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Chapter Seventeen

Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact after Ricci and Inclusive Communities

Richard Primus*

Six years ago, Ricci v. DeStefano1 foregrounded the possibility that statutory disparate-impact standards like the one in Title VII might be on a collision course with the Fourteenth Amendment's Equal Protection Clause. For many observers, it was a radically new possibility. Until that point, disparate-impact doctrine had usually been understood as an ally of equal protection rather than as a potentially conflicting aspect of the law. But between the 1970s and the beginning of the present century, equal protection doctrine became more individualistic and less tolerant of race-conscious actions intended to redress inherited racial hierarchies. Those developments put equal protection in increasing tension with disparate-impact doctrine, which is reasonably understood as race-conscious and which takes groups rather than individuals as a basic unit of analysis.2 The Supreme Court officially ducked the possibility of a constitutional conflict in Ricci, but the fact of potential conflict—and, accordingly, the potential end of statutory disparate-impact standards in race-discrimination cases3—was brought squarely into view.

After Ricci was decided, I identified three possible readings of that decision and explained that the continued viability of disparate-impact doctrine depended on the choice among them. They are a general reading, an institutional reading, and a

* Theodore J. St. Antoine Collegiate Professor, The University of Michigan Law School. Portions of the argument presented here were originally published as part of The Future of Disparate Impact, 108. MICH. L. REV. 1341 (2010). For help with research, I thank Virginia Niesler and the staff of the University of Michigan Law Library. The work of writing this paper was supported by a grant from the Cook Endowment at the University of Michigan Law School.


3 Disparate impact cases sometimes involve discrimination on the basis of characteristics other than race, including sex and age. The analysis in this paper is most relevant to race cases. When I write in this paper about disparate-impact scenarios and do not specify the axis of discrimination, I mean to be referring to scenarios raising issues of disparate impact on the basis of race.

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visibility reading. According to the general reading, *Ricci* stood for the proposition that the actions necessary to remedy a disparate-impact violation are per se in conceptual conflict with the demands of equal protection. Disparate-impact doctrine is race conscious; equal protection requires racial neutrality; the two are not compatible. Several observers seem to have regarded the general reading as straightforward—from a variety of normative perspectives. And that reading would likely have been fatal for disparate-impact doctrine as applied to discrimination on the basis of race. But the general reading was not the only available reading of *Ricci*, and it was probably not the best reading, even at the time when *Ricci* was decided. Today, after the Court’s further decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the general seems even less likely to prevail. And if the general reading of *Ricci* will not carry the day, disparate-impact standards will survive. More particularly, it will survive in a form compatible with at least one of the other two possible readings of *Ricci*—the institutional reading and the visibility reading. So it pays to consider those readings in depth and in the further light that *Inclusive Communities* sheds.

The institutional reading of *Ricci* focuses on a difference between courts and public employers. On this view, the Court’s ruling in *Ricci* was predicated on the fact that the case presented a disparate-impact remedy imposed preemptively by a public employer rather than a disparate-impact claim adjudicated by a court. The institutional reading teaches that a municipal employer’s attempts to remedy its own potential disparate-impact violations are likely to violate equal protection not because all disparate-impact remedies are 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, and that task requires more leeway to take note of race than other

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4 I originally called the third reading the “visible-victims” reading. See Richard A. Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1369–74. In the time since I first developed the typology, however, I have realized that it is more accurate to use the label “visibility.” The key fact in this paradigm is visibility of the race-consciousness of a governmental intervention. Visible victims are important because innocent and identifiable victims lend themselves to catchy narratives of injustice that raise the visibility of the practices that victimize them. But the importance of victims is in this way derivative—as a step toward the thing that ultimately matters, which is visibility. With this improved understanding, I will here speak of a “visibility reading” of *Ricci* rather than a “visible-victims reading.” See generally Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) (“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”).


6 At the least, it would have subjected disparate-impact standards to strict scrutiny in such cases. In cases where the axis of discrimination was not race, it may only have subjected disparate-impact standards to some lesser degree of scrutiny, and disparate-impact liability would have had an accordingly greater chance of survival.


8 In the foreseeable term—a caveat that should be appended to all such predictions. I leave aside, *inter alia*, the possible effects of a change in the Court’s membership.
public officials have. (A requirement of complete judicial colorblindness would thoroughly undermine antidiscrimination law as we know it, because courts cannot assess garden-variety discrimination claims without knowing the race of the parties involved.) In contrast, 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. If Ricci 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 carefully when addressing potential disparate-impact problems that arise within their own institutions.

Third and last, there is a visibility reading. It holds that the problem in Ricci was not the race-consciousness of the defendant's decision per se but the fact that the decision disadvantaged determinate and visible innocent third parties, thus making the racially allocative aspect of the defendant's actions publicly salient. Ricci concerned a promotions process in the fire department of New Haven, Connecticut. One phase of the process involved a written test, and the test had a severely adverse statistical impact on African-American firefighters. When the city discovered that disparate impact, it nullified the results of the test and went back to the drawing board rather than completing the promotions process as originally advertised. That course of action created a group of determinate individuals who were stripped of their successful advance to the next stage of the promotions process—that is, the firefighters, all of them white, who scored well enough on the test to be eligible for promotions. 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.

Many people to both the left and the right of the Supreme Court—indeed, certain people at the left and 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. Conversely, if some race-conscious decisionmaking is permissible, its permissibility should not depend on its being kept secret. These objections have force. That said, the distinction between more and less visible race-conscious interventions is already present in equal protection case law, and it may well be defensible, or even wise.

9 One of these firefighters was identified in published reports as both white and Latino. See Primus, The Future of Disparate Impact, supra note 4, at 1342 n. 2.

10 For a more thorough discussion of the facts of Ricci, see Primus, The Future of Disparate Impact, supra note 4, at 1348.


And on a visibility model, 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.\textsuperscript{13}

The recent decision in \textit{Inclusive Communities} strongly suggests that the Court—or at least its median Justice—is not on board with the general reading. \textit{Inclusive Communities} arose under the Fair Housing Act\textsuperscript{14} rather than Title VII, but the underlying conceptual relationship between disparate-impact doctrine and equal protection is the same. The question presented in \textit{Inclusive Communities} was whether disparate impact is a cognizable theory of liability under the Fair Housing Act. Writing for a 5-4 majority, Justice Anthony Kennedy answered in the affirmative. As a formal matter, such a judgment about statutory meaning need say nothing about the constitutional permissibility of disparate-impact standards. But if Justice Kennedy took seriously the possibility that disparate-impact standards in race-discrimination cases are per se unconstitutional, he might well have avoided the constitutional conflict by construing the Fair Housing Act not to include a disparate-impact standard. Such a construction might or might not be the best interpretation of the statute, but it would have been plausible. The language of the Fair Housing Act does not mention disparate impact, and four Justices did conclude that disparate-impact actions should not lie under the statute. Moreover, construing the Fair Housing Act not to create liability for disparate impact would have been consistent with Justice Kennedy's approach to the interpretation of the Age Discrimination in Employment Act\textsuperscript{15} ("ADEA") in a substantially analogous case. In \textit{Smith v. City of Jackson}, Justice Kennedy joined Justice Sandra Day O'Connor's opinion concluding that the ADEA does not create a cause of action for employment practices that have disparate impacts based on age.\textsuperscript{16} The dissenters in \textit{Inclusive Communities} in several respects replayed arguments from Justice O'Connor's opinion in \textit{Smith}. In short, it would have been both easy on a blank slate and broadly in step with his own previously articulated views for Justice Kennedy to avoid a potential constitutional infirmity in the Fair Housing Act by reading that statute not to include a disparate-impact standard. His conclusion that the Fair Housing Act does make disparate impact actionable thus signals a lack of a concern about such a constitutional problem.

\textit{Inclusive Communities} might further suggest that the Court is more preoccupied with the issues animating the visibility reading than the issues animating the institutional reading. To be sure, one should not overread \textit{Inclusive Communities}. The case did not require the Court to grapple with the concerns of the institutional reading, because it did not involve a public agency's attempt to impose a

\begin{footnotesize}
\textsuperscript{13} See \textit{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.

\textsuperscript{14} 42 U.S.C. § 3601 et seq.

\textsuperscript{15} 29 U.S.C. § 621 et seq.

\end{footnotesize}
race-conscious remedy for its own disparate-impact violation. On the contrary, the public agency in the case—the Texas Department of Housing and Community Affairs—took the view that its challenged actions could not be actionable under a disparate-impact theory at all because, in its view, the Fair Housing Act lacked a disparate-impact standard. But for what it is worth, Justice Kennedy’s opinion for the Court had one interesting point of contact with the institutional reading’s paradigm, one that suggests that the Court is not focused on those issues. The opinion suggests greater concern with issues related to the visibility paradigm, in particular by going out of its way to warn against the overt use of racially classificatory remedies.

Part I of this paper describes the institutional reading of Ricci. Part II describes the visibility reading. In all likelihood, visibility is the more powerful paradigm for explaining and predicting the trajectory of the Court’s decisions. But the two frameworks are not mutually exclusive. The Court may well be motivated by each set of concerns as they pertinently arise.

I. The Institutional Reading

On the institutional reading of Ricci, courts may order race-conscious remedies for disparate-impact problems much as they did before Ricci. But public employers’ freedom to remedy disparate-impact problems after they occur is significantly constrained by the dictates of equal protection.

As a general matter, the requirements of a constitutional norm often vary with the role or the capacities of the particular institutions by which (or to which) the norm is applied. 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. Both institutions are authorized to enforce 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 by (or to) different institutional actors can be

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17 See, e.g., Inclusive Communities, 192 L.Ed.2d at 533.
18 See infra at Section II.
19 I specify public employers rather than employers generally because, given the state action requirement, only public employers can violate the Equal Protection Clause. To be sure, if a private employer’s efforts to cure a disparate impact problem would violate equal protection if that employer were public, then those same efforts might well violate Title VII’s prohibition on disparate treatment. But the concerns animating the institutional reading of Ricci are particular to public employers and may not carry over to private ones, for reasons that the main text in this Part should make obvious. So to the degree that the institutional reading captures the Court’s perspective, it may leave private employers more free than public employers to remedy their own disparate-impact problems.
described in terms of underenforcement, prophylaxis, judicially manageable standards, or simply as the way constitutional adjudication always works. However described, it is clear that constitutional norms often impose slightly different demands on different institutional actors.

It has long 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

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26 This term is worth unpacking. As the expression is usually used, a colorblind government is one that takes no notice of the color, and by implication the race, of the people it governs. In a more subtle way, however, the language of blindness is not a precise match for the view of equal protection as a ban on racial classifications. The idea of blindness suggests the inability to perceive some feature of the physical world that exists independent of the viewer. But race, unlike color, is not an objective physical phenomenon. It is an intersubjective phenomenon, the product of a shared set of meanings among a community of people who form their understandings under one another's influences, and the government's influence has long played a powerful role in the construction of race. See, e.g., David A. Hollinger, Post-Ethnic America: Beyond Multiculturalism 32–33 (1995) (describing legal rules that have shaped racial categories and designated the race of persons of mixed ancestry). See generally Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 YALE L.J. 109 (1998) (describing the processes by which trials have shaped racial boundaries). By invoking a paradigm of pure perception, the metaphor of colorblindness implies that race is something apprehended rather than constructed, thereby obscuring government's role in shaping racial categories in the first place.

This misleading feature of the term "colorblind" is not entirely incidental to the way it is used. Obviously race-conscious government actions are today more likely to be aimed at improving the position of historically oppressed groups than at exacerbating their disadvantage. Accordingly, the colorblindness imagery now functions mostly to impede efforts to dismantle old racial hierarchies. See, e.g., Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1284 (Thomas, J., dissenting) (invoking the colorblindness idea to argue against a legislative redistricting plan aimed at increasing African-American voting strength in Alabama) (2015); Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 134 S. Ct. 1623, 1648 (2014) (Scalia, J., concurring in the judgment) (invoking the colorblindness idea in support of a referendum banning affirmative action); Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) (using the colorblindness argument to oppose affirmative action); see also Randall Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327, 1334–37 (1986) (describing the anti-affirmative-action valence of the colorblindness argument). The choice to keep government out of active efforts to dismantle racial hierarchies seems more appropriate if those hierarchies are
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. If I walk into federal district court and 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.\(^{27}\) 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.\(^{28}\) 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 the court is 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.\(^{29}\)

Consider the contrast between courts and public universities that Justice Lewis Powell articulated in *Regents of the University of California v. Bakke*.\(^{30}\) In Justice Powell’s view, public universities’ place in the American constitutional scheme made it appropriate for those institutions to have some latitude in making race-conscious admissions decisions, if the universities’ purpose in paying attention to race was in furtherance of their distinctive educational missions.\(^{30}\)

\(^{27}\) 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, there is no serious account in caselaw of why constitutional law’s aversion to racial classifications 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. For a related discussion, see Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404 (2012).

\(^{28}\) Like everybody else, judges can have biases, and 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.


\(^{30}\) *See Bakke*, 438 U.S. at 311–15 (opinion of Powell, J).
Hence the diversity rationale for affirmative action in university admissions, as articulated by Justice Powell in Bakke and later endorsed by the Court in Grutter v. Bollinger. But Justice Powell also wrote that universities should not have similar latitude to pursue race-conscious admissions policies for the purpose of curing past discrimination, because universities are as an institutional matter poorly suited to make the kinds of findings about past conduct that must underlie such policies—at least in the absence of particular guidance from appropriate legislative, judicial, or administrative mandates.

Public employers, like public universities, have substantially less latitude than courts to craft race-conscious remedies for discrimination. Indeed, in the history of disparate impact law, public employers have been among the institutions least trusted to deal with race appropriately. 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. Second, courts have periodically granted disparate-impact relief against large municipal employers, especially in settings like police and fire departments. Such suits account for a large share of all successful disparate-impact claims. 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

32 See Bakke, 438 U.S. at 307–10 (opinion of Powell, J).
36 Selmi, supra note 33, at 756-57.
in the absence of formal discrimination or official discriminatory purposes. 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.

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. 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. In the pursuit of that new agenda, judicial compulsion was a valuable ally. Especially because disparate-impact liability need not entail a finding of purposeful discrimination, many cities were perfectly 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. Integrating the departments served the interests of local decisionmakers, and disparate-impact doctrine gave them the cover they needed to make it happen.

To the extent that this shift in 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 channeled this anxiety,

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37 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).

38 See Selmi, supra note 33, at 756.


40 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.

41 See Selmi, supra note 33, at 764.
offering an ugly tale of racial politics as the context in which to see the issue presented.42

One need not see the local officials who are inclined to go too far in the pursuit of minority hiring as illicitly motivated. 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.43 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.44 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 efficient and successful investigations.45 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 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—or, perhaps, an administrative body executing

43 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.
44 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)).
45 I thank Trevor Morrison for suggesting this example.
an investigatory or adjudicatory function.

As I have described in depth elsewhere, the Ricci Court departed in several ways from the normal mode of adjudicating disparate-impact cases under Title VII.46 One of the Court's most overt departures 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."47 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.48 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, giving the burden of proof to the employer enables that employer to let a weak claim succeed simply by declining to argue the business necessity defense.

In Ricci, a public employer that wanted to implement a race-conscious remedy for the disparate impact of the written tests it administered denied that those tests were required by business necessity.49 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 of New Haven would clearly not satisfy its burden to show business necessity if its position was that the tests were unnecessary. 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.50 The language of Title VII makes business necessity an affirmative defense,51 so the Court's analysis required some unacknowledged

48 Id.
49 129 S. Ct. at 2678 (noting and rejecting New Haven's assertion that the promotion test was not job related and consistent with business necessity).
50 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 33, at 749.
51 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
surgery on the United States Code. But the Court’s 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. 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, or perhaps also by other neutral adjudicators such as administrative agencies charged with combatting discrimination. Ricci would mean only that employers that discover that their practices have disparate racial impacts are less free to implement race-conscious remedies by themselves.

Inclusive Communities did not furnish an occasion for the Court to deal frontally with the institutional reading’s animating concerns. The case featured a state agency denying liability for actions alleged to have a disparate racial impact, not a state agency trying to implement a race-conscious remedy for an alleged or potential disparate-impact violation. So perhaps the wisest reading of Inclusive Communities would conclude that the case sheds little light on the viability or the importance of the institutional reading. That said, the Court’s opinion does make one relevant and noteworthy reference to the role of municipal decisionmakers. In its final paragraphs, in the name of assuring readers that a disparate-impact theory of liability under the Fair Housing Act would not create horrible difficulties for local officials, Justice Kennedy’s majority opinion notes that “many of our Nation’s largest cities—entities that are potential defendants in disparate-impact suits—have submitted an amicus brief in this case supporting disparate-impact liability under the FHA.”

Considered in light of the background described above, that sentence is curious.

practice is job related for the position in question and consistent with business necessity”) (emphasis added).

52 See, e.g., Larry D. Kramer, Foreword: We the Court, 115 HARV. L. REV. 4, 146-47 (2001).
53 Inclusive Communities, 192 L.Ed.2d at 540 (citing Brief for City of San Francisco et al. as Amici Curiae).
It seems to see the significance of the municipalities’ amicus brief in the following way: these municipalities are potential defendants in Fair Housing Act suits, and they do not oppose a disparate-impact standard under the Act, so the harm that such a standard might do must be limited. That line of reasoning makes sense on the assumption that defendants want to reduce their exposure to liability—an assumption that is probably warranted in most cases. But as noted above, many officials in the Nation’s large cities have been happy to be sued on disparate-impact theories, especially when the result is a negotiated consent decree that gives local officials judicial cover for racially integrative (or otherwise racially allocative) policies that might have been difficult to pursue without the overlay of judicial compulsion.

The point should not be overstated. Municipal incentives are not uniform, and getting sued can be nasty business. And there are a great many instances in which disparate-impact suits against public agencies are unwanted, as the example of Inclusive Communities demonstrates. Nevertheless, it is interesting that the Court presented a brief by twenty-one municipalities in favor of a disparate-impact standard under the Fair Housing Act as unproblematic evidence in favor of recognizing such a standard. If the Court were aware of and concerned about the dynamics underlying the institutional reading, one might expect the Justices to hesitate at the thought that where disparate-impact standards are concerned, the key interest of large municipal governments is the reduction of exposure to liability. Instead, the Justices might have wondered whether the amicus municipalities—the City of New Haven among them—might be interested in expanding disparate-impact liability, and in ways that might be at odds with equal protection.

Perhaps this passage in Inclusive Communities means little. Given the realities of amicus briefing at the Supreme Court, it is more than plausible that no Justice read the municipalities’ brief, even though five Justices signed an opinion citing it. (The Court’s opinion contains no indication of the substance of the argument in the amicus brief; it simply notes the fact that the amicus municipalities are on the side of a disparate-impact standard, which would be apparent even to a reader who looked at the front cover of the brief and declined to open it.) The passage may have been inserted merely as a debater’s point, a quick way to respond to arguments that recognizing disparate-impact liability under the Fair Housing Act would be devastating to local governments. But if nothing else, it suggests the limited salience to Justice Kennedy of the concern that local officials might

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54 The brief was filed on behalf of San Francisco, Atlanta, Baltimore, Boston, Birmingham (AL), Carrboro (NC), Chapel Hill, Columbia (SC), Dubuque, Durham, Flint, Los Angeles, Memphis, Miami, Miami Gardens, New Haven, New York City, Oakland, Philadelphia, Seattle, and Toledo and King County, Washington. To say the least, New Haven is not the only municipality on this list whose urban politics feature racial dynamics of a kind that would play into the institutional reading.

55 Inclusive Communities, 192 L.Ed.2d at 540.
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manipulate disparate-impact frameworks as cover for an unconstitutional politics of racial allocation. Presented with a case raising the issue squarely, as in Ricci, he might react. But if the problem is a bit offstage, it does not seem to command much attention.

II. The Visibility Reading

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 whose race-consciousness is broadly visible and race-conscious measures whose race-consciousness operates deeper in the background, thus reducing its salience to some real or imagined audience. Justice Kennedy is an important example. In Parents Involved in Community Schools v. Seattle School District No. 1, 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. 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. The Ten Percent Plan was designed to secure substantial minority admission after a facially classificatory affirmative action program was struck down as a violation of the Equal Protection Clause. 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.

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 the race-conscious aspects of these policies are not as visible on their surface as the race-conscious aspects of the

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56 See Primus, Equal Protection and Disparate Impact, supra note 2, at 539-44.
59 See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
policies at issue in *Grutter* and *Parents Involved*. A school-siting plan need not declare itself as racially motivated, even if it is, and the Ten Percent Plan is written and describable without any mention of race, even though it is thoroughly race-conscious in its purpose. Race influences the allocation of social goods in both paradigms, but at a remove. Obviously and intentionally, the Ten Percent Plan increases the proportion of African Americans who are admitted to the University of Texas, and it decreases the proportion of admittees from other racial groups. There are winners and losers in predictable racial patterns. Race influences the allocation of social goods in both paradigms, but at a remove. Obviously and intentionally, the Ten Percent Plan increases the proportion of African Americans who are admitted to the University of Texas, and it decreases the proportion of admittees from other racial groups. There are winners and losers in predictable racial patterns.

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, retail-level affirmative action are comfortable with race-conscious measures whose racial aspects are buried a bit deeper in the causal chain.

It is easy to think it senseless for people to commend one of these types of policies while condemning the other. If one believes that all race-conscious interventions are unacceptable, the distinction between policies whose racial aspects are obvious and policies whose racial aspects are just as integral but not as publicly salient might seem unprincipled, perhaps maddeningly so. 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. 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

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62 Justice Ruth Bader Ginsburg has memorably written that, “only an ostrich could regard the supposedly neutral alternatives as race unconscious.” See Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting).
President Bush have articulated. The Supreme Court has not squarely upheld measures like the Ten Percent Plan, but important opinions from swing Justices have commended them more than once.63

Indeed, the difference between more and less visible uses of race often seems meaningful to relevant audiences even when the allocative consequences of the second kind of race-conscious measure are as great as, or greater than, those of more forthright kinds of affirmative action. Consider a telling feature of Fisher v. University of Texas at Austin,64 now pending before the Supreme Court. The University of Texas uses two separate systems to admit its undergraduate class. One, which by law must fill at least seventy-five percent of the seats available to in-state applicants, is the Ten Percent Plan.65 The other process, called the holistic review program,66 fills the remaining seats. Holistic review considers more or less the same broad range of factors that most selective colleges consider: high school records, test scores, letters of recommendation, essays, and a variety of other information that might reflect applicants' academic and personal capacities, including (or as well as) demographic information such as race.67 Abigail Fisher, the plaintiff in Fisher v. Texas, graduated from a Texas high school but not within the top ten percent of her class. She applied for admission, was considered under the holistic review process, and was rejected. Her suit challenges the use of race within the holistic review process, but it raises no challenge to the Ten Percent Plan.68 Indeed, Fisher's argument against the constitutionality of affirmative action in the holistic review process assumes the continued operation of the Ten Percent Plan. To boil it down, she argues that University's compelling interest in enrolling a racially diverse student body (recognized in Grutter) does not require (and therefore does not authorize) the use of affirmative action within holistic

65 The plan as it now operates has been modified in a way that makes its popular name atavistic: the University still admits the top graduates of every Texas high school class, but "top" no longer means "top ten percent." Instead, the cutoff percentile varies a bit from year to year, depending on the University's calculation as to what cutoff will cause the process to fill 75% of the incoming class. See Texas Education Code, Title 3, § 51.803(a-1) (2013). Nonetheless, the Ten Percent label has stuck.
66 See Fisher v. University of Texas at Austin, 758 F.3d 633, 637 (5th Cir. 2014).
67 The University introduced holistic review as an adjunct to the Ten Percent Plan after the Supreme Court's decision in Grutter nullified the prior lower-court ruling barring the University from considering race in undergraduate admissions. The use of race in holistic review is not in all respects identical to its use in the Michigan Law School system upheld in Grutter, but it was designed to be defensible under Grutter.
68 See Fisher v. University of Texas at Austin, 758 F.3d 633, 633-37 (5th Cir. 2014).
review, because the Ten Percent Plan admits enough nonwhite students to make the University racially diverse.69

The plaintiff's argument in *Fisher* is plausible, as are various counterarguments. But for present purposes, what matters is not how the Court should resolve that important contest. Instead, what is instructive here is that Fisher is challenging a facially classificatory affirmative action program that was almost certainly *not* the cause of her being rejected by the University of Texas, and she is *not* challenging a race-conscious program—the Ten Percent Plan—that may well have been a but-for cause of her rejection.

Given the relative strength (or weakness) of her application within the applicant pool, Abigail Fisher would not have been admitted to the University of Texas through holistic review even if the University had not considered race within that process—assuming, of course, that all other aspects of the admissions process were held constant.70 Fisher was not eligible for admission under the Ten Percent Plan, because she did not graduate within the top ten percent of her high school class. She was therefore considered under the holistic review process. That process is selective: it takes a strong candidate to succeed, and Fisher's application was not strong enough. Nor was her application strong enough to have succeeded if the holistic review process had been race-blind, nor even if she had been black or Latino and gotten a bump up for her racial background.71

But the stringency of the quality standard within holistic review is a function of the Ten Percent Plan. An admissions standard responds to the law of supply: the more seats there are available, the easier it is to get in. The Ten Percent Plan thus raises the bar for all applicants not graduating in the top ten percent of their classes, because it ensures that such applicants are competing for many fewer seats than would be available in a world without the Ten Percent Plan. (In the year when Fisher applied, the Ten Percent Plan accounted for 81% of all in-state admissions, leaving all Texas high school graduates not graduating in the top ten percent of their high school graduates to compete for just 19% of the seats.)72 Were there no Ten Percent Plan, an applicant in Fisher's position would confront a much less forbidding path to admission.

The Ten Percent Plan is quite clearly motivated by a race-conscious purpose. It aims to (and actually does) increase the enrollment of black and Latino students. That necessarily entails a reduction in the enrollment of applicants from other racial backgrounds—in practice, white applicants like Fisher and also Asian applicants. And yet Fisher attacks the holistic review process rather than the Ten

69 See *Fisher*, 758 F.3d 633 (5th Cir. 2014).
70 See *Fisher v. University of Texas at Austin*, 758 F.3d 633, 637-38 (5th Cir. 2014). The Fifth Circuit nonetheless held that Fisher nonetheless has standing to pursue her claim. *Id.* at 639-40.
71 *Id.* at 639.
72 *Id.* at 650.
Percent Plan. The race-conscious policy she asks the courts to invalidate is the one that was factually inconsequential for her but within which the racial aspect is explicit, rather than the more consequential measure where the racial aspect lies below the surface.

The idea that equal protection should respond to what is visible about a government practice is not merely a compromise or a failure to reason. It has a logic. Visibility drives social meaning; what a practice means to some audience depends on what the audience perceives about the practice. Officially, of course, the doctrinal concerns of equal protection are about purpose and form, not about social meaning. Governmental practices are treated as suspect if their have discriminatory purposes or if they classify in disfavored ways. But in the end, these official concerns 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* and *Brown v. Board of Education*, 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. Social meanings are often multiple and contested,

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74 See, e.g., *Adarand v. Pena*, 515 U.S. 200 (1995) (holding that all governmental uses of express racial classifications trigger strict scrutiny). What constitutes an "express racial classification" is sometimes less clear than doctrine officially lets on. See Primus, *Equal Protection and Disparate Impact*, supra note 2, at 502-15 (2003) (showing that "express racial classification" is a term of art, or a legal judgment rather than a merely factual one, because judicial determinations that particular practices do or do not make use of express racial classifications are themselves often parasitic on implicit normative judgments about the propriety of the practices at issue).

75 100 U.S. 303, 308 (1880) (describing the practice of excluding blacks from juries as "practically a brand upon them . . . an assertion of their inferiority").

76 347 U.S. 483, 494 (1954) (explaining that legal segregation was "usually interpreted as denoting the inferiority of the negro group").

77 *Adarand Constructors, Inc. v. Pena*, 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 inferiority 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).
such that it is hard to operationalize a reliable doctrine that focuses on them directly. But that 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 concerns have been core matters of equal protection, and appropriately so. Equal protection aims to reduce the public salience of race. When considering the constitutionality of a race-conscious policy, it is therefore useful to ask whether the measure will reduce or exacerbate racial divides within the American public. 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 then is 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.

The Texas Legislature seems to understand that publicly accessible meaning is an important factor in the acceptability, vel non, of a race-conscious policy. In an attempt to limit the salience of the Ten Percent Plan, it has adopted a remarkable rule limiting communication about that policy. In 2009, when the Legislature

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78 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).

79 See, e.g., Inclusive Communities, 192 L.Ed.2d at 539 (speaking of the Nation's "quest to reduce the salience of race in our social and economic system"); id. at 538-39 ("Difficult questions might arise if disparate-impact liability under the FHA clause race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them."); 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).

80 For the development of one important version of this idea, see Reva Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 YALE L.J. 1278 (2011).
authorized the current two-track admissions system, the Legislature also barred
the University from mentioning the Ten Percent Plan in rejection letters sent to
applicants considered under holistic review. This gag rule is a bit Orwellian, but
it has a clear rationale. In a world where roughly four-fifths of all the entering
places at the University of Texas are filled through the Ten Percent Plan, large
numbers of applicants from affluent suburban high schools will be rejected. Many
such students were also rejected before the Ten Percent Plan, of course, but the
Ten Percent Plan drives the proportion much higher. These rejections could easily
provoke anger among the parents of those applicants, many of whom are University alumni, otherwise well-connected in their communities, or both. One
can easily imagine admissions officers in Austin deciding to parry “How-could­
you-reject-my-kid” complaints by explaining, as a general matter, that the issue
was largely out of their hands and in any event that rejection is no ill reflection on
an applicant. Given the Ten Percent Plan, the letter would say, it’s just crazy hard
to get into UT Austin, and we’re sorry not to be able to accept so many excellent
candidates.

But once one imagines admissions officers taking that step, it’s just as easy to
imagine the step that comes next. A letter explaining that such an applicant’s
rejection is a function of—the fault of—the Ten Percent Plan practically invites
white suburban parents across the state to demonize that plan, which is keeping
their kids out of UT. White suburban outrage makes things hot for state
legislatures. And when the legislation outraging white suburban parents is
motivated by a racially allocative purpose, it is only a matter of time—and not
much time—before the political reaction is racialized. “The Legislature is taking
the University away from kids like ours and giving it to black and Latino kids with
lower test scores.” Presumably and understandably, the Legislature wanted to
forestall that conversation, or at least to keep the volume as low as possible. In
short, the political viability of the Ten Percent Plan depends substantially on
preventing its racial aspect from becoming its most socially salient feature.

Noticing the importance of how the Ten Percent Plan is framed (or hidden) at
the moment of an applicant’s rejection suggests a larger point about the visibility
of the race-conscious aspects of government actions. Specifically, one predictable

81 Prior to 2009, there was no limit on the proportion of seats in an incoming class that could be
filled through the Ten Percent Plan. Since 2009, the University has been authorized to cap admission
under that plan at 75% of the incoming class. See Texas Education Code, Title 3, § 51.803(a-1)
(2013).
82 See Texas Education Code, Title 3, § 51.803(i) (2013) (“If [the University] denies admission
to an applicant . . . in any letter or other communication the institution provides to the applicant
notifying the applicant of that denial, the institution may not reference the provisions of this section,
including using a description of a provision of this section such as the top 10 percent automatic
admissions law, as a reason the institution is unable to offer admission[.]”).
83 The University does not consider legacy status in its admissions process. See Texas Education
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. But the existence of visible victims greatly increases the probability that a race-conscious practice will become publicly salient and divisively so.

The facts of *Ricci* illustrated 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. As became famous, New Haven’s decision to discard the results of the fire department’s promotion tests was animated by race-conscious motives. What is less famous is that the original design and administration of those tests was also thoroughly race-conscious. But only the decision to discard the results created an identifiable set of victims, and only that decision became divisive.

As the Supreme Court in *Ricci* understood, New Haven’s fire department tests were designed in a race-conscious process. 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 tests were racially conscious on the model of the Texas Ten Percent Plan. Unlike the Ten Percent Plan, New Haven’s strategy failed to produce the desired racial allocation among the pool of successful applicants. But the city’s choice of test 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, all the firefighters who might have been promoted under a test that had been designed with no race-consciousness 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 government actions intended to allocate

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84 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.

85 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).
social goods on the basis of race, 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 was illegal. Whether they could succeed in making the test-design process 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 decisionmaking 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.86 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. Scrapping the test after it was administered and graded highlighted a specific set of innocent firefighters at risk of being adversely affected. There was no need for norm-entrepreneurs interested in pushing public sensibilities farther toward colorblindness in government 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.”87 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

86 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.”).

87 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.
ill feeling that surrounded the whole event. By the time the Supreme Court decided the case, one of the circuit judges who had sustained New Haven’s actions below—then-Judge Sonia Sotomayor—had been nominated to the Supreme Court. Her nomination and confirmation hearings raised the affair’s 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.

In the most recent Supreme Court Term, *Inclusive Communities* again sounded the basic concerns of the visibility paradigm as they apply to disparate-impact standards. Justice Kennedy’s majority opinion spoke of the danger that a system of disparate-impact liability, if not properly limited, might “tend to perpetuate race-based considerations rather than move beyond them.”88 To prevent that scenario, “Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”89 And in those cases where courts do find disparate-impact liability, they must strive to design remedies that “eliminate racial disparities through race-neutral means” rather than through the use of “racial targets or quotas[.]”90 Otherwise, the disparate-impact standard “would set our Nation back in its quest to reduce the salience of race in our social and economic system.”91

Fortunately, and perhaps not coincidentally, the standard judicial remedies for statutory disparate-impact violations are sensitive to the concern with visibility. They avoid creating the sort of identifiable and concretely injured third-party victims whose narratives might raise the salience of a race-conscious governmental intervention. 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.92 No hirings or promotions are retrospectively undone. Disparate-impact plaintiffs under Title VII can win backpay or other equitable monetary relief, but those remedies run only against employers and not against innocent third parties.93 Nor, outside the context of consent decrees, do judicially imposed disparate-impact remedies make use of racial targets or quotas, as Justice Kennedy cautions they ought not to do—and the use of such remedies even within consent decrees is already largely a thing of the past. All of this suggests that disparate-impact doctrine is sensitive to the visibility concern. It alters the racial

88 *Inclusive Communities*, 192 L.Ed.2d at 539.
89 Id.
90 Id.
91 Id.
92 See *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1315-16 (11th Cir. 1999) (explaining remedies).
93 Id.
allocation of social goods, but in a relatively quiet and nondisitive way.

On a visibility reading of the caselaw, then, equal protection limits disparate-impact remedies to those that minimize the visibility of their own race-consciousness—including, perhaps crucially, by avoiding the imposition of concrete costs on 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 visibility reading, *Ricci* poses no threat to the normal operation of disparate-impact doctrine as codified in Title VII. And *Inclusive Communities* suggests that visibility, rather than any paradigm more threatening to disparate-impact doctrine, is indeed the animating concern.

**Conclusion**

*Inclusive Communities* indicates that the most wooden reading of *Ricci*—what I called the general reading—does not seem likely to be animating the Supreme Court’s sense of the relationship between constitutional equal protection and statutory disparate-impact standards. The institutional and visibility readings of *Ricci* are better guides, both for explaining what the Court has done and for thinking about how future problems will be analyzed. As a result, statutory disparate-impact standards like those in Title VII and the Fair Housing Act will survive, leaving aside as always the question of how changes in the composition of the Court might alter future doctrine.

That said, statutory disparate-impact standards will survive in partly truncated form, as compared to what they once were. On either the institutional reading or the visibility 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. In the Fair Housing context, *Inclusive Communities* repeatedly suggests a vision of disparate-impact analysis that will make it very hard for plaintiffs to win cases—not that it has been easy up until now.\(^4\) Still, these limitations are less far-reaching, both practically and symbolically, than a flat declaration of unconstitutionality would be. How these limitations bear in practice will only become clear through the adjudication of the next round of disparate-impact cases—adjudication that may well take place on a doctrinal landscape where the Court’s concerns with visibility in equal protection are re-presented, in ways that cannot be completely foreseen, in the forthcoming decision in *Fisher*.

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\(^4\) For example, *Inclusive Communities* suggests that a defendant in a disparate-impact case under the Fair Housing Act can escape liability by showing that the challenged practice was motivated by “a legitimate rationale.” *Inclusive Communities*, 192 L.Ed.2d at 527. What the threshold for deeming a rationale to be legitimate might be is something that cannot be known for certain in the advance of further litigation, but the formulation sounds less demanding than the parallel formulation under Title VII, which uses the language of “business necessity.” See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).