Is Integration a Discriminatory Purpose?

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ABSTRACT: Is integration a form of discrimination? Remarkably, recent Supreme Court doctrine suggests that the answer to this question may well be yes. In Ricci v. DeStefano*, the Court characterizes—for the very first time—government action taken to avoid disparate-impact liability and to integrate the workplace as "race-based," and then invalidates that action under a heightened level of judicial review. Consequently,* Ricci *suggests that the Court is open to the "equivalence doctrine," which posits that laws intended to racially integrate are morally and constitutionally equivalent to laws intended to racially separate. Under the equivalence doctrine, integration is simply another form of discrimination. The Court has not yet fully embraced this view.* Ricci *contains a significant limiting principle: To be actionable, the government's action must create racial harm, i.e., single out individuals on the basis of their race for some type of adverse treatment. Thus, the lesson of* Ricci *is not that governmental action with an integrative motive is always prohibited (at least for now); instead it is that racial harm really matters. The challenge for the government seeking to increase integration is to design facially race-neutral programs that open up access to opportunity and increase integration without imposing racial harm.*

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I. INTRODUCTION

In his concurring opinion in *Ricci v. DeStefano*,[1] Justice Scalia warned that the Court's ruling only postponed the "evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[2] Under Title VII's disparate-impact provisions, both public and private employers may be held liable for neutral practices that have a disproportionate, adverse impact on a protected group.[3] *Ricci* did in fact sidestep the question of whether Title VII's disparate-impact provisions violate the Equal Protection Clause of the Fourteenth Amendment.[4] In his own inimitable fashion, Justice Scalia "teed up" a question of extraordinary importance: Is liability for disparate impact unconstitutional? This Article does not address that question directly.[5] Instead, this Article addresses an even larger concern: Whether the government's voluntary attempt to integrate the races, *even in the absence of a racial-classification scheme*, is action taken "because of" race and therefore is presumptively unconstitutional.

In *Ricci*, seventeen white firefighters and one Hispanic firefighter challenged the City of New Haven's refusal to certify the results of an examination to qualify for promotion.[6] If certified, the test results would have led to no black promotions and only two Hispanic promotions to supervisory positions within the New Haven Fire Department.[7] The City's action, the refusal to certify the examination results, was facially race-neutral and hardly motivated by racial animus. Instead, the City was motivated by a desire to avoid disparate-impact liability—and integrate the workplace—under Title VII of the Civil Rights Act of 1964.[8] Thus, the government's

1. 129 S. Ct. 2658 (2009).

2. *Id.* at 2682 (Scalia, J., concurring).

3. 42 U.S.C. § 2000e-2(k) (2006).

4. In *Ricci*, the petitioners raised both a statutory claim, "under the disparate-treatment prohibition of Title VII, and a constitutional claim, under the Equal Protection Clause of the Fourteenth Amendment." *Ricci*, 129 S. Ct. at 2672. The Court ruled that the petitioners were entitled to summary judgment on the Title VII claim and therefore, did not reach the constitutional question. *Id.* at 2681.

5. Other scholars have and will continue to probe this important question. *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010); Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

6. *Ricci*, 129 S. Ct. at 2664.

7. *Id.* at 2664, 2666, 2678.

8. *Id.* at 2671. In this Article, I take the position that Title VII of the Civil Rights Act of 1964 was passed at least in part to integrate the workplace. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 518–35 (2003) (discussing three possible reasons for disparate-impact law: disparate impact as an evidentiary dragnet for

"ultimate aim" in *Ricci* was to comply with federal law.[9] But the government's action was also race dependent in the sense that its actions likely would have been "different but for the race of those benefited or disadvantaged by" it.[10]

Prior to *Ricci*, it would have been hard to characterize the governmental action at issue as a form of discrimination. Controlling precedent in the parties' circuit held that the "'intent to remedy the disparate impact' of a promotional exam 'is not equivalent to an intent to discriminate against non-minority applicants.'"[11] And as a matter of constitutional law, the general rule is that facially race-neutral actions are presumptively permissible unless the Court infers a "discriminatory purpose."[12] Typically it is very difficult for plaintiffs to establish discriminatory purpose in governmental action.[13] Indeed, the Court has only found discriminatory purpose where it can infer racial animus or where it finds that the government took action "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[14] Thus, because the government acted to comply with federal law, one could certainly have understood the City's refusal to certify the examination results as action taken "in spite of" rather than "because of" any adverse impact on white candidates.[15]

Instead, *Ricci* characterized—for the very first time—action taken to avoid disparate-impact liability as a form of "race-based" action. The Court then invalidated that action under a heightened level of judicial review.[16]

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deliberate discrimination, disparate impact integrates the workplace by ending segregation and racial hierarchy, and disparate impact remedies subconscious discrimination).

9. *Ricci*, 129 S. Ct. at 2674. The Court conceded that the government's purpose in refusing to certify the examination results was to avoid disparate-impact liability. *Id.* ("We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.").

10. Paul Brest, *The Supreme Court Term, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976).

11. *Ricci*, 129 S. Ct. at 2695–96 (Ginsberg, J., dissenting) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 157 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd* 129 S. Ct. 2658).

12. *See infra* Part II.B.

13. *See infra* Part II.B.

14. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

15. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 183 (5th ed. Supp. 2009). The authors ask:

> Why isn't the employer's decision [in *Ricci*] "in spite of" the effects on whites? Perhaps more to the point, since the state action in this case is the federal government's, why isn't the federal government's purpose the integration of workforces rather than a desire to harm members of the white majority?

Id.; *see also* Charles A. Sullivan, Ricci v. DeStefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUY 201, 207 (2009) (arguing that "[a] better reading of the facts (or at least a plausible one) is that New Haven acted to avoid disparate impact liability *despite* the 'adverse effects upon an identifiable group' of whites" (quoting *Feeney*, 442 U.S. at 279)).

16. *Ricci*, 129 S. Ct. at 2664.

Consequently, *Ricci* finds that action taken to avoid disparate-impact liability and integrate the workforce is a form of presumptively impermissible race-based action. *Ricci* thus raises the following question: Is integration itself a discriminatory purpose? And if integration is a form of "discrimination," can the government's integrative actions survive strict-scrutiny review?

Ricci was decided on Title VII grounds and purported not to be a constitutional case.[17] But to view *Ricci* solely from the perspective of Title VII misses its contribution to the Court's larger conversation about the definition of "discrimination" in a variety of contexts.[18] As Cheryl I. Harris and Kimberly West-Faulcon recently observed, *Ricci* represents an effort by some members of the Court to radically redefine the definition of discrimination so that "thinking about race or racial effects [is] equivalent to race discrimination."[19] Justice Clarence Thomas is perhaps the Court's most persistent proponent of this "equivalence doctrine." His classic exposition comes from his concurring opinion in *Adarand Constructors, Inc. v. Pena*,[20] where he opined: "I believe that there is a 'moral [and] constitutional equivalence,' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[21]

Over time, the equivalence doctrine has attracted more adherents. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[22] a plurality of the Court flatly equated race-based student-assignment plans intended to educate students in a racially integrated environment to state statutes separating the races in public schools that the Court struck down in *Brown v. Board of Education*[23] as a violation of the Equal Protection Clause. And in *Ricci*, a majority of the Court ruled that facially neutral governmental action taken to avoid disparate-impact liability is "race-based," and can only be justified if the "employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[24] *Ricci* represents the closest that a majority of the Court has come to accepting the equivalence doctrine.

Although *Parents Involved* and *Ricci* suggest that the Court is entertaining the equivalence doctrine, the Court has not yet fully embraced

17. *Id.* at 2672, 2681.

18. *See, e.g.*, 129 S. Ct. 2658; Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

19. Cheryl I. Harris & Kimberly West-Faulcon, *America's Next Race War: How* Ricci v. DeStefano *Seeks to Redefine Discrimination*, DEFENDERS ONLINE (July 7, 2009), http://www.thedefendersonline.com/2009/07/07/america's-next-race-war-how-ricci-v-destefano-seeks-to-redefine-discrimination/.

20. 515 U.S. 200 (1995).

21. *Id.* at 240 (Thomas, J., concurring) (alteration in original) (citation omitted).

22. 551 U.S. at 720.

23. 347 U.S. 483 (1954).

24. 129 S. Ct. 2658, 2664 (2009).

it. The Court in *Ricci*, after all, left the disparate-impact provisions of Title VII intact which by its terms does not apply to the Equal Protection Clause. In *Parents Involved*, Justice Kennedy declined to join those parts of the plurality opinion that most explicitly embraced the equivalence approach. Instead, he articulated the view that the government can ameliorate the harms of de facto segregation and strive toward racial integration, *as long as it does not create racial harm*. "Racial harm" is some type of adverse treatment that befalls identifiable individuals because of their race. *Ricci* embraces this understanding and extends it to facially race-neutral government action. The central problem in *Ricci* was that the government refused to certify the examination results only *after* it learned that "white candidates had outperformed minority candidates."[25] From this perspective, the government created racial harm when it divested specific, identifiable individuals of a "vested right" to their promotions.

Thus, the Court is at a crossroads. A plurality of the Court would accept the equivalence doctrine in its entirety. Another wing of the Court solidly rejects this approach. Justice Breyer's dissent in *Parents Involved* exemplifies this wing of the Court by stressing "the legal and practical difference between the use of race-conscious criteria . . . to keep the races apart, and the use of race-conscious criteria to . . . bring the races together."[26] Justice Kennedy straddles the line between the two approaches. He acknowledges that the government may pursue racial diversity and attempt to ameliorate de facto segregation. But Justice Kennedy requires that the costs of obtaining integration must be as diffused as possible: Specific white individuals must not be able to trace the source of their grievances directly to governmental action intended to achieve integration.

Certainly, this conversation will continue on both a normative and doctrinal level. On the normative question—should integration be defined as a form of discrimination—both wings of the Court will continue to compete for Justice Kennedy's affection. On the doctrinal side, *Ricci* provides the blueprint for the Court to find that the government's facially race-neutral integrative action, *which creates racial harm*, is presumptively unconstitutional. Whether the Court will ultimately strike down such government action as a violation of the Equal Protection Clause depends to a large extent on the outcome of the normative debate. If integration equals discrimination then it is hard to imagine how the government justifies integrative action on strict-scrutiny review. *Ricci* does not mean that all facially race-neutral integrative action is presumptively unconstitutional. As I discuss below, facially race-neutral, yet integrative initiatives, such as the National Opportunity Voucher Program, that do not create racial harm

25. *Id.* at 2664.
26. 551 U.S. at 829 (Breyer, J., dissenting).

stand an excellent chance of passing constitutional muster even when the "*Ricci* effect" is factored into the constitutional calculus.

In Part II of this Article, I explore how the Court has traditionally viewed race-dependent government action. The Court generally strikes down racial-classification schemes under the Equal Protection Clause. Traditionally, however, the government enjoys immunity from equal-protection liability when it takes facially race-neutral action that is not motivated by a discriminatory purpose. Thus, the government's ability to take facially race-neutral, yet integrative, action turns on whether the action is motivated by what the Court perceives as a discriminatory purpose.

In Part III of this Article, I explore *Parents Involved* and *Ricci* in-depth. I explain how the plurality in *Parents Involved* defined "discrimination" to include *both* acts that further white supremacy as well as acts that attempt to ameliorate de facto segregation. Thus, the *Parents Involved* plurality signaled its openness to the argument that facially race-neutral action, even when taken to produce integration, is "race related" and thus impermissible. I next explain how Justice Kennedy's concurrence in *Parents Involved*, in contrast to the plurality, would allow the government to take facially neutral, yet race-conscious, actions aimed at increasing racial diversity and ameliorating de facto segregation. At the same time, Justice Kennedy expressed deep concern about governmental action—whatever its source—that creates racial harm.

I conclude Part III by explaining how the Court in *Ricci* imported a plaintiff-friendly, reverse-discrimination doctrine of equal protection into the Title VII context. I argue that while *Ricci* raises the question of whether the government is prohibited from taking facially race-neutral action that is motivated by integrative intent, its holding (thankfully) is more limited. *Ricci* suggests that since the disparate-impact provisions of Title VII intended to promote workplace integration, facially neutral actions taken to achieve integration are race-based and presumptively impermissible *if and only if such action creates racial harm.* Moving forward, the government's challenge is to design effective, facially race-neutral programs that do not entrench the status quo, open up access to opportunity, provide for maximum racial integration, and do not create racial harm.

In Part IV of this Article, I explain how the Court's recent embrace of the equivalence approach underestimates integration's importance as a lever for achieving social change and is out of step with previous doctrine. For instance, in *Grutter v. Bollinger*,[27] the Court views racial segregation as a particularly and perhaps uniquely harmful social arrangement. *Grutter* suggests that racial integration is an important social good and that the government can act to disestablish segregation. Moreover, the Court has consistently ruled that race-neutral means may validate otherwise

27. 539 U.S. 306 (2003).

impermissible race-conscious affirmative action plans. This earlier jurisprudence implies that facially race-neutral, yet racially motivated, governmental actions are constitutional. Consequently, other recent Supreme Court caselaw stands in stark contrast to *Parents Involved* and *Ricci*.

Finally, in Part V of this Article, I show how the Court's recent approach may have broader implications across the country. Last year, the Poverty and Race Research Action Council proposed that the federal government adopt the National Opportunity Voucher Program ("NOVP"), a large, integrative housing-mobility program. The purpose of the NOVP is to allow current federal housing-voucher holders living in economically and racially segregated neighborhoods to move to more racially integrated, higher-income areas. Under the NOVP, a percentage of the total housing-voucher pool would be available only to families living in highly racially segregated and high-poverty neighborhoods; families receiving such vouchers would be provided with counseling and other assistance to facilitate integrative moves. Thus, the NOVP is facially race-neutral but is clearly intended to create integrated housing opportunities.

Ricci measures "racial harm" in terms of direct impact on specific, identifiable white individuals with vested rights; the NOVP does not occasion such harm. So even assuming that a court applied strict-scrutiny review to the NOVP, it is highly unlikely that the Equal Protection Clause would invalidate the program. However, one of the most troubling aspects of *Ricci* is that it raises the possibility that the NOVP is constitutionally problematic, causing government actors to second-guess policy decisions that should be "no brainers." After *Ricci*, one can imagine white plaintiffs seeking to prevent NOVP voucher holders from entering their neighborhoods by asserting that the NOVP is "race-based" and therefore constitutionally suspect. And if the Court ultimately decides that integration equals discrimination, such an argument would likely succeed. The Court has not yet fully embraced the equivalence doctrine, but the constitutional conversation in this area is far from finished.

II. SOLVING FOR SEGREGATION: RACE-DEPENDENT GOVERNMENT ACTION

A. *THE RACIAL-CLASSIFICATION TRACK*

The constitutionality of race-dependent government action proceeds along two primary tracks. Track one is the "racial classification" approach. Because the Court infers intentional discrimination from racial classifications,[28] the ultimate constitutionality of race-dependent

28. *Washington v. Davis*, 426 U.S. 229, 239–40 (1976), conclusively established that the Equal Protection Clause prohibits only intentional discrimination. *See also* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 937 (1989) (stating that *Washington v. Davis* stands for the proposition that discrimination under the Equal Protection Clause means "acting with discriminatory intent").

government action turns on the strength of the government's justification for the classification.[29] The Court's method for gauging the government's justification for a racial classification is known as "strict-scrutiny review." Strict scrutiny requires that the government show a compelling justification for racial classification and that the means chosen to achieve that justification are "narrowly tailored" to effect its purpose.[30] Otherwise, the Court would invalidate the classification under the Equal Protection Clause. Perhaps because the harms associated with segregation are so great, the Court particularly disfavors racial classifications that segregate. Thus, the Court will review under strict scrutiny any express racial classifications such as a racial quota, a race-based set-aside or presumption, or a multivariate selection process which uses race as a factor.

Under strict scrutiny, all racial classifications, whether benign or invidious, are presumptively unconstitutional.[31] There are, of course, different interpretations of the Equal Protection Clause that suggest that the Court should subject racial classifications that benefit racial minorities to a more deferential standard of judicial review.[32] But this debate is now largely academic. The Court has consistently rejected those arguments in favor of a symmetrical approach: All racial classifications are subject to strict-scrutiny review.[33]

The Court's real debate is on how to *apply* strict-scrutiny review.[34] A recent example is *Johnson v. California*.[35] There, the issue was whether the California Department of Correction's ("CDC") unwritten policy of racially segregating all new male inmates in double cells upon arrival at a new

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29. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290 (1997).

30. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995).

31. *Id.* at 222–23, 226–27, 234.

32. *See, e.g.*, *id.* at 243–49 (Stevens, J., dissenting); Metro Broad., Inc. v. FCC, 497 U.S. 547, 564–65 (1990), *overruled by Adarand*, 515 U.S. 200.

33. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (indicating that all nine justices agreed that the standard to be applied to the racial-classification schemes at issue was strict scrutiny).

34. *Compare id.* at 725–33 (see *infra* Part III.B), *and id.* at 735–48 (see *infra* Part V), *with id.* at 748–82 (Thomas, J., concurring in the judgment) (agreeing with the majority and arguing that strict scrutiny is required even for benign classifications because even those "suffer[] the same constitutional infirmity as invidious race-based decisionmaking"), *id.* at 782–98 (Kennedy, J., concurring in the judgment) (affirming strict-scrutiny analysis for racial classifications, but emphasizing that the government can pass this standard by proving that the classification is sufficiently narrowly tailored), *id.* at 798–803 (Stevens, J., dissenting) (arguing that the majority failed to see the significance of the difference between the racial classifications in this case that "do not impose burdens on one race alone and do not stigmatize or exclude" and other forms of classifications that do), *and id.* at 803–68 (Breyer, J., dissenting) (asserting that the context of the classification matters and strict scrutiny that is "fatal in fact" when applied should only be the standard for classifications that harmfully exclude, and additionally that this case requires a more lenient standard than traditional strict scrutiny).

35. 543 U.S. 499 (2005).

correctional facility violated the Equal Protection Clause of the Fourteenth Amendment.[36] The CDC's rationale for segregating prisoners by race was to prevent racial gang violence.[37] Under the CDC policy, racially segregated housing assignments were automatic; there was no individualized assessment of the prisoner's propensity to engage in violence and the CDC never "experimented with, or even carefully considered, race-neutral methods of achieving its goals."[38] Because the CDC's policy embodied a racial classification, the Court ruled that strict-scrutiny review should apply.[39] However, the Court did not rule on the constitutionality of the CDC policy. Instead, it remanded the case to the lower federal court and indicated that the unique circumstances of the prison context should guide that court in applying strict scrutiny.[40] The Court's context-specific characterization of strict scrutiny suggested that the outcome on remand was not entirely certain.[41]

But as Justice Stevens pointed out in dissent, remanding the case to the lower court to apply strict scrutiny was unnecessary; there was insufficient evidence to support the asserted link between integrated housing assignments and violence.[42] The CDC's position was that "if race were not

36. *Id.* at 502–03. Under the CDC's policy, all male inmates were initially housed with inmates of the same race in reception centers for up to sixty days after their arrival so that prison officials could make final placement determinations for each inmate. *Id.* at 502.

37. *Id.* at 502.

38. *Id.* at 521 (Stevens, J., dissenting).

39. *Id.* at 512–13 (majority opinion).

40. *Id.* at 515.

41. *Id.* ("Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account."). On remand, the case settled, and the defendants agreed to "end segregation of inmates by race in its facilities" rather than "attempt to make a showing that the policy would survive strict scrutiny." Johnson v. California, No. CV 95-1192 CBM, slip op. at 2 (C.D. Cal. July 10, 2006) (on file with the Iowa Law Review) ("Order Finding Entitlement to Attorney's Fees"); Settlement and Release Agreement, Johnson v. California, (9th Cir. Dec. 12, 2005), *available at* http://www.clearinghouse.net/chDocs/public/PC-CA-0041-0001.pdf.

42. *Johnson*, 543 U.S. at 517–18 (Stevens, J., dissenting). Justice Stevens assessed the purported link between interracial housing assignments and gang violence in the following manner:

> [T]he CDC's *post hoc*, generalized evidence of gang violence is only tenuously related to its segregation policy. Significantly, the CDC has not cited a single specific incident of interracial violence between cellmates—much less a *pattern* of such violence—that prompted the adoption of its unique policy years ago. Nor is there any indication that antagonism between cellmates played any role in the more recent riots the CDC mentions. And despite the CDC's focus on prison gangs and its suggestion that such gangs will recruit new inmates into committing racial violence during their 60-day stays in the reception centers, the CDC has cited no evidence of such recruitment, nor has it identified any instances in which new inmates committed racial violence against other new inmates in the common areas, such as the yard or the cafeteria.

considered in making initial housing assignments . . . there would be racial conflict in the cells and in the yard."[43] The CDC's policy automatically equated interracial contact with racial violence without any individualized determination to establish such a relationship in any particular inmate's case.[44] Under the policy, "an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence."[45] For Justice Stevens, the CDC's racial-segregation policy amounted to a classic invidious racial classification because of its supposition that race alone is predictive of violence. Thus, there was no need to remand the case because on "the record before [the Court], . . . the CDC's policy [was] unconstitutional."[46]

With the important exception of the University of Michigan Law School admissions scheme upheld in *Grutter*, the Supreme Court has invalidated every single racial-classification scheme that benefited a racial minority (and that did not intend to remedy the effects of past discrimination by employing the classification scheme).[47] Racial classifications are presumptively unconstitutional under the Equal Protection Clause, even when intended to benefit members of groups formerly discriminated against, because such classifications deny individuals their "'personal rights' to be treated with equal dignity and respect,"[48] they risk stigmatic harm,[49] and because they may "promote notions of racial inferiority and lead to a politics of racial hostility."[50] Thus, it is very difficult for the government to solve for racial segregation using explicit racial preferences.

Id. at 520.

43. *Id.* at 503 (majority opinion).

44. *Id.* at 517 (Stevens, J., dissenting).

45. *Id.*

46. *Id.* at 523.

47. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Gratz v. Bollinger, 539 U.S. 244 (2003); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Missouri v. Jenkins, 515 U.S. 70 (1995); Shaw v. Reno, 509 U.S. 630 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

48. *Croson*, 488 U.S. at 493.

49. *Id.*

50. *Id.* In his concurring opinion in *Croson*, Justice Scalia expounded on the harms of racial classifications:

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.

Id. at 520–21 (Scalia, J., concurring in the judgment). From Justice Scalia's perspective, racial classifications require the government to "know" a citizen's race, to take account of her racial identity, and for race to matter with respect to allocating benefits and burdens. *Id.*

B. THE FACIALLY RACE-NEUTRAL TRACK

Alternatively, the government might take facially race-neutral action with the purpose of ameliorating the harms associated with segregation. The Court has taken a very different view of facially race-neutral rules, regulations, statutes, or other government action that disproportionately impact members of a racial group. While racial-classification schemes are generally struck down (intentional discrimination is the sine qua non of an equal-protection violation), facially race-neutral government action is generally upheld (racially disproportionate impact is simply the byproduct of otherwise valid governmental action and thus is constitutionally benign). These defaults correlate with adjudicative presumptions: facially neutral rule: advantage government; racial classification: advantage plaintiff.[51]

Under the facially race-neutral track, laws or other government action with a disproportionate racial impact do not offend the Equal Protection Clause unless that law or rule "reflects a racially discriminatory purpose."[52] One argument is that the Court, as a normative matter, should interpret the Equal Protection Clause to bring the government's lack of consideration for

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51. For instance, proof of discriminatory purpose does not result in the automatic invalidation of the facially neutral rule. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977). If the defendant can show that it would have taken the complained-of action even in the absence of discriminatory purpose, there is no equal-protection violation. *Id.* Moreover, it is quite difficult for a plaintiff to demonstrate that a facially race-neutral rule is animated by a discriminatory purpose. Selmi, *supra* note 29, at 334–35 (arguing that the Court only infers discriminatory purpose in two situations: "when the factual circumstances 'bespeak discrimination' and no other plausible explanation presents itself" and "when the evidence indicates that the legislation results in the total, or near total, exclusion of African-Americans"); *see also* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (demonstrating that a defendant challenging a death sentence because of its racially discriminatory application cannot simply rely on statistical disparity but must prove that "the decisionmakers in *his* case acted with discriminatory purpose"). Typically such a showing will be made via circumstantial rather than direct evidence, and the Court will not infer discriminatory purpose lightly. *Arlington Heights*, 429 U.S. at 266-68 (in the "rare" case, "a clear pattern [of discrimination], unexplainable on grounds other than race," could prove discriminatory purpose). The Court states:

> The historical background of the decision is one evidentiary source . . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Id. (footnotes omitted) (citations omitted).

52. Washington v. Davis, 426 U.S. 229, 239 (1976).

racially disproportionate impact within its purview.[53] But the Court has consistently reaffirmed its holding in *Washington v. Davis*: Only intentional discrimination, rather than racially disproportionate impact, violates the Equal Protection Clause.[54] Absent a discriminatory purpose, facially neutral rules are subject to the rational basis test, the most deferential form of judicial review, and are almost always upheld.[55]

The Court does not require a finding of animus or hostility toward members of a protected group in order to establish a discriminatory purpose.[56] As the Court observed in *Personnel Administrator v. Feeney*, in evaluating a facially gender-neutral statute, discriminatory purpose implies that the "decisionmaker . . . 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."[57] Leading cases, such as *Rogers v. Lodge*[58] and *Hunter v. Underwood*,[59] suggest that the Court will infer discriminatory purpose only where race is essentially the "but-for" motivation for the facially neutral action.[60] As Michael Selmi explained, "[T]he Court has only seen discrimination, absent a facial classification, in the most overt or obvious situations—situations that could not be explained on any basis other than

53. *See McCleskey*, 481 U.S. at 345–66 (Blackmun, J., dissenting); Pers. Adm'r v. Feeney, 442 U.S. 256, 281 (1979) (Stevens, J., concurring); *id.* at 281–88 (Marshall, J., dissenting); *cf. Davis*, 426 U.S. at 253–54 (Stevens, J., concurring) (arguing that no bright-line distinction exists between discriminatory purpose and discriminatory impact).

54. 426 U.S. at 229; *see, e.g.*, Batson v. Kentucky, 476 U.S. 79, 93–94 (1986); Rogers v. Lodge, 458 U.S. 613, 617 (1982); *Arlington Heights*, 429 U.S. at 264–65.

55. *See, e.g.*, *Arlington Heights*, 429 U.S. at 265–66.

56. Selmi, *supra* note 29, at 292 ("The petitioner need not prove that the decisionmaker acted with any animus or illicit motive.").

57. 442 U.S. at 279.

58. 458 U.S. at 627 (ruling that in Burke County, Georgia, where blacks made up a majority of the population and whites a slight majority of the voting age population, at-large method of elections for County Board of Commissioners—which had never had a black member—were maintained for racially invidious purposes).

59. 471 U.S. 222, 233 (1985) (ruling that the provision of the Alabama Constitution that disenfranchised anyone convicted of a crime "involving moral turpitude," which was claimed to include the crime of presenting a worthless check, violated the Equal Protection Clause).

60. *Id.* at 233. The Court stated:

> Without deciding whether [the challenged provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.

Id.; *see also Rogers*, 458 U.S. at 622–27 (outlining extensive evidence considered and relied upon by the district court in reaching the conclusion that discrimination was intentional and declining to pronounce these factual findings as clearly erroneous).

race. Whenever the Court found room to accept a nondiscriminatory explanation for a disputed act, it did so."[61]

Thus, it is hard to overstate the significance of a finding of discriminatory purpose for ultimately denying the constitutionality of government action. Facially race-neutral government action is immunized from constitutional attack unless the Court can draw an inference of discriminatory purpose. Thus, the government may use facially race-neutral means to "solve for segregation" if those means are not motivated by a discriminatory purpose. But an unrebutted finding of discriminatory purpose converts a facially neutral rule into a racial classification, creating an overwhelming presumption of unconstitutionality.[62]

III. WHEN *PARENTS INVOLVED* MET *RICCI*

If the constitutional prerogative for government action is "racial neutrality,"[63] then one might argue that *any action* taken by the government to eradicate racial segregation is race-based. One argument is that, if the government takes affirmative steps to eradicate de facto segregation, then it is no longer "neutral" when it comes to race, regardless of whether those actions are facially race-neutral or are embodied in racial-classification schemes. Thus, one could argue that facially race-neutral action, even when taken to produce integration, is "race related" and thus impermissible. From this perspective, if a government's facially race-neutral but integrative action is synonymous with "race," that action is motivated by a discriminatory purpose and is presumptively impermissible. Even before *Ricci*, a plurality of the Court in *Parents Involved* signaled its agreement with this approach.[64]

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61. Selmi, *supra* note 29, at 284; *see also* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 47–48 (1977) ("Even when the Court is willing to explore official motive, the problems of proof often will be insurmountable for the plaintiff.").

62. Washington v. Davis, 426 U.S. 229, 241 (1976); *cf.* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (showing no further inquiry where plaintiffs failed to meet their burden to establish a prima facie case of discriminatory purpose).

63. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1255 (1970). Ely explained:

> A number of commentators have asserted that government officials may, if they wish, go out of their way to favor the members of minority races without violating the Constitution. But none of whom I am aware, and certainly not the Court, has argued that such favoritism is constitutionally required: the Fourteenth Amendment is read only to require "neutrality" toward such groups.

Id. (footnote omitted).

64. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735–48 (2007) (plurality opinion) (Part IV of Justice Roberts's opinion, joined by Justices Scalia, Thomas, and Alito).

A. *The* Parents Involved *Plurality and Race Neutrality*

Parents Involved marked the first time the Court applied its affirmative-action jurisprudence to the K–12 public-school context. *Parents Involved* was a mixed plurality/majority opinion. Writing for a majority of the Court, Chief Justice Roberts held that two public-school districts' voluntary race-based student-assignment plans violated the Equal Protection Clause because the plans were insufficiently narrowly tailored.[65] Essentially, the Court viewed the student-assignment plans as an impermissible form of affirmative action, even though there was no "merits" determination and no student possessed a vested right to attend any particular public school.[66]

The four-justice *Parents Involved* plurality cast significant doubt on the constitutionality of the purpose of the school districts' race-based student-assignment plans. The two school districts attempted to justify the race-based student-assignment plans as efforts to reduce racial concentration in the schools and/or to educate students in a "racially integrated environment."[67] Thus, at least one justification for those plans was integration.[68]

The entire tenor of the plurality's opinion is skepticism, both of the school districts' motivations and of the asserted integrative goal itself. The plurality interpreted the *Brown* decision as requiring perfect governmental neutrality when it comes to race. For the plurality, *Brown* did not allow any racial "discrimination"—whether that discrimination furthered white supremacy or attempted to ameliorate de facto segregation.[69] The government must be neutral when it comes to race, and efforts to promote racial integration are necessarily suspect. Indeed, the plurality converted the school districts' integration justification into the desire to obtain racial balance: "In design and operation, *the plans are directed only to racial balance, pure and simple*, an objective this Court has repeatedly condemned as illegitimate."[70] From the plurality's perspective, the school districts' actual goal was patent racial balancing, rather than a good-faith attempt to achieve the benefits associated with integration or to "ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools."[71]

Integration and ameliorating the effects of de facto segregation are entirely distinct from "racial balancing." Integration, particularly in its most

65. *Id.* at 733–35.

66. *Id.* at 855 (Breyer, J., dissenting).

67. *Id.* at 725 (plurality opinion) (internal quotation marks omitted).

68. After the Court ruled that the school districts' voluntary student-assignment plans could not be supported as a remedy for past intentional discrimination or on a *Grutter*-style diversity theory, *id.* at 720–25 (majority opinion), the plurality then addressed the propriety of integration as a compelling interest, *id.* at 725–33 (plurality opinion).

69. *Id.* at 746–48 (plurality opinion).

70. *Id.* at 726 (emphasis added).

71. *Id.* at 725.

robust or "radical" sense, has both an associational element and an instrumental, or material element.[72] True integration creates association where there had been separation, but under conditions of mutuality, and material and social equality.[73] Conversely, "racial balancing" is an effort "to assure . . . some specified percentage of a particular group merely because of its race or ethnic origin."[74] Racial balancing is attention to racial statistics wholly divorced from any positive aim to facilitate minority empowerment or capture any prospective, society-wide benefits of integration articulated by Justice O'Connor in *Grutter*.[75] Racial balancing is aesthetics.[76]

The plurality's conversion of the two school districts' integration justification into acts of racial balancing raises several concerns. First, the plurality's conflation of racial diversity or integration with racial balancing undermines the compelling interest the Court recognized in the context of *Grutter*, casting doubt on the propriety of integration.[77] Although achieving racial balance cannot justify the use of racial classifications, the Court has recognized in at least one context that "obtaining the educational benefits that flow from a diverse student body" is a compelling interest which justifies the use of racial classifications.[78] Moreover, as Justice Breyer noted in his *Parents Involved* dissent, the Court's holdings in school-desegregation cases certainly permit "local school boards to use race-conscious criteria to achieve positive race-related goals."[79] But the plurality casts doubt on those holdings too, suggesting that school boards' desegregative actions are illegitimate forms of racial balancing.

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72. Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 272–73 (2006).

73. *Id.* at 272–76.

74. Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (internal quotation marks omitted).

75. *See id.* at 330–33. The Court, in recounting the law school's claim of a compelling argument, stated:

> [N]umerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." . . . [M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . 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.

Id. (citations omitted); *see also id.* at 330 (indicating that the District Court found a diverse student body "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races'" (alteration in original)).

76. *Id.* at 354 n.3, 355 (Thomas, J., concurring in part and dissenting in part).

77. *See infra* Part IV.B.

78. *Grutter*, 539 U.S. at 343.

79. 551 U.S. 701, 823 (2007) (Breyer, J., dissenting).

More globally, the plurality's approach can be seen as an attempt to "rebrand" integration.[80] Conflating integration with racial balance downgrades its status as a societal ideal and sows definitional confusion, which discourages government actors from attempting to integrate at all.[81] Finally, the plurality's approach lends credence to the idea that integration itself may be a discriminatory purpose. After all, if integration is synonymous with "racial balance," and racial balance is "an objective th[e] Court has repeatedly condemned as illegitimate,"[82] then perhaps integration is too. The *Parents Involved* plurality raises profound doubts that integration is an objective the government should pursue. It is a significant step toward destabilizing the concept of "discrimination."

B. Justice Kennedy's Concurrence

Justice Kennedy provided the pivotal fifth vote in *Parents Involved*, mitigating (somewhat) the decision's impact. In his concurring opinion, Justice Kennedy took issue with parts of the plurality's compelling-governmental-interest analysis.[83] On Justice Kennedy's view, school "districts can seek to reach *Brown*'s objective of equal educational opportunity."[84] More specifically, Justice Kennedy asserted that school districts have a compelling interest in attempting to ameliorate de facto segregation and in achieving a diverse student population.[85]

The puzzle of Justice Kennedy's concurring opinion was his definition of "race consciousness":

> [R]ace-conscious measures . . . address the problem [of a non-diverse student-body composition interfering with the objective of an equal educational opportunity] in a general way [whereas racial classifications] treat[] each student in different fashion solely on the basis of a systematic, individual typing by race. . . . [Permissible] 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 . . . . These [mechanisms] include

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80. For instance, in his concurring opinion, Justice Thomas says explicitly, "[O]utside of the context of remediation for past *de jure* segregation, 'integration' is simply racial balancing." *Id.* at 750 n.2 (Thomas, J., concurring).

81. john a. powell, Exec. Dir., Kirwan Inst. for the Study of Race and Ethnicity, Solving the Integration Problem: From Confusion to Public Support, Address at The Harvard Law School Charles Hamilton Houston Institute for Race & Justice National Summit on Interdistrict Desegregation, Passing the Torch: The Past, Present, and Future of Interdistrict School Desegregation (Jan. 17, 2009). The PowerPoint presentation accompanying Professor powell's address is available at http://www.charleshamiltonhouston.org/assets/documents/events/Passing%20the%20Torch/powell_From%20Confusion%20to%20Support2.pdf.

82. *Parents Involved*, 551 U.S. at 726.

83. *Id.* at 787–90 (Kennedy, J., concurring in part and concurring in the judgment).

84. *Id.* at 788.

85. *Id.* at 788–89.

> [specified] facially race-neutral means . . . or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.[86]

Race consciousness does not mean racial classifications. The governmental means obviously matter to Justice Kennedy. Racial classifications that single out individuals for race-based treatment amount to per se violations of the Equal Protection Clause.[87] Justice Kennedy acknowledged that race may be "taken into account" by the government.[88] Perhaps taking race into account means that the government may have an awareness of race, in the same way it is aware of the racial makeup of the citizenry when it draws electoral district lines.[89] But Justice Kennedy seems to mean something more than simply a school district's action taken against a background "awareness" of the racial makeup of the district or neighborhood. Instead, by "race conscious" he seems to mean that the government may pursue race-conscious ends. And by race conscious ends, he means the objective of obtaining racial diversity in the school system and/or ameliorating the effects of de facto segregation. Thus, from Justice Kennedy's view, school authorities may "consider the racial makeup of schools and . . . adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[90] On this view, "race" or "race consciousness" equates positively with integration.

For Justice Kennedy, the government may seek to achieve integration but may not pursue the integration objective using racial classifications. What is particularly notable about Justice Kennedy's approach is that the government may pursue the race-conscious objective of integration without even triggering strict-scrutiny review under the Equal Protection Clause. Thus, the following key passage:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods;

86. *Id.* at 788–90.

87. *Id.* at 793–98. "What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification." *Id.* at 798.

88. *Id.* at 787.

89. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995); Shaw v. Reno, 509 U.S. 630, 641, 644 (1993).

90. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment).

> allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious *but do not lead to different treatment* based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.[91]

This passage suggests that the essence of the equal-protection violation is not government action taken with an awareness of race, but government action that harms white individuals, i.e., racial harm. From this perspective, the form of the governmental action matters because the more explicit the race-conscious action, the more likely such action will harm identifiable white individuals. Justice Kennedy is concerned that the government's use of racial classifications tends to essentialize and therefore debase the individual. According to Justice Kennedy, the Equal Protection Clause prohibits the government from using racial-classification schemes because they define individuals who are necessarily complex, multifaceted, and unique, by virtue of a narrow racial category.[92] The Equal Protection Clause intended to prevent racial harm, which is typified by, but not limited to, racial-classification schemes: "What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification."[93] Under this reasoning, where government attempts to ameliorate the harms associated with segregation through race-neutral means, the prospects of racial harm are diminished.

Like the plurality, Justice Kennedy shares the view that the Equal Protection Clause generally requires governmental neutrality towards race; he differs in that he would allow deviations from this baseline only where white individuals are harmed in a less overt, more diffuse manner. Justice Kennedy believes governmental action raises significant equal-protection concerns—i.e., triggers "strict scrutiny"—when the government classifies citizens on the basis of their race thereby defining them based on their racial characteristics. Moreover, where the government uses racial-classification schemes, race is at the forefront rather than in the background of government decision-making. Therefore, racial classifications are clearly in tension with any constitutional requirement of racial neutrality.

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91. *Id.* at 789 (emphasis added).

92. *Id.* ("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.").

93. *Id.* at 798.

C. RICCI V. DESTEFANO

In *Ricci*, the Supreme Court ruled that the City of New Haven violated Title VII of the Civil Rights Act of 1964 when it refused to certify the results of examinations for promotion to the rank of lieutenant and captain in the New Haven Fire Department.[94] In 2003, 118 New Haven firefighters took a written examination to qualify for "promotion to the rank of lieutenant or captain."[95] These 118 firefighters were competing for fifteen promotions within the New Haven Fire Department; eight lieutenant positions and seven captain positions were vacant at the time of the examination.[96] A candidate's performance on the written exam was the most important factor determining eligibility for promotion.[97] The City filled promotion vacancies based on the "rule of three," which required the City to fill each promotion vacancy from the top three scorers on the examination.[98]

The pass rate on the examination for minority candidates was approximately one-half the pass rate for white candidates.[99] If the City had certified the examination results, all of the vacant lieutenant positions would have gone to white candidates; seven white applicants and two Hispanic applicants would have filled the captain positions.[100] Thus, no African-American candidates would have been promoted.[101] Because the City refused to certify the examination results, "no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion."[102]

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94. 129 S. Ct. 2658, 2664 (2009).

95. *Id.*

96. *Id.* at 2666. The breakdown of the candidates sitting for the promotion examination and their examination results by race is as follows:

> Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. . . . Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics.

Id. (citation omitted).

97. Under the City's contract with the New Haven firefighters union, "applicants for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant's total score." *Id.* at 2665.

98. *Id.*

99. *Id.* at 2678. On the lieutenant exam, "the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent." *Id.* On the captain exam, "the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates." *Id.* at 2677–78.

100. *Id.* at 2666.

101. *Id.* at 2678.

102. *Id.* at 2696 (Ginsburg, J., dissenting) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 158 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd* 129 S. Ct. 2658) (internal quotation marks omitted).

White firefighters and one Hispanic firefighter who were likely candidates for promotion based on the discarded examination results sued the City, asserting that its failure to certify the examination results discriminated against them on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the U.S. Constitution.[103] The plaintiffs' statutory assertions turned on Title VII's "disparate treatment" provision, which prohibits employers from intentionally discriminating against employees on the basis of race and other protected categories.[104] Under Title VII, a disparate-treatment plaintiff must show "'that the defendant had a discriminatory intent or motive' for taking a job-related action."[105] Conversely, the City's statutory defense turned on another provision of Title VII: The City asserted that it had a "good-faith belief that [it] would have violated the disparate-impact prohibition in Title VII had [it] certified the examination results."[106]

A prima facie violation of Title VII's disparate-impact provisions is established when an employer's neutral employment practice, such as a written examination, has a disproportionate adverse impact on a member of a group protected under the statute.[107] The employer may defend the Title VII disparate-impact suit only by showing that the neutral employment practice is "job related for the position in question and consistent with business necessity."[108] And, even if the neutral employment practice is job-related and necessary, a disparate-impact plaintiff might still succeed by showing "that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[109] The City's position vis-à-vis the plaintiffs' disparate-treatment assertion under Title VII was that if it had certified the examination results, it would have violated Title VII's prohibition against employment actions that have a disproportionately adverse impact on minority group members. With respect to plaintiffs' Title VII claim, the City presented a classic "between a rock and a hard place" defense.

The Court ruled that, "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*

103. *Id.* at 2664, 2671 (majority opinion).

104. *Id.* at 2671; *see* 42 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

105. *Ricci*, 129 S. Ct. at 2672 (quoting Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 986 (1988)).

106. *Id.* at 2671 (citation omitted).

107. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

108. *Ricci*, 129 S. Ct. at 2673 (internal quotation marks omitted).

109. *Id.*

evidence to believe it will be subject to disparate-impact liability if it fails to take the race conscious, discriminatory action."[110] The Court conceded that the City had a good-faith basis for believing that it would have violated the disparate-impact provisions of Title VII if it had certified the examination results. Indeed, the Court ruled that the City, in rationalizing why it did not certify the examination results, had made out a prima facie case of disparate-impact liability, *against itself*.[111] However, the City did not meet the new "strong basis in evidence" standard because the City might not have been found liable under a disparate-impact theory if it had certified the examination results. The Court opined: "[T]here is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City."[112] Thus, for the Court, there was no need to reach the plaintiffs' equal-protection allegations.[113]

Ricci raises the question of whether the government's desire to integrate the workplace is itself a discriminatory purpose and is therefore prohibited.[114] The City of New Haven's actions were race-dependent in that those actions likely "would have been different but for the race of those benefited or disadvantaged by them."[115] But the City's ultimate aim in taking such race-dependent action was to comply with the disparate-impact provisions of Title VII, which were passed at least in part to integrate the workplace. If the City had certified the examination results, a prima facie case of disparate-impact liability would have been stated against it.[116] Moreover, the City's actions were also facially race-neutral. As Justice Ginsburg noted in dissent:

> [The City's actions] were race-neutral in this sense: "[A]ll the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion." New Haven's action, which gave no individual a preference, "was 'simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly.'"[117]

The question, then, is whether the City's facially race-neutral, yet race-dependent action amounted to discrimination.

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110. *Id.* at 2677 (emphasis added).
111. *Id.* at 2677–78.
112. *Id.* at 2681.
113. *Id.*
114. *See infra* Part III.C.
115. Brest, *supra* note 10, at 6.
116. *Ricci*, 129 S. Ct. at 2678.
117. *Id.* at 2696 (Ginsburg, J., dissenting) (alteration in original) (citations omitted).

Thus, my focus here is on *Ricci*'s implications for facially race-neutral governmental actions motivated by a desire for general integration. This inquiry necessarily raises equal-protection concerns. Indeed, there are real reasons to be skeptical about the Court's attempt to cabin *Ricci*'s reach to the Title VII context alone. *Ricci* purports to be a statutory rather than a constitutional case. But there is no question that in *Ricci*, "the Justices clearly have constitutional issues in mind."[118] First, the "strong basis in evidence" standard the Court grafted onto Title VII was taken directly from the equal-protection "affirmative action" context. Borrowing a standard from the affirmative-action context suggests that the Court is synchronizing the Title VII and the constitutional standards, raising constitutional questions about the viability of Title VII's disparate-impact provisions.[119]

Second, the Court's affirmative-action jurisprudence has been consistently friendly to white reverse-discrimination plaintiffs and hostile to government actors seeking to take voluntary integrative action.[120] In *Ricci*, the Court praised *City of Richmond v. J. A. Croson Co.*[121] and *Wygant v. Jackson Board of Education*[122] as striking the appropriate balance between "eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other."[123] In both of those cases, there was a "head-to-head" competition between blacks and whites for an important governmental benefit such as a job or government contract.[124] In both cases, the Court ruled that the affirmative action plan at issue was unconstitutional.[125] *Ricci* cites these cases as persuasive precedent, even though both cases involved explicit racial classifications.

Third, the Court used a constitutional standard in deciding *Ricci*. The standard the Court imported from the equal-protection context is a high one. In *Ricci*, the Court ruled that the government must have a "strong basis in evidence" in order to justify voluntary-compliance efforts under Title

118. BREST ET AL., *supra* note 15, at 181.

119. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

120. *Grutter v. Bollinger*, 539 U.S. 306 (2003), is the proverbial exception that proves the rule. *But see, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003) (finding that a point allocation system for freshman admissions that included race violated the Equal Protection Clause).

121. 488 U.S. 469 (1989).

122. 476 U.S. 267 (1986).

123. *Ricci*, 129 S. Ct. at 2675.

124. *Croson*, 488 U.S. at 481–83 (explaining that the city denied contractor's request for a waiver of provision in the city's contested Minority Business Utilization Plan that required 30% of the dollar amount of city contracts be subcontracted to Minority Business Enterprises); *Wygant*, 476 U.S. at 271–72 (explaining that when "nonminority teachers were laid off, while minority teachers with less seniority were retained" as a result of the school board's minority retention agreement with the teacher's union, "[t]he displaced nonminority teachers" sued).

125. *Croson*, 488 U.S. at 486, 511; *Wygant*, 476 U.S. at 283–84.

VII.[126] The "strong basis in evidence" question previously was only asserted within a strict-scrutiny analysis in a constitutional context. Strict-scrutiny review is the highest level of judicial review applied to classification schemes under the Equal Protection Clause; it presumes the underlying impermissibility of the challenged classification.[127] As a matter of equal-protection law, the question of whether a governmental defendant has a "strong basis in evidence" measures the government's justification for an affirmative-action plan that is *otherwise unconstitutional*. Thus, the Court's shift in *Ricci* from a "good faith" standard to a "strong basis in evidence" standard is a momentous change in Title VII law, signaling that defendants' voluntary compliance efforts, which raise reverse-discrimination claims under the disparate-treatment provisions of the statute, are presumptively impermissible.[128]

But *Ricci* is not just a "one-way" ratchet signaling a potential change in direction in Title VII law toward pro-reverse discrimination in favor of plaintiffs. The Court imported the "strong basis in evidence" standard in order to resolve a tension it perceived between the disparate-treatment and disparate-impact provisions within the statute. The conflict arose because the Court assumed that New Haven's actions, refusing to certify examination results, specifically taken to avoid disparate-impact liability, actually did violate Title VII's disparate-treatment provision. Thus, there was an irreconcilable conflict in New Haven's actions under the statute unless the City could present an adequate defense.[129] However, a conflict between the disparate-treatment and disparate-impact provisions in Title VII arises only *if* the intent to remedy disparate impact is "equivalent to an intent to discriminate against non-minority applicants."[130] The Court conceded that the rationale for the City's action was to comply with Title VII's disparate-impact requirement.[131] But for the Court, the City's action in refusing to certify the examination results was "race-based,"[132] and therefore

126. 129 S. Ct. at 2677.

127. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451–52 (2d ed. 1988).

128. Cheryl I. Harris and Kimberly West-Faulcon persuasively argued, "*Ricci* effectively imports strict scrutiny equal protection analysis into Title VII's substantive provisions by requiring that an employer have a 'strong basis in evidence' for believing it is vulnerable to disparate impact liability before it takes any action to avoid or mitigate disparate impact against minorities." Harris & West-Faulcon, *supra* note 5, at 85; *see also* Primus, *supra* note 5, at 1349–55 (discussing the *Ricci* Court's departure from the traditional view of the disparate-impact doctrine).

129. *Ricci*, 129 S. Ct. at 2673.

130. Hayden v. Cnty. of Nassau, 180 F.3d 42, 51 (2d Cir. 1999).

131. *Ricci*, 129 S. Ct. at 2664, 2673–74.

132. *Id.* at 2664.

presumptively impermissible[133] under Title VII's disparate-treatment provisions. The problem, of course, is that "race-based" could mean anything. It could mean action taken to create or perpetuate a caste system, or to racially stigmatize an individual, or to comply with the requirements of federal anti-discrimination law.

Consequently, *Ricci* raises the following question: Is the government prohibited from taking facially race-neutral action motivated by an integrative intent?[134] There are two answers to this question: one is narrowly doctrinal, and the other is more normative. As a doctrinal matter, *Ricci* does not "hold" that facially neutral decisions intended to integrate are unconstitutional. As the Court explained, "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 race."[135] Thus, it would be reading *Ricci* too aggressively to suggest that ex ante, the government can take no facially race-neutral action that might have an adverse effect on white individuals.[136] Rather, the thrust of the Court's concern in *Ricci* is that the government discarded the examination results only *after* it learned that "white candidates had outperformed minority candidates."[137] The government's ex post determination made all the difference.

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133. Of course, one need not read the integrative legislative motive behind disparate impact so broadly. Perhaps the disparate-impact provision of Title VII is intended to "integrate the workplace only to the extent that existing hierarchies can be dismantled through the elimination of irrational business practices." Primus, *supra* note 8, at 519. If this is the case, then one argument is that *Ricci* is consistent with that view. After all, the Court ruled that the petitioners were entitled to summary judgment on the Title VII claim because "[t]here is no genuine dispute that the examinations were job-related and consistent with business necessity." *Ricci*, 129 S. Ct. at 2678. In addition, the City lacked a strong basis in evidence that there was an equally valid, less-discriminatory-testing alternative that it refused to adopt. *Id.* at 2679. Essentially, the Court's view was that because there was an adequate business justification for the promotion test, the City's failure to certify the results could not justify race-based discrimination.

Thus, *Ricci* could stand for the more limited proposition that disparate impact targets "not all segregation-perpetuating practices but only those that are not adequately justified by the rational commercial interests of employers." Primus, *supra* note 8, at 532. The only problem with this view is that the City was never given a chance to prove that its test lacked an adequate business justification under the new *Ricci* standard. As Justice Ginsburg notes in dissent: "The Court stacks the deck further by denying respondents any chance to satisfy the newly announced strong-basis-in-evidence standard." *Ricci*, 129 S. Ct. at 2702 (Ginsburg, J., dissenting). Instead, the Court tries the case itself.

134. Again, this is not a fanciful question. *See* BREST ET AL., *supra* note 15, at 181–82.

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

136. *See* Sullivan, *supra* note 15, at 207 (interpreting this portion of the Court's opinion to mean that "the employer could have adopted its testing (or other practices) to minimize the disparate impact, even though it could not invalidate a test, once it was given, for that reason").

137. 129 S. Ct. at 2664.

The *Ricci* case concerns facially race-neutral government action motivated by an integrative intent that was not strictly required by Title VII's disparate-impact provisions and that caused racial harm. *Ricci* suggests that because the disparate-impact provisions of Title VII intended to promote workplace integration, facially neutral actions taken to achieve that purpose are race-based and presumptively impermissible *if and only if that action creates racial harm. Ricci* stands for the conclusion that the government may not take action that (1) is race-based (now broadly interpreted) that (2) causes racial harm that is not required to avoid disparate-impact liability.

This understanding of *Ricci* jibes with Justice Kennedy's concurrence in *Parents Involved*. In *Parents Involved*, Justice Kennedy stressed the harm to individuals associated with racial-classification schemes. At the same time, he articulated a broad vision of facially race-neutral, yet race-conscious, actions that the government could take to eradicate de facto segregation without triggering strict scrutiny.[138] Presumably, such actions would not harm individual white students by stamping them with a governmentally ordained racial label. Even though *Ricci* does not involve an explicit racial-classification scheme, one might understand both cases as dealing with the same fundamental problem: How to assess the propriety of what the Court perceives as "race-based" governmental action—whether claims against such action are grounded in Title VII or equal protection, and whether the government's action is explicitly race-conscious or facially race-neutral.

Thus, the issue in both cases is the same: Is there an adequate justification for what the Court perceives as race-conscious action that creates racial harm? Racial harm matters. *Ricci* suggests that the form of the race-conscious action is secondary to the importance or visibility of the racial harm. Finally, *Ricci* also suggests that facially race-neutral governmental action with an integrative purpose, previously unobjected to, may well need to now meet the requirements of strict-scrutiny review in order to survive constitutional review.

But on a broader normative level, *Ricci* (and the *Parents Involved* plurality) suggests that the Court is not only shifting away from the pro-integrative approach that marked Justice O'Connor's opinion in *Grutter*,[139] but is "waging war" on the very idea of discrimination itself.[140] After *Ricci*, the issue is the size, nature, and explicitness of *the effect* on identifiable reverse-discrimination plaintiffs. The lesson of *Ricci* for government actors is not that governmental action taken with an integrative motive is always prohibited (at least for now).[141] Instead, it is that the effects of the facially neutral government action really matter. In *Ricci*, even though New Haven

138. *See supra* Part III.B.

139. *See infra* Part IV.B.

140. Harris & West-Faulcon, *supra* note 5, at 116.

141. Although, I have demonstrated why *Ricci* raises this troubling possibility.

did not use explicit racial classifications and was motivated by integrative intent, the City's action affected identifiable individuals. As Justice Kennedy's concurring opinion in *Parents Involved* suggests, the Court is particularly concerned about the harm caused by explicit racial classifications, which tend to undercut individuality. But racial harm can take many forms and need not always be embodied in racial classifications.

For instance, racial harm occurs when the government takes facially race-neutral action that is motivated by a discriminatory purpose.[142] And, as *Ricci* demonstrates, the Court is also concerned when the government takes facially race-neutral action that creates racial harm with respect to important social and economic benefits *even where the government's primary motivation for the facially neutral action is integrative*. In this respect, *Ricci* moves the Court one step further toward an interpretation of the Equal Protection Clause that requires absolute governmental neutrality when it comes to race. Moving forward, the challenge for the government is to design effective facially race-neutral programs that do not entrench the status quo, open up access to opportunity, provide for maximum racial integration, and do not cause racial harm. But such an interpretation risks destabilizing and ultimately subverting the term "discrimination."

IV. RESPONDING TO THE RACE-NEUTRALITY DEFAULT: THE IMPORTANCE OF INTEGRATION

A. *THE IMPORTANCE OF INTEGRATING THE WORKPLACE*

Ricci raises the question of whether the government's desire to integrate the workplace is itself a discriminatory purpose. In so doing, the Court undervalues the integrative foundation of Title VII's disparate-impact provisions and is acting out of step with previous doctrine. The disparate-impact provisions of Title VII seek, at least in part, to disestablish racial segregation in American employment and address structural inequality.[143] As Richard A. Primus explained, there are a variety of motives for disparate-impact law and there is no consensus as to its legislative motive.[144] However, one leading possibility is that the legislative motive undergirding disparate-impact law is to integrate the workplace.[145] Indeed, one argument is that the workplace is the single most promising domain for integrating adults in American society.[146] Thus, disparate impact prohibits facially neutral

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142. *See supra* Part II.B.

143. Primus, *supra* note 8, at 523–24.

144. *Id.* at 518 ("[T]here has long been a dispute over whether disparate impact doctrine is an evidentiary dragnet designed to discover hidden instances of intentional discrimination or a more aggressive attempt to dismantle racial hierarchies regardless of whether anything like intentional discrimination is present.").

145. *Id.* at 523–32.

146. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 9 (2003). Estlund argues:

workplace practices that "'"freeze" the status quo' and permit the legacy of prior discrimination to perpetuate itself."[147] Racial segregation in education, employment, housing and other areas of American life is a "primary impediment to achieving *structural* equality"[148] for African-Americans and other minority group members. Government attempts to integrate the races directly addresses these ongoing, persistent, and path-dependent processes that structure access to opportunity in American society.[149]

On this view, disparate-impact liability exists to eliminate the self-perpetuating mechanisms of racial segregation in American employment, which operate regardless of any discriminatory intent or racial animus on the part of the employer.[150] As Primus puts it in elaborating on how disparate impact is intended to integrate the workplace:

> After legal discrimination ended, whites on average still enjoyed better educational and occupational opportunities than blacks, with the result that employers who selected employees based on educational and occupational qualifications tended to hire whites over blacks even if they were not motivated by an intent to discriminate. That pattern can reproduce itself from generation to generation. To the considerable extent that the occupational success of parents shapes the educational and occupational opportunities of their children, and given the low rate of

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> The single most promising arena of racial integration—at least for adults—is the workplace. This is not to say that the typical workplace is genuinely integrated, but that even the partial demographic integration that does exist in the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain of American society.

Id.

147. Primus, *supra* note 8, at 524.

148. Adams, *supra* note 72, at 275.

149. *See* john a. powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 683–85 (2001). powell states:

> The positive effects of desegregation in the schools start with the students but permeate far beyond the immediate environs of students. Students of color "who attend more integrated schools have increased academic achievement and higher test scores." These increases have been credited to, among other factors, better resource access and enhanced motivation or competition. Attending a more desegregated school translates into heightened goals for future educational attainment and career, whereas being educated in a racially segregated environment is associated with lower educational attainment and career goals. . . .
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> . . . .
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> . . . Indeed, [the harm of segregation and subordination] is not limited to negative impacts on students' achievement, but reaches into and damages our democratic structure—reifying racial subordination in employment, health, wealth access, and political participation.

Id. (footnotes omitted).

150. Primus, *supra* note 8, at 523–24.

> intermarriage between whites and blacks, applying neutral criteria to haves and have-nots alike could help keep blacks an underclass in the workforce even if employers held no bias in favor of maintaining that state of affairs.[151]

This understanding of the purpose of disparate-impact law is consistent with my vision of "radical integration."[152] Radical integration moves beyond the standard assumption that integration is relevant only in educational settings where the positive externalities associated with intergroup contact are most commonly appreciated. Instead, radical integration recognizes that integration necessarily requires assimilation and lacks any structural or material component.[153] Radical integration—properly conceived—embraces both "the expectation that race mixing under conditions of social equality would break down racial stereotypes and allow members of each group to appreciate a common, shared humanity, and . . . the belief that integration would eradicate the advantages whites had accrued through segregation."[154] But if integration equals discrimination, then all governmental integration efforts—*even if undertaken using race-neutral means*—are suspect and potentially even unconstitutional.

B. GRUTTER V. BOLLINGER *(AFTER* PARENTS INVOLVED *AND* RICCI*)*

Looking back on the Court's decision in *Grutter* after *Parents Involved* and *Ricci*, the question becomes: Why wasn't Barbara Grutter invited to the party? Surely she had just as strong (and perhaps even a stronger) equal-protection argument as the students who were denied their choice of public schools in *Parents Involved*, or the firefighters seeking promotions in *Ricci*. Moreover, *Grutter* involved an explicit racial-classification scheme rather than a facially race-neutral determination.

At issue in *Grutter* was the University of Michigan Law School's affirmative-action plan that used race as a "plus" factor in its admissions scheme.[155] Barbara Grutter, a white resident of the state of Michigan, applied to the law school and was rejected.[156] She sued, alleging that the law school's admissions scheme violated her rights under the Equal Protection Clause because it gave "applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'"[157] In a celebrated and much

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151. *Id.* (footnote omitted).

152. *See generally* Adams, *supra* note 72 (defining radical integration as a concept encompassing both desegregation and associational and material equality).

153. *See generally id.* (arguing that radical integration, a part of which is individualistic assimilation, should be advanced as both a political and a social goal).

154. *Id.* at 272 (footnote omitted).

155. 539 U.S. 306, 321, 334–35 (2003).

156. *Id.* at 316.

157. *Id.* at 317.

scrutinized decision authored by Justice O'Connor, the Court ruled that the law school's admissions scheme did not violate the Equal Protection Clause.[158]

The ruling hinged on two key pivots: the deferential application of strict scrutiny and the importance the Court placed on racial integration both to the law school and to society more generally. The law school's admissions plan employed a racial-classification scheme, thus triggering strict scrutiny. But at the outset, the Court opined:

> Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.[159]

Thus, the Court signaled that it might uphold the law school's admissions scheme *if* the school's justification for the use of race was important enough to overcome the constitutional presumption against it. In *Grutter*, there is little question that the Court applied strict scrutiny in a relaxed, deferential fashion.[160]

The Court explained that it would defer to the law school in employing the strict-scrutiny framework.[161] Indeed, the Court deferred to the law school's judgment as to the importance of diversity to the law school's mission and with respect to the means the law school used to achieve that diversity.[162] The interest the *Grutter* Court found compelling was the law school's use of race to obtain the "educational benefits that flow from a

158. *Id.* at 343.

159. *Id.* at 326–27.

160. *See id.* at 328 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions . . . ."); *see also id.* at 350, 361–67 (Thomas, J., concurring in part and dissenting in part) ("Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'"); *id.* at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 388, 394 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. . . . Deference is antithetical to strict scrutiny, not consistent with it.").

161. *Id.* at 328 (majority opinion) ("Our scrutiny of the interest asserted by the law school is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").

162. Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 947–54 (2008) (asserting that the *Grutter* Court deferred to the law school on both the compelling-interest and narrow-tailoring prongs of the strict-scrutiny test).

diverse student body."[163] But that interest had universal, extra-educational effects including better workforce outcomes, increased corporate competiveness and military readiness, and the enhancement of a multi-racial citizenry and legitimate leadership class.[164] *Grutter* recognized the importance of racial integration to American society and upheld a government actor's explicit use of racial classifications because of it. So one answer to the question of why Barbara Grutter wasn't invited to the party is that the Court in *Grutter* was persuaded that the societal interests in integration outweighed the harm to the plaintiff given the nature of the multivariate admission-selection mechanism the law school used.[165]

Moreover, the Court ruled that the law school's admissions scheme was narrowly tailored to achieve the benefits of racial diversity because it used individual determinations and did not "make[] an applicant's race or ethnicity the defining feature of his or her application."[166] Race was just one factor among many in the admissions determination.[167] Additionally, the decision to take account of race was made ex ante and not ex post in response to discovering that a disproportionately white class had been admitted and whose admission offers were rescinded.[168] Thus, the law school's admission process did not unduly burden individual white applicants—in other words, it did not create racial harm.[169]

Contrast the Court's minimization of the potential racial harm in *Grutter* to the Court's perception of the school districts' use of race in *Parents Involved.* In *Parents Involved*, the Court ruled that the student-assignment plans were not narrowly tailored because:

> [Race] is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here

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163. 539 U.S. at 343.

164. Adams, *supra* note 162, at 948–53.

165. *Id.* at 949 (asserting that the *Grutter* Court balanced the public benefits associated with integration against the harm to frustrated white applicants that "is minimized through appropriate attention to their interests throughout the admissions process").

166. *Grutter*, 539 U.S. at 337.

167. *See id.* at 318–20. Indeed, this might help to explain the contrasting outcome in *Gratz*. *Compare id.* at 338 ("[T]he Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well." (citation omitted)), *with* Gratz v. Bollinger, 539 U.S. 244, 247, 253–54 (2003) (although the university's undergraduate admission's office considered "a number of factors in making admissions decisions," its automatic distribution of 20 points to every single applicant from an underrepresented minority group "ha[d] the effect of making the 'factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant").

168. *Grutter*, 539 U.S. at 318.

169. *Id.* at 341.

> "do not provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way.[170]

Thus, the student-assignment plans at issue in *Parents Involved* created significant racial harm by reducing "children to racial chits valued and traded according to one school's supply and another's demand."[171] For Justice Kennedy, this harm was so great that it could not be mitigated by otherwise permissible objectives: the school districts' desire to ameliorate the effects of de facto segregation and increase racial diversity in the schools.

Now compare the Court's perception of racial harm in *Grutter* to *Ricci.* Consider *Ricci*'s overarching focus on racial harm and the vested-rights orientation of the majority opinion. The very first paragraph of the *Ricci* opinion describes how much firefighters prize their promotions, that officers command respect within the department and the broader community, that officers receive increased salary and responsibility, and that there is "intense competition for promotions" within the New Haven Fire Department.[172] The first paragraph ends by tying the much sought-after promotions to the City's objective selection mechanism (the promotion tests) intended to "identify the best qualified candidates."[173] The next two paragraphs describe how promotion examinations were "infrequent, so the stakes were high" and that "[m]any firefighters studied for months, at considerable personal and financial cost"; and how these facts implied that the City acted in a biased and race-based manner when it discarded the test results after it became clear that "white candidates had outperformed minority candidates."[174]

The key point here is that the *Ricci* Court depicts the petitioners as possessing a vested right to a highly valuable social, reputational, and economic benefit by virtue of their performance on the promotion examination.[175] The City therefore dispossessed the petitioners of the vested right to their promotions by refusing to certify the test results. Thus, the conflict between the disparate-treatment and disparate-impact provisions of

170. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723 (2007) (citation omitted) (quoting *Gratz*, 539 U.S. at 276, 280 (O'Connor, J., concurring)).

171. *Id.* at 798 (Kennedy, J., concurring in part and concurring in the judgment).

172. 129 S. Ct. 2658, 2664 (2009).

173. *Id.*

174. *Id.* This implication arises in the third paragraph of the opinion. In that paragraph, the Court describes the examination results, the public debate that ensued after those results became public, and how each side in the debate argued for their respective positions. *Id.* In describing how the City resolved the dispute, the Court implied that the City simply sided with the minority applicants over the white applicants rather than attempting to come into compliance with federal law: "In the end the City took the side of those who protested the test results. It threw out the examinations." *Id.*

175. *See id.* at 2690 (Ginsburg, J., dissenting) (stating that petitioners had no "vested right" to the promotion).

Title VII arises because of the Court's core belief that the City "discriminated" against the petitioners in the disparate-treatment sense by taking something valuable from them solely on the basis of their race.

In *Grutter*, the Court takes exactly the opposite position. The Court defers to the law school's judgment about the value of racial diversity to the education mission[176] and characterizes the admissions process as individualized, fluid, and multi-faceted, thus foreclosing any argument that Barbara Grutter had a vested right to be admitted to the law school.[177] It describes strict scrutiny as "not 'strict in theory, but fatal in fact.'"[178] The Court's approach in *Grutter* stands in stark contrast to its approach in *Parents Involved* and *Ricci*, both decided just a few terms later. There is no question that the *Grutter* Court sees a meaningful distinction between the government's use of race to obtain a diverse student body and the kind of race discrimination practiced in the "Jim Crow South"; but by the time of *Ricci*, a plurality of the Court perceived no such distinction. Thus, the Court's approach "threatens to conflate the two."[179] At the risk of sounding too reductionist, it is hard to imagine that the change in the composition of the Court in the interim had no impact on the Court's approach in the two later cases. After *Grutter* was decided in 2003, Chief Justice Roberts replaced Chief Justice Rehnquist in September 2005, and Justice Alito replaced Justice O'Connor in January 2006.[180] And while Justice Kennedy did not sign onto the most troubling portions of the plurality opinion in *Parents Involved*, he provided the critical fifth vote necessary to strike down the student-assignment plans at issue. Thus, the Court stands at a crossroads: Will it reaffirm the integrative approach it approved in *Grutter*, or will it dismantle that precedent by undermining the critical distinction between racial discrimination and government action taken to ameliorate its effects?

C. Facial Race Neutrality as a Safe Harbor: Percentage Plans

Racial-classification schemes trigger strict scrutiny. To pass constitutional muster, they must be narrowly tailored to a compelling state interest.[181] The Court routinely insists, as it considers racial-classification schemes, that the government consider race-neutral alternatives, in

176. 539 U.S. 306, 328–30 (2003).

177. *Id.* at 337.

178. *Id.* at 326 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 237 (1995)).

179. Harris & West-Faulcon, *supra* note 19 (stating that the Court in *Ricci* is engaged in an "ideological battle to deem even thinking about race or racial effects as equivalent to race discrimination, race-conscious anti-racist law in every domain—education, voting rights and employment—is now being challenged as racist").

180. *See Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/about/members.aspx (last visited Jan. 2, 2011).

181. *See supra* Part II.A.

accordance with the narrowly tailored prong of strict scrutiny.[182] Where available and efficient race-neutral alternatives exist, the Court has found unconstitutional government action that does not employ these race-neutral means.[183] The Court's preference for race-neutral alternatives designed to achieve the same ends as racial-classification schemes indicates its acceptance of the underlying objectives of many affirmative-action plans and integration more generally.

In *Grutter*, the United States, as amicus curiae for petitioner Barbara Grutter, took the position that the University of Michigan Law School could use facially race-neutral measures to "ensure that universities and other public institutions are open to all and that student bodies are experientially diverse and broadly representative of the public."[184] Indeed, the United States' position was that schools could, consistent with the Equal Protection Clause, reject selection methods that had an adverse impact on educational diversity.[185] Thus, in the United States' view, nothing in the Constitution prohibited the law school from pursuing "goals, such as experiential diversity, that have had the effect of ensuring minority access to institutions of higher learning."[186] Essentially, the United States did not understand a facially race-neutral plan, which sought to obtain racial diversity, to be impermissibly race-based.[187] On this view, ensuring minority access to the law school, that is, integrating it, was not a discriminatory purpose. The United States took a binary approach: Race-conscious means are constitutionally impermissible, but race-neutral means *with exactly the same*

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182. *See Grutter*, 539 U.S. at 339 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."); *Adarand*, 515 U.S. at 237–38 ("The Court of Appeals . . . did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting . . . ." (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989))).

183. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (outlining the race-neutral alternatives that he believed could have accomplished the school districts' integrative goals); *Grutter*, 539 U.S. at 328, 340 (deferring to school administrators' "educational judgment that . . . diversity is essential to its educational mission" and finding that the school "sufficiently considered workable race-neutral alternatives" and appropriately rejected them because "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both").

184. Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 176635.

185. *Id.* at 13–14 ("Schools may identify and discard facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educational diversity.")

186. *Id.* at 17.

187. *Id.* at 13–14, 17.

integrative objective as the race-conscious means are constitutionally permissible.[188]

More specifically, the United States suggested that the University of Michigan Law School could obtain racial diversity by relying on "percentage plans," which guarantee admission to all students above a certain class-rank threshold in every high school in the state.[189] The United States asserted that percentage plans are facially race-neutral because they use the mechanism of high-school class rank rather than race to determine college acceptance.[190] However, the Court ruled that the law school's current admissions scheme was sufficiently narrowly tailored because the law school had considered feasible race-neutral alternatives.[191] The Court opined that even assuming that percentage plans were race-neutral, they were not a workable substitute for an explicitly race-conscious admission scheme.[192] The Court's concern about percentage plans as a viable race-neutral substitute was two-fold: First, percentage plans determine college acceptance based on high-school class rank. There was no explanation of how percentage plans might apply to law school admissions.[193] Second, percentage plans are inconsistent with individualized assessments. Thus, even assuming that percentage plans are race-neutral, "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[194] Thus, there was no obligation for the law school to consider percentage plans prior to employing racial classifications in its admissions scheme.[195]

If percentage plans are race-neutral and presumptively constitutional as a result, it is hard to see why other government action that is not explicitly race-based, but which attempts to achieve racial diversity, should be viewed any differently. Percentage plans are facially race-neutral, yet at the same time race-dependent. The only reason percentage plans exist is to substitute for racially explicit admission schemes—they have no other purpose.[196]

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188. *Id.*

189. Grutter v. Bollinger, 539 U.S. 306, 340 (2003).

190. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 184, at 14–18.

191. *Grutter*, 539 U.S. at 339–40.

192. *Id.* at 340.

193. *Id.*

194. *Id.*

195. *Id.* While the Court assumed for purposes of the narrow-tailoring analysis that percentage plans are race-neutral, it did not so rule. The Court did not reach the question of whether percentage plans violated the Equal Protection Clause because the plans are motivated by an impermissible discriminatory purpose.

196. *See* Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1737 (2001) (describing the genesis of the Texas "Ten Percent Plan," which was created in direct response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated*

Percentage plans are motivated by the government's desire to achieve racial diversity, thus they are "racially" motivated. Of course, the operative question here is whether this racial motivation amounts only to an unobjectionable *Shaw–Miller*-style "awareness of race,"[197] or whether we have entered the realm of discriminatory purpose. Perhaps percentage plans are saved by *Feeney*, in that governmental action is not taken "because of" its adverse impact on non-minority students, but rather "in spite of" it.[198] But the United States' position in *Grutter* was not that there was insufficient evidence of discriminatory purpose necessary to trigger *Davis* and *Feeney*, but instead that percentage plans raise no equal-protection concerns at all.[199]

Percentage plans demonstrate that a governmental action taken "because of" race is both relative and epistemic. The thrust of the United States' amicus brief in *Grutter* is that percentage plans are constitutionally unobjectionable when compared with old-fashioned race-based affirmative action. But percentage plans (and by extension other types of facially race-neutral action taken with an intent to increase racial integration) may look very different standing alone, when there is no explicit racial classification available for comparison. The question of whether a governmental action is taken "because of" race is also epistemic in the sense that it depends on some view or conception of what race-based action "is." The thrust of the United States' position vis-à-vis percentage plans in *Grutter* is that they raise no constitutional concerns. But this position depends upon a fixed view or definition of race-based action. That is, race-based action *means* a public university's explicit use of race as a (and perhaps the) deciding factor in an admissions scheme. On this view, "because of" race does not include actions focused on identifiable individuals taken to achieve exactly the same ends as a racial-classification scheme where there are few or no identifiable plaintiffs.

Percentage plans tell us three things about what "because of" race means. Perhaps percentage plans raise no equal-protection concerns because their predominant motive is integration. Certainly the government employs percentage plans "because of" their ability to racially diversify

by Grutter, 539 U.S. 306, invalidating the University of Texas Law School's race-based admissions scheme).

197. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); Shaw v. Reno, 509 U.S. 630, 641–42, 644 (1993) ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances.").

198. 442 U.S. 256, 279 (1979).

199. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 184, at 22 ("Absent such impermissible race-based admissions decisions, university officials may pursue whatever mix of goals they deem appropriate. They are free to pursue goals, such as experiential diversity, that have had the effect of ensuring minority access to institutions of higher learning.").

college campuses, not "because of" a desire to further segregate the public schools.[200] First, in the context of traditional affirmative action, the governmental motivation for the facially neutral rule is less important than the expression of that motivation. This is why racial-classification schemes themselves are deeply problematic. Racial classifications (whether constructive or actual) present certain expressive harms that may not be present in facially race-neutral government action, even if the motivation for both is the same. Second, identifiable victims matter even if the form of the government's action is facially race-neutral. The appeal of percentage plans lies in the fact that they generate racial diversity in a diffuse manner that does not frame the admissions determination as a head-to-head competition between differentially qualified applicants for a limited pool of a highly sought-after benefit.[201] There may be white "victims" of percentage plans—depending, of course, on how one defines "merit"—but they are far less identifiable than under an admissions system that uses explicit racial classifications.[202]

Finally, the acceptability of percentage plans as an appropriate substitute for explicit race-conscious action suggests another view of what "because of" race means (or doesn't mean). However, percentage plans are deeply entwined with racial segregation on a geographical level. That is, percentage plans are premised on racially segregated schools: "[S]chool attendance areas were based on the neighborhood in which the school was located, it was inevitable that the schools would also become more

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200. *See* Editorial, *Fighting School Resegregation*, N.Y. TIMES, Jan. 27, 2003, at A24 (asserting that percentage plans tell "minority parents that their children's best chance of attending a good college is to attend a segregated high school, [and thus] these programs exert pressure on minority communities not to fight for integration in court, or in their school districts").

201. There is, however, substantial dispute as to whether percentage plans have succeeded in generating significant racial diversity in public colleges and universities. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 547 & n.165 (2002) ("[T]he United States Commission on Civil Rights and its chair have criticized the Texas and Florida [percentage] plans because Florida and Texas have not admitted to college the same proportion of minority students as were admitted under affirmative action."); *see also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 315–16 & fig.2 (2001) (arguing that a comparison of in-state applicants to the University of Texas at Austin under the Ten Percent Plan does not show a disparate impact on white students).

202. *See* Roger Clegg, *Affirmative Action, the Federal Government, and President Bush: A Conservative View*, HUM. RTS., Spring 2001, at 10, 19 (criticizing percentage plans and arguing that "[t]here's no good reason for colleges to ignore SAT scores [in the admissions determination], and there's no good reason to assume that all high schools educate students equally well"); Janet McLaren, *Top 10 Percent Plan Under Fire*, BATTALION (Tex.), Apr. 14, 2003, *available at* http://www.thebatt.com/2.8500/top-10-percent-plan-under-fire-1.1210226 (reporting that "[s]ince the [Texas] top 10 policy was adopted, more students with low SAT scores have enrolled at A&M," and quoting a student at Texas A&M who stated: "The plan discriminates against whites and non-favored minorities including Asians . . . . The best answer is a system based 100 percent on merit." (internal quotation marks omitted)).

segregated" as a byproduct of racially segregated neighborhoods and metropolitan areas.[203] Not only are percentage plans unimaginable without affirmative action, they are ineffective without racial segregation.[204] Percentage plans build upon residential segregation to deliver racially diverse undergraduate classes to public colleges and universities.[205] Indeed, residential segregation is *required* in order for percentage plans to work as intended.[206]

As Benjamin Forest explains, "Although the plan guarantees admission to the top 10% from every high school, a disproportionate number of students in this group will be white so long as the average score (or GPA) of minority students is lower than the average of white students."[207] Forest continues, "As a result, only schools with a very high percentage of minority students will have a large number of these students in the top decile."[208] Consequently, such plans "shift the construction of racial identity from a discrete, individual action—marking race on applications—to the collective action required to maintain racial segregation in housing and secondary schools."[209] Yet, the United States advocated strongly for percentage plans in its *Grutter* brief.[210] Percentage plans may have a segregative effect (or at least reify existing segregation),[211] but unless such an effect is so overwhelming

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203. KATHRYN M. NECKERMAN, SCHOOLS BETRAYED: ROOTS OF FAILURE IN INNER-CITY EDUCATION 84 (2007); *see also* Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link*, *in* SEGREGATION: THE RISING COSTS FOR AMERICA 125, 125–50 (James H. Carr & Nandinee K. Kutty eds., 2008) (emphasizing the relationship between school quality and residential patterns).

204. *See* Greenberg, *supra* note 201, at 546; *see also* Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312, 315 (2006) ("Although touted as a race-neutral admissions regime, we confirm that the success of the top 10% law in restoring diversity to the public flagships resulted because of pervasive race and ethnic segregation in Texas public high schools.").

205. *See* OFFICE FOR MULTICULTURAL & ACADEMIC AFFAIRS, UNIV. OF MINN., FREQUENTLY ASKED QUESTIONS ABOUT THE USE OF RACE-CONSCIOUS AFFIRMATIVE ACTION POLICIES IN HIGHER EDUCATION 1 (2003), *available at* http://blog.lib.umn.edu/tran0410/soc3251/affirm1.pdf; B. Forest, *Hidden Segregation? The Limits of Geographically Based Affirmative Action*, 21 POL. GEOGRAPHY 855 (2002).

206. Tienda & Niu, *supra* note 204, at 314, 341.

207. Forest, *supra* note 205, at 856.

208. *Id.*; *see also* OFFICE FOR MULTICULTURAL & ACADEMIC AFFAIRS, *supra* note 205, at 1 ("Percentage plans work best in areas where housing tends to be segregated, namely, where there are large neighborhoods with high concentrations of families from like backgrounds. These neighborhood schools tend to be segregated and characterized by racial isolation, resulting in proportionate numbers of students of different backgrounds in the top percentage of their high school classes.").

209. Forest, *supra* note 205, at 856.

210. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 184, at 14–17.

211. Forest, *supra* note 205, at 857 ("The development of the Texas Plan reflects the acceptance of segregation at the local level as an inevitable, natural phenomenon even as it acknowledges the importance of racial diversity at the scale of the university.").

that it suggests discriminatory intent, it raises no equal-protection concerns. Thus, the concept of "because of" race does not include facially race-neutral, yet race-dependent, government action where the effect on white students is diffuse and amorphous, even if the racial diversity the government seeks cannot be obtained in the absence of racial segregation.

V. TEST CASE: THE NATIONAL OPPORTUNITY VOUCHER PROGRAM

In *Ricci*, the Court characterizes the City's desire to avoid disparate-impact liability as "race-based" and presumptively impermissible.[212] Even though the disparate-impact provisions of Title VII are intended to integrate the workplace,[213] *Ricci* raises the possibility that the government is prohibited from taking facially race-neutral action motivated by an integrative intent. This possibility is worth examining because if the Court were to more fully embrace this position, a wide range of facially neutral, yet pro-integrative, governmental actions might be at risk.

One prominent, recent example of such governmental actions at risk is the NOVP.[214] In July 2009, the Poverty and Race Research Action Council proposed that the federal government set aside 50,000 housing vouchers "to help low income families and children in high poverty, segregated neighborhoods move to higher opportunity communities with low poverty, high performing schools."[215] At its core, the NOVP is an integration measure. The NOVP is a voluntary housing-mobility program intended to allow housing-voucher holders living in economically and racially segregated neighborhoods to move to areas that "have less than the regional average minority population" with schools with low rates of student poverty.[216] The NOVP builds explicitly on the success of the Chicago housing-mobility program challenged and upheld in *Hills v. Gautreaux*,[217] which achieved and sustained "a measure of racial and economic integration."[218] Thus, the NOVP is the culmination of several earlier housing-mobility proposals

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212. 129 S. Ct. 2658, 2664 (2009).

213. Primus, *supra* note 8, at 523–32.

214. POVERTY & RACE RESEARCH ACTION COUNCIL, A NATIONAL OPPORTUNITY VOUCHER PROGRAM: A BRIDGE TO QUALITY, INTEGRATED EDUCATION FOR LOW INCOME CHILDREN (2009), *available at* http://www.prrac.org/pdf/NationalOpportunityVoucherProgram7-15-09.pdf.

215. *Id.* at 1.

216. *Id.* at 2.

217. *See* 425 U.S. 284 (1976). *See generally* James E. Rosenbaum & Susan J. Popkin, *The Gautreaux Program: An Experiment in Racial and Economic Integration*, BPI NEWSL. (Bus. & Prof'l People for the Pub. Interest, Chi., Ill.), Apr. 1990, at 3–4 (discussing the positive effects of the Gautreaux Program as it "provided a metropolitan-wide remedy for discrimination in Chicago's public housing"); *The Gautreaux Housing Mobility Program*, BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST, http://www.bpichicago.org/HousingMobilityPrograms.php (last visited Jan. 2, 2011) (analyzing how the lives of people who moved to low poverty areas under the mobility program dramatically improved).

218. *See* LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 10 (2000).

intended to enhance racial integration and provide low-income minority-group members with access to greater social and economic opportunities.[219]

The NOVP would use a revised version of the current Housing Choice Voucher Program as a vehicle to deconcentrate race and poverty.[220] The existing Housing Choice Voucher Program provides housing vouchers to very low-income families, which allow those families to secure housing in the private-housing market that meets certain program requirements.[221] Under the Housing Choice Voucher Program, the "participant is free to choose any housing that meets the requirements of the program and is not limited to units located in subsidized housing projects."[222] Eligible participants are not primed to make an integrated-housing choice. Consequently, many Housing Choice Voucher Program participants "live in economically and racially segregated neighborhoods; this is particularly true for black and Hispanic households."[223]

Under the NOVP, 50,000 housing choice vouchers per year would be set aside to assist families in integrative moves, thus converting 50,000 generic housing choice vouchers under the current Housing Choice Voucher Program into "opportunity vouchers."[224] For the 2009 fiscal year, Congress appropriated approximately $16.8 billion to fund the Housing

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219. For instance, in 2005, almost 200 social scientists signed a petition urging the government to provide housing-mobility assistance to individuals displaced by Hurricane Katrina. *See* Xavier de Souza Briggs, *After Katrina: Rebuilding Places and Lives*, 5 CITY & COMMUNITY 119, 127–28 (2006), *available at* http://www.hks.harvard.edu/saguaro/pdfs/briggskatrina0206.pdf (reproducing the "Scholar's Petition" in the appendix). The petition asserted that "[a]s the nation seeks to find housing for the many who have been left homeless, our goal for these low-income displaced persons, most of whom are racial minorities, should be to create a 'move to opportunity.'" *Id.* at 127. The petition cited scientific research indicating that "moving to lower poverty, lower risk neighborhoods and school districts can have significant positive effects on the well-being and economic opportunity of low-income children and their families." *Id.* at 128. The thrust of the petition was to link location to opportunity (or lack thereof) and to urge the government to provide federal rental-housing subsidies to persons displaced by Katrina so that they could relocate to lower poverty and implicitly less racially segregated neighborhoods. *Id.*; *see also* Alexander Polikoff, *Racial Inequality and the Black Ghetto*, POVERTY & RACE NEWSL. (Poverty & Race Research Action Council, Wash., D.C.), Nov.–Dec. 2004, at 1, 8, *available at* http://www.prrac.org/newsletters/novdec2004.pdf (calling for a national Gautreaux program that would earmark 50,000 housing-choice vouchers "for use by black families living in urban ghettos, [to] be used only in non-ghetto locations—say, census tracts with less than 10% poverty and not minority impacted").

220. POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 214, at 1.

221. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URBAN DEV., http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm (last visited Dec. 30, 2010). Eligible participants benefit financially from the program in that a "housing subsidy is paid to the landlord directly by the [public housing authority] on behalf of the participating family. The family then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program." *Id.*

222. *Id.*

223. *See* POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 214, at 1.

224. *Id.*

Choice Voucher Program,[225] and roughly 2 million vouchers were available for eligible participants nationally.[226] Thus, the NOVP would allocate 2.5% of the total housing-voucher pool for opportunity vouchers. These new opportunity vouchers would be available only to families living in high-poverty neighborhoods in the thirty most segregated metropolitan areas in the nation.[227] Under the NOVP, participants would be free to use opportunity vouchers to secure any housing that meets program requirements.[228] However, the NOVP would provide significant mobility, regional information, and counseling to participants in order to facilitate opportunity moves.[229] Thus, the NOVP is facially race-neutral; it does not allocate a governmental benefit (here, a housing voucher) to specific individuals on the basis of race. Instead, it uses the mechanism of geography—and more specifically residential segregation—to allocate a housing benefit and create integrated-housing opportunities.

One argument is that after *Ricci*, the NOVP (or similar mobility program) is constitutionally problematic. Unfortunately, this argument is not as farfetched as it might seem. *Ricci* lays out (and takes sides in) a central debate in anti-discrimination law: what the distinction is between governmental action taken "because of" race and government neutrality when it comes to race.[230] Under *Ricci*'s logic, the government does not act neutrally when it takes action to integrate the workplace or other setting to avoid a racially disparate impact. Along these lines, one might argue that the NOVP expresses "non-neutrality" when it comes to race and is therefore suspect. Indeed, Justice Scalia's concurrence in *Ricci* takes this point one step further. Justice Scalia interprets race-based action very broadly to

225. Department of Housing and Urban Development Appropriations Act, Pub. L. No. 111-8, 123 Stat. 950, 952 (2009); *see also* Linda Couch, *Housing Choice Vouchers*, NAT'L LOW INCOME HOUSING COALITION (May 6, 2009), http://www.nlihc.org/detail/article.cfm?article_id=6049&id=19 (tracing the history of the voucher program and its steady growth).

226. *See* Couch, *supra* note 225; *see also* CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: THE HOUSING CHOICE VOUCHER PROGRAM 1 (2009), http://www.cbpp.org/files/5-15-03hous.pdf (explaining the purposes and benefits of the voucher program).

227. POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 214, at 1.

228. In this respect, the NOVP proposal differs from Alexander Polikoff's recent call for a National Gautreaux Program. Under the Polikoff plan, housing vouchers could only be used "in non-ghetto locations—say, census tracts with less than 10% poverty and not minority impacted." *See* Polikoff, *supra* note 219, at 8.

229. POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 214, at 1.

230. This tension in discrimination law has taken a variety of forms. Take, for instance, Professor Herbert Wechsler's critique of *Brown v. Board of Education*, 347 U.S. 483 (1954), as lacking a neutral principle justifying its result. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959). Wechsler's view was that the central issue in *Brown* boiled down to a question of competing associational rights; blacks wanted to associate with whites, whites did not wish for the association. *Id.* at 34. For Wechsler, the question was how to break the tie, a question not susceptible to judicial review. *Id.* Wechsler argued that the Court's ruling in *Brown* simply favored blacks over whites, and thus it lacked a neutral principle. *Id.* at 31–33. On this view, *Brown* was the product of unrestrained judicial activism. *Id.*

include governmental action that requires "employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[231] Moreover, for Justice Scalia, an integrative (benign) motive for the governmental action would not vindicate the statute.[232] Justice Scalia appears to take the view that the disparate-impact provisions of Title VII are unconstitutional because they require the government to take race-based action that is otherwise prohibited under the Equal Protection Clause.[233]

Were the federal government to adopt the NOVP, a suit by white plaintiffs alleging that the NOVP violates the Equal Protection Clause is not unimaginable for several reasons. First, there is a history of opposition to housing-mobility programs from receiving neighborhoods.[234] Second, white plaintiffs have already used the courts to prevent low-income minority-group members from using federal housing assistance in their neighborhoods.

In *Walker v. City of Mesquite*, white plaintiffs alleged that a public-housing authority's construction of two new public-housing projects adjacent to their neighborhoods violated the Equal Protection Clause, even though the projects were a court-ordered remedy for past discrimination and segregation in Dallas's public-housing programs.[235] The plaintiffs argued that the remedial order requiring that "one hundred newly constructed replacement units be built in a predominantly white area of Dallas" was an impermissible racial-classification scheme that intentionally discriminated against them on the basis of their race.[236] Moreover, the plaintiffs claimed that the construction of the public-housing projects would decrease their property values, increase crime and population density, create

231. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

232. *See id.*; *see also* BREST ET AL., *supra* note 15, at 183 ("Perhaps Scalia's argument is that disparate impact is constitutionally troublesome because it requires employers to consider the racial effects of their actions. If so, why wouldn't this concern make unconstitutional any federal policies that encourage voluntary compliance with workplace integration?").

233. *See Ricci*, 129 S. Ct. at 2682.

234. *See, e.g.*, GEORGE C. GALSTER ET AL., WHY NOT IN MY BACKYARD?: NEIGHBORHOOD IMPACTS OF DECONCENTRATING ASSISTED HOUSING 50–73 (2003) (examining resistance to the Section 8 and the Moving to Opportunity demonstration programs in Baltimore County); John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 127, 136–37 (Xavier de Souza Briggs ed., 2005); Edward G. Goetz et al., *The Rise and Fall of Fair Share Housing: Lessons from the Twin Cities*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra*, at 247, 260; Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra*, at 197. *See generally* SARA PRATT & MICHAEL ALLEN, HOUS. ALLIANCE OF PA., ADDRESSING COMMUNITY OPPOSITION TO AFFORDABLE HOUSING DEVELOPMENT: A FAIR HOUSING TOOLKIT (2004) (providing housing developers with working knowledge of fair housing).

235. 169 F.3d 973, 975–76, 978 (5th Cir. 1999).

236. *Id.* at 977–79.

environmental problems, and diminish aesthetic values.[237] The United States Court of Appeals for the Fifth Circuit agreed. The Fifth Circuit ruled that such harms amounted to an "injury in fact" sufficient to support standing to sue, applied strict scrutiny to the remedial order, and ultimately ruled in the plaintiffs' favor.[238]

Although there is a very good argument that the Fifth Circuit should not have applied strict-scrutiny analysis in *Walker* in the first place,[239] perhaps *Walker* was a sign of things to come for the NOVP, because the Court's construction of racial harm in *Walker* and *Ricci* is similar. In each case, the government's integrative action takes something of value from a reverse-discrimination plaintiff, either a valuable property interest or a vested right to a promotion. It is possible that *Walker* (particularly after *Ricci*) is predictive of how a court might evaluate the constitutionality of the NOVP.

On the other hand, perhaps *Walker* and the NOVP are distinguishable. First, *Walker* involved the siting of public housing projects rather than the provision of Section 8 vouchers, which allow eligible recipients to secure already existing housing in a particular community. Second, in *Walker*, the

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237. *Id.*

238. *Id.* at 980. The Fifth Circuit Court of Appeals explained:

> [W]e cannot conclude, having reviewed the record, that the Homeowners did not put forth adequate evidence at trial to confer standing upon them. The district court did not hold that the Homeowners lack standing, as he was well aware of the potential for neighborhood disruption traceable to improperly managed public housing projects. HUD and DHA cite no cases in which standing has been denied to homeowners who asserted their quality of life and property values would be diminished by a next-door public housing or other HUD project.

Id.; *id.* at 981–82 (applying strict scrutiny and addressing the narrowly tailored prong).

239. *See* Philip Tegeler, *The Future of Race-Conscious Goals in National Housing Policy*, *in* PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 145, 152–55 (Margery Austin Turner et al. eds., 2009). Tegeler explained:

> [The] ruling in [*Walker*] is out of the legal mainstream because the policy that it struck down did not involve individual race-based preferences, but rather a broad geographically targeted consideration of race. But for the Fifth Circuit Court of Appeals, the mere mention of race in an official policy was enough to trigger strict scrutiny even though no individuals were targeted for differential treatment based on race. . . . [*Walker*] is also an "outlier" for another reason: it makes no distinction in the required constitutional analysis between court-ordered, race-conscious programs and legislatively adopted programs like those at issue in *Parents Involved*. A similar but more lenient standard would likely be applied to a court-ordered remedy that had characteristics similar to the Seattle and Louisville admissions preferences . . . .

Id. at 155; *see also* Walker v. Dep't of Hous. & Urban Dev., No. 3:85-CV-1210-R, 1997 WL 33177466, at *2 (N.D. Tex. Oct. 6, 1997), *rev'd in part and vacated in part*, 169 F.3d 973 (5th Cir. 1999) (applying strict scrutiny when Homeowners asserted an order "violate[d] their rights not to be discriminated against because of their race (white), and their right not to suffer a supposed loss in property values because of that reverse discrimination").

Fifth Circuit ruled that the remedial order requiring "newly constructed units of public housing to be located in 'predominantly white' Dallas neighborhoods,"[240] amounted to an impermissible racial-classification scheme.[241] In contrast, the NOVP is facially race-neutral and does not raise the same concerns as an explicit racial classification. However, a problem remains.

Even assuming that *Walker* can be distinguished on the theory that the NOVP is facially race-neutral, *Ricci* implies that facially race-neutral actions that are motivated by an integrative intent do not necessarily provide the government with a safe harbor. The import of *Ricci* is not that it condemns facially race-neutral governmental action outright but that it requires governmental decisionmakers seeking to vindicate the ideals of the Equal Protection Clause to second-guess what ought to be "no-brainer" decisions. From this perspective, *Ricci* (like *Parents Involved* before it) shifts the defaults and suggests that integration is no longer an appropriate public-policy goal.[242]

Indeed, were the NOVP challenged, the federal government might be in an even more compromised litigation posture than the City of New Haven in *Ricci*. Unlike the City of New Haven in *Ricci*, were the federal government to adopt the NOVP, it could not raise a "between a rock and a hard place" defense. The federal government could not argue, as New Haven did in *Ricci*, that it took integrative action in order to prevent "liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters."[243] It is highly unlikely that the federal government would face either statutory or constitutional liability for simply continuing to operate the Housing Choice Voucher Program with the knowledge that participants are likely to use their vouchers in "economically and racially segregated neighborhoods."[244] In this respect, the federal government's litigation position would be more consistent with that of the Louisville and Seattle school districts in *Parents Involved*: Is there an appropriate justification for the NOVP? Assuming strict-scrutiny review applies, the answer is yes.

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240. 169 F.3d at 975.

241. *Id.* at 979 ("The remedial order's explicit racial classification alone is sufficient to confer standing on these particular homeowners.").

242. James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 154–55 (2007). Ryan states:

> The [*Parents Involved*] plurality comes close to condemning voluntary integration altogether, whereas Justice Kennedy accepts the goal but holds his nose at the thought of how it might be achieved. Along the way, both the plurality and Justice Kennedy chastise the local officials who crafted and implemented these plans for their clumsiness and crudeness.

Id. (footnotes omitted).

243. 129 S. Ct. 2658, 2664 (2009).

244. POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 214, at 1.

Grutter and Justice Kennedy's concurring opinion in *Parents Involved* are highly relevant to the compelling-governmental-interest analysis for NOVP under strict scrutiny. *Grutter*, of course, emphasized the importance of integration to American society beyond the educational context.[245] Specifically, *Grutter* upheld an explicit racial-classification scheme on the theory that the benefits of integration outweighed the harm to the frustrated white plaintiff, because the law school's selection process that used race as one factor to determine admissions adequately protected her interests.[246] Justice Kennedy's approach in *Parents Involved* emphasized the importance of eradicating de facto segregation and obtaining racial diversity in the educational process.[247] From Justice Kennedy's perspective, facially race-neutral mechanisms intended to obtain racial diversity would not even trigger strict-scrutiny review.[248] The purpose and structure of the NOVP are consistent with both of these approaches. Applying strict scrutiny to the NOVP would satisfy the compelling-governmental-interest requirement.

Walker provides some guidance for the narrow-tailoring requirement. In *Walker*, the Fifth Circuit ruled that the remedial order was not narrowly tailored enough to remedy the vestiges of past discrimination and segregation in Dallas's public-housing programs because a less restrictive remedy was available: Section 8 housing vouchers.[249] Thus, the Fifth Circuit viewed Section 8 as a permissible race-neutral alternative to the race-conscious requirement that public housing be located in predominantly white communities.[250] This approach is consistent with the United States' approval of percentage plans as a facially race-neutral alternative to race-based affirmative action in the *Grutter* litigation.[251] Of course, the Fifth Circuit did not consider the government's role in "steering" recipients to predominantly white neighborhoods, a core component of the NOVP. Instead, it simply opined that "Section 8 is superior to a race-conscious remedy in that it allows market forces and personal preferences rather than racial criteria to guide the homemaking decision."[252] The NOVP, however, seems consistent with Justice Kennedy's approval of facially race-neutral, yet race-conscious, mechanisms for enhancing diversity and eradicating de facto segregation in *Parents Involved*.[253] Moreover, to the extent that the NOVP operates prospectively and uses private housing already existing in a

245. *See supra* Part IV.B.
246. *See supra* Part IV.B.
247. *See supra* Part III.B.
248. *See supra* Part III.B.
249. 169 F.3d 973, 984–85 (5th Cir. 1999).
250. *See supra* Part II.B.
251. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 184, at 14–18.
252. *Walker*, 169 F.3d at 984.
253. *See supra* Part III.B.

particular neighborhood, it does not appear to disestablish any vested right and create the "racial harm" at issue in *Ricci*.

VI. CONCLUSION

Today, "minority candidates hold office at unprecedented levels,"[254] and vote at unprecedented rates.[255] African-Americans and other minority group members occupy positions of power and influence in law, business, the military, government, education and a variety of other areas,[256] and many of the racial barriers that defined America during the time of "Jim

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254. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2511 (2009); *see also* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 385 n.3 (2008) (citing statistics of increased African-American and Hispanic elected officials).

255. *See* U.S. CENSUS BUREAU, HISTORICAL TIME SERIES TABLES, REPORTED VOTING AND REGISTRATION BY RACE, HISPANIC ORIGIN, SEX, AND AGE GROUPS: NOVEMBER 1964 TO 2008 tbl.A-1 (2009), *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html (reporting African-American voter turnout for the 2008 presidential election at 64.7% of the citizen population, the highest percent reported dating back to the 1964 Current Population Survey); *see also* David A. Bositis, *Blacks and the 2008 Elections: A Preliminary Analysis*, FOCUS MAG., Dec. 2008, at 1, 13–16 & tbls.1–3 ("Black turnout in the 2008 election . . . was at an historic high.").

256. Based on the 2000 U.S. Census, the total minority representation among lawyers is about 9.7%, 20.8% among accountants and auditors, 24.6% among physicians and surgeons, and 18.2% among college and university teachers. ELIZABETH CHAMBLISS, AM. BAR ASS'N, EXECUTIVE SUMMARY, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION ¶ 1 (2005); *see also* Don J. DeBenedictis, *Changing Faces*, A.B.A. J., Apr. 1991, at 54, 54 (1991) ("The number of minority lawyers has grown in recent years, albeit slowly."). Prominent examples of minority national and state politicians abound: Barack Obama, President of the United States; Eric Holder, U.S. Attorney General; Colin Powell, former National Security Advisor, Chairman of the Joint Chiefs of Staff, and Secretary of State; Sonia Sotomayor, Justice of the U.S. Supreme Court; Roderick Paige, former Secretary of Education; John Conyers, U.S. Representative, Chairman of the House Committee on the Judiciary; Henry Cisneros, former Secretary of Housing and Urban Development; Condoleezza Rice, former Secretary of State; Bill Richardson, Governor of New Mexico; David Paterson, former Governor of New York. In business, in 2006, minorities held 188 (15.42%) of the 1219 seats on the boards of the Fortune 100 companies. THE ALLIANCE FOR BD. DIVERSITY, WOMEN AND MINORITIES ON FORTUNE 100 BOARDS 6 (2008), http://theabd.org/Women and Minorities on F100 Boards_2008.pdf. And African-Americans are achieving representation in the important social and political circles of our nation's capital. Roxanne Roberts & Krissah Thompson, *Washington's High-Level Social Scene Now Mingles Black and White*, WASH. POST, Jan. 18, 2009, at A1. Finally, courts have recognized this growing minority clout. Barnett v. City of Chi., 969 F. Supp. 1359, 1449 (N.D. Ill. 1997) ("African-Americans and Latinos hold important and influential positions of power within the City's government, as chairmen or vice-chairmen of City Council committees, and within Cook County government. Latinos and African-Americans also serve in several highly influential appointed offices in Chicago. In positions such as these minority leaders enjoy input in guiding the course of public policy."), *aff'd in part and vacated in part*, 141 F.3d 699 (7th Cir. 1998); Reed v. Town of Babylon, 914 F. Supp. 843, 890 (E.D.N.Y. 1996) ("African-Americans have important and influential positions of power within the municipal government, in the Democratic party and on local boards. The number of seats that African-Americans hold on local boards is in proportion to their population in the Town.").

Crow" have fallen.[257] Yet the legacy of that era remains. This Article asks, is integration a form of discrimination? Until very recently, the answer to this question almost certainly would have been "no." But the Supreme Court is currently in the midst of a significant conversation about the meaning of "discrimination" in a world in which, in one view, many of the goals of the Civil Rights Movement have been achieved.[258] For this reason, the conversation is complicated, and the stakes are high.

Parents Involved and *Ricci* reveal a Court poised to adopt the "equivalence doctrine," that there is a "'moral [and] constitutional equivalence,' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[259] *Ricci*'s innovation is to extend the Court's skepticism of government action intended to "foster some current notion of equality" beyond explicit racial classifications into the realm of race-dependent, yet facially race-neutral, determinations. But the Court has not yet fully adopted the equivalence doctrine. In this regard, Justice Kennedy's concurring opinion in *Parents Involved* is key. In that opinion, Justice Kennedy leaves open the possibility for the government to take affirmative steps to ameliorate de facto segregation and obtain racial diversity.[260] Such a possibility could only exist if there is a "legal and practical difference between the use of race-conscious criteria . . . to keep the races apart, and the use of race conscious criteria . . . to bring the races together."[261]

I have demonstrated that effective facially race-neutral programs that do not entrench the status quo, open up access to opportunity, and provide for

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257. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 149–88 (commemorative ed. 2002); *see also* JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 210–73 (2002) (tracing the history after World War II when the United States began to show a move toward racial justice, including the passage of the Voting Rights Act in 1965).

258. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Quintard Taylor, *The Civil Rights Movement in the American West: Black Protest in Seattle, 1960–1970*, 80 J. NEGRO HIST. 1, 1 (1995) (identifying three historical views on the Civil Rights Movement: One, as an era "dominated by a powerful and ultimately successful national political coalition led by heroic figures such as Martin Luther King, Jr. that secured new laws insuring equality and opportunity." Another "locate[s] both the origins and success of the Civil Rights Movement in local initiatives from grass-roots organizations in the South." And the third: "The [Civil Rights] Movement should be viewed as a national transformation, an energizing of small and large African American communities throughout the country, inspired by national goals and leadership, but which pursued distinctly local agendas. . . . [For some, the Movement] was . . . the campaign to end job bias or school segregation in their local communities as an integral part of the national effort to eradicate racism, empower African Americans, and achieve the full and final democratization of the United States."), *cited in Parents Involved*, 551 U.S. at 873 app. B (Breyer, J., dissenting).

259. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (alteration in original) (citation omitted).

260. *Parents Involved*, 551 U.S. at 787–89 (Kennedy, J., concurring in part and concurring in the judgment).

261. *Id.* at 829 (Breyer, J., dissenting).

maximum racial integration, such as the National Opportunity Voucher Program, should comfortably survive constitutional review. But the next logical step in this progression looms on the horizon: the question of the constitutionality of Title VII's disparate-impact provisions. If the Court fully embraces the proposition that the government's racial motivations are truly symmetrical, then disparate impact, with its requirement that employers "evaluate the racial outcomes of their policies, and . . . make decisions based on (because of) those racial outcomes,"[262] is at grave risk. The Court has not yet fully embraced the equivalence doctrine, but the constitutional conversation in this area is far from finished.

262. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).