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The Future of Disparate Impact

Richard A. Primus

University of Michigan Law School, raprimus@umich.edu

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THE FUTURE OF DISPARATE IMPACT

*Richard Primus**

The Supreme Court's decision in Ricci v. DeStefano foregrounded the question of whether Title VII's disparate impact standard conflicts with equal protection. This Article shows that there are three ways to read Ricci, one of which is likely fatal to disparate impact doctrine but the other two of which are not.

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“[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”

—Justice Antonin Scalia, concurring in *Ricci v. DeStefano*¹

INTRODUCTION

Thanks to the confirmation hearings of Justice Sonia Sotomayor, *Ricci v. DeStefano* was the most publicly visible Supreme Court decision of 2009.² The basic facts are now famous. In brief, officials in New Haven, Connecticut suspended the city’s process for promoting firefighters to officer positions after discovering that a written test that was part of that process had a severely adverse statistical impact on African American firefighters.³ A group of white firefighters⁴ sued, arguing that the city’s decision constituted racial discrimination.⁵ New Haven contended that its decision was appropriate in light of Title VII of the Civil Rights Act of 1964, which prohibits the use of some written tests with such disparate impacts.⁶ The Supreme Court disagreed. In a 5–4 decision, the Court rejected New Haven’s claim that its actions were required by Title VII’s disparate impact doctrine and held instead that New Haven had violated Title VII’s prohibition on disparate treatment—that is, its ban on formal or intentional discrimination.⁷

The Court did not rule on the plaintiffs’ further claim that New Haven had also violated the Equal Protection Clause of the Fourteenth Amendment.⁸ But that gesture of constitutional avoidance does not conceal the deeper issue that the *Ricci* litigation raised. That issue, in short, is whether Title VII’s disparate impact doctrine, which requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification, can be consistent with equal

1. 129 S. Ct. 2658, 2683 (2009).

2. *Ricci*, 129 S. Ct. 2658; Adam Liptak, *Sotomayor Case Draws Scrutiny*, N.Y. TIMES, June 6, 2009, at A1.

3. *Ricci*, 129 S. Ct. at 2666–71 (describing the series of meetings held by the New Haven Civil Service Board to discuss the “significant disparate impact” of the written exams).

4. One of the *Ricci* plaintiffs, Benjamin Vargas, was Latino. Many accounts of the case have therefore spoken of the plaintiffs as a group of nineteen white firefighters and one Latino firefighter. See, e.g., *Sotomayor Embracing Affirmative Action, Then and Now*, LOS ANGELES TIMES, June 15, 2009; *Firefighters’ Case Called Civil Rights “Threat,”* NEW HAVEN REGISTER, March 26, 2009. That said, “Latino” and “white” are not mutually exclusive categories, and according to published reports Lt. Vargas falls into both categories. E.g., Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, June 30, 2009, at A1 (describing all the plaintiffs as white firefighters and one plaintiff as also being Hispanic).

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

6. *Id.* at 2664, 2673; see 42 U.S.C. § 2000e-2(k) (2006).

7. *Ricci*, 129 S. Ct. at 2681. My use of the phrase “formal or intentional” is intentionally ambiguous: disparate treatment doctrine often conflates these two conceptions of discrimination, but there is value for present purposes in noticing that they are not the same. See *infra* Part I.

8. *Ricci*, 129 S. Ct. at 2676, 2681.

protection after decisions like *Adarand Constructors, Inc. v. Peña*⁹ and *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁰ The problem is both legally complex and symbolically sensitive, and the *Ricci* majority practiced sound judicial craft in declining to resolve it when a statutory ground of decision was available. Now that the issue has come to the foreground, however, it is unlikely to disappear. In Justice Scalia's words, the Court's statutory ruling "merely postpones the evil day on which the Court will have to confront the question."¹¹

That the question is being asked at all represents a complete turnabout in antidiscrimination law. Once upon a time, the burning issue about equal protection and disparate impact was whether the Fourteenth Amendment itself embodied a disparate impact standard.¹² The Court rejected that idea in *Washington v. Davis*, but in doing so it also opined that Congress could create disparate impact standards at the statutory level.¹³ Until recently, therefore, the idea that a statutory disparate impact standard could violate equal protection was all but unthinkable.

Times change. Seven years ago, I noted that the Supreme Court's decreasing tolerance for race-conscious decisionmaking was creating tension between the Fourteenth Amendment and disparate impact doctrine under Title VII, and I analyzed the several ways that the two doctrinal frameworks might be either reconciled or found to conflict.¹⁴ That analysis was partly an exercise in canvassing possibilities. There is more than one way to understand equal protection, and there is more than one way to understand disparate impact, and whether the two are compatible depends on which interpretation of each is on the table.¹⁵ *Ricci* makes matters more determinate, because it says a fair amount about how the Supreme Court understands disparate impact under Title VII. It also signals that what was once academic speculation is now judicially actionable. In this Article, therefore, I explain what *Ricci* means for the future of disparate impact doctrine.

At the heart of the New Haven decision lies an idea that we can call the *Ricci* premise: that the city's suspension of the written test would constitute disparate treatment under Title VII unless suspending the test were justified

9. 515 U.S. 200 (1995).

10. 551 U.S. 701 (2007).

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

12. See, e.g., Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 4–5, 22–26 (1976); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 141–46 (1976).

13. See *Washington v. Davis*, 426 U.S. 229, 248 (1976).

14. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

15. See generally *id.*

by Title VII's provisions regarding disparate impact.¹⁶ In other words, *Ricci* portrayed disparate impact doctrine as creating an exception to Title VII's prohibition on formal or intentional discrimination. The view that disparate impact doctrine constitutes an exception to disparate treatment doctrine entails the view that the two doctrines are conceptually in conflict—or, more precisely, that they would be in conflict if one were unable to carve itself out of the other. The Court articulated this vision as a matter of statutory construction,¹⁷ but it clearly implies a constitutional proposition as well. For these purposes, Title VII's prohibition of disparate treatment and the Fourteenth Amendment's guarantee of equal protection are substantively interchangeable.¹⁸ A conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection. And that makes things look bleak for the disparate impact standard. A Title VII doctrine can stand its ground against another Title VII doctrine, but not against the Constitution.

Yet we should not rush too quickly to the conclusion that *Ricci* heralds the end of disparate impact law. Considered carefully, the *Ricci* premise can be read in three different ways. Call them the general reading, the institutional reading, and the visible-victims reading. Whether Title VII's disparate impact standard can survive future constitutional attack depends on which of these three readings prevails in cases to come.

On the general reading, the *Ricci* premise means that the actions necessary to remedy a disparate impact violation are per se in conceptual conflict with the demands of disparate treatment doctrine (and, implicitly, the demands of equal protection). Disparate impact doctrine is race conscious; equal protection requires racial neutrality; the two are not compatible. This seems to be Justice Scalia's reading of *Ricci*.¹⁹ It is also Ronald Dworkin's, albeit with a different normative spin.²⁰ The general reading is plausible, straightforward, and likely fatal for disparate impact doctrine. But it is not the only reading available, and it may not be the best one.

The institutional reading of the *Ricci* premise focuses on a difference between courts and public employers. On this view, a municipal employer's attempt to implement a disparate impact remedy is in conceptual conflict with the prohibition on disparate treatment (and implicitly with the requirements of equal protection) not because *any* disparate impact remedy is discriminatory but because public employers, unlike courts, are not authorized to engage in the race-conscious decisionmaking that disparate impact remedies entail. Judges are responsible for remedying racial discrimination,

16. *Ricci*, 129 S. Ct. at 2674 (“We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.”).

17. *Id.* at 2676.

18. *See infra* Part I.

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

20. *See* Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37, 39.

and that task requires more leeway to take note of race than other public officials have. (A requirement of complete judicial colorblindness would undermine all of antidiscrimination law, because courts cannot assess garden-variety discrimination claims without knowing the race of the parties involved.) Conversely, public employers face pressures that make it unwise to leave them with too much discretion to invoke disparate impact doctrine to justify racially conscious hiring decisions.²¹ If the *Ricci* premise is read through this institutional lens, courts can continue to enforce Title VII's disparate impact doctrine, even if public employers will have to tread more carefully.

Third and last, there is a visible-victims reading. It holds that the problem in New Haven's case was not the race-consciousness of the city's decision per se but the fact that the decision disadvantaged determinate and visible innocent third parties—that is, the white firefighters. Most disparate impact remedies avoid creating such victims. And within the category of formally race-neutral actions intended to improve the position of disadvantaged racial groups, equal protection doctrine may well distinguish between those that have visible victims and those whose costs are more diffuse.²²

Many people to both the left and the right of the Supreme Court may consider this distinction unprincipled. If race-conscious decisionmaking is objectionable, one might contend, then it is objectionable whether its allocative effects are visible or not.²³ Conversely, if some race-conscious decisionmaking is permissible, its permissibility should not depend on its being kept secret.²⁴ These objections have force. That said, the distinction between more and less visible race-conscious interventions is already present in equal protection caselaw,²⁵ and it may well be defensible, or even wise. If the Court ultimately reads *Ricci* through a visible-victims prism, Title VII's disparate impact doctrine can survive, because the standard judicial remedies all avoid creating visible victims: the *Ricci* plaintiffs suffered in the New Haven case only because the city acted more aggressively than a court enforcing a disparate impact order would have.²⁶

21. See *infra* Section II.B.

22. See *infra* Section II.C; see also Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997) (describing the ways in which an issue's moving from the background to the foreground of public consciousness can change constitutional doctrine's approach to that issue).

23. See, e.g., Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001).

24. See, e.g., Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 518 (2007).

25. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (stating that in some equal protection cases, “appearances do matter”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

26. See *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1315 (11th Cir. 1999) (explaining that the principal disparate impact remedy is enjoining the employer against future use of the challenged practice). As the above analysis suggests, a court could adopt the institutional and visible-victim readings simultaneously. See *infra* note 27.

In Part I of this Article, I briefly describe the New Haven case and the Supreme Court's decision, with emphasis on the *Ricci* premise. I then explain why the *Ricci* premise is of constitutional import, despite the Court's insistence that *Ricci* is a statutory decision only: for relevant purposes, Title VII's prohibition on disparate treatment and the Fourteenth Amendment's guarantee of equal protection have the same content, so a rule that conflicts with one also conflicts with the other. In Part II, I distinguish the general, institutional, and visible-victims readings of the *Ricci* premise. All three readings are compatible with the facts of *Ricci*, but the future constitutionality of Title VII's disparate impact doctrine depends on which reading emerges in future cases. As I explain, disparate impact doctrine could survive the institutional reading or the visible-victims reading, or a combination of the two.²⁷ The general reading could be fatal. Then, in Part III, I examine whether disparate impact doctrine could be defended on the grounds that it is narrowly tailored to a compelling government interest. I conclude that a successful compelling interest defense is possible but unlikely.

Finally, in Part IV, I explain that the Supreme Court's choice among the three readings may be substantially driven by the way the next case to reach the Court frames the question. The full analysis is complex, but it hinges on a question of visibility. The Court is more likely to sustain disparate impact doctrine if it can do so without appearing indifferent to the situation of innocent third parties who are clearly bearing the cost of race-conscious decisionmaking. Accordingly, the Court is most likely to adopt the general reading and hold disparate impact unconstitutional in a case like *Ricci* itself, a case featuring visible innocent victims. Given that employer-initiated disparate impact remedies can create such third-party victims but judicially imposed disparate impact remedies do not, disparate impact doctrine is in greatest danger of being held unconstitutional in cases where employers voluntarily seek to comply with Title VII, just as New Haven claimed to be doing.

Here we confront a substantial irony. Title VII policy has traditionally sought to encourage voluntary employer compliance rather than litigation.²⁸ According to the standard wisdom, it is better to avoid fighting about discrimination in front of judges if the problem can be worked out privately. New Haven argued this point in *Ricci*,²⁹ and the Court's majority agreed in

27. The institutional and visible-victims readings are easily combinable in practice because the remedies that courts standardly provide for disparate impact violations all avoid creating visible innocent victims. Those remedies include injunctive relief against using the challenged practice in the future and equitable relief like backpay. These remedies run against the employer only and do not visibly burden determinate third parties, even if they necessarily have downstream distributional consequences. Assuming that future judicially ordered disparate impact remedies conform to this pattern, the law could therefore adopt the institutional and visible-victims readings of *Ricci* simultaneously. Alternatively, it could officially adopt only the institutional reading but also satisfy the concerns of the visible-victims reading as a consequence.

28. See, e.g., *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986).

29. See Brief for Respondents at 17–18, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328).

principle that employers should have some room to maneuver, thus making it possible for them to avoid disparate impacts without involving the courts.³⁰ After *Ricci*, however, voluntary compliance is the greatest threat to disparate impact doctrine. If employers try to fix disparate impact problems themselves, they may create scenarios—like the one in New Haven—that make disparate impact law appear objectionable. With the constitutional question close, that framing could make all the difference.

It might seem intolerable for a constitutional question to turn on a difference in framing, just as it might seem odd for the validity of a governmental action to depend on which of its effects are visible to the public. That is, even if the constitutionality of disparate impact doctrine is a contestable question, perhaps the contest should not be resolved on the basis of what some audience notices. “Out of sight, out of mind” might be a feature of human decisionmaking, but something feels wrong about it as a principle of constitutional law. One could reply that actual judicial adjudication often falls short of the ideal. In this Article, however, I want to offer something more than the thought that legal theory should recognize the periodic reality of lousy judging. So consider the following point: Symbolism and social meaning have always shaped the law of equal protection, and necessarily so.³¹ To be sure, any attempt to make constitutional norms track public opinion or public values is rife with problems, some of them normative and some of them practical.³² But it is in the end hard to discern what equal protection should prohibit without recourse to some sense of the meaning of the government’s actions. The canonical failure of equal protection analysis, after all, was *Plessy v. Ferguson*’s refusal to understand that a formally neutral action might carry a clear meaning about racial hierarchy.³³

Whether Title VII’s disparate impact provisions or any other piece of law is consistent with equal protection depends in part, and perhaps deeply, on whether it is understood to reinforce society’s historical problems of racial division. The social meaning of disparate impact doctrine accordingly figures in the assessment of its constitutionality, and social meaning is in part a function of what is visible to a public audience. An accident of history made the New Haven controversy as visible as any constitutional contest is likely to be, and public officials and the legal commentariat then devoted their energies to arguing about what it meant. Those judgments are not separate from the constitutional question that now awaits decision in court.

30. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009).

31. See Primus, *supra* note 14, at 566–67.

32. See Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1 (2007).

33. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding Louisiana’s segregated-car law) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

I. *RICCI V. DESTEFANO*A. *The Case*

In 2003, the city of New Haven administered written and oral tests to firefighters seeking promotions to the ranks of lieutenant and captain.³⁴ The written tests had cutoff scores that applicants had to achieve in order to be considered qualified for promotion. If an applicant reached the required cutoff score on his³⁵ written test, his scores on the two tests would be combined into a single index, with the written test worth 60 percent of the total and the oral test worth 40 percent. All of the promotable applicants would then be arranged on the basis of that index, from the highest score to the lowest. Under the city charter, promotions would then be awarded based on a procedure called the “Rule of Three.” The first vacancy for the position of captain or lieutenant would be filled from one of the top three scorers on the applicable combined index, after which the second vacancy would be filled from the top three scorers remaining after the first vacancy had been filled, and so on until all of the vacancies were filled.

After the tests were scored, it became clear that no African Americans would be promoted under this system.³⁶ Rather than proceed with the promotions process as originally planned, city officials decided to throw out the test and develop an alternative selection process.³⁷ The motives behind that decision were disputed. According to the city, the test results were disregarded because proceeding on the basis of those results would have exposed the city to Title VII liability if African American applicants were to bring a disparate impact claim.³⁸ According to a group of white firefighters who became the plaintiffs in *Ricci*, the city wanted to promote black firefighters for reasons quite apart from any need to comply with Title VII. Among other things, they charged, the city wanted to please a powerful black community activist who was an important part of the mayor’s political coalition and who wanted to see more African Americans in positions of municipal authority.³⁹

34. This description of New Haven’s promotion process is adapted from the district court’s opinion in *Ricci*. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 142–47 (D. Conn. 2006).

35. All the applicants for promotion were male.

36. Forty-one applicants took the captain exam. Twenty-two passed, thus becoming eligible for promotion to one of the seven vacant captain positions. Three of those who passed were African American. Given the Rule of Three, however, the seven vacant positions all had to be filled from the nine highest scoring applicants on the combined index, and none of the three African Americans with passing scores was in the top nine. Accordingly, the system as designed would have promoted no African Americans to the rank of captain. The situation with the lieutenant exam was similar: seventy-seven applicants took the tests, and thirty-four did well enough to be deemed qualified for promotion, six of them black. But under the Rule of Three, the eight vacant positions all had to be filled from the top ten scorers, and none of the qualified black applicants was within the top ten. *Ricci*, 554 F. Supp. 2d at 145.

37. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009).

38. See *id.*

39. See *Ricci*, 554 F. Supp. 2d at 150.

The objecting firefighters brought suit in federal district court, alleging that the city's decision to throw out the written test constituted intentional racial discrimination in violation of both the disparate treatment prong of Title VII and the Fourteenth Amendment's Equal Protection Clause. The district court awarded summary judgment to the city,⁴⁰ and the Second Circuit affirmed.⁴¹ The Supreme Court reversed. In an opinion by Justice Kennedy for a five-Justice majority, the Court awarded summary judgment to the plaintiffs on their disparate treatment claim and declined to reach the issue of equal protection.⁴²

Justice Kennedy's majority opinion can be understood as a four-step argument. First, the city's action was a race-based decision that would violate Title VII's prohibition on disparate treatment, absent some defense.⁴³ Second, the need to comply with disparate impact doctrine is a valid defense, because one branch of Title VII cannot be read to prohibit what another branch affirmatively requires.⁴⁴ Third, an employer cannot invoke that defense without a strong basis in evidence that its action was needed to prevent a disparate impact violation.⁴⁵ And fourth, the city lacked such a strong basis in evidence in the present case.⁴⁶ To be sure, the test had a statistically disparate impact large enough to create a *prima facie* case of disparate impact liability.⁴⁷ But under Title VII, the use of a test with a statistically disparate impact can be justified if the test is a valid measurement of relevant skills and necessary for the purpose for which it was used—in the words of the statute, if it is “job related for the position . . . and consistent with business necessity.”⁴⁸ In the majority's view, the record below indicated that the city could have defended its test as sufficiently job related to withstand a disparate impact attack.⁴⁹

B. *The Ricci Premise*

The first step of the Supreme Court's analysis is a crucial move. New Haven's attempt at a voluntary disparate impact remedy, the Court says,

40. *Id.* at 163.

41. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *reh'g en banc denied*, 530 F.3d 88 (2d Cir. 2008).

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

43. *See id.* at 2673.

44. *See id.* at 2674.

45. *See id.* at 2675.

46. *See id.* at 2677.

47. *See id.* at 2678 (recognizing the “four-fifths rule” of 29 C.F.R. § 1607.4(D) (2008), under which federal enforcement agencies generally find evidence of disparate impact for the purposes of Title VII if a selection mechanism results in a pass rate for one racial group that is less than 80 percent of the pass rate for another racial group).

48. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (stating that no unlawful employment practice based on disparate impact is established in cases where the respondent can “demonstrate that the challenged practice is job related for the position . . . and consistent with business necessity”).

49. *Ricci*, 129 S. Ct. at 2678–79.

would constitute disparate treatment if it were not affirmatively saved by the statute.⁵⁰ That is, *Ricci* begins by envisioning disparate impact doctrine as ordaining an exception to disparate treatment doctrine, requiring something that Title VII would otherwise prohibit. This proposition—which I am calling the *Ricci* premise—may seem intuitive or even obvious. Disparate treatment doctrine prohibits race-conscious decisionmaking, and disparate impact remedies are always race-conscious. There is accordingly a tension between the two frameworks. That said, no prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment. That is why the *Ricci* Court had to state the premise in its own voice and without citation. From the traditional perspective of antidiscrimination law, the idea that disparate impact remedies are as a conceptual matter disparate treatment problems is a radical departure.

The best way to understand why the *Ricci* premise is both radical and straightforward is to break down the category of disparate treatment into its two component parts and examine disparate impact doctrine's relationship to each one. One of those component parts is about the overt conduct of employers, and the other is about their states of mind. These concerns are usually related. Indeed, they are sufficiently intertwined in disparate treatment doctrine that many people, including law professors and appellate judges, often neglect to distinguish between them. But they are distinguishable, at least in principle, and often in practice as well. For present purposes, it will help to consider them separately.

One large strain in disparate treatment doctrine is about employers applying different rules to employees of different races (or sexes, etc.).⁵¹ Such behavior involves “disparate treatment” in an ordinary-language sense. In cases raising this concern, people are treated disparately, and therein lies the illegality.⁵² As a term of art, however, “disparate treatment” in Title VII also covers cases of illicit employer *motive*, whether or not those motives lead to disparities in the treatment of individuals of different races.⁵³ As is well known, discriminatory motives can lead to formally identical treatment for

50. *Id.* at 2673 (“Our analysis begins with this premise: The City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.”); *see id.* at 2674 (recognizing that the need to comply with Title VII’s disparate impact doctrine would constitute such a defense).

51. Title VII prohibits discrimination on grounds of “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). In this Article, however, I am concerned with an issue of race, and I will generally use language that is limited to issues of race.

52. *See, e.g., Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (finding a disparate treatment violation when an employer assigned black and Hispanic truck drivers to less-desirable positions than white truck drivers).

53. *See, e.g., McMullen v. Warner*, 416 F. Supp. 1163 (D.D.C. 1976) (finding disparate treatment when, in order to prevent a black applicant from filling a position, the position was eliminated, thus denying it to all applicants). Conversely, a showing of illicit motive is not required to make out a disparate treatment claim: a showing of formally disparate treatment in the ordinary-language sense will suffice. *See, e.g., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

everyone as well as to different treatment for different people.⁵⁴ Consider a case in which a business located in a heavily white suburb of a heavily black city has a policy of hiring only people who live in the suburb. Formally, such a policy does not treat individual applicants disparately on the basis of their race. But if the policy is motivated by the desire to exclude black applicants from the city next door, it is actionable under the heading “disparate treatment,” despite the absence of disparate treatment by race in the ordinary-language sense.⁵⁵ The discrimination is intentional, and intentional discrimination is *called* “disparate treatment.”⁵⁶

Until recently, disparate impact remedies were not thought to involve either of the two phenomena that come under the heading of disparate treatment. That is, they were not seen to entail overt acts allocating benefits to employees of one race that were denied to employees of another race, nor were they understood to involve any illicit motives on the part of employers. Consider first the question of disparate treatment in the ordinary-language sense. If a written test has a racially disparate impact and the employer throws out the results—as happened in *Ricci*—the test results are thrown out for all applicants, regardless of race. Any black applicants who did very well on the test are disadvantaged by the disparate impact remedy along with white applicants who did very well. White applicants who did poorly may stand to gain along with black applicants who did poorly. Obviously, the decision to throw out the test is race-conscious. But throwing out the test results does not involve “disparate treatment” in the ordinary-language sense of sorting employees into groups and conferring a benefit on members of one group that was withheld from members of the other group. No two employees are given different tests, nor are separate criteria used to evaluate

54. See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971) (addressing the decision of city officials in Jackson, Mississippi, to close municipal swimming pools entirely rather than permit African Americans to swim there).

55. Given its aggregate effects, it is also likely to be actionable under the doctrine of disparate impact.

56. See, e.g., *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (describing what must be proved by a plaintiff who claims “‘disparate treatment’ (i.e., *intentional* discrimination[)]”). This terminological oddity is a product of the way that the Supreme Court organized antidiscrimination law in the 1970s. For a long time, official doctrine in American law had long wobbled among three accounts of the locus of actionable discrimination: motive, form, and impact. On the motive-based account, an action is discriminatory because of the actor’s state of mind. On the form-based account, an action is discriminatory on the basis of the overt or visible aspect of the action. On the impact-based account, an action is discriminatory on the basis of the consequences that the action produces. See Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1046 (1998) (distinguishing the three accounts). To be sure, these three concerns can flow into one another, such that many phenomena in antidiscrimination law cannot be fully understood as falling into one category but not the other two. But the law often tries to distinguish among them. When the disparate impact doctrine became the repository of the impact-based account of discrimination within Title VII, the other two accounts were grouped together as “not-disparate-impact”: courts began classifying all cases of intentional discrimination and all cases of overt or formal differentiation as falling into a single category, and they extended the term “disparate treatment” to cover both kinds of cases despite its semantic awkwardness for the purpose. The term has stuck well enough that today we rarely notice the awkwardness at all. We simply understand that “disparate treatment” in Title VII is a term that covers both formal differences in the treatment of people of different groups and unlawful employer motives.

different employees, and no job is given to a Mr. Black but denied to a similarly situated Mr. White.⁵⁷

Depending partly on one's normative perspective, the preceding analysis might seem like shallow formalism aimed at obscuring the race-conscious nature of the employer's intervention. But that intuition, if valid, is a concern about *motive*, rather than one about treatment in its strict sense. The remaining question, then, is whether throwing out the test results proceeds from a motive that is prohibited under Title VII. During the early decades of disparate impact doctrine, the easy answer to that question was no. Disparate impact doctrine was widely understood as a means of redressing unjust but persistent racial disadvantage in the workplace,⁵⁸ and antidiscrimination law was broadly tolerant of deliberate measures intended to improve the position of disadvantaged minority groups.⁵⁹ Even facially classificatory affirmative action was considered to have a permissible *motive*: challenges to affirmative action programs generally focused on their chosen means, which characteristically involved disparate treatment in the strict sense, rather than on the fact of a race-conscious intention.⁶⁰ Disparate impact doctrine is weaker medicine than affirmative action, so it raised no trouble as a matter of motive.⁶¹ It was understood to be race-conscious, but the law did not regard race-consciousness in the pursuit of improving the position of disadvantaged groups to be problematic in the way that it does today.

I do not mean to give the impression that competent employment lawyers thirty years ago could all recite the foregoing explanation for why disparate impact and disparate treatment were not in tension with one another. What I have set forth here is a reconstruction of the assumptions of an

57. Cases fitting the pattern here described and on which courts have declined to find disparate treatment under Title VII include, for example, *Oakley v. City of Memphis*, 315 F. App'x 500 (6th Cir. 2008); *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999); *Byers v. City of Albuquerque*, 150 F.3d 1271 (10th Cir. 1998).

58. See U.S. COMM'N ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION* 17 n.20 (1981).

59. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 194 (1979) (stating that Title VII was intended to be compatible with race-conscious affirmative action to help improve the position of African Americans).

60. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion) (agreeing that a medical school could aim at admitting a racially diverse student body but disapproving of the method used to achieve that aim).

61. See Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1676 (1997) (noting that affirmative action was controversial but disparate impact doctrine was not). The contrast between disparate impact and affirmative action parallels the distinction between overt disparities in treatment, strictly construed, and disfavored motives. Like disparate impact doctrine, affirmative action proceeds from motives that were broadly considered acceptable thirty years ago. But unlike disparate impact doctrine, most affirmative action programs engage in the disparate treatment (strictly construed) of particular persons. Accordingly, the Supreme Court long ago classified those forms of affirmative action that were acceptable under Title VII as *exceptions* to the general prohibition on disparate treatment. See, e.g., *United Steelworkers of Am.*, 443 U.S. at 201–08 (acknowledging that a facially classificatory affirmative action plan was within the language of Title VII's prohibition on disparate treatment but that a legitimate affirmative action plan constituted a valid defense to liability). The *Ricci* premise extends this way of thinking to disparate impact doctrine for the first time.

earlier time, not a recovery of authoritative statements laid out in caselaw or hornbooks. Reconstruction is necessary here precisely because recovery is unavailable: cases and hornbooks did not directly address the question of why disparate treatment and disparate impact were not in conflict with each other. But the fact that such sources did not address the question only signals how far the idea of such a conflict was from the way that lawyers at that time understood the overall structure of antidiscrimination law.⁶² The issue did not arise because it would not have made sense to imagine a conflict given then-prevailing assumptions about acceptable race-conscious motives. And given the general degree of comfort with the motives behind disparate impact doctrine, the formal absence of disparate treatment in the strict sense was enough to insulate the doctrine from any plausible complaint.

In the intervening decades, assumptions have changed. Antidiscrimination law is still not wholly colorblind, but it is considerably less tolerant of race-conscious measures of any sort.⁶³ In particular, the idea that the intent to improve the position of a disadvantaged racial group is unlike the intent to harm members of such a group has lost popularity.⁶⁴ Dominant judicial opinion now runs in the other direction, albeit with qualifications.⁶⁵ As a result, the race-consciousness involved in disparate impact doctrine is now problematic as a matter of motive. Discriminatory motives are, of course, coded as “disparate treatment” under Title VII. As a result, the idea that disparate impact remedies are as a conceptual matter tantamount to disparate treatment problems has become not just plausible but natural.

The *Ricci* premise is a radical departure from prior law, but its radicalism lies in forcing something old to align with newer ideas, not in striking out into unfamiliar territory. It is different from what went before, but it is supported by easily accessible intuitions, or at least intuitions that are easily accessible to people who take colorblindness to be the touchstone of anti-discrimination law. If Title VII’s prohibition on disparate treatment is understood as a general requirement of colorblindness in employment, then it is easy to see any race-conscious decisionmaking as disparate treatment. Disparate impact doctrine does require race-conscious decisionmaking, so it follows that there is a conflict between the two frameworks. It’s as simple as that. No court ever took this view before, but many people now and in the future will regard the proposition as obvious.

62. See Malamud, *supra* note 61, at 1693 (noting the near-universal acceptance of disparate impact theory as a valid part of antidiscrimination law).

63. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

64. Compare *id.* (disallowing consideration of race as a tiebreaker in a small number of school assignments as part of a school district’s attempt to maintain racial diversity in its schools), with *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding a wholesale busing remedy designed to integrate a school system).

65. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a limited affirmative action plan in university admissions when that plan gave sufficiently individualized consideration to all applicants).

C. *The Ricci Premise as a Constitutional Proposition*

The prohibitions on disparate treatment and disparate impact both rest on the authority of Title VII, so the Court in *Ricci* treated one as an exception to the other.⁶⁶ Given the view that the two prohibitions conflict, that was reasonable. To say that the race-consciousness that disparate impact doctrine requires violates the prohibition on disparate treatment would be to say that Title VII requires something that it also prohibits. Quite sensibly, the Court declined to make hash of the statute in this way. Instead, *Ricci* said that the two prohibitions must be read as compatible with one another and accordingly limited the scope of the prohibition on disparate treatment to something smaller than its full conceptual extension. The *Ricci* premise is that disparate impact doctrine *would* collide with the prohibition on disparate treatment, were it not ordained by Title VII's own authority.⁶⁷ But it is so ordained. If understood strictly as a statutory matter, therefore, the *Ricci* premise does not threaten the continued operation of disparate impact doctrine within its proper domain. And Justice Kennedy's majority opinion did present itself as a statutory analysis only.⁶⁸

It would be a mistake, however, to think of the *Ricci* premise as merely statutory. Despite the Court's professed intention to avoid equal protection issues, the *Ricci* premise is properly understood as a constitutional proposition as well as a statutory one. The reason is that constitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII's prohibition on disparate treatment. Obviously, the two doctrinal frameworks diverge in some respects. They cover different though overlapping sets of parties,⁶⁹ and they have different procedural requirements for plaintiffs filing causes of action.⁷⁰ But the conceptual content of the two frameworks is the same.⁷¹ The conduct prohibited under one is virtually coextensive with the

66. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009).

67. See *id.* at 2674.

68. *Id.* at 2675 (“This suit does not call on us to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution.”); *id.* at 2681 (declining to address the plaintiffs’ constitutional claim).

69. Equal protection doctrine covers all government actors, whether or not they are employers, but it reaches no private parties. See *Civil Rights Cases*, 109 U.S. 3, 11 (1883). Title VII reaches only employers, but it covers all employers, private or public, over a certain size. 42 U.S.C. § 2000e(a) (2006) (specifying that “person[s]” include “governments, governmental agencies, [and] political subdivisions”); 42 U.S.C. § 2000e(b) (2006) (defining as covered employers all persons “engaged in an industry affecting commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”); 42 U.S.C. § 2000e-16 (2006) (extending coverage to federal government employees).

70. Compare 42 U.S.C. § 2000e-5 (2006) (setting forth administrative filing requirements and enforcement procedures under Title VII), with 42 U.S.C. § 1983 (2006) (listing the necessary components of a cause of action alleging the deprivation of constitutional rights), and *Bivens v. Six Unknown Named Agents of Fed. Bureau Narcotics*, 403 U.S. 388 (1971) (governing requirements for lawsuits raising causes of action under the Equal Protection Clause).

71. Note that equal protection doctrine, like disparate treatment doctrine, houses both the form-based and the motive-based accounts of discrimination—that is, everything but the concern

conduct prohibited under the other. To be sure, it is possible to find differences in coverage at the margins.⁷² But until a particular difference is identified, it is a good working hypothesis that equal protection and disparate treatment prohibit the same substantive conduct.

If the prohibition on disparate treatment would conflict with disparate impact doctrine but for a statutory carve-out, and if the prohibition on disparate treatment has the same content as equal protection, then equal protection must also conflict with disparate impact doctrine, absent some saving carve-out. The carve-out that saved disparate impact doctrine from actual conflict with disparate treatment doctrine in *Ricci* will not do the trick. The authority for that carve-out is Title VII, and Title VII, as a statute, must give way to the Constitution. Perhaps some other defense is available, such that the *Ricci* premise need not conclusively establish the unconstitutionality of disparate impact doctrine. But the problem is squarely put. If administering the disparate impact doctrine would be a disparate treatment problem but for the statutory carve-out, it is also an equal protection problem.⁷³

with impact, which is carved off and placed elsewhere. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (regarding equal protection); *supra* Part I (regarding disparate treatment). The ambiguity between form and motive has animated a parallel set of conflicts at the statutory and constitutional levels. Just as the Court has divided deeply over whether formal racial classifications are offensive to equal protection even when not motivated by racial animus, *see, e.g.*, *Johnson v. California*, 543 U.S. 499 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Court has divided deeply over whether a statutory disparate treatment claim should lie when an employer deploys a disfavored classification in the course of advancing an administrative scheme not motivated by animus against any category of workers. *Compare* *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361 (2008) (majority opinion) (privileging motive), *with id.* at 2371 (Kennedy, J., dissenting, joined by Scalia, Ginsburg, & Alito, JJ.) (privileging form). As the examples of *Johnson v. California* and *Kentucky Retirement Systems* indicate, it is not always the same Justices who rest on form and the same Justices who rest on motive. A focus on constitutional affirmative action cases might encourage the generalization that the more conservative Justices are more focused on form than their liberal counterparts, but on fuller consideration the reality is more complex. Particular decisionmakers can be on either side under different circumstances, and the Court's familiar liberal and conservative blocs do not always cohere on the question. Whichever way the Court leans in a particular case, however, the ambiguity it confronts is the same in disparate treatment as in equal protection.

72. Suppose that a police department wants to assign an undercover officer to infiltrate the Russian mafia and considers only white officers for the position on the grounds that the target organization is composed exclusively of white people (i.e., ethnic Russians), such that a nonwhite officer could never pass as a member. If a black officer brought an equal protection claim alleging racial discrimination, a court could (and surely would) find against him on the grounds that choosing a white officer for this job was narrowly tailored to a compelling governmental interest. But if a black officer brought a Title VII disparate treatment claim, the police department would have no defense. (Title VII recognizes a bona fide occupational qualification ("BFOQ") defense in cases where a person's religion, sex, or national origin is actually necessary to performance of a job, but the statute recognizes no BFOQ defense to claims of disparate treatment of the basis of race. *See* 42 U.S.C. § 2000e-2(e)(1) (2006).) In two respects, however, this example of a divergence in the coverage between Title VII and equal protection only serves to emphasize how thoroughly the two rubrics reproduce each other as a general matter. First, finding this difference requires resort to the fanciful: in real life, police officers do not sue to be permitted to undertake quixotic suicide missions like the one imagined here. Second, even this divergence between statutory and constitutional coverage arises from a difference in the *defenses* that apply in each sphere, not a difference between what Title VII and equal protection reach as an initial matter.

73. As noted earlier, I have explored the potential tensions between equal protection and disparate impact doctrine at length elsewhere. *See* Primus, *supra* note 14. Readers interested in the full analysis should see that discussion. But that article demonstrated that the relationship between

Read carefully, the Court's opinion in *Ricci* confirms that equal protection and disparate treatment are virtually interchangeable in their conceptual relationship to disparate impact. Indeed, *Ricci* repeatedly erases the line between disparate treatment and equal protection, though perhaps unintentionally so. In discussing the plaintiffs' injury, the defendant's motive, and the defendant's action in canceling the test, the Court's language, analysis, or both are more at home in the rubric of equal protection than that of disparate treatment. Obviously, the fact that one can classify a particular piece of language or analysis as sounding in equal protection rather than disparate treatment means that there are, as a technical matter, identifiable differences between the two frameworks. But the Court's repeated use of the apparatus of equal protection while adjudicating a disparate treatment claim suggests that whatever distinctions there may be between disparate treatment and equal protection have little importance to either doctrine's relationship to disparate impact law. So despite the Court's official statement of constitutional avoidance, all indications are that the *Ricci* premise is a constitutional proposition, not just a statutory one.

1. Injury

Consider first the Court's approach to the question of whether the *Ricci* plaintiffs had a legally cognizable injury. Under orthodox Title VII doctrine, a plaintiff must suffer an "adverse employment action" in order to merit relief.⁷⁴ The easiest examples of adverse employment actions include dismissals,⁷⁵ demotions,⁷⁶ failures to hire,⁷⁷ failures to promote,⁷⁸ and reductions in pay.⁷⁹ But not every undesirable thing that happens in the workplace counts as an adverse employment action. To take an extreme case, a Title VII action will not lie for a supervisor's glowering at an employee, assuming the glowering is not part of a pervasive pattern of mistreatment.⁸⁰ Between dismissal and glowering lie contestable cases. For example, lower courts have disagreed about whether employer actions that might make it

equal protection and disparate impact was substantially indeterminate, such that the question of their compatibility would depend on which of several possible views of equal protection, and of disparate impact, an adjudicating official would ultimately adopt. The project of this Article is to show how *Ricci* narrows the range of views that the Supreme Court is likely to adopt.

74. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

75. E.g., *Vincent v. Brewer Co.*, 514 F.3d 489, 493 (6th Cir. 2007).

76. E.g., *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627–28 (7th Cir. 2007).

77. E.g., *Nilsson v. City of Mesa*, 503 F.3d 947, 952 (9th Cir. 2007).

78. E.g., *Springer v. Convergys Customer Mgmt. Group, Inc.*, 509 F.3d 1344, 1346–47 (11th Cir. 2007).

79. E.g., *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007).

80. Cf. *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (explaining that Title VII does not protect against every action "that an irritable, chip-on-the-shoulder employee did not like").

harder for employees to get jobs or promotions in the future count as adverse employment actions.⁸¹

Whether the plaintiffs in *Ricci* suffered adverse employment actions is a legitimate question within the contestable range. As of the time of litigation, the *Ricci* plaintiffs had not been denied promotions. The officer positions remained open. At least some of the plaintiffs would probably have been chosen to fill those positions under whatever alternative process New Haven might have instituted.⁸² Moreover, because the Rule of Three had not yet been applied, no applicant was yet entitled to a promotion when litigation began. To be sure, setting aside the test results almost surely reduced the plaintiffs' average probability of promotion.⁸³ But whether that sort of probabilistic concern rises to the level of an adverse employment action for Title VII purposes is a question over which courts have divided in the past. After all, a large part of the rationale for the adverse employment action requirement is to prevent courts from having to adjudicate cases where the feared injury may never come to fruition. It is not absurd to argue that being set back in the promotions process should count as an adverse employment action under Title VII. But neither is it absurd to argue that no adverse employment action exists under Title VII when an employee seeking a promotion encounters a procedural setback that might or might not ultimately lead to the denial of a promotion.

What is striking in *Ricci*, therefore, is not that the Court believed the plaintiffs could state a claim. It is that the Court offered no analysis to explain why what happened to the plaintiffs counts as an adverse employment action under Title VII at this intermediate stage of the process. *Ricci* never acknowledges that as a matter of disparate treatment doctrine, the plaintiffs' claim of statutorily cognizable injury might be premature. The Court's apparent indifference on this score is the first suggestion that its analysis did not hew to the distinctive concerns of disparate treatment law.

No parallel curiosity arises if *Ricci* is read as an equal protection case. As a matter of constitutional doctrine, the *Ricci* plaintiffs needed some injury cognizable under Article III to maintain an equal protection suit.⁸⁴ But

81. *Compare, e.g., Reed v. Unified Sch. Dist. No. 223*, 299 F. Supp. 2d 1215, 1226 (D. Kan. 2004) (stating that refusal to give a letter of recommendation is adverse employment action because it risks harming the employee's future ability to get a job), *with Enowmbitang v. Seagate Tech., Inc.*, 148 F.3d 970, 973–74 (8th Cir. 1998) (holding that giving a poor evaluation is not an adverse employment action if no further consequence immediately flows from it).

82. I assume that the canceled process and the hypothetical future process would have sorted roughly the same applicant pool. Obviously, the two processes would have sorted that pool somewhat differently. But many highly qualified applicants probably would have succeeded under both processes, assuming that both were valid measurements of qualification.

83. If New Haven had replaced the original test with a system that wound up yielding exactly the same set of promotable candidates, then the plaintiffs' average probability of promotion would be unaffected. But it seems highly unlikely that New Haven's chosen replacement system would have yielded that result. After all, we can assume that New Haven would have replaced the original test with a system designed, among other things, to change the pool of promotable candidates.

84. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (setting forth the general criteria for constitutional injury cognizable in Article III courts).

neither Article III nor anything particular to the rubric of equal protection mirrors the requirement of adverse employment actions under Title VII. On the contrary, an equal protection plaintiff can establish cognizable injury simply by demonstrating that he was subjected to and in some way harmed by a decisionmaking process infected by a state actor's illicit consideration of race.⁸⁵ That is a showing that the *Ricci* plaintiffs could make. Identifying the plaintiffs' legal injury is accordingly more straightforward if *Ricci* is read as sounding in equal protection than if it is read as sounding in disparate treatment.

2. Motive

Consider next the issue of the defendant's motive. One of disparate treatment doctrine's distinguishing characteristics is a burden-shifting regime derived from the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*.⁸⁶ Within the *McDonnell Douglas* framework, a court adjudicating a disparate treatment claim is supposed to ask whether the plaintiff made a prima facie showing about the defendant's motive according to certain stylized rules, and if so whether the defendant's evidence includes a rebuttal called a "legitimate nondiscriminatory reason," and if so, whether the plaintiff's evidence shows that rebuttal to be pretextual.⁸⁷ Walking through *McDonnell Douglas* and asking whether the various burdens it assigns have been satisfied is a staple of disparate treatment cases.⁸⁸ Not surprisingly, the district court in *Ricci* used the *McDonnell Douglas* framework to structure its entire analysis of the statutory question.⁸⁹ But the Supreme Court's opinion in *Ricci* says not a word about *McDonnell Douglas*.

Given an unusual feature of the case, the Court may have been justified in skipping *McDonnell Douglas*. The primary virtue of the *McDonnell Douglas* process is that it shifts the burden of production to the defendant earlier than happens in most other civil litigation, and it does so because discriminatory intent is normally hard to prove.⁹⁰ *McDonnell Douglas* makes employers proffer reasons for their actions, thus allowing plaintiffs to win their cases if they can raise inferences of discriminatory purpose by discrediting the employers' explanations. If an employer seems to be lying about its reasons, a court might infer that the proffered explanation is a pretext for an

85. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993).

86. 411 U.S. 792 (1973).

87. *Id.* at 802–03.

88. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995).

89. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151 (D. Conn. 2006) ("Because plaintiffs allege intentional discrimination, the familiar *McDonnell Douglas* three-prong burden-shifting test applies."); *id.* at 151–60 (conducting the *McDonnell Douglas* analysis).

90. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (stating that the rationale for the *McDonnell Douglas* proof framework is that "direct evidence of intentional discrimination is hard to come by").

illicit and perhaps discriminatory purpose.⁹¹ But on this understanding, the special framework of *McDonnell Douglas* might be unnecessary in cases where facts suggesting discriminatory purpose are already in plain view. Accordingly, some lower courts have held that *McDonnell Douglas* states the applicable process only in cases lacking “direct evidence” of discriminatory intent.⁹² It is not always clear what constitutes “direct evidence,”⁹³ but as a matter of common sense New Haven’s stated explanation for setting aside the test results in *Ricci* might qualify. That New Haven acted because of the expected racial distribution of promotions was already known at the start of litigation. Whether New Haven’s motives and actions added up to a violation of Title VII was a contestable question, but it was a question of legal interpretation rather than of facts and evidence.⁹⁴ So in the end, bypassing *McDonnell Douglas* may have made good doctrinal sense.

But it is once again noteworthy that the Court omitted any discussion of the issue. As with the matter of adverse employment actions, there is a reasonable doctrinal case on the other side of the question. Other than in mixed-motive cases where the special proof regime of *Price Waterhouse v. Hopkins* has been applied,⁹⁵ no Supreme Court majority prior to *Ricci* ever skipped *McDonnell Douglas* in a case adjudicating a Title VII disparate treatment claim.⁹⁶ And whatever the common sense of regarding an overtly

91. See generally *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1354–61 (2d Cir. 1997) (en banc) (Calabresi, J., concurring in part and dissenting in part).

92. See, e.g., *Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir. 2003).

93. See *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572, 582 (1st Cir. 1999) (canvassing varying understandings of direct evidence).

94. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006) (noting that the parties strenuously disputed the legal issues in the cases but largely agreed on the facts).

95. *Price Waterhouse*, 490 U.S. at 228; see, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (applying *Price Waterhouse*). The facts of *Ricci* made the case a natural candidate for mixed-motive analysis: the parties disputed whether New Haven had acted for the mere purpose of complying with Title VII or for the purpose of gratifying an important racially defined political constituency, and one possible answer was “a little of both.” Justice Alito’s concurrence suggests that at least three Justices found the racial politics explanation plausible, at least in part. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683–88 (2009) (Alito, J., concurring). Moreover, New Haven’s decision was the joint product of more than one decisionmaker, as many municipal decisions are, and decisions with multiple decisionmakers are regularly proper subjects for mixed-motive analysis because different decisionmakers may have acted for different reasons, or different combinations of reasons. The majority opinion suggested that New Haven acted for a combination of motives, rather than for any single purpose to the exclusion of all others. See *id.* at 2681 (majority opinion) (stating that “the raw racial results became the predominant rationale” for the city’s decision to set aside the tests) (emphasis added)). But the parties did not raise a mixed-motive argument in the district court, *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (Calabresi, J., concurring in the denial of rehearing en banc), so there is a straightforward explanation for the absence of mixed-motive analysis in the Supreme Court’s opinion.

96. The closest the Court has come has been to hold that direct-evidence cases are different from *McDonnell Douglas* cases in the context of the Age Discrimination in Employment Act. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 667 (1989) (stating, in the context of a disparate impact case, that *McDonnell Douglas* provides “[t]he means for determining intent absent direct evidence”); *Price Waterhouse*, 490 U.S. at 270 (O’Connor, J., concurring) (distinguishing *McDonnell Douglas* cases from cases involving “direct evidence” of employer decisionmaking on the basis of a forbidden factor). These statements are a sufficient foundation for applying the idea in a disparate treatment

race-conscious decision like New Haven's as not requiring *McDonnell Douglas*, the Court has in the past applied *McDonnell Douglas* even when adjudicating a disparate treatment challenge to a facially classificatory affirmative action plan.⁹⁷ Obviously, there is no doubt that an employment decision made pursuant to an affirmative action plan is racially motivated, nor is there any difficulty in producing evidence of that motivation when the plan is publicly known. If affirmative action cases have been handled within the *McDonnell Douglas* framework, some explanation is required as to why a case like *Ricci* should proceed outside of it—even if that explanation is, as it might reasonably be, that henceforth affirmative action cases should not use *McDonnell Douglas* either. All in all, the Court could have justified proceeding without *McDonnell Douglas*. But one might expect that the Court would explain why it was doing so, given both the reasonable possibility of going the other way and the fact that the statutory discussion in the court below relied on *McDonnell Douglas* from start to finish. That the Court did not even mention this set of questions suggests once again that its analysis in *Ricci* did not fully engage with the distinctive doctrinal apparatus of Title VII.

The Court's discussion of New Haven's motive did, however, draw upon the language of equal protection. Rather than having a single, overarching framework for the consideration of motive issues, equal protection has slightly different frameworks for assessing defendants' motives in different sorts of cases.⁹⁸ One of those frameworks is applicable to cases in which state actors use facially neutral means to improve the position of disadvantaged groups.⁹⁹ As explained in Part I, and as I have shown at greater length elsewhere, disparate impact remedies like the one used in *Ricci* can usefully be located within that category.¹⁰⁰ Throwing out test results can be understood as facially neutral when the test results are thrown out for everyone; the discrimination, if any, lies in the motivation for that action. Within the doctrinal framework applicable to such cases, the critical question is whether the racial consideration was the state actor's "predominant motive."¹⁰¹ And in *Ricci*, the Court used the idea of predominant motive to explain the invalidity of New Haven's decision. The absence of *McDonnell Douglas* is curious in a disparate treatment case, as described above, and

case, but giving them force for the first time merits some discussion in light of prior practice to the contrary.

97. See *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987).

98. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (distinguishing several modes of intent analysis in equal protection).

99. See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333 (2000).

100. See Primus, *supra* note 14, at 539–44.

101. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 474 (2006) (Stevens, J., concurring in part and dissenting in part); *Vieth v. Jubelirer*, 541 U.S. 267, 284–86 (2004); *Miller v. Johnson*, 515 U.S. 900, 911–13 (1995); Primus, *supra* note 14, at 545. Predominant motive is an imprecisely defined term, if it is defined at all. Its use in these cases seems intended to signal that racial consideration should not assume undue importance relative to other, less problematic factors in the decisionmaking process.

nothing in Title VII doctrine speaks of predominant motives. But if *Ricci* had been an equal protection case, a judgment about predominant motive would have been entirely at home.

3. *Standard for Voluntary Corrective Action*

In assessing the city's argument that it acted in order to comply with the disparate impact prong of Title VII, the Court had to confront the question of an employer's latitude to remedy actual or potential Title VII violations. The plaintiffs argued that if the purpose of remedying a disparate impact problem can ever justify what would otherwise be disparate treatment, it can do so only when an employer is actually in violation of Title VII's prohibition on disparate impact.¹⁰² In other words, employers may not act to forestall possible, rather than actual, violations. The city argued in contrast that a good-faith belief that disparate impact liability is the alternative to corrective action should be good enough.¹⁰³ The Court rejected both positions. In its view, employers must have more latitude than the plaintiffs maintained: as prior cases had noted, it is the policy of Title VII to encourage "voluntary compliance" rather than force employers to litigate and lose before taking corrective action. At the same time, the Court considered a requirement of no more than employer good faith to be overly permissive.¹⁰⁴ So it had to find some middle ground.

The Court took that middle ground from equal protection doctrine, and this time it was forthright about the borrowing.¹⁰⁵ *Ricci* announced that a defendant in New Haven's position must have a "strong basis in evidence" that its conduct would open it to disparate impact liability absent corrective action.¹⁰⁶ As the Court acknowledged, the strong-basis-in-evidence standard was taken from constitutional cases—that is, equal protection cases—in which defendants had taken voluntary actions intended to cure past discrimination.¹⁰⁷ The Court signaled its awareness in principle of the dangers of borrowing constitutional doctrine to resolve statutory questions, saying that its use of the strong-basis-in-evidence standard should not be understood to mean that everything about the restrictions on employers is identical in the Title VII context to what it is in the equal protection

102. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009) ("Petitioners next suggest that an employer in fact must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit.").

103. *Id.* at 2674–75.

104. *Id.*

105. *Cf.* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (describing the practice and hazards of using doctrinal tools and tropes from one context in another context).

106. *Ricci*, 129 S. Ct. at 2675 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

107. *Id.* (considering *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

context.¹⁰⁸ But it identified no differences. And once again, it used the apparatus of equal protection in what is ostensibly just a disparate treatment decision.

On its own, *Ricci*'s borrowing of the strong-basis-in-evidence standard might not signal a wholesale convergence between equal protection and disparate treatment doctrines. And it is tempting to understand *Ricci*'s other uses of the apparatus of equal protection rather than that of Title VII as little more than inattentive drafting. But more is going on. Equal protection language appears repeatedly in *Ricci*, and at key junctures, rather than in just a stray comment or two. Perhaps more importantly, the deep structure of the two conflated doctrines really is analogous, such that a Court thinking in terms of substantive fundamentals could easily let one colonize the other. Even if the *Ricci* Court had kept scrupulously to the terminology of disparate treatment doctrine, the substance of its analysis would have been largely transferable to the equal protection context. That the Court did not even bother to keep the terminologies separate only testifies to the artificiality of the distinction between them in practice. So despite the Court's presentation of the *Ricci* premise as a matter of statutory law only, one can probably substitute "equal protection" for "disparate treatment" and have an equally valid proposition.

II. THREE READINGS OF THE *RICCI* PREMISE

If the *Ricci* premise is of constitutional dimension, it threatens the continued validity of disparate impact law under Title VII. But the extent of the threat depends on which of three possible meanings the premise is given. One meaning, which I will call the general reading, is that any operation of the disparate impact standard is an equal protection problem. This general reading is plausible. Justice Scalia seems to read *Ricci* that way,¹⁰⁹ and so does Ronald Dworkin.¹¹⁰ But *Ricci*'s statement of the premise is indeterminate as between that reading and two others. One of those other readings is institutional, and the other is about visible victims.

On the institutional reading, the disparate treatment (read: equal protection) problem in *Ricci* arose because the actor that implemented a disparate impact remedy was a public employer rather than a court. On the visible-victims reading, the city's conduct in *Ricci* was a disparate treatment (or equal protection) problem because it adversely affected specific and visible innocent parties. Either of these readings calls for a bit more subtlety than the general reading, but they may make for sounder positions in the end. And if the *Ricci* premise is given either the institutional reading or the visible-victims reading, disparate impact doctrine can survive constitutional challenge.

108. See *Ricci*, 129 S. Ct at 2675.

109. See *id.* at 2682 (Scalia, J., concurring).

110. See Dworkin, *supra* note 20, at 38–39.

A. The General Reading

As described in Part I, the general reading would represent a fundamental change in American antidiscrimination law.¹¹¹ But like many successful fundamental changes, its logic is simple once one adjusts to the new perspective. The relevant perspective here takes colorblindness, understood as the rejection of race-conscious governmental action, as the guiding value of equal protection.¹¹² It is possible to understand Title VII's disparate impact doctrine in several different ways, but on any construction it is race-conscious. Courts must classify members of the workforce by race in order to adjudicate disparate impact claims, and the threat of liability encourages employers to classify their employees or applicants by race so as to monitor their own compliance with the law.¹¹³ Moreover, disparate impact doctrine is concerned with racial groups, and the colorblind version of equal protection insists that the law's attention be on individuals.¹¹⁴ If equal protection requires the law to be thoroughly colorblind, then a statutory doctrine that requires racial classification and makes liability turn on the status of groups considered collectively is an equal protection problem. As noted before, this view of the relationship between equal protection and disparate impact is sharply different from the view that prevailed in the first decades of Title VII's operation. But it is not hard to imagine the Supreme Court's adopting this orientation.

The general reading of *Ricci*'s premise does not quite entail the conclusion that disparate impact doctrine is unconstitutional. Even if disparate impact doctrine is in tension with equal protection, it could survive constitutional attack if it were found to be narrowly tailored to a compelling governmental interest. I explore this possibility further in Part III. But compelling interest defenses are always longshots. So if the general reading of the *Ricci* premise does not necessarily entail the unconstitutionality of disparate impact doctrine, it at least augurs poorly.

111. See *supra* Section I.B.

112. See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992).

113. Technically, it would be possible for an employer to avoid disparate impact liability without any race-conscious action. An employer who ensured that all of his employment practices met the business necessity test would be able to defend against any claim that might arise if some of those practices had racially disparate impacts. But one should not invest too heavily in this possible resolution. Litigation is expensive, so most employers most of the time would rather avoid being in the position where a plaintiff could make a prima facie case of disparate impact which would then need to be answered by a business necessity defense. The way to avoid going down that road is, of course, not to cause statistically disparate impacts in the first place.

114. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[T]he Fourteenth Amendment ‘protect[s] persons, not groups[.]’”) (second alteration in original) (emphasis added) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals.”) (internal quotation marks omitted).

B. *The Institutional Reading*

The *Ricci* premise is also susceptible of more limited readings, readings that go not to an equal protection problem inherent in any operation of the disparate impact standard but only to an equal protection problem that arose on the specific facts of the New Haven case. One of those readings is institutional. It holds that *courts* may order race-conscious remedies for disparate impact problems, but *public employers* may not.¹¹⁵

As a general matter, the requirements of a constitutional norm often vary with the role or the capacities of the particular institutions to which (or by which) the norm is applied.¹¹⁶ The judicially enforceable content of the Equal Protection Clause, for example, differs slightly from what Congress can do to enforce that Clause, and the difference is intended to track differences in the roles and capacities of the two institutions.¹¹⁷ Both institutions are bound by equal protection, but the operationalized content of equal protection has some play in the joints. Depending on the specific example and the underlying constitutional theory of the commentator, the resulting differences between what a constitutional norm demands when applied to different institutional actors can be described in terms of underenforcement,¹¹⁸ prophylaxis,¹¹⁹ judicially manageable standards,¹²⁰ or simply as the way constitutional adjudication always works.¹²¹ However described, it is clear that constitutional norms often impose slightly different demands on different institutional actors.

At least since *Shelley v. Kraemer*,¹²² it has been established law that the Equal Protection Clause applies to courts as well as other governmental institutions. Given the role and characteristics of courts, however, not even the strongest advocates of a colorblind approach to equal protection have maintained that courts may never take note of race. Taking note of race is regularly part of core judicial functions, including those made necessary by the Equal Protection Clause itself. If I walk into federal district court and

115. I specify *public* employers rather than employers generally because, given the state action requirement, only public employers can violate the Equal Protection Clause. A private employer trying to cure a disparate impact problem could violate Title VII, but its actions could not be unconstitutional.

116. See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 48–50 (2004).

117. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

118. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

119. See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

120. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

121. See Evan H. Caminker, *Miranda and some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 25 (2001); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLOM. L. REV. 857 (1999).

122. 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive covenant in a title deed constituted a denial of equal protection under the Fourteenth Amendment).

sue the government for discriminating against me as a black man, the court will, and should, notice that I am in fact a white man. That evaluation will and should figure heavily in the court's evaluation of my claim. As a matter of widely shared intuition, nothing about this governmental race-consciousness is an equal protection problem.¹²³ Additionally, our official conception of courts sees them as neutral adjudicators, rather than as agencies whose officers have incentives or self-conceptions that might lead them to favor some social groups over others.¹²⁴ It is accordingly not as necessary to prevent courts from taking note of race as it might be to prevent other governmental actors from doing so, because the danger that favoritism will result in unfair exercises of governmental power is less. To be sure, none of these considerations would justify allowing a court to violate the demands of equal protection. But in figuring out just what equal protection demands of a court, the fact that we are talking about a court is a relevant consideration. Partly because a certain degree of race-consciousness is necessary for executing core judicial functions, and partly for other reasons related to the judicial role, a legal system skeptical of race-conscious decisionmaking permits courts more leeway than it permits other institutions.

Public employers occupy a dramatically different position. Indeed, in the history of disparate impact law, public employers have been among the institutions least trusted to deal with race appropriately.¹²⁵ For as long as courts have recognized disparate impact claims under Title VII, disparate impact suits have been notoriously difficult for plaintiffs to win, with two categories of exceptions. First, in the years immediately after Title VII became effective, courts often granted disparate impact relief against Southern employers with histories of overt racial discrimination.¹²⁶ Second, courts have periodically granted disparate impact relief against large municipal employers, especially in settings like police and fire departments.¹²⁷ Such suits account

123. Equal protection has a similar tolerance for nonjudicial governmental actors executing something like the judicial function of remediation. For example, an administrative office evaluating an internal grievance alleging racial discrimination in a government agency would be permitted to consider the race of the complainant in much the same way that a court could take note of the race of a Title VII plaintiff. Interestingly, neither the caselaw nor the literature contains a full account of why colorblindness is subject to this limit. One possibility is that the individualist ideals that motivate colorblindness require at least this much color-consciousness for their enforcement. But this is not a complete explanation, because one could easily ask why what is required is this much, rather than a little more or a little less. Whether this conundrum is a problem for prevailing practices or for the theory of colorblindness is a question for another day.

124. This is not to deny that judges, like everybody else, can suffer from biases, nor is it to deny that a judiciary whose members are recruited disproportionately from certain segments of the population might show biases in predictable directions. But the design of the office is based on an aspiration to neutrality.

125. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 756–57 (2006).

126. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Parham v. Sw. Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Young v. Edgcomb Steel Co.*, 363 F. Supp. 961 (M.D.N.C. 1973).

127. See, e.g., *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974) (Boston); *Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973) (New York); *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974) (Chicago); *Officers for Justice v. Civil Serv. Comm'n*, 371 F. Supp. 1328 (N.D. Cal. 1973) (San Francisco); *Harper v.*

for a large share of all successful disparate impact claims.¹²⁸ In many large cities, police and fire departments have been dominated by members of white ethnic communities—Polish or Irish or Italian—that have comprised important constituencies within reigning local political coalitions. Partly because of the logic of patronage, and partly because of the natural dynamics of self-perpetuation, new jobs in the departments have often gone disproportionately to members of the incumbent ethnic community. As a result, members of racial minority groups have often found it difficult to break in, even in the absence of formal discrimination or official discriminatory purposes.¹²⁹ In the 1970s, this pattern furnished the backdrop for several successful disparate impact suits against municipal employers, even as courts were showing themselves strongly disinclined to hold private employers liable in disparate impact cases.¹³⁰

Then came an important shift. In the 1980s and 1990s, black and Latino voters became increasingly important political constituencies in many of the same big cities where the logic of local politics had previously been consistent with maintaining police and fire departments as domains of white ethnic patronage.¹³¹ Alongside their other incentives, therefore, urban political leaders developed powerful interests in bringing more members of racial minority groups into municipal offices, including in police and fire departments.¹³² In the pursuit of that new agenda, judicial compulsion was a valuable ally. Many cities were only too happy to be held liable for disparate impact violations, or to enter into consent decrees in suits brought on disparate impact grounds, and then to implement remedial decrees requiring increased minority hiring.¹³³ Integrating the departments served the interests of local decisionmakers, and disparate impact doctrine gave them the cover they needed to make it happen.

Mayor of Baltimore, 359 F. Supp. 1187 (D. Md. 1973) (Baltimore). There are recent examples as well. *See, e.g.*, *United States v. City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009) (granting summary judgment against the New York City Fire Department in a Title VII suit alleging that a written examination for selecting entry-level firefighters had an unlawfully disparate impact on black and Hispanic applicants).

128. *Selmi*, *supra* note 125, at 756–57.

129. *See, e.g.*, Diane Cardwell, *Racial Bias in Fire Exams Can Lurk in the Details*, N.Y. TIMES, July 24, 2009, at A22 (describing a recent suit where fire department entrance exams tested knowledge of technical jargon, thus favoring those from traditional firefighter families or English-speaking families).

130. *See Selmi*, *supra* note 125, at 756.

131. *See, e.g.*, AFRICAN AMERICAN MAYORS: RACE, POLITICS, AND THE AMERICAN CITY 4–6 (David R. Colburn & Jeffrey S. Adler eds., 2001); JON TEAFORD, THE TWENTIETH-CENTURY AMERICAN CITY: PROBLEM, PROMISE, AND REALITY 147 (1993); CLARENCE STONE, REGIME POLITICS: GOVERNING ATLANTA, 1946–1988 247 (1989).

132. As should be obvious, the shift in political demographics did not mean that urban officeholders no longer had incentives to protect the interests of white ethnic groups in the allocation of public employment. Often those incentives remained. But similar incentives also obtained with respect to the employment of nonwhites. The precise balance of incentives in any particular case, or for any particular official, is a function of specific circumstances within the relevant polity.

133. *See Selmi*, *supra* note 125, at 764.

To the extent that this shift in urban political incentives reflected a larger share of the urban population's being represented at the municipal table, it should be regarded as a welcome change. But it means that courts in the twenty-first century are again likely to be suspicious of the racial agendas of local officeholders in police and fire department hiring, albeit sometimes from a different angle. Once the concern was that local politics would keep blacks out of the jobs. Now, just as often, the concern is that local leaders are playing politics by putting more blacks or Latinos into those jobs. Justice Alito's concurrence in *Ricci* vividly channels this anxiety, offering an ugly tale of racial politics as the context in which to see the issue presented.¹³⁴

To be sure, one need not see the local officials who are inclined to go too far in the pursuit of minority hiring as evil. They might merely be officeholders acting in good faith to pursue the welfare of their cities as they best understand it, rather than being racially biased or intent on delivering political spoils along racial lines.¹³⁵ One important insight of constitutional theory, however, is that officeholders charged with particular responsibilities might pay insufficient attention to public values that argue against achieving those responsibilities in the most direct way.¹³⁶ A standard solution is to check those officeholders by subjecting them to the review of another institution that does not share the same incentives and responsibilities. Consider the Fourth Amendment warrant requirement: Police officers need judicial authorization to conduct certain kinds of searches because the responsibility for investigating crime tempts officers to minimize privacy concerns where the interest in privacy gets in the way of important investigations.¹³⁷ If investigating officers could decide on their own whether a search was valid, they would predictably undervalue the privacy that the Constitution protects, not for reasons of bad faith but simply because of what their role as police officers asks them to accomplish. Similarly, many public employers in racially

134. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683–88 (2009) (Alito, J., concurring).

135. *Ricci*'s willingness to let employers escape disparate treatment liability with a strong basis in evidence for believing that the alternative is a disparate impact violation—rather than requiring a completely clear showing that the alternative is such a violation—indicates some measure of willingness to give public employers margin for error. Clearly, the Court does not see every public employer as bent on subverting the law, and the institutional reading of *Ricci* does not require such a dim view. It requires only that courts see a greater need for checking public employers than there is for checking courts.

136. For one excellent modern distillation of this idea in the Supreme Court's jurisprudence, relying partly on James Madison, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that 'the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.'") (quoting THE FEDERALIST NO. 51 (James Madison) (J. Cooke ed. 1961)).

137. I thank Trevor Morrison for suggesting this example.

diverse municipalities face a systematic temptation to use the threat of disparate impact liability to practice race-conscious hiring beyond what the law condones. This fact about public employer incentives might make it sensible to prohibit those employers from implementing disparate impact remedies without the review and direction of a court.

One of the *Ricci* Court's most overt departures from Title VII's rules for disparate impact cases can best be understood in terms of this understanding of the incentives of public employers. According to Title VII, the defendant in a disparate impact case can escape liability by showing that the employment practice with a racially disparate impact is "job related . . . and consistent with business necessity."¹³⁸ The statute places the burden of proof on the employer to show business necessity, not on the plaintiff to show that the practice is arbitrary.¹³⁹ That allocation of the burden makes sense on the generally sound assumption that employers prefer not to be held liable for Title VII violations. After all, the employer has the best access to information about why it deploys the challenged practice. If the employer also has a strong incentive to defend that practice—for example, to escape liability—then all considerations argue for giving the employer the burden of proof. But if a public employer's interest in increased minority hiring means that it prefers to be held liable, this allocation of the burden enables that employer to let a weak claim succeed simply by declining to argue the business necessity defense.

In *Ricci*, the employer *denied* that the written tests were required by business necessity.¹⁴⁰ Had the Court mechanically applied Title VII's burdens of proof, it would have been forced to conclude that the potential disparate impact claim against the city would have succeeded: there was a statistically disparate impact, and the city would clearly not satisfy its burden to show business necessity if its position was that the tests were not necessary. But perhaps because the Court was aware that the city's incentives were the reverse of what the statute supposed, the majority opinion treated the absence of business necessity as an element of a disparate impact claim, rather than regarding business necessity as an affirmative defense that the employer might or might not invoke.¹⁴¹ The language of Title VII makes business necessity an affirmative defense,¹⁴² so the Court's analysis required some unacknowledged surgery on the United States Code. But the Court's

138. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

139. *Id.*

140. 129 S. Ct. at 2678 (noting and rejecting New Haven's assertion that the promotion test was not job related and consistent with business necessity).

141. Or, more broadly, perhaps the Court reallocated the burden not because of any particular sense it had about this case but because courts have been informally reallocating that burden as a matter of course for years, partly in response to the shift in incentives here described. *See Selmi, supra* note 125, at 749.

142. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating that a violation of Title VII is established when a statistically disparate impact is shown and "*the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity*") (emphasis added).

impulse to relocate the burden arises sensibly from its recognition that under current conditions, a municipal employer like New Haven might have incentives to engage in race-conscious decisionmaking beyond that which a court would order to remedy authentic disparate impact violations.

At the constitutional level, the Court's analysis would make even more sense. There is no textual assignment of burdens to rewrite. Within equal protection doctrine, courts routinely adopt standards that are sensitive to the question of how far a certain kind of party should be trusted with a particular decision. The whole system of tiers of scrutiny is an example.¹⁴³ So if it is sensible for courts to worry that large municipal employers will have political incentives to allocate public employment along racial and ethnic lines, it is sensible for them to give those employers close scrutiny in cases involving such employment, including cases where the employers might be using Title VII as cover. Within that framework, it makes sense for equal protection to be less tolerant of a public employer's race-conscious actions taken to comply with Title VII than of a court's race-conscious actions taken to enforce the same statute. On that institutional reading, Title VII's disparate impact doctrine is still constitutional, so long as it is implemented by courts. *Ricci* would mean only that employers cannot implement race-conscious remedies by themselves.

C. *The Visible-Victims Reading*

Even as colorblindness has become increasingly dominant as the metaphor guiding equal protection, center-right constitutional actors have often drawn a distinction between race-conscious measures that visibly burden specific innocent parties and race-conscious measures intended to improve the position of disadvantaged groups but whose costs are more diffuse.¹⁴⁴ Justice Kennedy is an important example. In *Parents Involved*, he wrote that school districts seeking racially integrated student bodies could pursue that end with formally race-neutral means, like choosing where to locate schools or how to draw district lines, even though school districts were not permitted to achieve the same end by overtly using the race of particular students as decisional criteria.¹⁴⁵ Another important example is former President George W. Bush. As governor of Texas, Bush approved a plan under which the University of Texas admitted all in-state undergraduate applicants who graduated in the top 10 percent of their high school classes.¹⁴⁶ The Ten Percent Plan was designed to secure substantial minority admission after a facially classificatory affirmative action program was struck down as a

143. See, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 146–47 (2001).

144. See Primus, *supra* note 14, at 539–44.

145. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

146. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 361 (2009).

violation of the Equal Protection Clause.¹⁴⁷ In a world where high schools are assigned on the basis of residence and people's places of residence are highly correlated with their racial backgrounds, taking students from every high school will predictably ensure racial diversity. When the Bush Administration's Justice Department urged the Supreme Court to disallow the University of Michigan's affirmative action plans, it pointed to the Ten Percent Plan as a model for better alternatives.¹⁴⁸

If all race-conscious government action were equally objectionable, Justice Kennedy's and President Bush's recommendations would be senseless. The Ten Percent Plan was adopted with the purpose of altering the racial allocation of social goods, and the school-siting or district-drawing measures that Justice Kennedy envisioned would be as well. But unlike the affirmative action plans of which Justice Kennedy and President Bush disapproved, these alternatives do not create visible victims. Obviously, if the Ten Percent Plan increases the proportion of African Americans who are admitted to the University of Texas, it also decreases the proportion of admittees from other racial groups. There are, in the end, losers. But it is harder to identify them, and their losses may therefore be less publicly salient and less likely to seem offensive to the ideals of individualism. To be sure, the degree to which these potential differences in salience and social meaning are realized depends on several fluid factors. Successful norm-entrepreneurs could, in principle, persuade the public that there is no moral difference between the two kinds of programs. But as a general matter, it has not worked out that way. At least at this point in history, many people who oppose classificatory affirmative action are comfortable with alternative measures that do not exclude identifiable innocent third parties, even though as a logical matter those alternatives must be excluding someone.

It is easy to think that this distinction should make no difference. If one believes that all race-conscious interventions are unacceptable, the distinction between policies creating identifiable victims and policies whose effects are more diffuse might seem unprincipled, perhaps maddeningly so.¹⁴⁹ From a different normative perspective, one might argue that broad public tolerance of measures like the Ten Percent Plan demonstrates the acceptability of race-conscious decisionmaking, such that more visible race-conscious interventions should be permitted as well.¹⁵⁰ Either of these views has analytic integrity. But whatever their appeal in terms of logical consistency or normative principle, equal protection doctrine has not to date endorsed either perspective. It may instead mediate between the two poles in roughly the way that Justice Kennedy and President Bush have articulated. The Supreme Court has not squarely upheld measures like the Ten Percent

147. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

148. Brief for the United States as Amicus Curiae Supporting Petitioner at 14–18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

149. See FRIEDMAN, *supra* note 146, at 340–41 (quoting activists who hold this view).

150. See, e.g., Ayres & Foster, *supra* note 24, at 518.

Plan, but important opinions from swing Justices have commended them more than once.¹⁵¹

The idea that equal protection should be concerned with visible victims is not merely a compromise. It has a logic. For in the end, the official doctrinal concerns of equal protection—that is, motive and form—sometimes fail to capture what is important in the realm of constitutional equality. From time to time, the Court comes up against those limits, acknowledges them, and considers also what a governmental practice *means*. Examples range from *Strauder v. West Virginia*¹⁵² and *Brown v. Board of Education*,¹⁵³ where the Court took note of the white-supremacist meanings of the laws at issue, to modern affirmative action cases where the Court worried that well-intentioned programs would feed racial stigma or teach people to think of themselves in racial terms.¹⁵⁴ To be sure, social meanings are multiple and contested, such that it is hard to operationalize a reliable doctrine that focuses on them directly.¹⁵⁵ But that just means that the issue is slippery, not that the concern is misplaced.

The concern that a practice marks a group as inferior is a concern about social meaning, as is the concern that the government sees people as members of racial groups rather than as individuals. These have been core matters of equal protection, and appropriately so. Equal protection aims to reduce the public salience of race.¹⁵⁶ When considering the constitutionality of a race-conscious intervention, it is therefore useful to ask whether the measure will reduce or exacerbate the racial divides within the American

151. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (plurality opinion).

152. 100 U.S. 303, 308 (1880) (describing the practice of excluding blacks from juries as “practically a brand upon them . . . an assertion of their inferiority”).

153. 347 U.S. 483, 494 (1954) (explaining that legal segregation was “usually interpreted as denoting the inferiority of the negro group”).

154. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228–29 (1995) (arguing that racial classifications, even when made with “good intentions,” raise equal protection problems because they will be perceived to rest on stigmatizing assumptions about the benefited groups); *id.* at 241 (Thomas, J., concurring in part and concurring in the judgment) (“So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority”); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (explaining that legal classifications by race “threaten to stigmatize individuals by reason of their membership in a racial group”); *Croson*, 488 U.S. at 493–94 (plurality opinion) (focusing on the danger of stigmatic harm resulting from racial classifications).

155. See, e.g., DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 295–303 (1996) (using public opinion data to demonstrate the divide between the ways that whites and blacks perceive the meanings of legal policies).

156. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (expressing the hope that race-conscious policies necessary in 2003 would not be necessary in the future); *Croson*, 488 U.S. at 495 (plurality opinion) (stating that equal protection should be construed so as to diminish the relevance of race in American life over time).

public.¹⁵⁷ Salience is a function of perceptions, and perceptions are affected by the meanings attached to visible practices. Reducing racial divides therefore calls for sensitivity not just to what is done or what is intended but what is publicly understood.

To be sure, there would be something odd about a doctrine on which a practice can be permitted as long as the damage it does is hidden. But treating differentially visible practices differently need not be about hiding the damage. It might be about reducing the damage, inasmuch as a large part of the harm that race-conscious interventions cause operates at the level of public social meaning. A person who does not get a promotion that he would have gotten but for the operation of a disparate impact remedy suffers practical disadvantage whether or not the race-conscious factor is publicly known. But if the race-conscious aspect is visible and given a divisive social meaning, the disparate impact remedy causes a further harm at the societal level. The problem is then not just the particular individual's loss of a promotion but the exacerbation of race as a source of tension and ill-feeling in the polity at large.

One predictable way for the race-conscious aspect of a governmental practice to acquire a divisive social meaning is for the practice to create visible victims. Visible victims lend themselves to easily understood narratives of injustice, as every good plaintiffs' lawyer knows. To be sure, some instances of race-conscious decisionmaking become publicly salient and carry divisive social meanings even in the absence of visible victims.¹⁵⁸ But the existence of visible victims greatly increases the probability that a race-conscious practice will become publicly salient and divisively so. Indeed, what happened in New Haven illustrates the enormous difference in social meanings that can attend the difference between race-conscious interventions that do not create visible victims and race-conscious interventions that do. The decision to discard the results of the fire department's promotion tests was animated by race-conscious motives—as was the design and administration of those tests in the first place. But only the decision to discard the results created an identifiable set of victims, and only that decision became divisive.

As the Supreme Court understood, New Haven's fire department tests were designed in a race-conscious process.¹⁵⁹ The city strove to create tests that would both identify qualified officers *and* allow the promotion of significant numbers of nonwhite firefighters. In this respect, the promotion

157. See Christopher L. Eisgruber, *Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan*, 50 VAND. L. REV. 347, 355–56 (1997).

158. The race-conscious electoral districting at issue in cases like *Shaw v. Reno*, 509 U.S. 630 (1993), may be an example: it is notoriously difficult to identify the determinate individual victims of such practices. See generally Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998). I thank Nathaniel Persily for pressing this point.

159. See, e.g., *Ricci*, 129 S. Ct. at 2678 (explaining that the municipal consultant entrusted with designing the test made sure that “minorities were overrepresented” among the people designing the test).

tests were racially conscious on the model of the Texas Ten Percent Plan. Unlike the Ten Percent Plan, New Haven's strategy failed: the tests did not produce the desired racial results. But the city's choice to use those particular tests likely affected *which* white firefighters scored well enough to be promoted. Had the test design process not been race-conscious, the tests would have asked a different set of questions, and the seventeen top scorers would probably not have been exactly the same people who earned the seventeen top scores under the tests that were actually administered. Quite straightforwardly, then, all the firefighters who might have been promoted under a test that had been designed with no race-consciousness at all but who did not score well enough to be promoted under the actual 2003 tests were disadvantaged by the race-conscious decision of a public actor. It is very hard, however, to know who those disadvantaged firefighters are. And in the absence of visible victims, the race-consciousness involved in designing the tests did not give rise to divisive social meanings about preferential treatment for members of minority groups, even though the tests were deliberately designed to foster a certain racial distribution of promotions.

Like most facts about the social meanings of particular events, this one is only contingently true. If norm-entrepreneurs had noticed and publicized the race-consciousness of New Haven's test design, they might have been able to persuade a public audience that the race-consciousness involved in the design of the tests constituted illegal discrimination. Whether they could in fact succeed in making the tests seem discriminatory would depend on complex and fluid aspects of the relevant public conversation. But the absence of visible victims—that is, of people whose disadvantage is already intuitively perceived by the public before the norm-entrepreneurs go to work—would make it more difficult to present the tests in a racially divisive light. And for now, even audiences suspicious of race-conscious decision-making tend to accept the kind of race-consciousness that informed the design of New Haven's tests. The *Ricci* plaintiffs and the Supreme Court both deemed respecting the results of those tests to be tantamount to judging applicants on their merits as individuals, not as implementing a system that was designed with racial considerations in mind.¹⁶⁰ As a matter of social meaning, the fact that the tests were designed to promote a certain racially calibrated outcome all but disappeared.

In contrast, the race-conscious aspect of New Haven's decision to discard the results of the test became enormously and divisively salient, and its creation of visible victims was an important part of the reason why. Scraping the test after it was administered and graded highlighted a specific set of innocent third parties at risk of being adversely affected. There was no need for norm-entrepreneurs interested in pushing public sensibilities farther

160. See *Ricci*, 129 S. Ct. at 2677 (characterizing each test-taker's interest in having the test results applied as originally planned as a "legitimate expectation not to be judged on the basis of race"); Petitioners' Brief on the Merits at 2, *Ricci*, 129 S. Ct. 2658 (No. 07-1428) ("Our Constitution envisions a society in which race does not matter and individuals are judged on the strength of their character."); *id.* at 3 ("Petitioners qualified for promotion under a race-blind, merit-selection process.").

toward colorblindness to re-educate an audience to make it see the city's decision as disadvantaging people on the basis of race. That work was already done: within the common sense of the day, the victims were identifiable, and their victimization occurred in plain view. As the Court put it, "the firefighters *saw* their efforts invalidated by the City in sole reliance upon race-based statistics."¹⁶¹ The language of sight may or may not have been intended to make this point, but the point is there: the publicly visible impact of New Haven's race-conscious decisionmaking was central to the ill feelings that surrounded the whole event. By the time the Supreme Court decided the case, the Sotomayor nomination had magnified that visibility even further, extending the audience nationwide. All in all, the storm around *Ricci* presented an object lesson in the divisive power of visible race-conscious interventions.

Perhaps not coincidentally, the standard judicial remedies for Title VII disparate impact violations all avoid creating visible third-party victims. Successful disparate impact plaintiffs can win forward-looking injunctive relief to end offending practices, but people who have already benefited from practices found to violate the disparate impact rule are never required to disgorge their benefits.¹⁶² No hirings or promotions are retrospectively undone. Disparate impact plaintiffs can also win backpay or other equitable monetary relief, but those remedies run only against the employer and not against innocent third parties.¹⁶³ All of this suggests that disparate impact doctrine is sensitive to the visible-victims concern. It alters the racial allocation of social goods, but in a relatively quiet and nondivisive way.

On a visible-victims reading of the *Ricci* premise, then, equal protection limits disparate impact remedies to those that do not disadvantage determinate and innocent third parties. To date, the standard judicial remedies for disparate impact violations have stayed within that limit. The facts of *Ricci* presented disparate impact doctrine more divisively, and on those facts the Court found a problem. But on the visible-victims reading, *Ricci* poses no threat to the normal operation of disparate impact doctrine as codified in Title VII.

* * *

The choice among these three readings of the *Ricci* premise will be enormously consequential for disparate impact law. If the general reading prevails, Title VII's disparate impact provisions will be constitutional only in the unlikely event that the Court concludes that the prohibition on disparate impact is narrowly tailored to a compelling state interest. But if the

161. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (2009) (emphasis added). From a different perspective, it is misleading to say that the city acted in "sole" reliance on race-based statistics. If one credits the city's account, it acted on race-based statistics in combination with its understanding of its legal obligations under federal statute. But this point may not affect what the firefighters "saw" from their own perspective.

162. See *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1315-16 (11th Cir. 1999) (explaining remedies).

163. See *id.*

Court settles on the institutional reading or the visible-victims reading, disparate impact doctrine will survive. To be sure, it may survive in a partly truncated form. On either the institutional reading or the visible-victims reading, public employers might not be permitted to invoke Title VII to suspend employment practices in midstream, even if those practices do in fact violate the disparate impact prong of Title VII. But such a limitation on disparate impact doctrine would be less far-reaching, both practically and symbolically, than a flat declaration of unconstitutionality.

III. COMPELLING INTERESTS

Within the domain of disparate impact doctrine’s equal protection problem—whether that turns out be all of disparate impact doctrine, employer-initiated remedies, or remedies with visible victims—a constitutional attack can be parried by showing that that the doctrine is narrowly tailored to a compelling governmental interest. In this Part, therefore, I consider two interests that might rise to the level of the compelling. One, which we can call the “evidentiary interest,” explains Title VII’s disparate impact provisions as a dragnet intended to identify hidden intentional discrimination. The other, which we can call the “compliance interest,” seeks to rescue state and local officials from situations where a tension between constitutional law and a federal statute threatens them with having to violate one or the other.

Given two potentially compelling interests and three readings of *Ricci*, there are in principle six possible states of the world to consider. One might ask, that is, whether the evidentiary interest or the compliance interest could underwrite a constitutional defense of disparate impact doctrine on each of the three understandings of the *Ricci* premise. For the sake of completeness, I sketch all six possibilities: the outcomes are schematically represented in the figure below. But only the sake of completeness justifies worrying about all six possibilities, much less worrying about all of them equally. In the end, the only scenario in which a compelling interest argument could affect the constitutionality of disparate impact doctrine is if *Ricci* is given its general reading and the constitutional defense on offer is based on the evidentiary interest.

		Reading of the <i>Ricci</i> Premise		
		General Reading	Institutional Reading	Visible-Victims Reading
Compelling Interest	Title VII as Evidentiary Dragnet	Yes	No (not narrowly tailored)	No (not narrowly tailored)
	Compliance with Federal Statute (limited time only)	Yes, for public employers	Yes, but hard to imagine	No (not narrowly tailored)

The other five scenarios fall away for varied reasons that I will gesture at here and then explain in greater depth in the coming pages. Briefly, the evidentiary interest cannot save disparate impact doctrine from a constitutional attack founded on either the institutional or the visible-victims reading of *Ricci*, and the basic reason why not is a matter of narrow tailoring. Even if the evidentiary interest is compelling, fulfilling that interest requires neither employer-initiated remedies nor remedies that burden determinate third parties. The compliance interest poses more intricate riddles when mapped onto the three readings of *Ricci*: sorting it all out could provoke squeals of glee from the doctrinally inclined.¹⁶⁴ But on the ground, none of that analysis will matter, or at least not for long, because the entire framework of the compliance interest comes with an expiration date. Even if it is accepted as compelling, the compliance interest can only shield state and local employers from constitutional liability while it remains unclear whether Title VII directs public employers to violate the Constitution. But that question will eventually be adjudicated. Once the Supreme Court announces that Title VII's disparate impact provisions either are or are not consistent with equal protection, the threat that complying with one of those sources of law would require the violation of the other will dissolve, and arguments based on the compliance interest will disappear with it.

In the long run, therefore, the only scenario in which compelling interest analysis might be important for the constitutionality of disparate impact doctrine involves the evidentiary interest and the general reading of *Ricci*. So that is where I now turn.

A. *The Evidentiary Interest*

As I have explained elsewhere, Title VII's disparate impact doctrine can be understood either as intended to redress self-perpetuating racial hierarchies inherited from the past or as an evidentiary dragnet intended to identify hidden intentional discrimination in the present.¹⁶⁵ On the evidentiary-dragnet view, an employment practice with a statistically disparate racial impact and that cannot be justified as a matter of business necessity supports an inference that the employer is discriminating intentionally. We presume that the employer has some reason for using its chosen employment practices, and if the reason is not a matter of the economic demands of the business, it is sensible to ask what ends are in fact being served—at

164. To sum up: On the general reading of *Ricci*, the compliance interest might underwrite a constitutional defense for public employers but not private ones. On the institutional reading of *Ricci*, the compliance interest might again offer a defense for public employers, but it is hard to imagine a court that is attracted to the institutional reading of *Ricci* also being willing to credit the idea that the compliance interest is compelling, because the two stances imply sharply different attitudes toward public employers. On the visible-victims reading, the compliance interest might fail narrow-tailoring analysis. See *infra* notes 179–181 and accompanying text.

165. Primus, *supra* note 14, at 520–21.

which point the disparate racial impact could be telling.¹⁶⁶ Viewing disparate impact doctrine as an evidentiary dragnet for intentional discrimination is less ambitious than viewing it as a device for redressing self-perpetuating racial hierarchies regardless of present ill intentions, and forgoing the more ambitious interpretation has costs.¹⁶⁷ But disparate impact doctrine is more likely to be justified by a compelling governmental interest if the more modest evidentiary interpretation prevails. Preventing intentional discrimination seems compelling as a consensus matter; the concern with inherited hierarchies lies within the domain of redressing “societal discrimination,” and the Court has held that interest not to be compelling.¹⁶⁸

The next question is whether Title VII’s disparate impact provisions are narrowly tailored to advancing the interest in ferreting out hidden intentional discrimination. Perhaps the most critical part of that question goes to whether narrow tailoring requires that *only* intentional discriminators be caught in the evidentiary dragnet. If so, the doctrine might not be narrowly tailored, because intentional discrimination is not the only explanation for an employer’s choice to use a non-business-justified practice with a disparate impact. Employer motivations are not wholly exhausted by the categories “economically necessary” and “racially invidious.” An employer might just be mistaken, and perhaps stubbornly so, about what is good for business: he cannot demonstrate the instrumental rationality of his selection criteria, but he believes that they are good for the bottom line, and he sticks to his guns at his own economic peril. Or perhaps his conduct gratifies a noneconomic preference about the running of his enterprise. But employers who act for reasons like these and whose employment practices have statistically disparate impacts on people of different races could be—officially, would be—liable under Title VII even if their motives amount to nothing like racial animus. Once the statistical showing of disparate impact is made, business necessity is the only statutorily recognized defense. In *Ricci*, Justice Scalia intimated that the absence of a general good-faith defense might undermine the characterization of disparate impact doctrine as an evidentiary dragnet.¹⁶⁹ To be sure, the absence of a good-faith exception does not indicate that disparate impact doctrine could be *largely* understood in evidentiary terms: cases in which nonintentional discriminators will be swept up in the net might be few. But the relevant issue here is one of narrow tailoring, and a relatively small margin of overinclusivity could defeat the statute’s claim to being narrowly tailored to the interest in identifying present intentional discrimination.

166. The same is true if the challenged practice has a disparate racial impact and is justified as a matter of business necessity but the plaintiffs demonstrate the existence of an alternative employment practice that is equally good at meeting the business’s economic needs and the employer refuses to adopt that alternative.

167. See Primus, *supra* note 14, at 520–21.

168. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–99 (1989) (rejecting the idea that an attempt to redress societal discrimination can rise to the level of compelling interest).

169. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (implying this view).

It is worth noting, however, that rejecting the evidentiary-dragnet picture of disparate impact doctrine on these grounds would privilege a largely ignored set of formal rules over the operational realities of Title VII. Out in the world, courts almost never impose disparate impact liability if they do not suspect something untoward about the defendant's motivations.¹⁷⁰ (*Ricci* itself treated New Haven's good faith in designing the fire department's promotion test as strong support for the proposition that the city would not have been held liable in a disparate impact suit.¹⁷¹) Invalidating disparate impact doctrine on the grounds that it does not recognize a good-faith defense thus has a heads-I-win, tails-you-lose quality: Title VII plaintiffs cannot in practice win disparate impact suits without raising credible inferences of employer bad faith, but the formal absence of a good-faith defense would ultimately shut the door on those plaintiffs entirely. A Court sensitive to the practice as well as the form of Title VII litigation might therefore see beyond disparate impact doctrine's official omission of a good-faith defense. In that case, the idea of disparate impact doctrine as an evidentiary dragnet for identifying hidden intentional discrimination might support the claim that Title VII's disparate impact provisions are narrowly tailored to a compelling government interest.

The foregoing analysis applies if the constitutional problem to be solved is the one indicated by the general reading of the *Ricci* premise: that is, that Title VII's disparate impact provisions are per se in tension with the requirements of equal protection. If the Court adopts one of the more limited readings of *Ricci*, a compelling interest argument based on the need for an evidentiary dragnet for intentional discrimination may be less on point.¹⁷² Consider first the status of the evidentiary-dragnet idea within a jurisprudence that follows the institutional reading of *Ricci*. The compelling interest in remedying hidden intentional discrimination may justify the existence of disparate impact doctrine, but there is no particular reason why it calls for employer-initiated remedies rather than judicial enforcement. Indeed, the premise of the institutional reading is that public employers might engage in intentional discrimination under the guise of compliance with disparate impact doctrine, so stressing the importance of preventing hidden intentional discrimination might make the Court *more* determined to prevent public employers from initiating disparate impact remedies on their own. Similarly, the evidentiary interest may be of little use if the Court reads *Ricci* in terms of visible victims. Once again, the need to prohibit hidden intentional discrimination may be sufficient to justify Title VII's inclusion of a disparate impact standard. But there is no specific reason why advancing that interest requires remedies than run against visible and innocent third parties.

170. Selmi, *supra* note 125, at 716, 768–69.

171. 129 S. Ct. at 2678–79.

172. That said, the lack of a compelling interest defense would be much less damaging to disparate impact doctrine if the Court adopts the institutional or visible-victims reading of *Ricci* than if the general reading prevails.

B. The Compliance Interest

Consider next the possibility that state and local officials have a compelling interest in complying with Title VII's disparate impact provisions simply because federal law requires them to do so. At first blush, this idea might seem like a nonstarter: as a general matter, statutory law cannot create defenses to constitutional claims. But in an analogous context under the Voting Right Act, seven of the now-sitting Justices have endorsed the idea of compliance with federal law as a compelling interest. The reasons for this exceptional possibility are rooted partly in the difference between federal and local governments and partly in the special status of a few federal statutes.

In *Bush v. Vera*, five Justices opined in dicta that state governments have a compelling interest in complying with section 2 of the Voting Rights Act.¹⁷³ In *League of United Latin American Citizens v. Perry (LULAC)*, the dicta of eight Justices endorsed the parallel proposition for the Voting Rights Act's section 5.¹⁷⁴ The reason in each instance was not that Congress has the authority to create compelling interests as a matter of legislative will. To say that would be to undermine the proposition, on which the Court insists, that Congress cannot unilaterally alter constitutional doctrine.¹⁷⁵ It is instead because the contrary holding might force state officials to choose between complying with the Voting Rights Act, which requires states to consider race when drawing electoral districts, and complying with the Fourteenth Amendment, which restricts the consideration of race. Saying that state governments have a compelling interest in complying with the Voting Rights Act rescues local officials from situations in which whatever they do might otherwise constitute illegal discrimination.¹⁷⁶

If state officials have a compelling interest in complying with the Voting Rights Act, they might also have a compelling interest in complying with Title VII. The two scenarios are alike in several respects. In each setting, there is a tension between the Fourteenth Amendment and a statute that requires state actors to engage in race-conscious behavior and, accordingly, a

173. *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *id.* at 1033 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.); *id.* at 1046 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.).

174. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., concurring in part and dissenting in part, joined by Breyer, J.); *League of United Latin Am. Citizens*, 548 U.S. at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *id.* at 518–19 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Roberts, C.J., Thomas & Alito, JJ.).

175. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act).

176. See *League of United Latin Am. Citizens*, 548 U.S. at 518–19 (Scalia, J., concurring in the judgment in part and dissenting in part) (explaining this rationale). For further discussion and some trenchant criticism of Justice Scalia's reasoning, see Nathaniel Persily, *Strict in Theory, Loopy in Fact*, 105 MICH. L. REV. FIRST IMPRESSIONS 43, 44–46 (2006). To date, no Supreme Court case squarely holds that compliance with a federal antidiscrimination statute constitutes a compelling interest for a state or local official. But the dicta of eight Justices—seven of them still sitting—seems a pretty good indication of how the Court would approach the question.

serious threat that state officials will be forced to violate either the statute or the Constitution. The dilemma is especially ugly because the subject matter is race, such that either violation exposes state officials not just to legal liability but to the opprobrium that attaches to people who are adjudged to be racial discriminators. Given these similarities, a Court willing to recognize a compelling state interest in complying with the Voting Rights Act might also recognize a state employer's compelling interest in complying with the disparate impact prong of Title VII. To be sure, differences between the two contexts might persuade the Court to deem the compliance interest compelling only with respect to the Voting Rights Act.¹⁷⁷ But it is plausible that the similarities would outweigh the differences.¹⁷⁸

If the compliance interest were deemed compelling, its capacity to underwrite a defense against equal protection claims would depend in part on which reading of *Ricci* is in play. As was true of the evidentiary interest, the compliance interest is most relevant if the Court adopts the general reading of *Ricci*. If the general reading prevails, the compliance interest would shield public employers¹⁷⁹ from constitutional liability for actions required

177. First, the tendency toward judicial abstention sometimes runs particularly strong in voting and election cases, and recognizing a compelling interest in compliance with the Voting Rights Act is a way of leaving more of that sphere to the ordering of other institutions. *See, e.g.*, Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615 (2009). There is no parallel rubric of extraordinary deference in employment law. Second, there is a long history of judicial skepticism toward Title VII's disparate impact doctrine that is not matched by anything in the history of the Voting Rights Act. Title VII as a whole may have a sacred status similar to that of the Voting Rights Act, but the disparate impact prong of Title VII has never much shared in that status. *See Selmi, supra* note 125. Recognizing a compelling interest in compliance with a statute that is widely regarded as sacred may be much easier than recognizing a compelling interest in compliance with a doctrine that many judges have at best tolerated for many years.

178. The Court in *Ricci* showed some sensitivity to the importance of giving employers some room to maneuver when facing a partly analogous compliance dilemma at the statutory level: *Ricci* holds that an employer must have a strong basis in evidence for believing that one of its practices violates Title VII's disparate impact doctrine before it can avail itself of an exception to disparate treatment doctrine, but it does not hold that the employer must actually have committed a disparate impact violation. *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009). That margin of difference reflects reluctance to subject public employers to situations in which a good faith desire to comply with antidiscrimination law will predictably lead to other antidiscrimination violations. Of course, the dilemmas are not fully analogous. One involves two pieces of a single statute, and the other involves a statute and the Constitution; one involves the fine line between two doctrines, and the other involves two doctrines that might actually demand conflicting behaviors.

179. The limitation to *public* employers here is simple at first glance, but on second look it invites a trip down a particularly dark doctrinal rabbit hole. Given that the entire possibility of a successful compelling interest defense based on the compliance dilemma is limited, it may not be worth readers' time and effort to work this puzzle through to the end. But for those who are so inclined, here we go. At one level, it would seem that public employers are the only employers who could avail themselves of a compliance-based compelling interest defense—or, indeed, of any compelling interest defense. Private employers, not being state actors, are not subject to constitutional claims, and a party that cannot be sued on a constitutional claim is not a party that can raise a constitutional defense, or even a party that would want to. But matters are not so simple. Imagine a case in which a private employer takes some action necessary to comply with Title VII's disparate impact doctrine and in consequence is sued for disparate treatment, also under Title VII. (That is, imagine a case just like *Ricci*, but with two variations: the employer is private rather than municipal, and the employer's action was uncontroversially required by Title VII's provisions on disparate impact.) The employer, citing *Ricci*, defends on the ground that an action required by Title VII's disparate impact provisions cannot be a violation of Title VII's prohibition on disparate treatment. In response, the

to comply with Title VII's disparate impact provisions. In principle, the same analysis might apply given the institutional reading of *Ricci*, but it is hard to imagine the Supreme Court's both adopting the institutional reading and deeming the compliance interest a compelling one. The institutional reading is founded on mistrust of public employers, so a Court that found the institutional reading persuasive might be disinclined to take exceptional doctrinal measures to give those public employers ways out of difficult situations. Finally, a Court that chose the visible-victims reading of *Ricci* might conclude that the interest in letting local officials escape a liability dilemma could not survive narrow tailoring analysis. Even in the more favorable voting rights context, nothing in existing law indicates that the Supreme Court would credit a compliance-interest defense if that compliance victimized visible and innocent third parties. The race-conscious measures that state and local governments must take under the Voting Rights Act generally avoid that result: drawing minority-favorable electoral districts is much like drawing race-conscious but facially neutral school districts, which Justice Kennedy in *Parents Involved* held up as potentially consistent with equal protection.¹⁸⁰ If compliance with the Voting Rights Act created visible victims, the Court might be less willing to let such compliance escape constitutional censure. And there is every reason to expect the Court to be less generous with Title VII's disparate impact doctrine than it is with the Voting Rights Act.¹⁸¹

All of the preceding analysis, however, is subject to two sharp and interrelated limitations, one about the kind of claim against which the compliance interest can be a defense and one about the time frame in which such a defense could be valid. First, even if the compliance interest were compelling enough to protect state officials from constitutional liability, it could not

plaintiff argues that the disparate impact provisions are unconstitutional. That move, if successful, would deny the private employer its proffered defense. So the private employer might choose to defend the constitutionality of the disparate impact provisions—or at least its own compliance with those provisions. At this point, one might be tempted to say that the private employer would be in the same position as a public employer making the compliance-interest argument and should be entitled to its protection on the same terms: the private employer, like a public one, faces a nasty dilemma, one in which a lack of clarity in the law forces him to choose between violating two different demands of antidiscrimination law. But the situation is not fully analogous. The idea that a public official's compliance interest rises to the level of the compelling is, after all, partly founded on special solicitude for public officials. In the end, the private employer's situation is no different from any situation in which uncertainty in the law makes it hard for some party to know how to escape liability. There are appropriate canons of construction to apply in such cases: concerns about lenity and notice and vagueness all come to mind. But to make all such cases involving constitutional law into sources of compelling interest arguments is to work an unnecessary universalization of an exceptional rule.

180. *Parents Involved in Cmty. Schs. v. Seattle Sch. District No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring).

181. The analysis above proceeds as if narrow tailoring is essentially a balancing test: the question is whether fulfilling the compelling interest is worth the required costs. To be sure, that is not the only way that narrow tailoring analysis operates: it also sometimes asks whether the measure taken is strictly required for achieving the end. The present narrow tailoring question would be harder, and more complex, on that model. But a court that read the *Ricci* premise in terms of visible victims would probably opt for the balancing model simply because of the strength of its concern that the cost of creating such victims was too great to justify a compelling interest argument.

protect Title VII's disparate impact provisions themselves from direct attack. The premise of recognizing a compelling interest in state compliance with Title VII is that the state should not be required to violate the Constitution as the price of abiding by a federal statute. That compelling interest is therefore only pertinent if the legal issue under consideration is whether a state has violated the Constitution by its statutory compliance. It does not bear on whether *Congress* violated the Constitution by passing the statute. Nor would it prevent a disparate impact *defendant*, public or private, from challenging the constitutionality of the provisions under which it was sued.

Perhaps the only scenario in which the compliance-dilemma argument could successfully protect a public employer, therefore, is during an interim period before the Court adjudicates the underlying question that it declined to reach in *Ricci*. That makes sense: the logic of the compliance argument is at its strongest precisely during such an interim period. Given uncertainty in the law, local officials fear both that following a federal law might be unconstitutional and that failure to do so might be garden-variety unlawful, such that they will be judged racial wrongdoers whatever they do. But once the underlying constitutional issue is clarified, the dilemma will dissolve. If disparate impact doctrine is upheld (e.g., because the evidentiary-dragnet argument passes the compelling interest test), local officials will know that they can comply with the statute. And if disparate impact doctrine is struck down, public employers will cease to worry about complying with it.

* * *

The two compelling interest arguments described above operate in different domains. Characterizing Title VII's disparate impact provisions as an evidentiary dragnet could save those provisions from wholesale invalidation in a world where the courts adopted the general reading of *Ricci*. The compliance interest could protect public officials from constitutional liability until such time as the Court's reading of *Ricci* becomes clear. All that said, nothing here changes the fact that compelling interest arguments are usually outside shots. And if no compelling interest argument succeeds in addressing the tension between equal protection and disparate impact, the future viability of the doctrine rests that much more heavily on the choice among the three readings of the *Ricci* premise.

IV. FRAMING THE NEXT CASE

Now that the question of disparate impact doctrine's constitutionality has come to the foreground, it may well be adjudicated in the next disparate impact case to reach the Supreme Court. If the Justices have already chosen among the three ways of reading *Ricci*, that next case will merely be an occasion for clarification. But it is more likely that the *Ricci* premise is, as of now, indeterminate. If so, the choice among its possible readings may be significantly driven by the facts of the case that presents the constitutional question.

Suppose that the next case arises when a group of black plaintiffs brings a solid Title VII disparate impact claim against an employer who appears relatively unsympathetic. Imagine, for example, that the employer has a history of bringing few black employees into positions of responsibility, or that pretrial discovery reveals racially insensitive attitudes among middle management, or that the employer had long known that the challenged practice was not justified by business necessity and had a badly adverse racial impact but had done nothing to find alternatives. If the district court found for the plaintiffs, it would probably enjoin continued use of the challenged practice. It might also award the plaintiffs other equitable relief like backpay. In other words, it would order remedies that run against the employer, who seems like a bad apple in any event. But the district court would not order any remedy that required white employees who benefited from the now-invalid practice to surrender their benefits, because Title VII authorizes no such form of relief. Going forward, the fact that the old practice would now be prohibited by judicial decree would predictably change the racial distribution of jobs (or promotions, or raises, or whatever else was at issue) in the relevant workplace in a way that would be, on net, more favorable to blacks than to whites. But it would not be known, when the case was litigated, which particular people's futures had been adversely affected. Title VII's visibility as a racially allocative mechanism would be relatively low.

On appeal to the Supreme Court, the employer could challenge the constitutionality of the statutory disparate impact provision under which it had been held liable. Visible or not, the employer would argue, the race-consciousness is there. Some members of the Court would likely agree. But as a whole, the Court might prefer a more cautious course. As recent experience suggests, the Justices may experience some reluctance to invalidate portions of flagship antidiscrimination laws, even when those laws seem constitutionally questionable under presently prevailing doctrine.¹⁸² So if the social meaning of disparate impact law in the litigated case permitted it, the Court might well decline to strike down a part of Title VII.

Doing so would require an explanation of how such a decision was consistent with *Ricci*. The answer, of course, would be that the *Ricci* premise should not be read for the most it might mean—that is, in accordance with the general reading. Instead, the *Ricci* premise would mean only that public employers cannot be the ones to institute race-conscious disparate impact remedies, or that disparate impact remedies may not disadvantage innocent third parties, or perhaps both. For a court to afford race-conscious relief that harms nobody but the wrongdoer is entirely in bounds. That is what happens when courts grant garden-variety disparate *treatment* relief, the Court might point out. And nobody believes disparate treatment doctrine to be constitutionally problematic.

182. See *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009) (upholding section 5 of the Voting Rights Act after showcasing powerful reasons for considering it unconstitutional).

Now suppose, however, that the next disparate impact case to reach the Supreme Court features visible victims. That would frame the social meaning of disparate impact law in a highly unfavorable light. If the facts of the case encouraged the Court to take a dim view of the doctrine generally, it might adopt the general reading of *Ricci*'s premise and hold Title VII's disparate impact provisions unconstitutional. (Whether it would do so because the Justices themselves were influenced by the social meaning of the facts, or because they tried to read and mirror a public perception, or whether some more complex dialectic would operate, is a subtle question that I do not propose to resolve here.¹⁸³) To be sure, a Court could in principle say "This case puts disparate impact doctrine in a bad light, but considered carefully it isn't so bad." But there are foreseeable circumstances under which it seems both easier and more likely for the Court to dispense with such careful parsing.

Suppose that a case arises that is just like *Ricci* except in two respects: the employer is a private corporation rather than a municipality, and the promotion test at issue would clearly support a disparate impact claim by minority employees. In other words, suppose a private employer gives a written promotion test that has a racially disparate impact and cannot be justified on the grounds of business necessity. After discovering the test's disparate racial impact, the employer suspends the process without promoting anyone. Several white employees who did well on the test then file suit, just as the *Ricci* plaintiffs did. But unlike the *Ricci* plaintiffs, the plaintiffs in this case could not bring an equal protection claim. The state action doctrine would exclude their employer, a private corporation, from the coverage of the Fourteenth Amendment.¹⁸⁴ The plaintiffs would therefore bring only a disparate treatment claim under Title VII. As in *Ricci*, considerations of social meaning would weigh heavily for granting relief. Once again, a group of visible, determinate, innocent employees who worked hard and played by the rules would stand to incur a loss as a result of an employer's race-conscious decisionmaking. But if Title VII's disparate impact provisions are valid, the Court could not grant relief on statutory disparate treatment grounds. As *Ricci* confirms, a set of facts that actually constitutes a Title VII disparate impact violation cannot be a violation of Title VII's prohibition on disparate treatment. It is, according to the *Ricci* premise, an exception to that prohibition.¹⁸⁵

The only way to grant relief for these plaintiffs, therefore, would be to bar the employer from defending on the grounds that his actions were required by Title VII disparate impact doctrine. And the most straightforward way to do that would be to hold the disparate impact doctrine unconstitutional. Given that the hypothesized defendant is a private corporation, only the general reading of *Ricci* would allow the Court to reach that conclusion.

183. I have tried to sort out such complexities in another place. Primus, *supra* note 32.

184. *See Civil Rights Cases*, 109 U.S. 3 (1883).

185. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009).

The institutional reading and the visible-victims reading both locate the constitutional violation in the particular actions of a defendant-employer, and a private employer cannot violate equal protection. Stripping the employer of its statutory defense to the plaintiffs' disparate treatment claim would therefore require the Court to adopt the general reading of *Ricci* and declare Title VII's disparate impact doctrine invalid across the board. Given the unfavorable light that the facts of such a case would cast on disparate impact doctrine, and given the Court's relatively unsympathetic attitude toward that doctrine in the first place, the Court in such a case would probably embrace the general reading of *Ricci* rather than conclude that these plaintiffs are simply out of luck.

All this means that Title VII now faces an ironic bind. Historically, Title VII policy has been to encourage voluntary employer compliance, rather than to have employers let the chips fall where they may and sort things out in ex post litigation.¹⁸⁶ It now turns out, however, that voluntary employer compliance is the greatest threat to disparate impact doctrine.¹⁸⁷ So long as employers do nothing and wait to be sued, disparate impact doctrine can probably continue, because cases in which the question of its constitutionality can arise will be limited to cases in which courts intervene ex post and order remedies that create no visible victims. But if employers try to fix disparate impact problems themselves, they risk creating facts on which disparate impact doctrine might seem intolerable. After *Ricci*, the best chance for disparate impact doctrine to survive is for employers to ignore it until they find themselves in court.

CONCLUSION

"The war between disparate impact and equal protection will be waged sooner or later," Justice Scalia has advised, "and it behooves us to begin thinking about how—and on what terms—to make peace between them."¹⁸⁸ I have pointed to three possible settlements. *Ricci* is compatible with any of the three. Which one becomes actual depends substantially on matters of framing: to keep to Justice Scalia's metaphor, victory in warfare often goes to the party who succeeds in maneuvering the fight to its chosen ground. And this Article's analysis suggests ample opportunities for strategic

186. See, e.g., *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986).

187. One might wonder whether the conclusion that voluntary compliance is the greatest threat to the doctrine's continued constitutionality is in tension with the possibility, discussed above, that compliance could be regarded as a compelling interest. It is not. The underlying dynamic here is the conflict between the desire to give public officials room to maneuver and the aversion to visible victims, and my assumption throughout is that the latter force is more powerful. Thus, I earlier concluded that the compliance interest probably could not succeed in underwriting a constitutional defense of a public employer whose compliance created visible victims, even if it might shield a public employer whose compliance avoided that result. See *supra* Section III.B. Here, I am similarly contending that compliance that produces visible victims might provoke a generally negative view of disparate impact doctrine.

188. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

behavior. Cause-oriented lawyers who seek the demise of the disparate impact doctrine should be looking for cases with visible victims. Their opposite numbers should try to have the constitutional question resolved in a case involving only a forward-looking judicial remedy, and preferably one where the defendant seems unsympathetic, before a less favorable vehicle can reach the Supreme Court.¹⁸⁹ To be sure, the choice of case might not completely determine the outcome any more than the choice of physical ground need completely determine a battle. But concerned parties are nonetheless well advised to do what they can.¹⁹⁰

It is worth noting that the Court could uphold disparate impact doctrine against constitutional challenge without having to choose between the institutional reading and the visible-victims reading of *Ricci*. So long as courts confine themselves to the traditional judicial remedies for Title VII disparate impact violations, they will not create third-party victims, because the traditional remedies run only against the offending employers. In effect, therefore, all of the considerations that argue for the visible-victims reading also argue for the institutional reading. Indeed, a court that was skittish about acknowledging the importance of visibility but was nonetheless persuaded that visible victims make a difference could have things both ways by adopting the institutional reading and saying nothing about the visibility concern. The benefits of the visible-victims reading would follow anyway. Such a strategy might be executed deliberately or subconsciously, which is to say that even a court adopting the institutional reading in good faith might be partly influenced by the fact that such a decision would eliminate the problem of visible victims from disparate impact cases.

The next disparate impact case to reach the Supreme Court is unlikely to be as squarely in the public eye as the last one was. Supreme Court nominations are rare, and the coincidence of a nominee's participation in a fraught and pending case is unlikely to be repeated. But to the smaller though still considerable audience that monitors constitutional law, either outcome on

189. One case still in litigation that might fit this bill is *United States v. City of New York*, 637 F. Supp. 2d 77, at 82–83 (E.D.N.Y. 2009) (granting summary judgment against the New York City Fire Department in a Title VII suit alleging that a written examination for selecting entry-level firefighters had an unlawfully disparate impact on black and Hispanic applicants). To be sure, the New York City Fire Department is in many ways a sympathetic litigant. But the facts of this case show the Department in a poor light. That the lawsuit was commenced by the Department of Justice under the Bush Administration suggests that the case lends itself to mainstream intuitions about improper discrimination.

190. The Justices themselves have substantial agency to choose the ground through the certiorari process. It follows that if the Court were a unified decisionmaker with a clear prior view of the constitutional question, other people's strategic behavior might be relatively unimportant. The Court would simply deny review of cases raising the issue in a posture unfavorable for reaching its desired result and wait for a better vehicle. But the process is not necessarily this simple, because the Court is composed of nine different decisionmakers who may see the issue differently. Some probably have already formed the view that Title VII's disparate impact doctrine should be held unconstitutional across the board, and some have probably already formed the view that the doctrine should be upheld, and others may be still working through the question. Given the Rule of Four for granting Supreme Court review, one could accordingly imagine four Justices with a clear view forcing their colleagues to confront the constitutional question in the setting most favorable for their own preferred perspective. Other permutations are also possible.

the question of disparate impact doctrine's constitutionality will be highly salient for years to come. From the perspective of the future looking back, what is at stake is whether disparate impact doctrine will represent a legislative commitment to redressing inequality or a perversion of fundamental values that was ultimately cured. How the future will understand this chapter of American law is very much an open question.