the job, *Griggs* adverted to the recent segregation of the North Carolina public schools, observing that “[b]ecause they are Negroes, petitioners have long received inferior education in segregated schools.”¹¹⁸ The Court explained: “Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹¹⁹ As *Griggs* reasoned, discrimination does not consist only in isolated or aberrant individual bad acts but occurs in a larger societal context; for this reason even facially neutral employment criteria can become racially salient as they interact with norms and practices outside the workplace.

While disparate impact doctrine requires no showing of intent,¹²⁰ disparate impact law is also understood as a constraint on the individual bad actor. In *Albemarle Paper Co. v. Moody*,¹²¹ decided several years after *Griggs*, the Court set out the framework for proving disparate impact claims. If the complaining party makes out a prima facie case of discrimination by showing that “the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants,” then the employer has the “burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.”¹²² The Court then asserted that plaintiffs could rebut an employer’s showing of business necessity, describing this rebuttal as a demonstration of “pretext”:

If an employer does then meet the burden of proving that its tests are “job related,” it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in “efficient

been excluded if the incumbent had been employed prior to the time of the new requirement.

Id. at 427-28.

118. *Id.* at 430.

119. *Id.*

120. See *id.* at 432 (“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”).

121. 422 U.S. 405 (1975).

122. *Id.* at 425 (alterations in original) (quoting *Griggs*, 401 U.S. at 432).

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and trustworthy workmanship.” Such a showing would be evidence that the employer was using its tests merely as a “pretext” for discrimination.¹²³

The disparate impact framework thus attempts to limit the effects of structural discrimination and to constrain covert or quasi-conscious bias by requiring that if an employer hires using a test or criterion with a significant racial disparate impact, the employer can show that the test assesses skills actually needed to perform the job. If selection criteria with a racial disparate impact are shown to be job-related, any exclusion that results is deemed to be on the basis of merit; but if the selection criteria with racial disparate impact are not shown to be job-related, then the resulting exclusion is deemed to be “on the basis of race.” *Griggs* thus makes job qualifications a ground of race neutrality.¹²⁴

In the years after *Griggs*, judges and administrators began to apply disparate impact as a framework for identifying discrimination in a variety of contexts under federal law, including Title VI of the 1964 Civil Rights Act, which bars discrimination in programs that receive federal funding;¹²⁵ and a number of courts employed disparate impact as a framework for interpreting

123. *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The language of pretext was drawn from the framework generally established for proving Title VII discrimination claims in the 1973 decision of *McDonnell Douglas*.

124. The Court reasons:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.

Griggs, 401 U.S. at 436; see also Siegel, *supra* note 21, at 95-96 (observing that the *Griggs* disparate impact theory of liability rests on an understanding of structural discrimination that identifies job-relatedness or market functionality as a ground of race neutrality).

125. 42 U.S.C §§ 2000d to 2000d-7 (2006). On the spread of disparate impact law in the decades after *Griggs*, see Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 509 (2009) (“In an early case interpreting Title VI, *Lau v. Nichols*, the Supreme Court ‘squarely held . . . that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities.’” (alteration in original) (quoting *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 589 (1983))); and *id.* at 510 (“For almost forty years, private citizens aggrieved by discriminatory federally-funded programs had brought suits based on disparate impact under a variety of agency regulations.”).

the Equal Protection Clause.¹²⁶ These developments in turn prompted energetic conservative criticism of disparate impact law.

While those who support disparate impact liability interpret existing race stratification as, in significant part, reflecting the legacy of discrimination—the presumption from which the Court reasoned in *Griggs*¹²⁷—disparate impact’s critics are inclined to interpret the underrepresentation of minorities as evidence of racial group differences in taste or aptitude¹²⁸ and so to see

126. In rejecting disparate impact as a framework for interpreting the Equal Protection Clause in 1976, the Supreme Court acknowledged that a number of circuit courts had viewed the framework as appropriate for identifying violations of the Equal Protection Clause:

Both before and after *Palmer v. Thompson*, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

Washington v. Davis, 426 U.S. 229, 244-45 (1976) (footnote omitted); see also *id.* at 244 n.12 (collecting cases addressing public employment); *United States v. City of New York*, 683 F. Supp. 2d 225, 238-40 (E.D.N.Y. 2010) (noting that the district court had found the New York Fire Department selection exam to violate the Equal Protection Clause under a disparate impact analysis in *Vulcan Soc’y of New York City Fire Dep’t, Inc. v. Civil Service Comm’n*, 360 F. Supp. 1265 (S.D.N.Y. 1973), a ruling that the Second Circuit upheld the same year, 490 F.2d 387 (2d Cir. 1973)).

127. See *supra* text accompanying notes 118-119; see also Siegel, *supra* note 21, at 95-96 (observing that *Griggs* reasons from a historical understanding of race).

128. See, e.g., Thomas Sowell, *Disparate Impact Dogma*, NAT’L REV. ONLINE (July 7, 2009), <http://article.nationalreview.com/399347/d disparate-impact-dogma/thomas-sowell> (“A key notion that has created unending mischief—from its introduction by the Supreme Court in 1971 to the current firefighters’ case—is that of ‘disparate impact.’ Any employment requirement that one racial or ethnic group meets far more often than another group is said to have a disparate impact and is considered evidence of racial discrimination. In other words, if group X doesn’t pass a test nearly as often as group Y, then there is something wrong with the test, according to this reasoning—or lack of reasoning. This implicitly assumes that there cannot be any great difference between the two groups in their skills, talents, or efforts.”).

Conservative critics of civil rights law have long raised this objection. See, e.g., NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION 63 (1975) (arguing that “[f]ederal agencies persist” in “reduc[ing] all differences in labor force distribution . . . to *discrimination*” while, in fact, many other factors, including “taste or, if you will, culture” are at work); CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN 85 (1997) (“At any moment in history a completely fair system for treating individuals will produce different outcomes for different groups,

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disparate impact liability as creating incentives for employers to engage in “quota” hiring of persons who do not belong in their workplace.¹²⁹ Initially race conservatives opposed adoption of the disparate impact framework as a constitutional liability rule, a dispute they won with the Court’s 1976 decision in *Washington v. Davis*¹³⁰ that plaintiffs would have to establish proof of discriminatory purpose to challenge facially neutral state action under the Equal Protection Clause.¹³¹ Soon thereafter disparate impact’s critics persuaded the Court to reverse its decision recognizing a disparate impact claim under Title VI of the 1964 Civil Rights Act.¹³² By the late 1980s, conservative judges had so eviscerated disparate impact under Title VII of the 1964 Civil Rights Act¹³³ that Congress reinstated the *Griggs* framework through the 1991 Civil

because groups are hardly ever equally represented in the qualities that go into decisions about whom to hire, admit to law school, put in jail, or live next door to.”); Dinesh D’Souza, *Improving Culture To End Racism*, 19 HARV. J.L. & PUB. POL’Y 785, 788-89 (1996) (“Merit produces inequality . . . between groups. . . . The real problem is that African-Americans are not competitive with other groups in our society.”); see also Matthew J. Lindsay, *How Antidiscrimination Law Learned To Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 117-20 (2006) (“If the colorblind marketplace functions as its proponents believe – as a competitive meritocracy that justly distributes rewards according to individual desert – it requires only a short logical step to infer that its outcomes accurately register the relative talent, effort, skill, or merit of the individual competitors.”); cf. Siegel, *Colorblind Constitutionalism*, *supra* note 23, at 48 (“[I]f one follows the logic of concerns about proportional representation and racial social engineering expressed in *Croson* and *Hopwood*, it appears that strict scrutiny doctrines under the Fourteenth Amendment radically restrict the use of race-conscious remedies in order to protect and preserve real differences among racial groups. To say the least, this is a counterintuitive ambition for a body of law that embraces as its ‘ultimate goal’ the purpose of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race.’” (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion))).

129. See, e.g., Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993). For discussion of the shifting meaning of “quotas,” see *infra* note 135.

130. 426 U.S. 229.

131. At the time the Court decided *Davis*, a number of circuits viewed the disparate impact framework as of constitutional as well as statutory relevance. *Id.* at 244 n.12 (collecting cases); see also *supra* note 126 (quoting the Court’s discussion of these cases in *Davis*).

132. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (holding that agencies could not provide a private right of action to people who suffered disparate impact discrimination); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983) (holding that the statutory language of Title VI did not prohibit disparate impact discrimination); see also Kirkpatrick & Kwoka, *supra* note 125, at 509-11 (reconstructing the case law that first recognized a disparate impact cause of action under Title VI and then progressively overruled it).

133. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) (shifting burden of proving business necessity from disparate impact defendant to plaintiff); *id.* (“The Court of Appeals’ theory, at the very least, would mean that any employer who had a segment of his

Rights Restoration Act, which codified disparate impact as an express part of federal employment discrimination law.¹³⁴ Criticizing Congress's effort to reinstate burden-of-proof rules for the disparate impact cause of action, conservative critics of the Act assailed it as a "quota" bill,¹³⁵ yet they did not

work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. The Court of Appeals' theory would 'leave the employer little choice . . . but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.'" (alteration in original) (citations omitted) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in the judgment)); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion) ("We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid 'disparate impact' as such" (citation omitted)); *id.* at 993 ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.").

134. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k) (2006)).

135. President George H.W. Bush vetoed the Civil Rights Act of 1990 on the grounds that it would force employers to adopt quotas. 136 CONG. REC. 31,827, 31,828 (1990) ("[T]he bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system.").

Though President Bush signed the Civil Rights Act of 1991, stating that "[t]his law will not lead to quotas," Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1701 (Nov. 21, 1991), other critics insisted that the bill was a "quota bill" in part because it sought to reinstate the framework for proving a disparate impact claim prevailing before the Court's 1988 *Ward's Cove* decision. Dissenting members of the House Judiciary Committee published in the bill's committee report an extended discussion of why the bill was "a quota bill." H.R. REP. NO. 102-40, pt. 2, at 58-63 (1991). They essentially equated hiring with an awareness of "the numbers" with quota-based hiring. *Id.*, pt. 2, at 68-69. Some conservative opponents of the disparate impact standard were candid about the expansion of the range of practices to which they applied the term "quota." A Heritage Foundation report on the Civil Rights Act of 1991 defined a "quota bill" as follows:

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contend that the statute imposing disparate impact liability violated equal protection.¹³⁶ Despite disparate impact's codification in 1991, judges are quite conservative in enforcing the framework.¹³⁷

In its original, narrow usage, the term "quotas" referred only to the practice of setting aside a fixed number or percentage of employment positions for members of a particular race, color, religion, sex, or ethnic group. In recent debates over civil rights legislation, however, the term has come to be used for all forms of race-conscious decision-making or preferential treatment based on group membership, including such terms as "goals" and "timetables." The term "quotas" also refers to laws that force employers to abandon perfectly legitimate hiring practices simply because they happen to produce statistical disparities between the racial or ethnic composition of an employer's work force and that of the general population. This broadened definition is more in line with the commonly understood idea of a quota. Thus, a policy of giving job applicants an advantage in the hiring process merely because they are, say, black or Hispanic, would count as a quota, as would a policy of always choosing a minority whenever two applicants are otherwise equally qualified.

A bill can fairly be classified as a quota bill if its effect would be to give an employer the incentive to adopt quotas to protect himself from potential lawsuits based on the percentage of minorities in his work force. Or it would be a quota bill if it changes the rules of civil litigation to make it impossible for victims of employment discrimination to challenge quota plans adopted by employers under court order or in settlement of prior litigation.

William G. Laffer III, *The "Danforth" Compromise: Another Quota Civil Rights Bill*, HERITAGE FOUND. 1 (Oct. 7, 1991), http://web.archive.org/web/20060119101004/http://www.heritage.org/Research/Religion/upload/89897_1.pdf.

For an exhaustive analysis of the discourse on quotas in the debates over the 1991 Civil Rights Act, see Robin Stryker, Martha Scarpellino & Mellisa Holtzman, *Political Culture Wars 1990s Style: The Drum Beat of Quotas in Media Framing of the Civil Rights Act of 1991*, 17 RES. SOC. STRATIFICATION & MOBILITY 33, 55-65 (1999), which analyzes the usage of "quotas" in editorials supporting and opposing civil rights legislation codifying the disparate impact cause of action in federal employment discrimination law.

136. Conservative views about disparate impact in the 1980s are expressed in an important report from the Department of Justice during Ronald Reagan's presidency, see OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988), which displayed concern that the Supreme Court might "'constitutionalize' the 'disparate impact' definition of discrimination by extending the *Griggs* analysis to the equal protection area," *id.* at 50, expressed skepticism about the statutory interpretation underlying the Court's disparate impact decisions, *id.*, and noted the possibility that the Court "may reinstate the intent requirement for claims brought under the Civil Rights Acts," *id.* at 55, but did not consider the possibility that the Constitution prohibited Congress from imposing disparate impact liability. (For an account of the historical significance of this *Constitution in 2000* report, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 221-23 (2008)).

Some critics of the Civil Rights Act of 1991 were prepared to attack the Act in constitutional terms but did so without challenging the constitutionality of the Act's

B. *The Ricci Facts*

Disparate impact liability is at the heart of the events leading to the *Ricci* case. In 2003, the City of New Haven administered promotional exams in order to fill vacant Lieutenant and Captain positions in its fire department.¹³⁸ The City hired a firm that specializes in creating exams for public safety departments to design the tests, which, by contract with the firefighters union, were required to have a written component (worth sixty percent of the total score) and an oral component (worth forty percent). The City's civil service rules provided that promotional lists would be created, listing in rank-order those firefighters who passed the test, and that vacancies would be filled by the "Rule of Three"—a rule that allows only the top three candidates on a promotion list to be considered for a vacancy. Only nineteen of the seventy-seven firefighters who took the Lieutenant's exam were African-American; only six of them passed. In contrast, of forty-three Caucasian candidates, twenty-six passed the exam. Similarly, whereas eighteen of the twenty-five white candidates for Captain passed the exam, only three of the eight black candidates did so. These test results, combined with the Rule of Three, meant that only white candidates would be considered for Lieutenant vacancies and that the Captain's promotions would be distributed among seven white firefighters and two Latinos. In a city where African-Americans account for approximately forty percent of the population and Latinos twenty percent,¹³⁹ the test results promised that no African-Americans and scarcely any Latinos would be promoted for the fifteen openings for the next two years.

New Haven's Civil Service Board held five hearings to determine whether to certify the test results, during which time the Board publicly released the

codification of disparate impact liability. See, e.g., L. Gordon Crovitz, *Bush's Quota Bill: (Dubious) Politics Trumps Legal Principle*, WALL ST. J., Oct. 30, 1991, at A17 (arguing that the Civil Rights Act of 1991 is "a quota bill" but challenging as unconstitutional only the provision "depriving third parties of the right to challenge consent decrees"). A 2003 article in the *Harvard Law Review* claimed to be the "first serious consideration" of whether statutory disparate impact liability might violate the Equal Protection Clause. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 497 (2003).

137. See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734-53 (2006).

138. Unless otherwise specified, these facts are drawn from the joint appendix filed with the Supreme Court in *Ricci*, see Joint Appendix, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), and the district court opinion in the case, see *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145-51 (D. Conn. 2006).

139. See *New Haven (City) QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/09/0952000.html> (last visited Aug. 16, 2010).

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applicants' test scores by race (though not by name). After hours of testimony from attorneys, experts, and residents – and an acrimonious public debate – the City decided to throw out the test results and arrange for a new exam. Although none of the candidates knew their results, a group of white test-takers and one Hispanic brought suit, alleging that New Haven's decision to throw out the exam violated their rights under Title VII and the Equal Protection Clause. The district court rejected the plaintiffs' claims.¹⁴⁰

C. Ambiguities in Ricci's Holding: Colorblindness or Antibalkanization?

In *Ricci*, the Supreme Court divided five to four in favor of the firefighters. Writing for the majority, Justice Kennedy held that the City's decision to throw out the exam results was unlawful disparate treatment in violation of Title VII; the majority indicated that the statutory holding avoided the constitutional question of equal protection, to which the Justices nonetheless repeatedly averted.¹⁴¹

Ricci is remarkably unclear in explaining *how* the City engaged in disparate treatment in violation of Title VII. What aspects of the City's conduct were unlawful? Some read the decision as holding that New Haven engaged in unlawful disparate treatment because the City considered the likely racial impact of its civil service exam, that the effort to avoid disparate impact liability itself is "discriminatory"¹⁴² – a theory of the case that Justice Scalia emphasizes

^{140.} *Ricci*, 554 F. Supp. 2d 142, *aff'd*, 530 F.3d 87 (2d Cir. 2008).

^{141.} See *Ricci*, 129 S. Ct. at 2676 ("Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.").

^{142.} *Id.* at 2682 (Scalia, J., concurring); see Helen Norton, *The Supreme Court's Post Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 229 (suggesting that on one reading disparate impact liability is constitutionally suspect, as "[t]he Court now, however, appears to treat a decision maker's attention to the disparities experienced by members of traditionally subordinated racial groups – that is, its antisubordination ends – as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification"); Primus, *supra* note 105, at 1344 (suggesting that one reading of *Ricci*, a "general reading," is that "[d]isparate impact doctrine is race conscious; equal protection requires racial neutrality," and thus "the two are not compatible"). Primus, whose article is discussed below in the text accompanying notes 194–202, observes:

It is possible to understand Title VII's disparate impact doctrine in several different ways, but on any construction it is race-conscious. Courts must classify members of the workforce by race in order to adjudicate disparate impact claims, and the threat of liability encourages employers to classify their employees or applicants by race so as to monitor their own compliance with the law. Moreover,

in his concurring opinion.¹⁴³ If *that* is what *Ricci* holds, then Justice Kennedy would seem to be suggesting that a government's decision to select a facially

disparate impact doctrine is concerned with racial groups, and the colorblind version of equal protection insists that the law's attention be on individuals. If equal protection requires the law to be thoroughly colorblind, then a statutory doctrine that requires racial classification and makes liability turn on the status of groups considered collectively is an equal protection problem.

Id. at 1363 (footnotes omitted); *cf.* Joseph Seiner & Benjamin Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2213 (2010) (“[F]or the first time in disparate-impact law, the employer’s state of mind would be relevant to the analysis. . . . Now the claims would also turn on what the employer knew and what conclusions it drew [about the impact of the facially neutral employment policy].”) This account of disparate impact’s constitutional vulnerability might well extend to disparate treatment liability under Title VII and potentially to a wide variety of inquiries into civil rights and racial justice.

143. In a concurring opinion, Justice Scalia challenges disparate impact liability in ways that the majority does not. Unlike the majority, Justice Scalia suggests that Congress’s decision to enact the civil rights law may have been unconstitutional:

[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race. As the facts of these cases illustrate, *Title VII’s disparate-impact provisions place a racial thumb on the scales*, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. *That type of racial decisionmaking is, as the Court explains, discriminatory.* *Personal Administration of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. . . . Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. . . . And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

Ricci, 129 S. Ct. at 2682 (Scalia, J., concurring) (emphases added) (citations omitted). In this passage, Justice Scalia contends that disparate impact liability violates equal protection, but the cases he cites do not support this claim. The type of race-conscious decisionmaking that Justice Scalia terms “discriminatory”—or more colorfully refers to as placing “a racial thumb on the scales”—is facially neutral state action. As we have seen, there is a developed body of equal protection case law governing equal protection challenges to facially neutral state action that has a disparate impact on identifiable groups. See *supra* notes 93-95 and accompanying text.

To show that facially neutral state action with disparate racial impact is discriminatory, the Court ruled in *Feeney* that the challenged action must be undertaken at least in part because of its adverse effects upon an identifiable group. See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (“Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’

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neutral policy that promotes employee diversity—the very sort of decision he

not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (footnote omitted) (citation omitted)). Thus, to sustain his allegation, Justice Scalia would have to show that in enacting Title VII, (1) Congress acted (2) with a purpose to inflict adverse effects upon an identifiable group. Justice Scalia offers no evidence whatsoever to support that proposition. Congress had numerous reasons to enact the civil rights laws having nothing to do with a purpose to harm whites (just as, in *Feeney*, Massachusetts had numerous reasons to enact veteran preferences in civil service employment having nothing to do with a purpose to harm women). These numerous benign purposes establish the constitutionality of the statute under prevailing equal protection case law.

Justice Scalia states the law exactly backwards when he invokes *Adarand* for the proposition that a “purportedly benign motive” for a facially neutral law “cannot save the statute.” The *Adarand* case that Justice Scalia cites sets forth the law governing cases where the government *has employed a racial classification* and triggered the presumption of unconstitutionality. Under *Davis* and *Feeney*, facially neutral action undertaken for a purportedly benign motive is presumptively *constitutional*; a challenging party bears the burden of proof that the purportedly benign motive conceals an intent to inflict adverse effects on a particular group.

Justice Scalia offers no evidence that Congress acted with discriminatory purpose under *Feeney*, and he acknowledges that Congress mandated no quotas in the civil rights laws, but he goes on to suggest that in codifying disparate impact law, Congress compelled *employers* to engage in intentional discrimination. He offers no evidence of that claim (in what constitutionally relevant sense is adopting facially neutral laws “compulsion” of “intentional discrimination”?). Here Justice Scalia is implicitly recalling (and constitutionalizing) policy arguments against disparate impact liability advanced in the 1980s and 1990s, when conservatives attacked disparate impact laws that exposed employers to potential liability for discrimination as imposing “quotas” because, they argued, the statute created incentives for employers to avoid litigation by increasing minorities in their workforce. *See supra* notes 135–137 and accompanying text. Justice Scalia’s innovative equal protection claim is a remarkable act of “legislating from the bench.” Congress rejected this policy argument and enacted the 1991 Civil Rights Act for a range of reasons, none of which Justice Scalia has shown to be discriminatory within the meaning of *Feeney*.

If the concerns that prompted Congress to enact the 1991 Act are discriminatory, Justice Scalia is (1) raising concerns about the constitutionality of *all* antidiscrimination laws and (2) expanding the meaning of discriminatory purpose in ways that would make it much easier for minority plaintiffs to challenge facially neutral laws with a foreseeable racial disparate impact (unless he means to alter the framework for proving discriminatory purpose only for white plaintiffs challenging civil rights laws).

In short, Justice Scalia suggests that government imposition of disparate impact liability might violate equal protection, but the cases that he cites (but does not discuss) do not support the propositions of law he asserts. Nor does Justice Scalia square his suggestion that disparate impact liability might be unconstitutional under the Equal Protection Clause with his own opinion in *Croson* suggesting that “[a] State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race. . . . Such programs may well have racially disproportionate impact, but they are not based on race.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring); *see supra* notes 96–100 and accompanying text.

went out of his way to affirm in *Parents Involved*—violates Title VII and possibly the Equal Protection Clause as well.¹⁴⁴

144. Kenneth Marcus, who directed the U.S. Commission on Civil Rights under President George W. Bush, reads *Ricci* expansively, construes Justice Kennedy's concurring opinion in *Parents Involved* in light of this expansive reading of *Ricci*, and then suggests that disparate impact law is only constitutional if narrowed, concluding that the "the Court may be forced to strike down the disparate-impact provision and encourage Congress to reenact it without its problematic features." Marcus, *supra* note 15, at 80.

On Marcus's reading of *Ricci*, facially neutral state action is unconstitutional when the racial motive predominates. *See id.* at 72 ("Taking *Ricci* and *Parents Involved* together, the Court has established that racially neutral governmental actions with a predominant racial motive trigger both strict scrutiny and disparate-treatment analysis."). While Justice Scalia identifies *Feeney* as the equal protection case defining discriminatory purpose, *see supra* note 143, Marcus omits discussion of the case and instead relies on Justice Kennedy's opinion in *Miller v. Johnson*, 515 U.S. 900 (1995), which applies strict scrutiny to district lines adopted in compliance with the Voting Rights Act when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," 515 U.S. at 916.

Marcus plainly intends this new framework to trigger strict scrutiny review of many race-conscious, facially neutral laws and policies. *See Marcus, supra* note 15, at 72-73 ("The scope of decisions covered by this new rule is potentially broad, encompassing racially motivated decisions by school districts to redraw school boundaries or employ socioeconomic factors in student assignment decisions, state universities to institute percent-rank plans, and private universities to give admissions or financial aid preferences on the basis of either student economic status or such factors as whether a student is the first person in his family to attend college. *In all of these cases, strict scrutiny and disparate treatment analysis are both triggered.*" (emphasis added)).

Absent any account of what counts as a "racial motivation," Marcus's proposed liability rule would seem to subject *all* civil rights statutes to strict scrutiny. Which civil rights laws would survive strict scrutiny? Marcus proposes an account of "predominant racial motive" that would separate constitutional from unconstitutional concern about race discrimination and so determine which kinds of civil rights laws survive strict scrutiny.

Marcus argues that, under *Ricci*, disparate impact remains constitutional if the liability rule is adopted to rectify hard-to-prove intentional or unconscious discrimination. *See id.* at 70 ("[T]o the extent that the disparate-impact provision is narrowly construed as a means to limit intentional or even unconscious discrimination, the conflict [with disparate treatment and equal protection] dissolves."). But Marcus then goes on to suggest that racial motives predominated in the enactment of the 1991 Civil Rights Act, which codified disparate impact liability under Title VII; he suggests that the 1991 law was not enacted for the primary purpose of rectifying hard-to-prove intentional or unconscious discrimination but instead was enacted for the purpose of achieving "diversity," "racial balance," or "quotas" in the workplace. *See id.* at 66 ("Congressional motives may have included a desire to increase racial diversity in the workforce other than by reducing discrimination. Former White House counsel Boyden Gray has disclosed that a 'principal motivation' for the Civil Rights Act of 1991, which codified the disparate-impact provision, was to achieve racial balancing. Some critics opposed the disparate-impact provision of the 1991 Act on the ground that it was a 'government mandate for proportional quotas.'" (citations omitted) (quoting Michael

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There are certain passages of *Ricci* that could be read to say that selecting an employment test with awareness that it will increase diversity is unlawful under Title VII. Here is an example of a passage in the *Ricci* majority opinion suggesting that the ground of liability is bad motive, purpose, or justification:

All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates. 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.” 554 F. Supp. 2d, at 152; see also *ibid.* (respondents’ “own arguments . . . show that the City’s reasons for advocating non-certification were related to the racial distribution of the results”). Without some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race. See § 2000e-2(a)(1).¹⁴⁵

But if concern about the racial disparate impact of selection devices was an illegitimate racial motive, as the decision at a few points might be read to suggest,¹⁴⁶ *Griggs* itself would be encouraging unlawful race-based

Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1153 (1993)).

In the foregoing article, Professor Marcus seems to take a position that is in some tension with views he expressed in government. KENNETH L. MARCUS, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* (2004), <http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html> (describing “race-neutral means to achieve diversity in educational institutions” and stating that “President George W. Bush has challenged the education community to develop innovative ways to achieve diversity in our schools without falling back upon illegal quotas”).

¹⁴⁵. *Ricci*, 129 S. Ct. at 2673.

¹⁴⁶. The following passage uneasily characterizes the ground of liability in terms that slide from purpose to motive to conduct to justification:

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.

Id. at 2674. The claim that the City “rejected the test results solely because the higher scoring candidates were white” is in fact inaccurate unless we credit facts in Justice Alito’s concurring opinion not contained in the majority opinion, which suggest that racial malice of some kind was animating the City’s decision. *Id.* at 2683-89 (Alito, J., concurring). The

decisionmaking; so would the Court's own requirement of narrow tailoring in affirmative action cases, which asks the government to try to integrate by facially neutral means before employing affirmative action – a requirement that even Justice Scalia has endorsed.¹⁴⁷ If an employer's concern about the disparate impact of its selection criteria is an unlawful reason for changing those criteria, how can an employer voluntarily comply with Title VII without violating the statute?¹⁴⁸

In fact, Justice Kennedy, writing for the majority in *Ricci*, expressly refuses to adopt an interpretation of disparate treatment law that makes an employer's efforts to comply voluntarily with Title VII per se unlawful¹⁴⁹ and explains:

Title VII does not prohibit an employer from considering, *before* administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.¹⁵⁰

facts contained in the majority opinion suggest that the City threw out the results not out of hostility to whites, but (1) out of its interest in ensuring that its test produced an applicant pool that included some minorities and (2) out of concern that its selection device might violate Title VII's disparate impact provisions.

147. See *Crosby*, 488 U.S. at 528. For discussion, see *supra* notes 97-100 and accompanying text.

148. Even that account of liability would not amount to discriminatory purpose in a constitutional sense. That showing entails a showing, at least in part, that the decisionmaker was adopting the challenged action at least in part because of its "adverse effects" on a racial group. See *Feeney*, 442 U.S. at 279 ("[D]iscriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (footnote omitted) (citation omitted)).

For one reading of *Ricci* suggesting that the Court has inadvertently liberalized the framework for proving disparate treatment liability under the statute, see Michael J. Zimmer, *Ricci's Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?* (Loyola Univ. Chi. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 2009-0020), available at <http://ssrn.com/abstract id=1529438>.

149. *Ricci*, 129 S. Ct. at 2674 ("Petitioners would have us hold that, under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination. That assertion, however, ignores the fact that, by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination. We must interpret the statute to give effect to both provisions where possible.").

150. *Id.* at 2677 (emphasis added).

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Considering the racial disparate impact of a test *before* the test is administered is lawful, while considering the racial disparate impact of a test *after* the test is administered is not. If *Ricci* had extended the colorblindness principle to require neutrality in facially neutral practices, then it should not matter whether an employer considered the potential racial impact of a test before or after officially adopting it. But it is precisely this distinction that *Ricci* emphasizes.

Ricci's repeatedly expressed concern about whether an employer considers the racial disparate impact of an exam before or after the employer announces and administers the test identifies antibalkanization as the ground of the Court's decision, rather than anticlassification or colorblindness. Passage after passage of *Ricci* focuses on the City's decision to invalidate the test it had already administered,¹⁵¹ frustrating the hopes and expectations of those who took it. What seems to disturb Justice Kennedy is *not* the employer's consideration of potential racial impact in the initial selection of employment tests but the employer's decision to throw out an already-administered promotion test, especially when that change in standards is justified for reasons concerning the race of the candidates the test selected:

[O]nce that [promotions] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e-2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.¹⁵²

On this understanding of *Ricci*, wrongful disparate treatment consists of an employer's expressly race-related interaction with job applicants. By this reading, *Ricci* rejects (1) New Haven's decision to change already-public selection criteria on which applicants have relied in forming judgments about

151. See *supra* text accompanying note 145; see also *Ricci*, 129 S. Ct. at 2676 (“If an employer cannot rescore a test based on the candidates’ race, § 2000e-2(l), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations.”).

152. *Ricci*, 129 S. Ct. at 2677.

their employment prospects (2) for the publicly stated reason of avoiding racial disparate impact where (3) there is not “a strong basis in evidence” supporting the disparate impact claim.¹⁵³

D. Antibalkanization, Parents Involved, and Ricci

But what kinds of racial considerations are sufficiently provocative that federal courts are prepared to step in to constrain them? In *Parents Involved*, Justice Kennedy sanctioned the government’s pursuit of diversity through the race-conscious choice of *facially neutral* policies – but balked at the government’s pursuit of diversity through race-conscious decisions about individuals, arguing that this use of racial classifications would violate individual dignity and promote racial balkanization.¹⁵⁴ Has Justice Kennedy drawn this same line in *Ricci*? *Ricci* involved race-conscious government action but did not involve a racial classification in the sense Justice Kennedy discussed in *Parents Involved*. At no point did New Haven single out individual applicants for promotion and give their applications a plus on the basis of racial identity as the schools treated applicants for admission in *Parents Involved*; rather, on learning the demographic composition of the group of test-takers who fared well and the group that did not, New Haven threw out the test results for all applicants, without ever knowing the scores of individual applicants, and with the plan to

153. The *Ricci* Court adopts a “strong-basis-in-evidence” standard from its affirmative action cases as a constraint on compliance efforts that involve “intentional discrimination”:

We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

Id. The “intentional discrimination” that Justice Kennedy discusses in *Ricci* concerns the treatment of those who studied for a test that was subsequently invalidated for reasons related to the race of those the test made eligible for promotion. *See, e.g., supra* text accompanying note 152 (referring to this action as a “preference”).

In *Parents Involved*, the Court discusses the role of the “strong-basis-in-evidence” standard in the Court’s remedial affirmative action cases. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 754 (2007) (Thomas, J., concurring) (“[F]or a government unit to remedy past discrimination for which it was responsible, the Court has required it to demonstrate ‘a strong basis in evidence for its conclusion that remedial action was necessary.’ Establishing a ‘strong basis in evidence’ requires proper findings regarding the extent of the government unit’s past racial discrimination.” (citation omitted) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)) (internal quotation marks omitted)).

154. *See supra* text accompanying notes 86–89.

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administer a new test for all applicants. In that sense, Justice Kennedy imposed a more stringent constraint on New Haven under Title VII than he seemed willing to impose on school districts under the Constitution.

But in another sense, there is a river of common concern linking Justice Kennedy's opinions in the two cases. In *Parents Involved*, Justice Kennedy emphasizes that government has the responsibility and prerogative to promote an equal opportunity society less afflicted by racial stratification, so long as the government does so in ways that respect individual dignity and do not inflame racial balkanization. In *Ricci*, Justice Kennedy seems equally concerned that government abate racial stratification in ways that respect individual dignity and do not inflame racial balkanization. The selection process that New Haven employed—administering a promotion exam, then announcing that it would retest the group because of the demographic composition of those who passed and failed—did not give individual applicants a race-related advantage over other individual applicants, but it did communicate to a relatively small group of applicant coworkers that the City had race-related reasons for selecting the test by which it would determine promotions and that it intended to change tests in such a way that fewer of the white applicants would be promoted—a message that invited all white applicants (who did not know their scores) to imagine they would be promoted but for race.

Justice Kennedy defines the wrong in balkanization-focused terms:

Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. *Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent.* Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.¹⁵⁵

In this passage, Justice Kennedy's opinion for the Court in *Ricci* explains the importance of protecting the "legitimate expectations" of those who take employment tests as key in safeguarding against balkanization—"the very racial animosities Title VII was intended to prevent." But what kind of "legitimate expectations" is Justice Kennedy interpreting the disparate treatment provisions of Title VII to protect? The job applicants have no entitlement to the jobs in question, despite all the time that they invested in studying—"personal

155. *Ricci*, 129 S. Ct. at 2676 (emphasis added).

sacrifices” that the Court recounts in empathic detail.¹⁵⁶ If New Haven decided not to hire anyone for fiscal reasons relating to a downturn of the market, the applicants would have no claim to a job, either in equitable estoppel or under civil rights law.

The “legitimate expectation” that the Court steps forward to protect is quite specifically a “legitimate expectation not to be judged on the basis of race.”¹⁵⁷ But exactly how has that “legitimate expectation not to be judged on the basis of race” been breached? As we have seen, no applicant was singled out and treated differently from any other; all took the same test and together would have to take any future test the City adopted. The City’s race-conscious effort to ensure *ex ante* that it complied with Title VII and chose an exam that tested for job skills without racial bias was one that, before *Ricci*, any lawyer would counsel that Title VII required—and that Justice Kennedy continues to insist remains appropriate today.¹⁵⁸ Justice Kennedy is not objecting to the use of individualized racial classifications of the kind that he rejected in *Parents Involved*; instead, Justice Kennedy focuses on the potentially balkanizing effects of the City’s announced plan to retest all its applicants because of the racial distribution of promotions that the first test yielded. On this view, the “legitimate expectation not to be judged on the basis of race” concerns the City’s conduct in jettisoning the results of an exam for reasons openly concerned with the racial distribution of applicants the test would select: “Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.”¹⁵⁹ On this view, the Court has interpreted Title VII to protect a job applicant’s expectation that his or her application will be judged free of *visible* racial considerations.¹⁶⁰

From the vantage point of the antibalkanization principle, which is concerned with the lived experience of social relations, appearances matter centrally. Competing for promotion in a process in which racial considerations

156. *See id.* at 2667 (“Ricci stated that he had ‘several learning disabilities,’ including dyslexia; that he had spent more than \$1,000 to purchase the materials and pay his neighbor to read them on tape so he could ‘give it [his] best shot’; and that he had studied ‘8 to 13 hours a day to prepare’ for the test.” (alteration in original) (quoting Petition for Writ of Certiorari app. at 169a, 176a-77a, *Ricci*, 129 S. Ct. 2658 (No. 07-1428))); *see also id.* at 2676, 2681 (discussing the time the firefighters invested in studying).

157. *Id.* at 2677.

158. Justice Kennedy repeatedly emphasizes that employers can endeavor to avoid the racial disparate impact of selection devices before employing them to test applicants. *See supra* notes 149-150 and accompanying text.

159. *Ricci*, 129 S. Ct. at 2676.

160. *See supra* note 70 and accompanying text (outlining Justice O’Connor’s emphasis that appearance matters).

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play a visible—and seemingly decisive—part undermines the confidence of job applicants that they have a fair opportunity to compete and so can affect race relations in the workplace and in society at large. To be sure, the aggrievement white applicants experience differs significantly from the paradigmatic forms of race discrimination that Title VII was enacted to combat.¹⁶¹ This distinction is decisive for many concerned with subordination;¹⁶² but those concerned with balkanization fear that, however majority group aggrievement differs from

161. Racial segregation was—and is—a social system with symbolic and material dimensions. The paradigmatic form of race discrimination that Title VII was enacted to combat inflicts harm on minority employees because it reflects and reinforces inequalities that minorities experience across social spheres. Compare this to civil rights interventions that limit opportunities for majority group members: these race-related restrictions on opportunity may provoke aggrievement precisely as they deviate from structures of racial privilege that organize the workplace and other social spheres.

But if we analyze the aggrievement of whites with attention to class as well as race, however, there may be points of intersection in the experience of “race discrimination” and “reverse discrimination.” In some cases, majority group members may resent civil rights interventions as restrictions on opportunity imposed by economically privileged whites on less privileged whites; in this case, their sense of injury would have a social-structural logic to it that resembles, at least in some degree, forms of race discrimination that racial minorities experience.

162. The antisubordination framework judges the constitutionality of race-based state action by asking whether it disrupts or entrenches historic forms of inequality. Proponents of antisubordination would have judges closely review race-based practices that entrench historic inequalities and have judges defer to race-based practices that disrupt historic inequalities. See *supra* note 23 and accompanying text. That said, a number of judges and commentators prominently associated with the antisubordination perspective advocate at least “intermediate” judicial scrutiny of “benign” or integration-promoting race-based state action—a form of review providing more oversight than rationality review, yet more deference than strict scrutiny, which those associated with the antisubordination perspective would reserve for race-based state action that entrenches historic forms of inequality. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (“We hold that benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., concurring in part and dissenting in part) (“[A] number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives.’” (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977)) (internal quotation marks omitted)); see also Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004).

minority group aggrievement, it nevertheless can stimulate racial resentments that erode social cohesion.

On this understanding, proponents of antibalkanization might be concerned with how a workplace policy appears to workers, without reasoning from a formalist or “post-racial” standpoint that equates harms to members of majority and minority groups¹⁶³ or from an “unprincipled” concern with racial appearances.¹⁶⁴ Reasoning from a concern about conditions that threaten cohesion in a society negotiating a transition in racial mores, proponents of an antibalkanization understanding of equality might adopt the perspective of “transitional justice”¹⁶⁵ and concern themselves with the social meaning of

163. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1589 (2009) (analyzing “postracialism as an ideology that both converges and departs from its predecessor ‘colorblindness’” and “identify[ing] four key features of the revamped ideology (racial progress or transcendence, race neutral universalism, moral equivalence, and political distancing)”); Haney López, *supra* note 22, at 988 (“By reactionary colorblindness I mean an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.”); Siegel, *supra* note 21, at 90-92 (discussing discourse of “formal race” employed in colorblindness claims that treats race as an abstract property that subordinate and superordinate groups share).

164. See *infra* text accompanying notes 194-200 (discussing Primus’s article on *Ricci*, cited *supra* note 105).

165. Transitional justice addresses problems of justice and the rule of law that arise in the aftermath of repressive political regimes, where the state and much of the social order is understood to have engaged in massive wrongdoing. See, e.g., Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003) (“Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”). The repertoire of transitional justice strategies generally includes institutions and practices, such as trials and truth commissions, for confronting past wrongdoing. Cf. *id.* at 86-87 (“In the transitional justice discourse, revisiting the past is understood as the way to move forward. . . . The paradoxical goal in transition is to undo history. The aim is to reconceive the social meaning of past conflicts, particularly defeats, in an attempt to reconstruct their present and future effects.”). But these strategies have been developed with attention to the need to develop social cohesion in communities that have been riven by violence. *Id.* at 79-80 (“Seen in a genealogical perspective, the primary aim of truth commissions was not justice but peace. . . . [This] response transcended the single-minded focus on individual accountability in favor of a more communitarian conception.”).

Civil rights laws might be conceived of as a practice of transitional justice. So understood, race moderates’ instinct to organize civil rights interventions so as to minimize public attention to their remedial aims can easily be criticized as lacking transparency and undermining the aims of transitional justice by masking past wrongdoing.

But race moderates’ instinct to allow civil rights interventions on the condition that they assume universalizing form might be differently understood: as a practice of transitional justice that facilitates movement away from a world forged in racial wrongdoing and toward a new world in which participants might see, understand, and “live” race

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practices in the hopes of channeling old understandings of race into new and transformative forms.¹⁶⁶ Justice Kennedy's opinion in *Ricci* judges an employer's inquiry into the racial disparate impact of an employment test differently, depending on whether the inquiry occurs before or after the employer has announced and administered the test. The distinction that the *Ricci* opinion draws does not reflect race-formalism and need not reflect an unprincipled consideration of appearances. It might well reflect a context-attentive judgment about the different understanding of race produced by employer practices that attend to the racial disparate impact of employment tests before they are announced and administered—and after. Kennedy's own discussion suggests as much.¹⁶⁷

Analyzed from this standpoint, the antibalkanization principle itself provides compelling reason for New Haven to inquire into the racial disparate impact of its promotion tests. The antibalkanization principle raises concern about features of the City's selection process that have the potential to estrange minority as well as majority groups in the community. Disparate impact law guards against employment practices that have the potential to divide and balkanize employees along racial lines. Much as proponents of antibalkanization have conditionally approved affirmative action to promote social cohesion, so, too, can they endorse disparate impact law as a tool to ensure that all members of the community have confidence that the employer is hiring and promoting on an equal-opportunity basis.¹⁶⁸

differently. On this view, race moderates' concern with the social form of civil rights interventions can be understood as a concern with cultivating cohesion in a period of regime transition. As such, it shares at least some functional similarity with other transitional justice strategies that endeavor to promote peace and forge bonds of community that support the growth of a new sociopolitical order.

¹⁶⁶. Some race progressives have theorized this approach to the disestablishment of entrenched status relations. See *infra* note 235 and accompanying text (discussing the work of Nancy Fraser).

¹⁶⁷. Compare *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (2009) (“Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.”), *with id.* at 2677 (“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.”).

¹⁶⁸. See *supra* text accompanying note 150.

E. *The Antibalkanization Principle as the Basis for Disparate Impact Law*

The intense controversy surrounding New Haven's decision to retest applicants dominates discussions of *Ricci*. But as Justice Ginsburg's dissent emphasizes, the City's concern about adopting a test that would substantially preclude the promotion of minority applicants arose against the backdrop of a long-running conflict over the employment practices of the Fire Department. Because of this conflict, it was not only white applicants who mistrusted the Department's personnel decisions but minority applicants, as well. For decades, minority firefighters had struggled to gain access to a department that they viewed as hostile to their presence.

In the early 1970s, African-Americans and Hispanics composed 30% of New Haven, yet only 3.6% of the fire department.¹⁶⁹ In 1973, at a time of widespread challenges to race discrimination in municipal employment,¹⁷⁰ the Firebird Society of New Haven, an association of minority firefighters, challenged the employment practices of the New Haven Fire Department as racially discriminatory.¹⁷¹ The suit ended with a consent decree requiring the City to adopt recruitment, hiring, and promotion practices designed to remedy past discrimination, ensure against future discrimination, and help increase diversity in the department.¹⁷²

After implementation of the decree and decades of continuing litigation, racial disparities among entry-level firefighters have significantly decreased. While the population of New Haven is nearly 40% African-American and over 20% Hispanic, 30% of the City's firefighters are black, and 16% are Hispanic.¹⁷³ But there remains substantial underrepresentation in the Department's officer corps: only 9% of senior officers are African-American, and a similar

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

170. See *id.* at 2690-91 (describing a report by the United States Commission on Civil Rights that found "pervasive" race discrimination in municipal employment, due both to "overt racism" as well as reliance "on criteria unrelated to job performance," such as "nepotism or political patronage." (quoting H.R. REP. NO. 92-238, at 17 (1971); 118 CONG. REC. 1817 (1972))).

171. See *Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn. 1975).

172. See *id.* at 462.

173. *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting). According to the 2000 Census, 37.4% of New Haven residents are African-American, and 21.4% are Latino. See *supra* note 139.

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percentage are Hispanic.¹⁷⁴ Only one of twenty-one New Haven fire captains is black.¹⁷⁵

In the years since the consent decree first brought significant numbers of nonwhite firefighters into the New Haven Fire Department, the Department's employment practices remain a site of conflict and mistrust. The Firebirds, and their members, have brought several lawsuits challenging the City's practices.¹⁷⁶ The firefighters union—which, mirroring the Department it represents, is predominantly white—has repeatedly sided against minority firefighters (who are also, of course, members of the union), even intervening

174. *Ricci*, 129 S. Ct. at 2691.

175. *Id.*

176. In 1992, for example, the Firebird Society sued to enjoin the City's practice of "stockpiling," in which it would hire or promote a number of people just as the employment lists were about to expire for jobs that were not yet vacant. This practice, the Firebirds argued, violated the City's civil service rules, which permitted employees to be hired only for current vacancies. Most of the people who were "stockpiled" were white. The firefighters union intervened in the suit on the side of the City to defend this practice. The Firebirds won. *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 630 A.2d 131 (Conn. App. Ct.), *appeal denied*, 634 A.2d 295 (Conn. 1993). In 2004, the Firebirds challenged the City's practice of "underfilling"—that is, leaving vacancies at the captain level and using the money to hire more than the allotted number of subordinate officers (lieutenants). This violated the civil service rules and, the Firebirds alleged, resulted in the promotion of fewer minorities to captain when such promotions did occur because there were more lieutenants against whom to compete. Again the union intervened to defend the practice, and again the Firebirds won. *Broadnax v. City of New Haven*, 851 A.2d 1113 (Conn. 2004); *see also* Nicole Allan & Emily Bazelon, *The Ladder*, SLATE (June 25, 2009, 7:17 AM), <http://www.slate.com/id/2221250/entry/2221298> (describing the history of successful antidiscrimination lawsuits against the New Haven Fire Department).

In 1998, a New Haven firefighter who criticized the department's hiring practices as discriminatory on a television talk show was suspended from work shortly thereafter. *Benson v. Daniels*, 89 F. Supp. 2d 212, 214-15 (D. Conn. 2000). The firefighter, then president of the Firebirds, sued the City, claiming his suspension was in retaliation for his criticism and therefore unconstitutional under the First Amendment. *Id.* The lawsuit was eventually settled. *See* Order of Dismissal of Case Due to Reported Settlement, *Benson v. Daniels*, 98-CV-1290 (D. Conn. Apr. 13, 2000).

In 2002, two firefighters, active—and outspoken—in the Firebirds, were fired, ostensibly for copying a personnel list to which they were not supposed to have access. However, both terminations were overturned by the state labor board and eventually by Connecticut state courts. *See* *Brantley v. City of New Haven*, 920 A.2d 331 (Conn. App. Ct. 2007); William Kaempffer, *Appeals Court Rules Firefighter Be Rehired*, NEW HAVEN REG., May 4, 2007, at A3; William Kaempffer, *Appeals Court Rules for Firefighter*, NEW HAVEN REG., July 23, 2005, at A1. The firings were understood, and protested, as retaliation for the firefighters' criticism of the Department's discriminatory hiring practices and the firefighters' participation in litigation to contest these practices. *See, e.g.*, Meg Barone, *Black Pickets Support New Haven Firefighters*, CONN. POST, Apr. 12, 2002, at A6.

in lawsuits to which it was not originally a party in order to defend the employment practices contested by the Firebirds as racially discriminatory.¹⁷⁷

These ongoing tensions between minority firefighters, on the one hand, and the union and Fire Department, on the other, framed the controversy in *Ricci*. Selection of the promotion standard did not occur outside the conflict but was instead entangled in it.¹⁷⁸ In 2004, when the City first announced that the test had identified a group of firefighters for promotion that included no African-Americans, the *New Haven Register* opened its report by describing the “palpable” “tension” in the air, in terms that foretold the conflict that would follow.¹⁷⁹

The New Haven Civil Service Board hearings that ensued document how tests that shut out minority applicants without clear public justification can balkanize, especially in a workplace with a history such as the Department’s. When the City announced that exam results indicated that virtually no minority candidates would be promoted, minority firefighters attributed the outcome to an inequitable testing process that tested for insider information, possessed by white applicants who had a long history of firefighters in the

177. See *Firebird Soc’y of New Haven*, 66 F.R.D. at 460 (explaining the union’s support for white Fire Department captains who opposed restructuring promotions to permit the entry of more firefighters of color); *New Haven Firebird Soc’y*, 630 A.2d 131 (noting that the union not only intervened to defend an employment practice challenged by the Firebirds as racially discriminatory and prohibited by the civil service rules but also was the only party to appeal the Court’s decision when the Court ruled in favor of the Firebirds); see also *New Haven Firefighters Local 825 v. City of New Haven*, No. 3:04cv1169, 2005 U.S. Dist. LEXIS 38139, at *7 (D. Conn. Dec. 21, 2005) (describing the firefighters union’s attempt to sue the City for refusing to certify the results of the exams at issue in *Ricci* and holding that the union did not satisfy the standing requirements for organizational plaintiffs, because the “deep and divisive conflict between the interests of its members” was “clear”).

178. It was by contract with the firefighters union that the City weighed the written and oral components of the promotion exam in a 60/40 ratio—a requirement that increased the racial disparate impact of the test results. Testimony before the Civil Service Board indicated that had the scores been weighted differently, so that the oral score accounted for 70% and the written 30%, two additional African-American lieutenant candidates and one additional black candidate for captain could have been considered for promotion. *Ricci*, 129 S. Ct. at 2679; see also *Complaint, Briscoe v. City of New Haven*, 04-CV-01109 (D. Conn. Oct. 15, 2009) (challenging the City’s weighting of the employment test at issue in *Ricci* as not job-related).

179. William Kaempffer, *Fire Exams Flawed, Lawyer Says*, *NEW HAVEN REG.*, Jan. 23, 2004, at A3, available at www.nhregister.com/articles/2004/01/23/import/10855004.txt (“The three police officers stationed at the meeting were a strong indication that city officials expected some tension. And tension there was. It was palpable . . .”).

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family as minority applicants did not.¹⁸⁰ At the hearings, minority firefighters worried about how young persons of color in the community would find role models if the Fire Department was predominantly led by whites¹⁸¹ and spoke of the sense of racial estrangement that hearing the exam results provoked. One firefighter stated:

[W]hen you see 99 percent of minority firefighters—we're first-generation firefighters. You know, a lot of my Caucasian counterparts, they've come into the fire houses when they were little kids. They've come into the fire—they've seen different study material. They went to all the New York fire houses in which all this material is coming. They met John Norman. They've met Randy. And they've been to their seminars.

This—if you look at the results, something's wrong. If 70 percent of your officers are white, something's wrong. . . .

And if you do this again in another three or four years where you only promote seven or eight officers and you pit 44 Caucasians against 15 or 18 blacks and change the rules again—now, I've got these pile of books. I've been reading them. Ever since the test was over, I've read them. I've been reading them over and over and over. Now come the next exam, the rules are going to be changed again. That's what I'm anticipating.¹⁸²

Another testified:

You're going to tell me this kid, this sharp boy that studied, does what he's supposed to do, comes to work, does his job, who is going home about the test and everything, that he failed this test? This kid is bright

180. See *In re: Fire Captain and Lieutenant Promotional Exams, Hearings Before the City of New Haven Civil Serv. Comm'n* 65-66 (New Haven, Conn. Feb. 5, 2004) [hereinafter *Promotional Exams Hearings*] (statement of Lieutenant Gary Tinney, New Haven firefighter) (“[T]he people that have these books are uncles, nephews, kids from people that have been in the Fire Department for years. Personally, I never had these books. I never had anyone that was a grandfather or uncle or anybody. I grew up in the city of New Haven. I’ve been in New Haven all my life. And these books have been read and known for a long time before this test came out.”).

181. See, e.g., *id.* at 38-40 (statement of Donald Day, Rep. of the Northeast Region of the International Association of Black Professional Firefighters) (“One other thing I’d like to say is that young black and Latino kids have every right to see black and Latino officers on those fire trucks that are riding through their community. They have every right to look for a role model on that fire truck. They have every right to expect to see that.”).

182. *Id.* at 92-93 (statement of Octavius Dawson, New Haven firefighter).

and sharp. There's no way. And I got to sit here and see him with his head down because he hears that he didn't pass the test. That's a slap in the face. It's not fair. And like, again, there's enough divisiveness among this department. I thought we were supposed to be comrades and we were together. That's what firefighting is supposed to be all about. But it's not. These guys think there's so much diversity on this department.

. . . And things—the way things are going now hurts. . . . And this test showing that no minorities passed—

. . . .

It's not going to work. . . . It's going to cause a big ruckus. And it doesn't make sense. We're supposed to be together. We're supposed to work together. We're supposed to save lives. And that's supposed to be the most important thing. And it's not.¹⁸³

The vivid testimony of minority firefighters reminds us that the disparate impact framework itself is designed to inhibit the estrangement and build the confidence of minority applicants in the job market as a job market in which minority as well as majority applicants have an equal opportunity.¹⁸⁴ That cohesion-building function remains important for minority communities today, as Justice O'Connor observed in upholding race-based affirmative action under an equal protection strict scrutiny framework:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.”¹⁸⁵

In this case, with dispute about the fairness of the test razing, both the majority-white firefighters union as well as the black firefighters urged the City to validate the promotion exam in accordance with the EEOC's guidelines on disparate impact, seeking in a definitive determination of the test's job

183. *Id.* at 79-80 (Jan. 22, 2004) (statement of Lieutenant Gary Kinney, New Haven firefighter).

184. See *infra* note 203 and accompanying text (discussing the role of work in shaping forms of community).

185. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1949)).

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relevance a ground on which to settle the dispute about the validity of the test results.¹⁸⁶ But the City decided to discard the test, without ever receiving a report indicating whether the test accurately measured skills needed for the job, thus leaving to public debate a question central to the fairness of its procedures.¹⁸⁷ Without any such report, the parties had little more to draw on besides the recollection of a representative of the test preparer (IOS) and anecdotal reports of test-takers. It is unsurprising that from these accounts, the parties—and the public—drew vastly different conclusions about the exam.

186. See, e.g., *Promotional Exams Hearings*, *supra* note 180, at 11-12 (Feb. 5, 2004) (statement of Patrick Egan, President of New Haven Firefighters Local 825) (“[T]he answer to find out the fairness of the exam is clearly spoken about in that federal code. It talks about business necessity and certain validation procedures to be able to look at and evaluate if, in its totality, the exam was fair. So what we as a membership would ask for is that, since the issue—the City has brought up the issue of disparate impact, that then the law be, you know, followed through, that there be a validation study done on the exam, content-based, that it be done by a third-party professional who has the expertise, credibility and resources to perform such a study”); *id.* at 41-42 (statement of Ronald Mackey, Internal Affairs Officer for the Northeast Region of the International Association of Black Professional Firefighters) (agreeing with Egan that “the Federal Guidelines” ought to be followed and indicating that a validation study ought to be performed); *id.* at 55 (statement of Alderwoman Shirley Ellis-West) (“I am hearing that this Commission is very strongly considering looking at validating and the reliability of this test through a third party or however. I’m very, very happy to hear that this Commission is looking to do that because I think that’s going to be important in how we resolve this issue.”).

187. In order for an employment exam to be validated properly under the EEOC Guidelines, the results of a validation study must be documented. See EEOC, UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES § 15(C) (1978). This report must include detailed descriptions of the job analysis undertaken in developing the test and the selection procedures represented in the exam; evidence demonstrating that the selection procedures were job-related, including an explanation of the job qualification each test item was meant to measure; an explanation of the alternative selection procedures that were considered and their likely impact; and the rationale for choosing any cutoff score, ranking, or weighting used. See *id.* The EEOC emphasizes that informal reports of the exam’s validity, such as those the Civil Service Commission heard in the hearings, are insufficient. See *id.* § 9(A) (“Under no circumstances will . . . casual reports of its validity be accepted in lieu of evidence of validity. Specifically ruled out are . . . non-empirical or anecdotal accounts of selection practices or selection outcomes.”).

Although the parties in *Ricci* disagreed about the extent to which the content of the exam was job-related, it is undisputed that neither IOS nor the City itself produced an empirical report of the kind contemplated by the EEOC Guidelines. See Petitioners’ Brief on the Merits at 35, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328) (explaining that the City never received any written report documenting the exam’s validity); Respondents’ Brief on the Merits at 11, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328) (same).

They disagreed about whether the exam was job-related,¹⁸⁸ about whether it was scored fairly,¹⁸⁹ and about the City's motives for failing to obtain documentation of a validation study.¹⁹⁰ Indeed, perhaps the only thing upon which those who testified at the City's hearings seemed to agree is that the City ought to provide a validation report.¹⁹¹ Both sides sought a procedure for assuring that Fire Department promotions would be determined on the basis of job qualifications, not race.

In short, as the *Ricci* record shows, invalidating test scores for openly racial reasons can estrange majority applicants, while promoting employees on the basis of tests that are of uncertain job-relevance but have dramatic racial disparate impact can estrange minority applicants. In *Ricci*, Justice Kennedy recognized that confidence of majority and minority employees in the selection processes that allocate employment opportunities is crucial in shaping race relations in the workplace, pointing out that, properly administered, the disparate impact framework can promote "a common ground for open discussions" about what different employees might view as a fair test and emphasizing that fair tests are "safeguards against the very racial animosities

188. Compare Petitioners' Brief on the Merits, *supra* note 187, at 20 ("[R]espondents knew their tests were content-valid."), *id.* at 7 ("IOS composed and validated the exams based on EEOC-recommended practices."), and *id.* at 7 n.3, with Respondents' Brief on the Merits, *supra* note 187, at 29 n.19 ("The sole person to review the tests was a fire officer from outside Atlanta. Not only is the relevance of this review questionable, but standard practice requires review of an exam by multiple experts. Legel later testified that internal review was '[s]tandard practice.'" (alteration in original) (citations omitted) (quoting petitioners' appendix)).

189. Compare Petitioners' Reply Brief on the Merits at 26-27, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328) (explaining that "there is no merit to respondents' criticism" of the use of 70 as the cutoff score as required by the New Haven City Charter), with Respondents' Brief on the Merits, *supra* note 187, at 3 ("IOS did not, however, pursue a process . . . which enables a test-developer to 'establish a content-valid, legally defensible cut-off score for the examination.' . . . IOS conceded that using the 'conventional cutoff' of 70 'isn't very meaningful when you are trying to find . . . the cut-off score that defines minimally competent or minimally qualified, which is ultimately what you are looking to do in a situation like this.'" (alteration in original) (citations omitted) (quoting petitioners' appendix)).

190. Compare Petitioners' Brief on the Merits, *supra* note 187, at 35 (arguing that the City refused to receive an IOS report that would have validated the exam, because it wished to remain "willfully ignorant of [the] test's validity" in order to justify throwing it out), with Respondents' Brief on the Merits, *supra* note 187, at 11 (arguing that "there is no evidence that the City attempted to prevent IOS from preparing a technical report" and that the report IOS initially contracted to provide "would not have proved whether the tests were in fact 'valid'" anyway).

191. See *supra* note 186.

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Title VII was intended to prevent.”¹⁹² The facts of *Ricci* illustrate that, when properly implemented, the disparate impact framework serves to deter balkanization and so promote social cohesion, in much the fashion that the race-conscious design of percent plans and school district boundaries can.

The text of the *Ricci* decision and the concern with racial balkanization that has guided the center of the Court for several decades now (1) point to retesting for overtly racial reasons as the locus of liability in *Ricci* and (2) identify reasons for preserving the disparate impact framework itself in order to promote workplace cohesion. *Ricci* is written in the tradition of *Bakke*, *Crosby*, *Grutter*, and *Parents Involved*. In each of these decisions, race moderates preserved, while limiting, civil rights interventions that their conservative brethren would have barred.¹⁹³ Race progressives have often condemned the decisions of race conservatives and moderates together without identifying the ways in which they diverge in result or rationale. But, as this Article shows, there are principled differences between race moderates and race conservatives that have played a significant role in shaping our law.

* * *

How we understand the past in turn shapes the way we imagine the future of equal protection law. In an important early commentary on *Ricci*, Richard Primus identifies three possible readings of the case¹⁹⁴: a “general” reading that calls into question the constitutionality of all disparate impact law as race-conscious government action in violation of equal protection;¹⁹⁵ an “institutional” reading that suggests that government employers are not competent to enforce disparate impact remedies because they are vulnerable to

¹⁹². *Ricci*, 129 S. Ct. at 2676; *id.* at 2677 (“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.”).

¹⁹³. See *supra* text accompanying note 61.

¹⁹⁴. Primus, *supra* note 105, at 1344-45.

¹⁹⁵. *Id.* at 1363 (“The relevant perspective here takes colorblindness, understood as the rejection of race-conscious governmental action, as the guiding value of equal protection.”); see also *id.* (observing that “the general reading would represent a fundamental change in American antidiscrimination law”). Primus explains the basis of his reading: “Disparate impact doctrine is race conscious; equal protection requires racial neutrality; the two are not compatible.” *Id.* at 1344. The reading seems to be premised on the view that race-conscious action violates equal protection, although it does not identify a standard for demonstrating discriminatory purpose.

capture (in the past by white ethnic groups and now by racial minorities); and a “visible-victims” reading holding that “equal protection limits disparate impact remedies to those that do not disadvantage determinate and innocent third parties”¹⁹⁶—a constraint that “[m]any people to both the left and the right of the Supreme Court may consider . . . unprincipled”¹⁹⁷ but nonetheless represents a familiar way of managing the “public social meaning” of the “damage” on whites that disparate impact law inflicts.¹⁹⁸ If the Court adopts a colorblindness reading and applies strict scrutiny to disparate impact law, Primus warns, disparate impact law is likely to survive compelling interest analysis only as a tool for smoking out hidden intentional discrimination rather than as a remedy for structural discrimination.¹⁹⁹

Exploring all three possible readings of *Ricci*, Primus offers no clear view about which the Court will endorse: “the *Ricci* premise is, as of now, indeterminate,” with “the choice among its possible readings . . . significantly driven by the facts of the case that presents the constitutional question.”²⁰⁰ Temporizing, Primus suggests that the Court may adopt the institutional or visible-victims reading of *Ricci*. But the framework of the Primus analysis suggests that colorblindness will reach beyond objections to racial classifications and draw into question the constitutionality of race-conscious, facially neutral state action, over time, steadily gaining ground on the race-asymmetric understandings of the antisubordination principle. On this view, it

196. *Id.* at 1374.

197. *Id.* at 1345.

198. *Id.* at 1372.

199. *Id.* at 1376-78. Interestingly enough, Kenneth Marcus, who served as the director of the U.S. Commission on Civil Rights under President George W. Bush, argues the constitutional case against disparate impact law somewhat more narrowly than does Professor Primus. Professor Marcus argues for evaluating disparate impact law under a “predominant racial motive” standard and contends that where disparate impact law redresses intentional or unconscious discrimination, racial motivation does not predominate, but where disparate impact law redresses structural discrimination, racial motivation predominates in violation of equal protection. *See supra* note 144.

In contrast to Professors Primus and Marcus, Justice Scalia seems to suggest that disparate impact law taken as a whole is unconstitutional, as reflecting a discriminatory purpose within the meaning of *Feeney*. *See supra* note 143 (discussing Justice Scalia’s concurring opinion in *Ricci*); *cf.* *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (“[D]iscriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (footnote omitted) (citation omitted)).

200. Primus, *supra* note 105, at 1382.

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is only a matter of time until the forty-year-old disparate impact framework is invalidated by the immanent logic of colorblindness.²⁰¹

But if we recognize the antibalkanization perspective that has given defining shape to modern equal protection law, our intuitions about the law's developmental trajectory may change. At a minimum, recognizing antibalkanization alters the frame in which we read *Ricci*. The triadic framework through which this Article analyzes debates over equal protection identifies the reading of *Ricci* that makes the best sense of the text of the decision, on its own terms *and* as part of our recent constitutional history: (1) the antibalkanization perspective illuminates passage after passage of *Ricci* concerned with the racial resentment that changing an already-administered promotion test stimulated; (2) antibalkanization explains the opinion's focus on retesting (the so-called visible-victims reading) as a potentially principled²⁰² ground of decision in *Ricci*, a concern with threats to social cohesion that Justices Powell, O'Connor, and Kennedy have invoked as reason to preserve and to limit civil rights initiatives in the past; and (3) antibalkanization supplies reasons to preserve disparate impact law that are grounded in the same concerns of cohesion that justify restrictions on retesting: the importance of sustaining the confidence of (minority and majority) employees in the fairness of the selection processes.

In short, antibalkanization provides race moderates reasons to uphold as well as to limit disparate impact law, just as it provides race moderates reasons to uphold as well as to limit affirmative action law. Antibalkanization in fact supplies new justifications for disparate impact law. Just as moderates and progressives tend to uphold affirmative action for distinctive reasons, with moderates concerned about social cohesion and progressives concerned about repair of unequal group status, so, too, moderates might conclude that concerns about social cohesion warrant preserving disparate impact law, in

201. The Primus analysis does not focus on the doctrines mandating different treatment of race-based and facially neutral state action that initially cabined the reach of conservative arguments about colorblindness, *cf. supra* notes 96-106 and accompanying text, so it does not clarify the doctrinal path the Court would take, its practical implications for other laws, or its conceptual implications for colorblindness. Even conservative proponents of colorblindness, who are divided and confused about the constitutional status of race-conscious, facially neutral laws, *see supra* notes 96-106 and accompanying text, may reflect differently on the doctrinal shape and normative content of the colorblindness principle they wish to embrace. Would they subject *all* civil rights laws to strict scrutiny? *Only* civil rights laws?

202. *Contra supra* text accompanying note 197 (discussing those who consider attention to the form of race-conscious interventions "unprincipled").

addition to traditional concerns about repairing hidden, unconscious, and structural bias.

Forms of community forged at work, as at school, can divide or unite us.²⁰³ When employers hire and promote on the basis of criteria that have an unjustified racial disparate impact (because employers have hidden or unconscious biases or are selecting for traits associated with current jobholders rather than for the skills needed to do the job), they are not only perpetuating group inequality but also exacerbating balkanization in the workplace. The disparate impact framework provides incentives for employers to ensure that the employment criteria used select among applicants in race-salient ways—only insofar as needed to do the job in question. A workplace organized in this way is more likely to be and to be seen as open to all applicants. Thus, as the disparate impact framework ameliorates unjust social stratification, it also can alleviate balkanization—the rationale that Justice O'Connor offered for affirmative action.²⁰⁴

Indeed, Justice Kennedy's opinion in *Parents Involved* suggests that race moderates might have reason to prefer that governments pursue integration by the elimination of criteria with unjustified disparate impact rather than by affirmative action. Avoiding selection criteria that have unjustified racial disparate impact produces institutions that integrate in the normal course of business, without "affirmative" action. Demographic awareness at the stage of institutional design may disrupt racial legacies of the past and allow new forms of race relations to develop without requiring participants to engage in specific race-conscious interactions—or so Justice Kennedy's opinions in *Parents Involved* and *Ricci* suggest.²⁰⁵

203. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000) (arguing that work is capable of transforming workers' identities, building community, and providing the basis for equal citizenship); see also CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 4 (2003) (arguing that the workplace is, "generally speaking, both more sociable and cooperative and more integrated than most places where adults spend time" and thus that the workplace is "extraordinarily important in a diverse democratic society").

204. See *supra* text accompanying note 63 (quoting Justice O'Connor's discussion of affirmative action in *Grutter*).

205. See *supra* text accompanying note 107 (discussing the preference for integration through districting in *Parents Involved*); *supra* text accompanying note 167 (discussing the *Ricci* Court's preference for consideration of disparate impact of promotion criteria in the selection of a test before it is administered); see also *infra* note 235 (discussing Nancy Fraser's distinction between affirmative and transformative remedies).

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IV. TOWARD “A MORE PERFECT UNION”

[S]o many of the disparities that exist in the African-American community today can be directly traced to inequalities passed on from an earlier generation that suffered under the brutal legacy of slavery and Jim Crow.

....
. . . Even for those blacks who did make it, questions of race, and racism, continue to define their worldview in fundamental ways.

....
In fact, a similar anger exists within segments of the white community. Most working- and middle-class white Americans don't feel that they have been particularly privileged by their race. Their experience is the immigrant experience—as far as they're concerned, no one's handed them anything, they've built it from scratch. . . . [I]n an era of stagnant wages and global competition, opportunity comes to be seen as a zero sum game, in which your dreams come at my expense. So when they are told to bus their children to a school across town; when they hear that an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed; when they're told that their fears about crime in urban neighborhoods are somehow prejudiced, resentment builds over time.

Like the anger within the black community, these resentments aren't always expressed in polite company. But they have helped shape the political landscape for at least a generation.

—Barack Obama, “A More Perfect Union,” Philadelphia, March 18, 2008²⁰⁶

At a crucial juncture in his campaign for the presidency, Senator Barack Obama spoke of racial justice in terms that bridged a divided nation. He invoked an image of constitutional community:

[A] firm conviction—a conviction rooted in my faith in God and my faith in the American people—that working together we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union.²⁰⁷

²⁰⁶. Senator Barack Obama, A More Perfect Union: Address at the National Constitution Center (Mar. 18, 2008), in *THE SPEECH: RACE AND BARACK OBAMA'S “A MORE PERFECT UNION”* 243 (T. Denean Sharpley-Whitins ed., 2009).

²⁰⁷. *Id.*

Without equating the anger and mistrust of whites and blacks, Senator Obama recognized and related them. Without equating the position of whites and blacks, he demonstrated how addressing the vulnerabilities of white Americans was an integral part of transforming the position of black Americans. The Philadelphia speech modeled a conversation about racial justice in a community riven by racial strife—a conversation in politics, with no imminent prospect of settlement, only the pragmatic needs of coexistence, shaped to an uncertain degree by the constitutional conviction that we are, and are committed to be, joined in a more perfect union.

As an African-American Democratic nominee for president, Senator Obama invoked this vision with different authority and very different understandings from those of the Justices on the Court who reason from antibalkanization concerns. But his observations nonetheless seem responsive to similar developments—to the race conflicts of the civil rights era. We are not “post-racial,” as fierce racial divisions about the Obama presidency make painfully clear.²⁰⁸ Responding to the race conflicts of the civil rights era, moderates in dialogue with a polarized Court and nation have articulated the view that social cohesion is a prerequisite for equality.²⁰⁹ The emergence of this reflexive understanding on the Court reveals that positions in the debate over equality are dynamic and responsive, shifting, however slowly, over the decades.²¹⁰ As Americans have argued with one another about the best way to “get beyond” the legacy of slavery and segregation, they have elected presidents who have appointed Justices who have invoked concerns of anticlassification, antisubordination, and, increasingly, antibalkanization.²¹¹

208. For example, one poll found that 91% of black respondents but only 37% of white respondents said they “[a]pprove of the way Barack Obama is handling his job as president.” Charles M. Blow, Op-Ed., *Obama’s ‘Race’ War*, N.Y. TIMES, July 31, 2010, at A19. The poll demonstrated similarly striking racial differences of opinion on more specific aspects of Obama’s presidency, such as his handling of the economy, foreign policy, and immigration. See *id.*

209. Antibalkanization’s emergence suggests that the long-running conflict over equality’s meaning has had constructive consequence. Cf. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1331 (2006) (“Bitter constitutional dispute can be hermeneutically constructive, and has little noticed socially integrative effects.”).

210. It is not only that the composition of the Court changed; the views of Justices O’Connor and Kennedy seem to have changed with changes in the composition of the Court. Cf. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 105 (2007) (exploring *LULAC* and *Parents Involved* as decisions “run[ning] directly contrary to Justice Kennedy’s prior equal protection jurisprudence”).

211. For historical accounts of the emergence of antisubordination and anticlassification values, see Schmidt, *supra* note 25; and Siegel, *supra* note 7.

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To this point, the project of this Article has been to describe the arguments of the “swing” Justices as they diverge from the colorblindness commitments espoused by conservative critics of affirmative action. In describing the antibalkanization perspective, I have synthesized concerns animating decisions authored by several Justices over several decades. In concluding, I raise questions about the antibalkanization perspective whose emergence I have been chronicling.

My aim in this Part is to suggest how recognizing antibalkanization as a perspective that differs from anticlassification and antisubordination makes possible debate about what it means to vindicate concerns about cohesion in a plausible and principled way—a conversation in which even those who do not believe that concerns about social cohesion are a proper basis for interpreting the Equal Protection Clause can nonetheless enter into dialogue with those who do.

By analyzing the normative and practical judgments guiding the enforcement of antibalkanization in the opinions we have examined so far, we are better situated (1) to abstract a principle whose content and application can be evaluated; (2) to analyze and criticize the principle’s application in particular cases; (3) to probe the logic of the restrictions on race-conscious interventions that antibalkanization often imposes; and (4) to consider how antibalkanization might be applied in cases of concern to minority communities, not involving challenges to civil rights laws.

A. Clarifying Antibalkanization’s Normative Basis as an Equality Principle

Any evaluation of the balkanization opinions must begin with a simple call for clarity. Remarkably, despite the many equal protection opinions raising concerns about balkanization, the opinions have yet clearly to articulate how antibalkanization is connected to equality. Do the opinions invoking concerns about balkanization reason from their own substantive account of equality? Or do antibalkanization opinions only impose a side constraint on the pursuit of equality (government may pursue equality, however equality is understood, so long as government acts in ways that do not unduly threaten social cohesion)?

The opinions upholding and limiting affirmative action do in fact seem to reflect a substantive conception of equality, one sufficiently robust to lead race moderates to break with conservatives and identify the pursuit of diversity as a compelling government interest. Justice O’Connor’s embrace of diversity can be read as expressing a substantive conception of equality.²¹² So, too, can we

212. See *supra* text accompanying note 63.

read a commitment to equality in Justice Kennedy's insistence, in *Parents Involved*, that government may engage in race-conscious, facially neutral action in pursuit of "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."²¹³ We can read in these statements of why government has constitutional reason to engage in race-conscious action an antibalkanization conception of equality: that the government may act to ensure that no group is so deeply marginalized as to feel like an outsider or a nonparticipant, so long as government combats group marginalization by means that do not unduly stimulate group resentment.²¹⁴ (On this account, antibalkanization shares with antisubordination a concern with social arrangements that communicate to some members of the community that they are outsiders, while it shares with anticlassification a concern with the experience of majority as well as minority groups.) If this view is implicit or emergent in the opinions of race moderates, however, it has not been articulated with sufficient clarity to establish with certainty the substantive conception of equality on which the opinions rest. Clarifying the substantive conception of equality that antibalkanization enforces is in turn necessary to evaluate the interpretive and practical judgments that guide the principle's vindication in particular cases.

213. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring in part and concurring in the judgment); see *supra* text accompanying note 83.

214. On this view, Justices interpreting the Fourteenth Amendment are developing a cohesion-related theory of equal protection, much as Justices interpreting the First Amendment have developed a cohesion-related account of establishment. Social cohesion—and the potential for political divisiveness—has long been a central concern of the Supreme Court's Establishment Clause jurisprudence. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (2002) (Souter, J., dissenting) (identifying as an important justification for "the ban on establishment[] its inextricable link with social conflict"); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring) ("Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."). The equal protection opinions do not advert to the Establishment Clause opinions but nonetheless might be influenced by them. Cf. Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 IND. L.J. 1, 15 (2008) (arguing that the Court understands the racial redistricting cases as involving "a sort of establishment of race" but has been "reluctant . . . to do anything about the far more pernicious 'establishment of party' achieved by partisan line-drawing").

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B. Evaluating Antibalkanization's Application in Particular Cases

Clarification of the principle guiding the opinions upholding and limiting race-conscious civil rights initiatives is needed if we are to assess how the Justices have enforced antibalkanization in particular cases and to consider whether antibalkanization might shed new light on cases that race moderates have never considered.

Consider the expressed concerns about balkanization that lead race moderates to uphold and limit civil rights laws and initiatives. Does this use of strict scrutiny in fact promote social cohesion? The race-conscious civil rights laws that moderates strike down are often adopted by fragile coalitions negotiating under severe political constraints; once invalidated, the policies may never be reenacted or implemented in the form race moderates recommend or permit. As importantly, doctrine undertaking to alleviate racial resentments may in fact stimulate racial resentments. Myriad factors shape promotion and admissions decisions, but a disappointed applicant *only* can get strict judicial scrutiny if she expresses her grievance in racial terms; a strict scrutiny doctrine thus has the capacity to *aggravate* as well as to diffuse racial balkanization. For these reasons, the ultimate practical consequence of judicial oversight of race-conscious interventions may be to destroy coalitions for change and to entrench the racial status quo, even if this is not the judge's purpose.

Even if concerns about social cohesion *are* an appropriate basis on which to interpret the Equal Protection Clause, a mediating principle concerned with cohesion might not be best vindicated through the strict scrutiny framework. Progressives have invoked concerns of cohesion as a reason for applying intermediate scrutiny, a more deferential standard of judicial oversight.²¹⁵ But there is no reason to debate the question as a choice between strict and intermediate scrutiny. While concerns about balkanization were first expressed in disputes over the application of the tiers-of-scrutiny framework, concerns about balkanization are not analytically dependent upon standards of review. Judicial oversight that guards against balkanization could well be extended to forms of state action presently subject to rational basis review—a possibility this Article suggests in concluding.

215. See *supra* notes 52-53 and accompanying text.

C. *Colorblind and Race-Conscious Concerns About the Form of Civil Rights Interventions*

Another undertheorized feature of antibalkanization opinions is the function served by the limitations on race-conscious civil rights initiatives that moderates have imposed. Over the decades, a bloc of conservative and moderate Justices has voted to limit affirmative action and other race-conscious remedies, often reasoning about race in abstract or formal terms that equate the position of whites and minorities.²¹⁶ Yet, as we have seen, on a number of occasions race moderates upholding and limiting these race-conscious initiatives have acknowledged that “race matters.”²¹⁷ Even as Justice O’Connor invoked formal accounts of race to justify applying strict scrutiny to affirmative action in *Adarand*,²¹⁸ she insisted that she could apply strict scrutiny in ways that would differentiate between a law that segregates and integrates—between a “no trespassing sign” and a “welcome mat.”²¹⁹

What is the rationale for restricting race-conscious interventions that might be advanced by Justices who vote to uphold and limit race-conscious state action while acknowledging that race matters? Moderates have employed strict scrutiny, not to bar all race-conscious efforts to integrate, but rather *to impose a particular social form on government’s race-conscious efforts to integrate*: to insist that when government engages in a race-conscious act in support of integration, government interacts with the public in ways that emphasize commonality among citizens and minimize the appearance of racial partiality.²²⁰

216. See Neil Gotanda, *A Critique of “Our Constitution Is Colorblind,”* 44 STAN. L. REV. 1, 37 (1991) (“[T]he Court relies increasingly on the formal-race concept of race, a vision of race as unconnected to the historical reality of Black oppression.”); Haney López, *supra* note 22, at 1061-62 (“One detects in current Supreme Court equality discourse a renewed penchant for the racial formalism which in an earlier and ignominious version helped defend Jim Crow oppression In this early incarnation, race-as-merely-color stripped the social meaning of group debasement from segregation laws. In its recrudescence, an abstract, empty conception of race insulates patterns of racial exclusion while linking Jim Crow and affirmative action.”).

217. *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment).

218. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (calling for “consistency of treatment irrespective of the race of the burdened or benefited group”).

219. See *supra* note 60.

220. In *Bakke*, Justice Powell seemed to equate the position of minority and majority groups but then offered a framework in which government could engage in affirmative action, so long as it proceeded in a form that emphasized commonality rather than difference among applicants. I have described the dual character of Justice Powell’s formalism:

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Justices concerned with balkanization ask that when government engages in a race-conscious act in support of integration, it proceed in ways that diminish public engagement with these concerns. In *Bakke*,²²¹ Justice Powell emphasized commonality when he rejected remedial justifications for educational affirmative action in favor of racial “diversity”²²² and when he imposed conditions on affirmative action, such as the requirements that schools consider all applicants together and consider every applicant as an individual.²²³ Justice O’Connor followed this example, leading the Court to impose constraints on affirmative action in *Gratz*²²⁴ and *Grutter*²²⁵ designed to diminish the salience of race in the administration of the programs, as commentators Robert Post and Neil Siegel have observed.²²⁶ Concern about

Justice Powell addressed members of the “dominant majority” as “minorities” who needed courts to protect them from the discrimination that race-conscious desegregation initiatives might inflict on them. . . .

Yet Justice Powell’s *Bakke* opinion accepted the analogy between the race discrimination claims of majority and minority groups only to a point. In quiet ways, Justice Powell understood that members of superordinate and subordinate groups were differently situated, and in constitutionally significant ways. Even as he rejected a race-asymmetric or antisubordination framework for interpreting the presumption against racial classifications, Justice Powell offered the nation a master compromise in the concept of “diversity” itself—a framework that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles.

Siegel, *supra* note 7, at 1532; *see also id.* at 1538-42 (analyzing indirection in affirmative action and discriminatory purpose doctrine).

221. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
222. *Id.* at 313 (opinion of Powell, J.) (“[T]he right [of a university] to select those students who will contribute the most to the robust exchange of ideas . . . is of paramount importance in the fulfillment of its mission.” (internal quotation marks omitted)).
223. *Id.* at 317-18.
224. *Gratz v. Bollinger*, 539 U.S. 244 (2003).
225. *Grutter v. Bollinger*, 539 U.S. 306 (2003). O’Connor presents the limitations as designed to allay the apprehension that affirmative action will harm nonminority applicants. *See id.* at 341 (“We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”).
226. Robert Post analyzes the restrictions as controlling the extent to which affirmative action programs appear to make race salient in admissions decisions. *See Post, supra* note 59, at 75 (“Even as it authorizes universities to establish affirmative action plans that produce a critical mass of minority students, the Court prohibits these plans from utilizing procedures or rules that symbolically convey the message that applicants are entitled to educational benefits by virtue of their membership in a racial group. Here, as in other areas of equal protection law, ‘appearances do matter.’ Racial inequalities can be addressed, but only in

the racial meanings particular policies can communicate to citizens also seems to animate the constitutional distinction that Justice Kennedy drew in *Parents Involved*²²⁷ between admissions policies that sort individual applicants by race and administrative decisions that locate school districts with attention to the demographics of the students who will attend.²²⁸ Both policies entail race-conscious state action, but Justice Kennedy seemed concerned that making race an express factor in individual school admissions decisions would make an exclusionary meaning of race more salient to citizens than would the use of race in the design of school districts.²²⁹ In *Ricci*,²³⁰ this same instinct led Justice Kennedy to differentiate between employer consideration of the racial disparate impact of a testing device before administering the test, and after.²³¹ With a historically informed appreciation of the difference in position of racial groups, Justice Kennedy is clear that government may act in race-conscious ways to promote equal opportunity for all, so long as government pursues these ends in

ways that efface the social salience of racial differences.” (footnote omitted) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Neil Siegel analyzes restrictions on race-based state action as directly concerned with constraining policies and programs that have the potential to provoke racial balkanization. See Siegel, *supra* note 59, at 787 (“My scrutiny of the case law suggests that the type of individualized consideration required in a given context turns on the Court’s judgment about how the use of racial criteria is likely to impact racial balkanization in America over the long run.”).

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

228. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools [and] drawing attendance zones with general recognition of the demographics of neighborhoods.”).

229. *Id.* (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”); cf. Siegel, *supra* note 59, at 844 (“The primary way that school districts can render the use of race less overt in the assignment process is in the drawing of attendance zones to increase integration.”). If administrative consideration of race in the design of school districts were sufficiently pronounced so as to make race visible as a predominant factor in the districting process, this too might be of constitutional concern to Justice Kennedy. Cf. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (“The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”).

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

231. See *supra* notes 145-147 and accompanying text.

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ways that do not make race so salient as to affront dignity and threaten divisiveness.²³²

In all these examples, moderates allow government to engage in race-conscious efforts to integrate, providing that government proceeds in ways that lower the salience of race in its interactions with the public. Antibalkanization, as we have seen, is distinctively concerned about the appearance of race-conscious interventions—the risk that race-conscious civil rights interventions will heighten conflict or resentment.

The concerns that antibalkanization raises about the social form and meaning of race-conscious interventions find echoes in conversations about remedial interventions that unfold in progressive circles. Many progressives advocate structuring government interventions so that they do not emphasize, entrench, or construct group-differentiated identities.²³³ Kenji Yoshino argues

232. See *supra* notes 81-90.

233. These advocates offer not one but many reasons for avoiding, where possible, government interventions that reflect, express, or construct group-differentiated identities. There is a considerable literature on the merits of structuring entitlements in targeted or more universal forms. Compare, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 118-20 (1987) (criticizing targeted programs as politically unsustainable), and Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies To Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411, 414 (Christopher Jencks & Paul E. Peterson eds., 1991) (arguing that “when U.S. antipoverty efforts have featured policies targeted on the poor alone, they have not been politically sustainable, and they have stigmatized and demeaned the poor” but that there is “room . . . within certain universal policy frameworks for extra benefits and services that disproportionately help less privileged people without stigmatizing them”), with Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in *THE URBAN UNDERCLASS*, *supra*, at 437, 437-38 (arguing that certain entitlements may be better administered through targeted programs). Feminists have debated the wisdom of antidiscrimination regimes that single out pregnant employees because of the risk of reifying stereotypes or inviting employer backlash against female applicants. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *COLUM. L. REV.* 1118, 1142-48 (1986) (summarizing the debate between “equal treatment” theorists who believe that pregnant employees should be treated the same as employees with other potentially disabling conditions and “special treatment” theorists who argue that special policies covering pregnancy are needed to ensure equality). Queer theorists have questioned the forms of identity that antidiscrimination regimes construct. See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). For a critical race theorist cognizant of these same risks, see RICHARD THOMPSON FORD, *RACE CULTURE: A CRITIQUE* (2005). See also Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 *UCLA L. REV.* 1455 (2002) (analyzing arguments of progressives who advocate resisting racial categories); Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 *CARDOZO L. REV.* 905 (exploring benefits and costs of limiting anti-alien legislation that do not directly address antidiscrimination concerns).

that universalizing appeals to liberty might serve as the “new equal protection” in a society of increasing pluralism.²³⁴ Nancy Fraser advocates redressing group inequalities through “transformative remedies” that destabilize conventional understandings of group identity, rather than “affirmative remedies” that further entrench conventional understandings of group identity.²³⁵ Understood as a concern about the form of government interventions under conditions of social conflict, antibalkanization’s impulse to channel race-conscious interventions into universalizing forms might be, or might grow to be, a “transformative remedy” designed to cultivate the new understandings of race that a constitutional democracy needs in order to sustain social commitments to equal opportunity in an epoch of racial transition.

Antibalkanization’s concern about preserving social cohesion in an epoch of racial transition raises hard and fraught issues for antisubordination theory. Given that, in a constitutional democracy, equal opportunity must ultimately find its grounds in popular assent, not judicial decree, there are antisubordination theorists who have explored the relation of cohesion and equality.²³⁶ Work of this kind might supply reasons, internal to antisubordination theory, to structure remedial interventions in terms that

For a skeptical account of the universalist turn, see Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. (forthcoming 2011) (on file with author).

234. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

235. See NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE POSTSOCIALIST CONDITION 26 (1997) (“Whereas affirmative remedies can have the perverse effect of promoting class differentiation, transformative remedies tend to blur it.”).

236. There are antisubordination theorists who consider questions of cohesion for reasons internal to antisubordination theory itself. See Richard T. Ford, *Hopeless Constitutionalism, Hopeful Pragmatism*, in THE CONSTITUTION IN 2020, at 143, 151-52 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“I suspect that the best—perhaps the only—way to frame a broad constitutional vision that will both appeal to a majority of Americans and satisfy traditional left-liberal objectives . . . will be to tell a story that emphasizes what joins us as a political community.”); Michelman, *supra* note 162, at 1397 (“In South Africa, to paraphrase John Ely, redistributive social programs all must emanate from a nonwhite, political-majority *we* for the benefit of a racially identifiable *us* at the apparent expense of a racially identifiable *them*. How will the law respond?” (footnote omitted)); Siegel, *supra* note 7, at 1545-46 (“[A] court seeking to intervene in a status order must make judgments about when and how to proceed, knowing that, in the end, it cannot secure systemic change through brute force; efforts to transform a society through constitutional adjudication require the political confidence and consent of the very groups a court would subject to the force of law. The groups whose social privilege law circumscribes may object, vociferously; but they must, in the end, recognize the Constitution to which they are subject as *their* law, or it will lack authority as law.”); see also Eskridge, *supra* note 59, at 1294 (“A pluralist democracy needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes.”).

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affirm commonality rather than emphasize difference. Yet many critical race theorists remain deeply skeptical of any doctrine suggesting equal protection solicitude for the racially privileged or expressing a “post-racial” equivalence in position between majority and minority group members,²³⁷ especially where the practical consequence of the restriction is to impose constitutional limitations on the scope of remedial interventions.

These expressive and practical concerns have weight. One cannot assess doctrines requiring government to govern through forms that emphasize racial inclusion and commonality without knowing more about the larger doctrinal framework of which the requirement is a part. In particular doctrinal frameworks and practical settings, requiring race-conscious government interventions to assume universalizing forms can preserve inequality;²³⁸ in others, the requirement may promote cohesion and integration. Skepticism about this feature of antibalkanization opinions seems warranted so long as antibalkanization opinions focus exclusively, as they now seem to, on the constitutionality of civil rights laws and initiatives.

Even if antibalkanization supplies reasons to uphold as well as to limit affirmative action, disparate impact laws, and percent plans—and so might be understood as responsive to the potential estrangement of minority as well as majority groups—antibalkanization continues to function in the service of policing civil rights remedies. But nothing intrinsic to the antibalkanization inquiry would seem to require this. Indeed, if antibalkanization is a principle of transcontextual application, it should be enforced in ways that are at least as responsive to practices and conditions of concern to minority as to majority communities. An antibalkanization principle could ultimately supply reasons for revising other aspects of equal protection doctrine. I close with some thoughts about what it might mean to apply an antibalkanization principle in a new doctrinal context, not involving the constitutionality of a civil rights initiative.

237. See Cho, *supra* note 163, at 1589 (analyzing “postracialism as an ideology that both converges and departs from its predecessor ‘colorblindness’” and “identify[ing] four key features of the revamped ideology (racial progress or transcendence, race neutral universalism, moral equivalence, and political distancing)”). For conservative use of post-racial discourse, see *supra* note 2 and accompanying text (quoting the Tea Party’s petition to the NAACP, cited *supra* note 2).

238. See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 23, at 1113 (analyzing dynamics of “preservation-through-transformation”).

D. Transporting the Logic of Reverse Discrimination Cases to New Contexts

The equal protection framework that we now have focuses judicial oversight on race-conscious remedies – when race-conscious remedies are *surely* not the only form of state action with potential to engender racial resentment or exacerbate racial balkanization. In the decades after *Brown*, the Court’s equal protection docket was populated by minority plaintiffs. But today, the Court’s race discrimination cases are almost exclusively brought by white plaintiffs invoking doctrines of strict scrutiny to challenge civil rights laws. This is not accidental. The complexion of the Court’s equal protection docket tells us something about the Court’s equal protection doctrine. Courts have defined what counts as a group-based classification and what counts as discriminatory purpose in such a way as to make it exceedingly hard for minorities and women to craft equal protection challenges to race- and gender-salient laws.²³⁹ Ironically (or not), it is now *conservatives* who are bringing innovative equal protection challenges to facially neutral laws and developing new and expansive conceptions of discriminatory purpose to attack civil rights legislation whose constitutionality they never questioned for decades.²⁴⁰

A hopeful place to conclude this Article would be to reflect on what equal protection doctrine might look like were the antibalkanization principle vindicated in an equal protection framework that focused judicial review on a different class of problems – so that the antibalkanization inquiry was applied to laws and practices that potentially estrange minority as well as majority communities. Today, the Court insists that *all* racial classifications are subject to strict scrutiny.²⁴¹ Yet government continues to employ racial criteria in

239. On the development of discriminatory purpose doctrine, see *supra* notes 92-95. See also Siegel, *Why Equal Protection No Longer Protects*, *supra* note 23. On the inconsistent, or absent, definition of a “racial classification,” see *infra* note 243 and accompanying text.

240. For new approaches to challenging facially neutral laws, see *supra* notes 143-144, which discuss the theories of Justice Scalia and of Professor Kenneth Marcus, who headed the U.S. Commission on Civil Rights under President Bush. For evidence of the shift in conservative claims about the constitutionality of race-conscious, facially neutral laws, see *supra* notes 91-108, 135-136 and accompanying text. See also THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 7 (2004) (presenting a political history of “the emergence of conservative activism” in the Rehnquist Court).

241. In *Bakke*, Justice Powell emphasized:

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a

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crucial contexts not subject to strict judicial oversight, for example, in apprehending criminal suspects.

Why is the Court's docket not inundated by minority plaintiffs challenging government's use of race in suspect apprehension, as well as by majority plaintiffs challenging government's use of race in affirmative action programs? While there is widespread agreement that racial profiling violates the Equal Protection Clause, courts have universally agreed that the use of race as part of suspect description does not constitute a racial classification and therefore does not require strict scrutiny to determine its compliance with the Fourteenth Amendment. The cases agree that the use of race in suspect apprehension is not a racial classification²⁴² but offer no coherent explanation why.²⁴³ However one

person of another color. If both are not accorded the same protection, then it is not equal.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.) (alteration in original) (quoting U.S. CONST. amend. XIV). Justice O'Connor repeatedly quoted from this statement in her own equal protection opinions. See Grutter v. Bollinger, 539 U.S. 306, 323 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 218 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion).

242. See *Brown v. City of Oneonta*, 221 F.3d 329, 337-38 (2d Cir. 2000) ("In acting on the description provided by the victim of the assault—a description that included race as one of several elements—defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found. . . . In this case, plaintiffs do not sufficiently allege discriminatory intent."); *United States v. Avery*, 137 F.3d 343, 354 n.5 (6th Cir. 1997) (explaining that "the decision to investigate someone [of a particular race] based on a tip from a source outside the police organization (e.g., cab driver, gate agent)" does not violate the Equal Protection Clause); *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) ("Obviously race or ethnic background may become a legitimate consideration when investigators have information on this subject about a particular suspect."); Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1215 (2003) ("Although race, ethnicity, or national origin should not be used based on the perception of a general or circumstantial correlation between race and crime, an exception is created when a specific past crime has been committed and a victim or witness provides a detailed physical description of the perpetrator that includes race, nationality, or ethnicity as one of multiple characteristics that can narrow the field of suspects."); David Rudovsky & R. Richard Banks, Debate, *Racial Profiling and the War on Terror*, 155 U. PA. L. REV. PENNUMBRA 173, 178 (2007), <http://www.pennumbra.com/debates/debate.php?did=5> ("The use of race as a component of a suspect description is a widespread and accepted practice that no court has ever regarded as racially discriminatory, much less prohibited." (opening statement of Rudovsky)).

243. Cf. Balkin & Siegel, *The American Civil Rights Tradition*, *supra* note 23 (analyzing inconsistencies in defining what is a "racial classification" that triggers strict scrutiny); *id.* at 27 ("Courts currently reason that the state may employ race in suspect descriptions so long as race is not the sole factor used to detain suspects. The same rationale once shielded

answers that question, it cannot be by appeal to a definition of a racial classification enunciated by the Supreme Court because, to date, the Court has never defined what a racial classification *is*. In making these observations, my concern is *not* to extend strict scrutiny to the use of race in suspect apprehension but rather to question the development of a bifurcated framework of judicial review under the Equal Protection Clause that (1) focuses all judicial oversight on a narrow class of “racial classification” cases, while (2) offering almost no judicial oversight to all other claims of race discrimination, especially when (3) that bifurcated framework offers no rigorous transcontextual criteria for determining what forms of state action count as “racial classifications” and thus warrant rigorous review.

Imagine, by contrast, a framework of equal protection review that recognized the role, and responsibility, of coequal branches of government in vindicating equal protection values—a framework that invited courts to listen to the representative branches of government when they sought legislatively to enforce equal protection values, without abdicating a court’s role in guaranteeing to *all* persons the equal protection of the laws. Such a framework

affirmative action programs from invalidation Courts now look upon all affirmative action programs with suspicion, even if race is only one factor.”).

Within the last decade, however, some have begun to question the distinction between racial profiling and suspect descriptions and to ask whether the refusal to characterize the use of race in suspect descriptions as a racial classification can be justified. *See, e.g.*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1109 (2001) (“To conclude that race-based suspect descriptions should not be treated as a racial classification because they seem useful or justified would be to engage in precisely the sort of threshold substantive evaluation that the doctrinal structure forecloses, and that the Supreme Court has explicitly disavowed.”); Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 178-79 (2006) (arguing that “the costs of applying the Equal Protection Clause may be outweighed by its many benefits”); R. Richard Banks, *The Illusion of Colorblindness in Antidiscrimination Law* (2008) (unpublished manuscript at 4), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=r_banks (“Facilitative accommodation, suspect description reliance and race-based casting, for example, are so widely accepted that they could not be categorically prohibited. . . . Thus, the doctrine can only appear to presume the invalidity of all racial classifications by, ironically, exempting some racial classifications from strict scrutiny. The law cannot become colorblind as long as our society remains so race conscious.”); Rudovsky & Banks, *supra* note 242, at 178-79 (“The distinction between (permissible) suspect description reliance and (impermissible) profiling is especially fuzzy in the antiterrorism context. Many antiterrorism measures assailed by some as racial profiling might be viewed by others as permissible uses of suspect descriptions. Currently, law enforcement agents may be seeking hundreds, or even thousands, of individuals—predominantly Arab or Muslim men—who are suspected of participating in, supporting, or having information about terrorist activity.” (rebuttal by Professor Banks)).

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would not be sharply bifurcated, with all laws presumptively constitutional except those employing racial classifications. Instead, doctrine would invite dialogue between courts and legislatures in a greater range of cases.²⁴⁴ A concern about balkanization could shape development of that equal protection framework.

Consider one hypothetical case—a reverse “reverse discrimination” claim. An equal protection framework that was evenhandedly responsive to concerns of balkanization would worry about particular practices of suspect apprehension that estrange minority communities,²⁴⁵ as it has worried about

244. See Balkin & Siegel, *Remembering How To Do Equality*, *supra* note 23, at 99-104 (proposing revisions in the equal protection framework for 2020, including, in the area of judicial constitutionalism, doctrines that would reorient equal protection law away from its preoccupation with formal classification, doctrines promoting the sharing of responsibility between courts and the political branches, and doctrines relying on jurisdictional redundancy in a federal system).

245. Law enforcement’s overreliance on race in suspect descriptions has caused racial grievance among minority groups in numerous cases. Black students at SUNY College at Oneonta, for example, expressed tremendous anger and frustration when, based on a witness’s description of a suspect as a young African-American male with a cut on his hand, the Oneonta police attempted to question every black man in the city, regardless of age, and at least one black woman. See, e.g., Jim Mulvaney, *College Dragnet for Black Blasted*, NEWSDAY, Sept. 12, 1992, at 5 (“‘They came to my dorm, asked me where I was the night before and demanded to see my hands,’ said Dan Sontag, 22, a junior from Scotia majoring in business. ‘I was scared, but I just figured it was a simple mistake . . . It wasn’t until later I learned it was every black male that I got furious.’” (ellipsis in original)); *id.* (“‘It is very discouraging to live in an environment where you can be harassed like that,’ said Clement Mallory, 22, a political science student from Park Slope, Brooklyn, who also was questioned. ‘You don’t see them questioning every white man every time somebody commits a crime.’”).

Muslim, Arab, and South Asian Americans selectively targeted by post-9/11 programs such as the National Security Entry-Exit Registration Program based on their race, ethnicity, or national origin report mistrust of law enforcement. See NICOLE J. HENDERSON ET AL., LAW ENFORCEMENT & ARAB AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY 13, 21-22 (2006), available at <http://www.vera.org/content/law-enforcement-and-arab-american-community-relations-after-september-11-2001-engagement-tim.pdf> (showing that Arab-Americans most frequently cite immigration enforcement and racial profiling by law enforcement as the main concerns of their community and distrust of law enforcement as the top barrier to better relations with local and federal law enforcement). Latinos selectively targeted by immigration enforcement in part based on appearance exhibit similar mistrust of law enforcement and racial grievance. See Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 10 (2005) (“[R]ace-conscious police tactics have subjected Latinos to severe emotional stress, caused them to alter their behavior to avoid police scrutiny, perpetuated stereotypes regarding supposedly ‘Hispanic’ characteristics, cast Latinos as foreigners, hampered relations between the community and law enforcement, and brought into question the legitimacy of the justice system.”). See generally Jeffrey Fagan, *Introduction to Symposium*,

particular forms of race-conscious remedies that estrange majority communities, and perhaps would not rely on strict scrutiny in either case. In neither case is judicial control needed; judicial dialogue is. In our hypothetical reverse “reverse discrimination” case, courts concerned with balkanization might prompt the representative branches to explore new practices of suspect apprehension that might make domestic and international security more equitable *and* effective.²⁴⁶ Whether judges decided to act through classification or discriminatory purpose doctrine seems less important than their deciding to provide some sort of equal protection oversight, an incentive that would prompt the political branches to rein in the kinds of suspect apprehension practices that most alienate minority communities.²⁴⁷ Judges concerned about balkanization might creatively devise a doctrinal device that provides the appropriate mix of judicial oversight and deference to the political branches.²⁴⁸

Legitimacy and Criminal Justice, 6 OHIO ST. J. CRIM. L. 123, 123 (“[S]urveys show that more than one in three Whites have little confidence in the police, compared to more than half of Black respondents.” (citing BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 119 (1996), available at <http://www.albany.edu/sourcebook/pdf/sb1996/sb1996-section2.pdf>)).

246. Minority groups who perceive procedural injustice in police practices are less likely to view law enforcement as legitimate and engage in cooperation. See Fagan, *supra* note 245, at 127 (“There are longstanding grievances between minority citizens and the police that give rise to anger and suspicion on the one hand, and ambivalence on the other.” (footnote omitted)); Tom R. Tyler, Stephen J. Schulhofer & Aziz R. Huq, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans* 2 (Univ. of Chi. Law Sch., Working Paper No. 296, N.Y.U. Sch. of Law, Working Paper No. 10-15 2010) (“Judgments about procedural justice have been found to influence the perceived legitimacy of law enforcement and thus to affect willingness to comply and to cooperate . . . To win this battle the government must win legitimacy by displaying fairness.”).

247. See *supra* note 245.

248. So long as all racial classifications are subject to strict scrutiny, courts will refrain from recognizing that the use of race in suspect descriptions is a racial classification. The judges of the Second Circuit conducted a revealing debate about this question in the course of concluding not to hear the *Oneonta* decision en banc. *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000) (denial of rehearing en banc); see *id.* at 786-87 (Calabresi, J., dissenting from denial of rehearing en banc) (“The problem is that the strict scrutiny criteria developed by the Supreme Court are much too blunt. If an action is deemed a racial classification, it is very difficult, under the Supreme Court precedents, ever to justify it. And, were such justification made easier in cases of police following a victim’s description, the spillover to other racial classification contexts would be highly undesirable. In other words, were the requirements of strict scrutiny to be relaxed in the police/victim’s description area, it would be hard indeed to keep them from also being weakened in other areas in which racial classifications ought virtually never to be countenanced. If, instead, following victim racial descriptions by the police were not deemed to be, at least potentially, racial classifications, there would be no constitutional impediment on police sweeps [that most would agree involve illegitimate uses of race]. For these, and other similar reasons, courts should

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Needed is judicial empathy for citizens who are estranged by racialized encounters with government—empathy of the kind that led courts to develop heightened scrutiny of affirmative action law.

CONCLUSION

As we have seen, concern about minority communities' potential estrangement *has* led race moderates on the Court to preserve civil rights initiatives that race conservatives would prohibit. Justices citing concerns about balkanization have upheld affirmative action, subject to constitutional constraints.²⁴⁹ Citing concerns about balkanization, Justice Kennedy has emphasized that government has race-conscious, facially neutral ways to achieve an equal opportunity society²⁵⁰ and explained that employers can consider the racial disparate impact of a selection measure before administering a promotion test, but not after.²⁵¹ As this Article has shown, balkanization provides race moderates reasons to uphold as well as to limit disparate impact law, just as it provides race moderates reasons to uphold as well as to limit affirmative action law.²⁵²

But however important preserving existing civil rights initiatives from judicial invalidation may be, preserving existing civil rights initiatives from judicial invalidation is not sufficient to demonstrate equal solicitude for majority and minority communities. Many will doubt that antibalkanization values community—rather than particular communities—so long as the Supreme Court's equal protection doctrine and docket continue to be dominated by the claims of white plaintiffs.

Will the antibalkanization principle be vindicated in ways that entrench historical injustice—or that forge bonds of identity and empathy that a community needs to transcend historical injustice? Is the concern about social

recognize severe limitations on their competence to deal with victim racial descriptions. But limitations do not mean impotence, they mean that courts ought to be reluctant to act alone. Rather, courts should encourage legislatures to develop guidelines for this area. Such legislative guidelines could make nuanced distinctions between what is needed and acceptable police behavior, and what is not. Courts could then both enforce those guidelines, and if a jurisdiction made distinctions that were inadequately sensitive, perhaps even strike some of them down.”).

249. *See supra* Part I.

250. *See supra* Part II.

251. *See supra* Sections III.C-D.

252. *See supra* Section III.E.

cohesion expressed in several decades of Supreme Court cases an *alternative* to race equality—or a predicate of it?