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Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality

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HARVESTING NEW CONCEPTIONS OF EQUALITY: OPPORTUNITY, RESULTS, AND NEUTRALITY

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INTRODUCTION

Only two years after the plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,[1] in which Justice Kennedy's concurring opinion endorsed the very limited use of race in school integration cases under the Fourteenth Amendment,[2] the Court's opinion in *Ricci v. DeStefano*[3] transplants Fourteenth Amendment colorblind tenets[4] into Title VII jurisprudence.[5] Just as the *Washington v. Davis* intent requirement[6] sets a nearly insurmountable barrier to proof in Fourteenth Amendment discrimination cases,[7] so too does the Court's novel "strong basis in evidence"

1. 551 U.S. 701 (2007). A Louisville case, *McFarland v. Jefferson County Board of Education*, was consolidated with the Seattle case. 416 F.3d 513 (6th Cir. 2005).

2. *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring in part and concurring in the judgment) ("[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

3. 129 S. Ct. 2658 (2009).

4. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

5. 42 U.S.C. §§ 2000e–e-17 (2006) (prohibiting discrimination based on race, color, national origin, sex and religion); *see Ricci*, 129 S. Ct. at 2675 (noting that the Court's equal protection cases "can provide helpful guidance in this statutory [TitleVII] context").

6. 426 U.S. 229, 242 (1976) (finding discriminatory impact, standing alone, is not enough to establish a constitutionally cognizable Equal Protection claim).

7. *See* Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 242–43 (1997); Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 402–03 (1994).

presumption set forth in *Ricci*.[8] For under either evidentiary standard, proof must be nearly conclusive that the discriminatory perpetrator intended to discriminate.

Under the Fourteenth Amendment, disproportionate impact is alone insufficient to establish an equal protection claim;[9] likewise, mere fear of litigation is insufficient to sustain an employer's assertion of voluntary compliance with Title VII.[10] Doctrinally, the Court is one short step away from merging the Fourteenth Amendment and Title VII into an insurmountable, post-racial standard of proof in discrimination cases.[11]

There is a central tension in the Court's Equal Protection and Title VII jurisprudence between equality of opportunity and equality in results.[12] The Court's entire body of race jurisprudence is a series of piecemeal, incremental compromises to constitutionalize or codify "opportunity" (mere access) with little or no regard for substance.[13] Substantive equality is effectively ignored because the Court emphasizes process values over transformative equality.[14] While this was certainly true in reference to the Rehnquist Court's race jurisprudence, where Justice O'Connor wrote seminal opinions advocating diversity as a process value,[15] rejecting the significance of the present day

8. *See Ricci*, 129 S. Ct. at 2675–77.

9. *See generally* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 955 (1989) (noting that "*Plessy* adopted the narrowest possible interpretation of the Reconstruction understanding, and *Washington v Davis* adopted the narrowest plausible interpretation of *Brown*"); Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 845 n.100 (2008) ("In reverse discrimination cases, that is, cases where the claim is centered on a burden on white interests, the *Washington v. Davis* intent requirement is conspicuously absent—disproportionate impact is enough."). This means that reverse discrimination claims are privileged by the Court, while claims advanced by people of color are uniformly rejected because either there is no "proof" of discrimination or the burden on white interests cannot be justified in a race-neutral manner. *See* Powell, *supra*, at 845 n.100; Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 30 (2005) ("While whites and men who challenge remedial usages of gender and race receive heightened judicial scrutiny of their discrimination claims, women and persons of color who seek judicial solicitude, but who lack proof of specific intent, or the elusive 'smoking gun,' only receive rational basis review." (footnotes omitted)).

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

11. *See id.* at 2683 (Scalia, J., concurring) ("But the 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.").

12. Cedric Merlin Powell, Hopwood: Bakke II *and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811, 857 (1999).

13. *Id.* at 933.

14. *Id.* at 859.

15. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

effects of past discrimination[16] and systemic societal discrimination, the Roberts Court has gone even farther in promoting this contrived "choice" between race neutral opportunity and race-conscious results. Justice O'Connor's opinions at least acknowledge race, although in decidedly narrow terms.[17] There has been a marked doctrinal shift with Justice O'Connor's retirement and the ascendance of the Roberts Court. While the Court has never been enthusiastic about race-conscious remedial approaches to eradicate inequality, the Roberts Court has advanced a neutral approach rooted in liberal individualism and post-racialism.

Parents Involved and *Ricci* graphically illustrate this shift. These decisions start from the premise that discrimination no longer exists, or, if it does, it must be identified with exacting particularity.[18] For example, in *Parents Involved*, since the City of Louisville had been released from a consent decree in 2000,[19] and Seattle never had a history of *de jure* segregated schools,[20] the Court held that both school assignment plans violated the Fourteenth Amendment's colorblind mandate because race was purportedly a predominant factor in school assignment decisions.[21] Since there were no state-mandated segregated school systems in Louisville and Seattle, race-conscious remedies were constitutionally suspect.[22] Diversity cannot be pursued at the cost of individual choice to attend neighborhood schools. This is essentially the tenet that the Constitution guarantees equal opportunity, not equal results. This fits squarely within liberal individualism—opportunity is available to all individuals, and the Constitution protects individuals, not racial groups. This blindly optimistic view obscures the present day effects of past discrimination. It also displaces

16. *See, e.g.*, Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 270, 284 (1986) (invalidating a race-based layoff system agreed upon by the Jackson, Michigan Board of Education and the teacher's union and ignoring the fact that African-American teachers in the system were consistently the last hired and first fired); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–500 (1989) (concluding that amorphous societal discrimination is not constitutionally actionable and applying strict scrutiny to invalidate a minority business enterprise program); Adarand Constuctors, Inc. v. Peña, 515 U.S. 200, 204–10, 227 (1995) (invalidating a federal disadvantaged business enterprise program and concluding that strict scrutiny applied to local, state, and federal race-conscious initiatives).

17. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

18. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711 (2007); Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

19. 551 U.S. at 715–16.

20. *Id.* at 712.

21. *Id.* at 782 (Thomas, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

22. *Id.* at 748.

valid political decisions made by the community to embrace diversity and substantive equality.[23]

In *Ricci*, the Court constructed, out of whole cloth, a new evidentiary standard for Title VII cases: there must be a strong basis in evidence that a disparate impact claim will be initiated against a public employer seeking to avoid such liability by decertifying the results of a promotion test for firefighters.[24] The Court concluded that the city engaged in disparate treatment (intentional discrimination) of the white and Latino firefighters who expected to be promoted based on the results of the exam.[25] The fact that the exam disproportionately impacted African-American firefighters [26] was irrelevant to the Court because the Constitution (and by extension Title VII) does not guarantee equal results.[27] Instead, the Court viewed the city's efforts to avoid

23. Professor Spann explains that:

> There is no credible argument that either the text or the original intent of the Constitution requires the Supreme Court to invalidate integration programs that are *voluntarily* adopted by politically accountable, white majoritarian, government policymaking officials. And as a matter of relative institutional competence, there is simply no reason whatsoever to believe that an institution with the racial track record of the Supreme Court is better able than a legislature or school board to decide whether primary and secondary school integration is in the best interests of a pluralistic, multicultural society.

Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 628 (2008) (emphasis added). In this sense, the very legitimacy of the Court's decision in *Parents Involved* can be questioned. *See id*. at 623–27. It should be noted that there are times when the legislature itself is ill-suited to deal with the problems underlying school integration. Recently, a bill was introduced in the Kentucky Senate, captioned Senate Bill 3 ("SB 3"), which was an attempt to displace the current school student assignment plan with a neighborhood schools policy. *See* Stephanie Steitzer, *Senate OKs Local-School Bill*, COURIER-J. (Louisville, Ky.), Jan. 8, 2011, at A1; Stephanie Steitzer, *Senate Schools Plan Likely Dead*, COURIER-J. (Louisville, Ky.), Jan. 12, 2011, at A1; Mike Wynn, *Senate Votes Against Busing*, COURIER-J. (Louisville, Ky.), Mar. 21, 2012, at A1.

24. 129 S. Ct. 2658, 2681 (2009).

25. *Id*. at 2664–65, 2681.

26. *Id.* at 2667. Out of seventy-seven candidates for promotion to lieutenant in the fire department, only six blacks passed the eligibility exam. *Id.* at 2666. These candidates were not, however, eligible for immediate promotion; there was an internal rule that determined the order of promotions. *Id.* Ten candidates were eligible for immediate promotion—they were all white. *Id.* Forty-one candidates took the exam for promotion to captain, only three black candidates passed. *Id.* Again, these three candidates were not eligible for immediate promotion. *Id.* Seven white candidates and two Hispanic candidates were eligible for immediate promotion. *Id.* So, in a very real sense, no African-American firefighter actually "passed" the exam in order to be eligible for promotion. *See id.*

27. The narrative framework of "equal opportunity" versus "equal results" fits squarely within the Court's post-racial jurisprudence. Since the process is essentially open and fair, any use of race is suspect. So, racial disparity that negatively impacts African-Americans is "natural," and any burden on white privilege and settled entitlements is constitutionally suspect or a violation of Title VII. As Professors Cheryl I. Harris and Kimberly West-Faulcon note:

disparate impact liability as pure racial politics.[28] The Roberts Court is off course.

This Article advances a critique of these cases in particular, and more broadly, the concept of equality of opportunity versus equality in results. Under the Equal Protection Clause, disproportionate impact alone is insufficient to advance an equal protection claim—there must be discriminatory intent by a state actor.[29] Conversely, under Title VII, a cognizable claim can be advanced under a disparate impact theory against a private or public actor.[30] There is an unresolved issue in *Ricci*: whether the Equal Protection Clause *and* Title VII should be interpreted to require discriminatory intent, thereby providing "symmetry" to equal protection and Title VII jurisprudence. Should the *Washington v. Davis* discriminatory intent standard be transplanted into the Court's Title VII jurisprudence? This Article answers this question with an emphatic "No." In fact, the Court's equal protection and Title VII jurisprudence should be reconceptualized so that disproportionate impact may serve as presumptive evidence of discriminatory intent. This moves the analysis away from an outcome-determinative assumption that discrimination is natural and neutral to a critical assessment of how structural inequality functions in society. The contrived dichotomy between equal opportunity and equal results should be rejected. By segmenting "equality" into the false choice of "opportunity" or "result," the current discussion is skewed toward liberal individualism and neutrality. The significance of race is obscured.

> Arguably, even before *Ricci*, modern antidiscrimination law's central narrative was that potential changes to the racial status quo in the workplace, in business, and in schools and universities, threatened and compromised the rights and legitimate expectations of whites as a group. Over the long colorblind march of the past two decades, the Court has embraced the view—albeit by a bare five-vote majority—that racially attentive actions or public policy are inherently suspect, no matter the motive. This doctrinal move has effectively constrained the operation of antidiscrimination law and remedies—indeed turning the remedies into racial injuries and further legitimizing a narrative in which whites are (or are at risk of being) repeatedly victimized because of their race. . . . [T]he underlying racial frame is that present-day discrimination is largely a problem confronting whites.

Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 81–82 (2010) (footnotes omitted).

28. *See Ricci*, 129 S. Ct. at 2684 (Alito, J., concurring) (rejecting the City of New Haven's rationale that it voluntarily complied with Title VII by decertifying the exam because of its disproportionate impact on African-American firefighters, and concluding that this rationale was merely a "pretext" for the City's real reason: "the desire to placate a politically important racial constituency").

29. *See id.* at 2700 (Ginsburg, J., dissenting).

30. *Id.* at 2672–73 (majority opinion).

This Article rejects neutrality and argues that the Fourteenth Amendment and Title VII should embrace transformative equality and an interpretive analysis that seeks to eradicate the present day effects of past discrimination. True symmetry between the Fourteenth Amendment and Title VII means that the constitutional and statutory mandates of equality reinforce each other.[31]

Ironically, the Court's race jurisprudence is a paradigmatic example of disparate impact discrimination: while it may not be intentionally discriminatory (this itself is debatable), it certainly disproportionately impacts people of color in a negative way.[32] There is nothing neutral about this:

> The essence of this postracial form of discrimination would entail the transformation of a conventional discrimination claim asserted by racial minorities into a claim of reverse discrimination asserted by whites. That transformation could be achieved by stressing the absence of any legally cognizable basis for providing remedial resources to the original minority claimants, in order to free up those resource [sic] for allocation to worthier whites. The technique would entail more than just the time-honored practice of evading a discrimination claim by blaming the victims. It would recast the minority victims as shameless perpetrators of discrimination, with all of the negative connotations that an indictment of unlawful discrimination conveys.
>
> It turns out that this postracial discrimination strategy is far from merely hypothetical. Its proponents include a majority of the current Justices on the United States Supreme Court. The Roberts Court, despite its relative youth, has already issued a number of decisions that employ the technique of postracial discrimination to elevate the interests of whites over the interests of racial minorities. The most revealing is its 2009 decision in *Ricci v. DeStefano*, where a divided Court required the City of New Haven to utilize the results of a firefighter promotion exam that benefitted whites, even though the exam had a racially-disparate impact that adversely affected Latinos and blacks. The majority opinion depicted historically advantaged white firefighters as the victims of unlawful discrimination, while depicting historically disadvantaged minority firefighters as the politically powerful perpetrators of invidious discrimination. The governing legal doctrines hardly compelled the Court's result, or the Court's inversion of the customary categories of perpetrator and victim.[33]

As Professor Spann points out in eloquent detail, what is particularly devastating about the Court's brand of post-racialism is that everything is

31. *See* Powell, *supra* note 12, at 922–32.

32. *See* Derrick Bell, *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595,1610–11 (1989) [hereinafter *Xerces*]; *see also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 109–126 (1992) (discussing shifting rules of racial standing that perpetuate a caste based system of racial oppression).

33. Girardeau A. Spann, *Postracial Discrimination*, MOD. AM., Fall 2009, at 26 (footnote omitted).

turned inside out—"the oppressed become the oppressor;"[34] doctrinal standards are inverted so that disparate impact claims morph into reverse disparate treatment claims, while voluntary attempts at eradicating the present day effects of past discrimination are rejected as race-based decision-making. The neutral rhetoric employed by the Court, including the rationale that the Constitution (or Title VII) guarantees equal opportunity, not equal results, serves to preserve systemic oppression.[35] The Court constitutionalized liberal individualism in a series of decisions under the Fourteenth Amendment.[36] Now, the Court is attempting to codify that same principle under Title VII by transplanting Fourteenth Amendment principles into its Title VII jurisprudence:

> The Supreme Court now appears to be forcing Title VII into the doctrinal regime that it has used to neutralize affirmative action. Since the conservative bloc majority took control of the Supreme Court, the Court has invalidated every constitutional affirmative action program that it has considered on the merits, with only one exception. . . . Justice O'Connor has now been replaced on the Supreme Court by Justice Alito. Justice Alito's vote to invalidate the voluntary school integration plans that the Roberts Court held unconstitutional in *Parents Involved in Community Schools v. Seattle School District Number 1* suggests that Justice Alito is unlikely to vote in favor of affirmative action programs for racial minorities. Accordingly, it now seems likely that the fate of disparate impact claims under Title VII will replicate the fate of affirmative action under the Court's conservative bloc jurisprudence.[37]

34. Powell, *supra* note 7, at 199–220.

35. *See id.* at 214–220.

36. Powell, *supra* note 9, at 861 ("Justice O'Connor incorporates race into her colorblind approach to the Fourteenth Amendment, but only if it does not substantively impact white interests and can be explained in a broader context as a benefit to all. This is interest convergence." (citing Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform 149–55 (2004))). This strand of liberal individualism is a central theme in the Court's race jurisprudence. *See, e.g.*, Adarand Constructors, Co. v. Peña, 515 U.S. 200, 204–10, 227 (1995) (invalidating a federal disadvantaged business enterprise program, which used race as a factor in the distribution of contracts, concluding that strict scrutiny applied to local, state, and federal race-conscious initiatives); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476, 505 (1989) (applying strict scrutiny to invalidate a minority business enterprise program enacted by the City of Richmond based upon a federal program previously held to pass constitutional muster); Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 270, 284 (1986) (invalidating a race-based layoff system designed to prevent minority school teachers from being the last hired and first fired agreed upon by the Jackson, Michigan Board of Education and the teacher's union); *see also* Powell, *supra* note 9, at 859–73.

37. Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1148 (2010) (footnotes omitted).

Justice Scalia clearly signals this in his *Ricci* concurrence.[38] It is particularly noteworthy that there are no citations to Title VII decisions in Justice Scalia's concurrence; the doctrinal shift has already occurred:

> But if the Federal Government is prohibited from discriminating on the basis of race, *Bolling v. Sharpe*, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race. See *Buchanan v. Warley*. As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory. *Personnel Administrator of Mass. v. Feeney*.
>
> . . . .
>
> . . . "[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*. And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors v. Pena*.[39]

Ostensibly, the Court postponed the resolution of the issue above; yet, it appears that the only thing missing from the Court's post-racial opinion is the holding that the use of race, under the Fourteenth Amendment or Title VII, will be held unconstitutional or a violation of Title VII in the absence of intentional discrimination.[40] Thus, post-racialism means that reverse discrimination claims have an inherent validity, while claims of minorities will be viewed skeptically and subjected to unattainable levels of evidentiary proof.[41] Racial discrimination against minorities seemingly no longer exists, but reverse discrimination claims are readily cognizable under the guise of liberal individualism.

What is striking, indeed startling, is the manner in which Justice Scalia frames the issue—the conclusion the next time the issue comes before the Court is virtually assured—race skews any semblance of "fairness" and will be viewed as presumptively discriminatory under the Fourteenth Amendment or Title VII.[42]

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

39. *Id.* (citations omitted).

40. *See generally* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342–43 (2010) [hereinafter *Future of Disparate Impact*]; Richard Primus, *Equal Protection and Disparate Impact*: *Round Three*, 117 HARV. L. REV. 493, 493–94 (2003) [hereinafter *Equal Protection*].

41. *See Future of Disparate Impact*, *supra* note 40, at 1342–43, 1353; *Equal Protection*, *supra* note 40, at 520–21.

42. *Ricci*, 129 S. Ct. at 1282 (Scalia, J., concurring).

Both *Parents Involved* and *Ricci* are process-based,[43] post-racial decisions rooted in neutrality. Since equal opportunity is open to everyone in the well-functioning polity, then *individual* success becomes a group-based trope for racial success:

> Postracial discrimination is discrimination against racial minorities that purports to be merely a ban on discrimination against whites. It is premised on the belief that active discrimination against racial minorities has largely ceased to exist, and that the lingering effects of past discrimination have now largely dissipated. As a result, a prospective commitment to colorblind race neutrality is now sufficient to promote racial equality, and any deviation from such neutrality will itself constitute unlawful discrimination. . . . [T]he claim that we now live in a postracial society has acquired enhanced plausibility from the success of prominent racial minorities in roles that were traditionally reserved for whites. Those successes have ranged from the golfing achievements of mixed-race Tiger Woods in a traditionally white game, to the selection of black politician Michael Steele as head of the Republican Party, to the election of mixed-race Barack Obama as President of the United States.[44]

The Court has expanded this notion of post-racial liberal individualism in the *Parents Involved* and *Ricci* decisions. The Court's colorblind constitutionalism has transformed into post-racialism.[45] What is striking about both decisions is how they ignore history, define discrimination in narrow post-racial terms, and employ neutral rhetoric to legitimize subordination:[46]

> The Supreme Court has played its part in this form of postracial discrimination by inverting the traditional concepts of perpetrators and victims in a way that allows the Court ultimately to invert the concepts of discrimination and

43. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980). "The Process Theory, or representation-reinforcement rationale, does not address the present day effects of past discrimination—there is no substantive conception of equality because the Process Theory's primary focus is on those 'rare' process malfunctions that impede access to the political process." Powell, *supra* note 9, at 827 n.15. This is a corollary to the doctrinal theory that the Constitution protects equal opportunity (or access to the process), not equal results (or race-conscious decisions targeted to address the present day effects of past discrimination). Indeed, there is no past discrimination under the Process Theory because it is inherently forward-looking.

44. Spann, *supra* note 33, at 39 (footnotes omitted).

45. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2009) (discussing post-racialism as an ideology that is even more pernicious than colorblind constitutionalism because (i) it "obscures the centrality of race and racism in society;" (ii) it encourages a retreat from race-conscious remedial approaches because society has "transcended" race; (iii) it privileges liberal individualism to refute any claims about the lingering effects of centuries of racial oppression; and (iv) it "denigrates collective Black political organization"); Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 923 (2009) (discussing the rhetorical power of neutral narratives designed to displace any meaningful efforts at dismantling racial discrimination).

46. Powell, *supra* note 9, at 858–59.

> equality themselves. *Ricci* serves as an example of such postracial discrimination, and other postracial discrimination decisions handed down by the Roberts Court belie any suggestion that *Ricci* was merely an aberration. Moreover, the Roberts Court's postracial discrimination decisions are reminiscent of historical Supreme Court decisions that were issued when the Court was openly hostile to minority rights, thereby further calling the legitimacy of those Roberts Court decisions into question.[47]

The Court's post-racial jurisprudence, as evinced in *Parents Involved* and *Ricci*, is hostile to minority rights, but the rhetoric of the decisions is neutral.[48] Unpacking this contrived neutrality, this Article advances a critique of the Court's race jurisprudence by analyzing *Brown v. Board of Education* and its progeny as decisions about process (equal opportunity) and substance (results),[49] connecting these doctrinal themes in Justice O'Connor's race decisions to the inevitable post-racial decision in *Parents Involved*, and interpreting the doctrinal bridge that the Court constructs between its Fourteenth Amendment and Title VII jurisprudence. The Fourteenth Amendment and Title VII complement each other[50] and should be construed as embracing substantive, voluntary race-conscious remedial approaches designed to eradicate systemic (structural) inequality.

It is striking how similar the Court's approach to race is in *Parents Involved* and *Ricci*—the Fourteenth Amendment and Title VII are merged in the Court's post-racial analysis so that:

1) Voluntary efforts by the political community or the state to use race-conscious remedial approaches are rejected outright as intentional discrimination against innocent whites;[51]
2) Formal equality[52] is employed so that *individual* rights trump a group rights approach to substantive equality;[53]
3) Colorblindness, as a normative principle, is replaced by post-racialism[54] so that race can never be used unless there is an identifiable state action (or a

47. Spann, *supra* note 33, at 39.

48. *See infra* Section I.

49. *See infra* Section II.

50. Powell, *supra* note 12, at 922–32.

51. *See* Spann, *supra* note 23, at 627–28; Spann, *supra* note 33, at 45 ("In cases ranging from firefighter promotions to school resegregation, the Court seems to care very little about the interests of racial minorities—and very much about the interests of the white majority.").

52. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 38 (1991) (developing the theory of formal race unconnectedness where race is neutral and unconnected to history or context, and arguing that racism is an aberrational defect of the process and any use of race is inherently unconstitutional when it impacts innocent whites); Powell, *supra* note 7, at 210–14.

53. Powell, *supra* note 12, at 933.

54. *See* Cho, *supra* note 45, at 1593.

diversity interest in post-secondary education)[55] under the Fourteenth Amendment or a "strong basis in evidence" under Title VII;[56] and

4) Neutrality is foregrounded so that there is an emphasis on *equal opportunity* for whites,[57] not the eradication of the present day effects of past discrimination.

To develop and critique these themes, this Article advances several arguments. Section I explores the neutral rhetoric of equal opportunity and equal results. Since the Court borrows from its Fourteenth Amendment decisions to fashion the "strong basis in evidence" standard in Title VII cases, it is instructive to analyze the Court's process-based neutrality.[58] Section II builds upon this theme by exploring how the school cases ultimately lead to a post-racial decision like *Ricci*. It is no doctrinal accident that, only two years after its decision in *Parents Involved*, which radically redefined *Brown* (the font of the Fourteenth Amendment), the Court then transplanted its newly minted post-racialism into its Title VII jurisprudence.[59] The Court expanded *Davis* to encompass *voluntary* remedial efforts to eradicate existing systems of caste in the public and private workplace.[60]

Section III critiques *Ricci* as a doctrinally flawed opinion that disregards the legislative history and meaning of Title VII, inverts the meaning of disparate impact so that now it means *disparate treatment of whites* whose reverse discrimination suits are more valid than the illusory claims of displaced minorities, and establishes a new evidentiary presumption ("strong basis in evidence") without articulating an analytical framework to evaluate prospective claims. Section III concludes with an argument for substantive equality, an approach that rejects the narrow conception of discrimination employed by the Court in *Parents Involved* and *Ricci*, and instead focuses on the eradication of structural inequality through doctrinal principles rooted in the anti-subordination and anti-caste principles underlying the Fourteenth Amendment.

55. Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

56. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) ("We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.").

57. *See* Harris & West-Faulcon, *supra* note 27, at 102 ("*Ricci* reconfigures and ultimately whitens discrimination, effectively privileging whites as a racial group. *Ricci* furthers this larger project in multiple ways: It suppresses racial attentiveness; it skews the concept of racial neutrality; it privileges disparate treatment claims over disparate impact claims; it treats disparate impact as a form of affirmative action and repositions whites as racially disempowered protagonists in the struggle for civil rights." (footnote omitted)).

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

59. *See id.* at 2673.

60. *See id.* at 2677.

I. THE NEUTRAL RHETORIC OF EQUAL OPPORTUNITY AND RESULTS

It should be clear that whether discrimination "exists" or not is a product of *how* the Court chooses to define it.[61] This brings us to the underlying "tension" between equal opportunity and equal results. This is a largely manufactured tension because the Court disregards history, context, and the present day effects of past discrimination to construct a neutral rationale for inequality. Professor Kimberlé Williams Crenshaw describes what she refers to as the restrictive view of equal opportunity:

> The restrictive vision, which exists side by side with this expansive view, treats equality as a *process*, downplaying the significance of actual outcomes. The primary objective of antidiscrimination law, according to this vision, is to prevent future wrongdoing rather than to redress present manifestations of past injustice. "Wrongdoing," moreover, is seen primarily as isolated actions against *individuals* rather than as a social policy against an entire group. Nor does the restrictive view contemplate the courts' playing a role in redressing harms from America's racist past as opposed to merely policing society in order to eliminate a narrow set of proscribed discrimination practices. Moreover, even when injustice is found, efforts to redress it must be balanced against and limited by competing interests of white workers—even when those interests were actually created by the subordination of blacks. The innocence of whites weighs more heavily than do either the past wrongs committed upon blacks or the benefits that whites derived from those wrongs. In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and then only when other interests are not overly burdened.[62]

Parents Involved and *Ricci* fit squarely within the restrictive, process view of equality. *Parents Involved* re-conceptualizes *Brown* as a process-based decision that permits reverse discrimination suits whenever *individual* school choice is burdened.[63] This doctrinal move is much more sinister than a colorblind approach that, at minimum, seeks to rationalize a neutral outcome where race may be used in limited instances.[64] *Parents Involved* marks a seminal shift to post-racial jurisprudence: "The way to stop discrimination on

61. *See* Jeffrey J. Wallace, *Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693, 709–11 (2003).

62. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Anti-Discrimination Law*, *in* Critical Race Theory: The Key Writings that Formed the Movement 103, 105 (Kimberlé Crenshaw et al. eds., 1995) (emphasis added).

63. *See* 551 U.S. 701, 746–48 (2007) (plurality opinion).

64. *See id.* at 788–89 (Kennedy, J., concurring in part and concurring in the judgment) ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.").

the basis of race is to stop discriminating on the basis of race."[65] Likewise, in *Ricci*, the Court disregards its own precedent, the legislative history of Title VII, and fundamental principles of Evidence to craft a novel "strong basis in evidence" standard[66] that privileges process over true equality.[67]

The theory advanced here advocates a substantive and expansive interpretation of equal opportunity, one that is inclusive and highly skeptical of process.[68] In other words, results are not presumptively legitimate if they flow from a narrow set of process-based opportunities:

> Part of the intuitive appeal of this conception of "equality of opportunity, not equality of result" stems from the analogy that can be drawn to a game. If a game is well designed and its rules are enforced, each of the competitors can be said to have an equal opportunity to win even though some will have more of the requisite abilities. To insist that the results be equalized to compensate for differences in ability among the competitors would be inconsistent with the whole idea of playing the game.[69]

But what if the game is slanted toward the preservation of existing systems of caste-based oppression? The answer should be that we have to change the game:

> The problem, therefore, is that the definition of "discrimination" has been narrowed and broadened to denote the intentional use of race no matter the

65. *Id.* at 748 (plurality opinion).

66. *See* 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) (noting that context matters and that, given the long and pervasive history against minority firefighters, the white firefighters "had no vested right to promotion"); Spann, *supra* note 37, at 1145–46 ("[I]n 1991 Congress actually codified [Griggs v. Duke Power, 401 U.S. 424, 429–32 (1971) (endorsing disparate impact claims)] in the Title VII amendments that it adopted as part of the Civil Rights Act of 1991—a statute that was enacted to overrule certain post-*Griggs* Supreme Court discrimination decisions that Congress viewed as insufficiently protective of racial minorities. Despite *Griggs* and the Civil Rights Act of 1991, the Roberts Court has now chosen to launch an attack on Title VII disparate impact claims—an attack that is difficult to understand in a non-invidious way." (footnote omitted)). From the standpoint of the law of Evidence, the "strong basis in evidence" standard lacks an interpretive principle and analytical framework. Specifically, it is unclear whether the standard is simply an inference or a full-blown presumption and how the burden of proof will be allocated once it is established that there is a strong basis in evidence to believe that an employer will be subject to a disparate impact suit. There is no consideration of any of these fundamental concerns in the *Ricci* opinion itself.

67. *See* Spann, *supra* note 37, at 1154 ("Because whites outperformed minorities on the exam, the exam must have been measuring qualities that were relevant to merit-based promotions. Therefore, any decision not to certify the results of that exam must have been rooted in a desire to abandon merit in favor of unwarranted racial affirmative action.").

68. *See* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 697–98.

69. David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 181–82 (1992) (footnote omitted).

> context. This means that neutral policies and practices having a disparate impact on women and persons of color will be ignored as unimportant and that affirmative remedial measures based on historical context will be labeled "discrimination" and banned. "Discrimination" must be redefined to combat this tendency. The definition of "discrimination" must include neutral structures and processes that create a disparate impact on persons who have suffered discrimination historically; it should also include behaviors that harm protected groups as a result of unconscious discrimination.[70]

Given the current state of the Court's race jurisprudence, it is not an exaggeration to say that we are in a new era of racial denial made easier by the passage of time and a series of incremental victories and one historic moment—the election of President Barack H. Obama:

> It is true that the President of the United States is now black, but that does not mean that the society that elected him has become postracial. One could choose to characterize Obama's election in different ways. One could characterize it as demonstrating that minorities can now compete on a level playing field, without the need for affirmative action or serious antidiscrimination measures. Alternatively, one could characterize Obama's election as demonstrating only that a mixed-race, multiple Ivy League graduate, with the intellectual and political skills to become President of the Harvard Law Review can successfully navigate contemporary racial culture—thereby providing little evidence of how less-exceptional racial minority group members are likely to fare on a playing field that is far from level. As Professor Darren Hutchinson has noted, the "postracial" claim may simply illustrate the phenomenon of "racial exhaustion." Whites have simply grown tired of having to deal with the discrimination claims asserted by racial minorities. As a result of this fatigue, whites may now have decided to assert retaliatory discrimination claims of their own.[71]

In this vein, *Parents Involved* and *Ricci* are preemptive strikes against equality in the name of white privilege.[72] In *Parents Involved*, the individual school choice preferences of white students are privileged over the substantive integrative goals *voluntarily* embraced by the community;[73] likewise, in *Ricci*, the purported "merit" of the firefighter promotion exams is used to rationalize years of exclusion from the officer ranks of African-American firefighters.[74]

70. Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 456 (2010).

71. Spann, *supra* note 33, at 41 (footnote omitted).

72. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

73. *See* Spann, *supra* note 23, at 623–30 (discussing the Court's use of raw political power to undermine valid, locally based political decisions to embrace integration rather than the Court's cynical decision to constitutionalize *de facto* resegregation).

74. 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) ("Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow."); *see also* Harris & West-Faulcon, *supra* note 27, at 157–65 (discussing the inherent flaws in the firefighter promotion test to illustrate the error of presuming the validity of promotion tests that

This is why the rhetorical allure of "equal opportunity, not equal results"[75] is so profound and formalistically narrow. In the midst of this epochal change in race relations, there remain persistent and lingering present day effects of past discrimination. Structural inequality exists, and it persists.[76]

The Court's post-racial jurisprudence preserves structural inequality under the guise of neutrality. Similarly situated individuals should not be differentiated on the basis of race, and equal opportunity (or equal treatment)[77] is the touchstone of the Court's post-racial jurisprudence. Process is valued over the eradication of caste and substantive rights.[78] This process-based, market approach to substantive equality should be rejected—the marketplace model of equal protection where the process is *open* and individuals "compete" for goods and substantive rights is antithetical to the mandate of the Fourteenth Amendment. It ignores the core purpose of the amendment—the eradication of race-based oppression.[79]

Parents Involved and *Ricci* are process-based equal protection and Title VII cases.[80] The central premise underlying both decisions is that the process

disproportionately impact people of color and noting how decisions like *Parents Involved* and *Ricci* replicate systemic inequality).

75. *See* John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 314 (1994).

76. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1996); Symposium, *Structural Racism*, POVERTY & RACE, Nov./Dec. 2006; Note, *"Trading Action for Access": The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156 (2008) (examining structural inequalities that displace people of color and women, and critiquing neutral, process-based explanations for disparities).

77. Professor Cheryl I. Harris explains that:

> Actual differences between the races are beyond the reach of the law unless there is evidence they were intentionally and maliciously produced, or the argument runs they are not real or relevant differences. Thus, Equal Protection means only equal treatment. When equal treatment defines equal protection, not only are subordinated groups foreclosed from exercising effective legal remedies, but the law functions to actually promote and entrench subordination.

Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1757 (2001); ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 4 (2009) (rejecting the anti-differentiation principle by noting that "where it can be shown that blacks and whites are *not* similarly situated in society because of historical forces, blacks must be treated differently if they are to be accorded equal opportunity, or similar treatment").

78. *See* Crenshaw, *supra* note 62, at 105–06.

79. *See* Powell, *supra* note 7, at 226–29; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 338–40 (1993) (noting that the Fourteenth Amendment is an anti-caste principle, not an anti-differentiation principle); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (noting that the history of the Fourteenth Amendment acknowledges the amendment as a race-conscious remedial approach to the eradication of caste).

80. Powell, *supra* note 9, at 841–42.

is open (or should be) and that the Constitution or Title VII protects *individuals*, not racial groups, and equal *process*, not equal results. Justice Kennedy is a pivotal figure in the articulation of the rhetorically neutral theme of equal opportunity. Indeed, his concurrence in *Parents Involved*[81] and his opinion for the Court in *Ricci*[82] track the doctrinal parameters of the Court's new conception of equality. While Justice Kennedy embraces neutrality in both decisions, he adopts two distinct views about how the process functions.[83] In *Parents Involved*, he eschews Chief Justice Roberts' post-racial constitutionalism and adopts an approach that acknowledges that race can be used holistically so that school systems do not have to accept resegregation as a "natural" occurrence.[84] *Parents Involved* is all about equal educational opportunity in the process. While Justice Kennedy agrees that the Constitution protects individuals, not groups,[85] he is more concerned that an individualized right to school choice will lead inevitably to resegregation.[86] Thus, he is willing to permit the limited use of race after other race neutral alternatives prove ineffective. [87] This is a rare process malfunction to Justice Kennedy, so the use of race is appropriate in this limited circumstance.[88] *Brown* cannot be

81. 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

82. 129 S. Ct. 2658, 2664–81 (2009).

83. *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring in part and concurring in the judgment); *Ricci*, 129 S. Ct. at 2681.

84. 551 U.S. at 783, 788–89 (Kennedy, J., concurring in part and concurring in the judgment) ("The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion."); *id.* at 788–89 ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way . . . .").

85. *Id.* at 795 (emphasizing the analytical significance of the *de jure-de facto* distinction to determine whether race-conscious remedies are permissible, and stating that "[r]eduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake").

86. *Id.* at 797 ("A compelling interest exists in avoiding racial isolation . . . .").

87. *Id.* at 798 ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. . . . [M]easures other than differential treatment based on racial typing of individuals first must be exhausted."); *id.* at 789–90.

88. *See* ELY, *supra* note 43, at 136 ("To the extent that there is a stoppage, the system is malfunctioning, and the Court should unblock it without caring how it got that way."). Under this process-oriented view of polity, courts should serve as referees to the process and only intervene when there is a significant stoppage of access and meaningful participation. *Id.* at 101–03. Justice Kennedy's concurrence is squarely within this canon: racial isolation and resegregation are blockages to the process that serve to undermine its proper functioning. Thus, "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity

interpreted so formalistically that *any* consideration of race becomes unconstitutional.

It would be erroneous and overly optimistic to conclude that Justice Kennedy embraces a substantive view of equality. He does not jettison liberal individualism—his concurrence is an attempt to reconcile *Brown*'s anti-caste principle with the plurality's post-racial anti-differentiation principle—neutral alternatives come before any consideration of race.[89] However, race can be used, in limited circumstances, to promote *equal opportunity* in the process of assigning schools based on the expressed preferences of students and their parents. There is a more generalized benefit to society as a whole in the form of diversity, so "a district may consider it a compelling interest to achieve a diverse student population."[90] Diversity is more of a process value than an affirmation of substantive equality;[91] indeed, Justice Kennedy's reliance on this concept graphically illustrates the bright-line drawn between equal opportunity (process) and results (substance).

There is at least an implicit concern with disparate impact in Justice Kennedy's concurrence. He notes emphatically that state and local authorities do not have to accept the "status quo of racial isolation in schools," and that *de facto* resegregation should not be ignored.[92] So, there is at least some skepticism that structural disparities are natural: Justice Kennedy does not embrace Justice Thomas' explanation that *de facto* resegregation is solely the result of "innocent private decisions, including voluntary housing choices."[93] Racial imbalance means something, particularly in analyzing access to the process. However, when there is no *intentional* discrimination by the state itself, the *de jure-de facto* distinction means that "[t]he state must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here."[94] To Justice Kennedy, there was no showing that the school boards considered race-neutral alternatives.[95] As a result, race predominated in the school assignment decision-making process.[96] There was no equal opportunity because the state tried to use "crude racial categories" to guarantee a specific racial percentage

. . . ." *Parents Involved*, 551 U.S. at 797–98 (Kennedy, J., concurring in part and concurring in the judgment).

89. *See Parents Involved*, 551 U.S. at 789–90 (Kennedy, J., concurring in part and concurring in the judgment).

90. *Id.* at 797–98.

91. Powell, *supra* note 12, at 905–06; Powell, *supra* note 9, at 873–79.

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

93. *Id.* at 750 (Thomas, J., concurring).

94. *Id.* at 796 (Kennedy, J., concurring in part and concurring in the judgment).

95. *Id.* at 789.

96. *Id.* at 786–87.

(result) in the schools.[97] Thus, Justice Kennedy's analytical approach in *Parents Involved* is rooted in the notion of a neutral process where race should be considered only in the rare instance where neutral alternatives fail. This is in line with the conception that the Constitution protects equal opportunity, not equal results.[98]

Justice Kennedy's conception of race is much more literal and formalistic in *Ricci*.[99] Conversely, *Ricci* is all about equal results—a neutral result cannot be disturbed to guarantee a preferred racial outcome.[100] Disparate impact—the fact that no African-American firefighter passed the promotion examination—is irrelevant because every eligible firefighter had an opportunity to pass the examination.[101] There is no reference to racial isolation in the officer corps of firefighters, no acknowledgement of a history of exclusion with present day effects, and no mention of diversity in the employment ranks of firefighters in general.[102] There is no broader community benefit here. Justice Kennedy imports equal protection principles into the Court's Title VII jurisprudence and constructs a new strand of liberal individualism under the statute.[103]

Ironically, *intent* becomes a prerequisite to advancing a successful defense to a reverse discrimination (disparate treatment) charge.[104] The irony rests in the fact that Title VII explicitly recognizes impact as statutorily cognizable without any evidence of intent.[105] Justice Kennedy's opinion changes this: "[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to

97. *Id.*

98. *See* Morrison, *supra* note 75, at 314.

99. 129 S. Ct. 2658, 2666 (2009).

100. *Id.* at 2675 ("Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate- impact liability would encourage race-based action at the slightest hint of disparate impact. . . . That would amount to a *de facto* quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.' Even worse, an employer could discard test results . . . with the intent of obtaining the employer's preferred racial balance." (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988))).

101. *Id.* at 2678.

102. *Id.* at 2689–2710 (Ginsburg, J., dissenting). "In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to cover public employment. At that time, municipal fire departments across the country, including New Haven's, pervasively discriminated against minorities. . . . It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities." *Id.* at 2690.

103. *See id.* at 2681.

104. *See infra* Section III.A.3.

105. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

take the race-conscious, discriminatory action."[106] Disparate impact is *unintentional* and cannot be remedied in the absence of a strong basis in evidence,[107] a Fourteenth Amendment standard, for doing so. *De facto resegregation* is remediable in Justice Kennedy's *Parents Involved* concurrence[108] while *de facto disparate impact* is irremediable in his *Ricci* opinion.[109] This is the core distinction between process and results.

Under Justice Kennedy's reasoning, *Parents Involved* is about equal access (opportunity) to the process.[110] Since racial isolation threatens the enduring mandate of *Brown* and an open process, Justice Kennedy is unwilling to adopt the Roberts Court's post-racial constitutionalism.[111] By contrast, *Ricci* is about racial results (who is entitled to "win" between competing disparate treatment and potential disparate impact claims),[112] so Justice Kennedy presumes that the reverse discrimination claim of the white firefighters is valid, and virtually ignores the well-established disparate impact claim of the African-American firefighters.[113] *Parents Involved* and *Ricci* lack a substantive conception of equality. Doctrinally, this can be traced from the school decisions, to *Parents Involved*, and to *Ricci* itself.

II. *BROWN V. BOARD OF EDUCATION* AND ITS PROGENY: PROCESS AND SUBSTANCE

There is a doctrinal link between the Court's school race decisions and its Title VII race jurisprudence—the school cases constitutionalize the process-based proposition that the Constitution protects equal opportunity, not equal results,[114] while the Court's Title VII jurisprudence codifies the same

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

107. This is akin to the rationale that societal discrimination is too amorphous to remedy. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731–32 (2007) (plurality opinion); *Ricci*, 129 S. Ct. at 2675.

108. 551 U.S. at 788–90 (Kennedy, J., concurring in part and concurring in the judgment).

109. 129 S. Ct. at 2675, 2678.

110. 551 U.S. at 788–89 (Kennedy, J., concurring in part and concurring in the judgment).

111. *Id.* at 787–88 ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.").

112. 129 S. Ct. at 2664, 2673 ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.").

113. *See Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment) (noting the "frustrating duality" of the Equal Protection Clause and concluding that "[t]he idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward").

114. *See* Strauss, *supra* note 69, at 173–75; *see infra* Section III.A.1.

proposition.[115] While the cases seemingly unfold on two separate doctrinal tracks, they ultimately meet in the *Ricci* decision. Of course, the Court does not decide the ultimate issue of whether "the strong-basis-in-evidence standard would satisfy the Equal Protection Clause,"[116] but its decision to employ Fourteenth Amendment standards to analyze the validity of Title VII disparate impact claims means that any "predictions"[117] are much more than mere dicta. Indeed, there is a thematic connection from *Brown v. Board of Education* to *Parents Involved* to *Ricci* that leads to the conclusion that "equality" is more about preserving superficial access and neutrality than about eradicating deeply rooted structural inequities.[118]

Brown is about the tension between process (equal educational *opportunity* through desegregation) and results (dismantling dual school systems and substantively integrating schools).[119] Years of litigation culminating in *Parents Involved* did not resolve this tension.[120] However, the tension between process and substance embodied in *Brown* is essential to understanding the inevitable decisions of *Parents Involved* and *Ricci*.

Milliken v. Bradley[121] and *Washington v. Davis*[122] are seminal cases in the Court's race jurisprudential canon: *Milliken* marks the narrow limits of race-conscious remedial efforts to eradicate dual school systems,[123] and *Davis* all but ensures that race-conscious remedial efforts will uniformly be held unconstitutional in the absence of clearly identifiable discrimination.[124] Both decisions embrace discriminatory *intent* as the touchstone of equal protection

115. *Ricci*, 129 S. Ct. at 2681 ("[T]he process was open and fair. The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results.").

116. *Id.* at 2676.

117. *Id.* at 2682–83 (Scalia, J., concurring).

118. Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 383–85 (2008).

119. Wendy B. Scott, *Dr. King and* Parents Involved*: The Battle for Hearts and Minds*, 32 N.Y.U. REV. L. & SOC. CHANGE 543, 544–46 (2008); Powell, *supra* note 118, at 391–92.

120. *See* Powell, *supra* note 118, at 371 n.33, 371–416 (2008); Symposium, *The Future of School Integration in America*, 46 U. LOUISVILLE L. REV. 559 (2008); Enid Trucios-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race and Public Schools in Louisville, Kentucky*, 112 PENN. ST. L. REV. 947, 948 n.8 (2008).

121. 418 U.S. 717 (1974).

122. 426 U.S. 229 (1976).

123. 418 U.S. at 745 ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

124. 426 U.S. at 230, 239, 242 (holding that disproportionate impact is insufficient to establish an equal protection violation); *see also* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The ID, The Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 952–55 (2008) (critiquing the *Washington v. Davis* intent requirement as rigid and formulaic because it minimizes the significance of racial impact on historically oppressed people of color).

analysis.[125] Once the decision is made to import these concepts into Title VII jurisprudence, the inversion of disparate impact case concepts into disparate treatment (intent) analysis is inevitable.[126] Thus, there is a readily discernible doctrinal thread between *Parents Involved* and *Ricci*:

> The mechanism for redefining discrimination was the extension and application of affirmative action precedent and analysis to other areas of law. The most recent example is *Parents Involved in Community Schools v. Seattle School District*, where the Roberts majority opinion relied almost exclusively on affirmative action case law—specifically *Grutter v. Bollinger*—rather than the body of school desegregation law, to strike down school integration plans. *Ricci* similarly relies on affirmative action cases rather than disparate treatment cases, importing strict scrutiny into Title VII doctrine. Analogizing to affirmative action cases in the context of equal protection jurisprudence, the Court in *Ricci* found that, just as strict scrutiny requires the government to justify its race-conscious remedial measures by evidence of a compelling interest and the lack of viable alternatives, so too does Title VII require that before an employer can take a race-conscious action like canceling test results that favor whites—a per se disparate treatment violation—it must have a strong basis in evidence that the remedial actions are necessary.[127]

This conceptual, doctrinal, and rhetorical move is an example of Rhetorical Neutrality. "Three underlying myths—historical, definitional, and rhetorical—all serve to shift the interpretative (doctrinal) framework on questions of race from an analysis of systemic [structural] racism to a literal conception of equality where the anti-differentiation principle is the guiding touchstone."[128] The Court's post-racial analysis begins with the proposition that anything that burdens white privilege is reverse discrimination that is presumptively unconstitutional (or a violation of Title VII).[129] What is striking about all of the Court's reverse discrimination decisions is that history is ignored; then discrimination is defined so narrowly and formalistically that reverse discrimination suits are presumptively valid, while race-conscious remedial efforts are presumptively invalid; finally, neutral rhetoric is employed to explain why inequality is "natural" and inevitable. This rhetorical move derives its power from all of the critiques of race-based affirmative action,[130]

125. Powell, *supra* note 118, at 407, 412–13 (citing *Davis*, 426 U.S. at 238–48; *Milliken*, 418 U.S. at 745).

126. Ricci v. DeStefano, 129 S. Ct. 2658, 2675–76 (2009) (citation omitted) (relying on *Wygant* and *Croson* and noting that "an amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota" (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989))).

127. Harris & West-Faulcon, *supra* note 27, at 116–17 (footnotes omitted).

128. Powell, *supra* note 9, at 831 (footnotes omitted).

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

130. *See* Morrison, *supra* note 75, at 314.

and it can be distilled into one phrase: the Constitution protects equal opportunity, not equal results.[131] "Antidiscrimination law is transformed into *race discrimination* because a law that presumed minorities should receive *outcomes* in similar proportions to whites constitutes making nonwhites 'special favorites of the law'—virtual affirmative action."[132]

This has been a central tension in the Court's race jurisprudence for over one hundred years. Indeed, a mere eighteen years after the end of slavery, the Court proclaimed that:

> When a man has emerged from slavery, and by the aid of *beneficent legislation* has shaken off the inseparable concomitants of that state, there must be some stage in the process of his *elevation* when he takes the rank of a mere citizen, and ceases to be the *special favorite of the laws*, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[133]

The infamous *Civil Rights Cases* dealt a death blow to the Civil Rights Act of 1875 and marked the end of the substantive legislation enacted during the Reconstruction Era.[134] All of the themes against race-conscious remedial measures are present here: the legislative efforts of Congress to strike down barriers in private and public accommodations is illegitimate, result-oriented "beneficent legislation"; the oppressed are "special favorites of the law" (a central tenet of any reverse discrimination claim); and the process "works" for everyone without reference to the enduring history of subjugation. It is breathtaking how eager the Court is to forget the badges and incidents of slavery still at work in 1883;[135] it is even more so when the Court adopts the same rhetorical posture in 2011.

131. *Ricci*, 129 S. Ct. at 2677 ("[O]nce that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. . . . [This] is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race."). Thus, Title VII protects equal opportunity—everyone is eligible to take the examination notwithstanding its disproportionate impact on African-American firefighters—not equal results because to "equalize" the results would mean displacing the settled expectations of the white firefighters who simply did well on an examination that measures "merit." To the Court, this is statutorily prohibited racial decision-making. *Id.* at 2662, 2673, 2676; *see also infra* Section III.A.

132. Harris & West-Faulcon, *supra* note 27, at 118 (emphasis added).

133. The Civil Rights Cases, 109 U.S. 3, 25 (1883) (emphasis added).

134. *See* Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521 (1989) (reviewing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988)).

135. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1365–66 (2007) ("[T]here is general agreement in the cases and scholarship that the Thirteenth Amendment empowers Congress to prohibit what it rationally determines to be badges and incidents of slavery.").

Milliken, *Davis*, and *Parents Involved* all fit squarely within this jurisprudential canon that race-conscious remedies afford people of color unconstitutional results.[136] Since any formal shackles have been removed, everyone has the same opportunity, and therefore burdens should not be imposed on similarly situated individuals based on race. These Fourteenth Amendment decisions lead directly to *Ricci* because the Court transforms a Title VII disparate impact case into a reverse discrimination affirmative action case.[137] So, discriminatory intent under the Fourteenth Amendment merges with disparate treatment under Title VII—there must be particularized discriminatory intent to advance a Fourteenth Amendment claim, and now there must be a "strong basis in evidence," under Title VII, to believe that remedial action is "necessary to avoid violating the disparate-impact provision."[138] The net effect of these doctrinal maneuvers is to erect virtually insurmountable barriers of proof to legitimate claims of discrimination and to chill voluntary efforts to eradicate structural inequality.[139]

Rhetorically, *Milliken* constitutionalizes process over substantive results—the opportunity to attend integrated schools extends only within the district line where *de jure* discrimination has been identified.[140] This is the doctrinal precursor to *Davis*. The same proposition unifies both decisions: In the absence of particularized discrimination, race-conscious remedial efforts to

136. Powell, *supra* note 118, at 363–64, 373.

137. *See* Harris & West-Faulcon, *supra* note 27, at 116–17; *see also supra* note 127 and accompanying text.

138. Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009).

139. Hutchinson, *supra* note 45, at 958 ("The intent rule, like the affirmative action doctrine, treats racism as aberrational or nonexistent, and the Court strives to rebut invidious explanations for racially disparate state action."). Identifying the doctrinal link between the Court's post-racial equal protection jurisprudence and its Title VII jurisprudence, Professor Hutchinson writes:

> The Court has also justified adherence to a rigid intent standard on the grounds that a more flexible rule could lead to quotas or reverse discrimination against whites. Accordingly, Court doctrine in this context mirrors majoritarian distrust of civil rights remedies and claims of injustice. In early Title VII cases, for example, the Court treated disparate impact evidence as probative of unlawful discrimination. The conservative Rehnquist Court, however, would later abandon this approach and toughen the evidentiary burden required of plaintiffs. The Court announced its more exacting standard in *Wards Cove Packing Co. v. Atonio.* The Court concluded that a flexible rule would cause employers to adopt hiring quotas, thus discriminating against whites . . . . Following criticism from civil rights advocates, Congress overruled *Wards Cove* in 1991, but only after President Bush vetoed and characterized a prior version as a "quota bill." The conservative opposition to this legislation provides another example of the way in which political rhetoric frames civil rights measures as invidious discrimination.

Hutchinson, *supra* note 45, at 961–62 (footnotes omitted).

140. Milliken v. Bradley, 418 U.S. 717, 745 (1974) ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

dismantle systemic inequality are presumptively unconstitutional.[141] Next, the Court will draw upon the Fourteenth Amendment intent requirement and extend it to buttress reverse discrimination lawsuits. Finally, the Court will create the strong basis in evidence requirement to fortify Title VII reverse discrimination complaints. All of these doctrines preserve white privilege and entitlement.[142]

A. Milliken v. Bradley

In *Milliken*, the Court concluded that:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.[143]

Since "the scope of the remedy is determined by the nature and extent of the constitutional violation," there can be no interdistrict remedy in the absence of an interdistrict violation and interdistrict effect.[144] Remedies stop at the district line in the absence of identifiable, district-wide segregation.[145]

Milliken is a seminal decision because it literally changes the meaning of the Fourteenth Amendment in the school cases and beyond. It lays the doctrinal groundwork for the post-racial *Parents Involved* decision, and it sets the stage for the post-racial merging of Fourteenth Amendment and Title VII principles in *Ricci*. The doctrinal thread that runs through all of the decisions is the protection of white interests and privilege. The Court literally ignores evidence of systemic racial discrimination in order to preserve suburban school districts and insulate them from the burden of urban integration.[146] As Professor Tribe observes:

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141. *See Ricci*, 129 S. Ct. at 2675 ("[A]n amorphous claim that there has been past discrimination . . . cannot justify the use of an unyielding racial quota." (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989))); Erica E. Hoodhood, Note, *The Quintessential Employer's Dilemma: Combating Title VII Litigation by Meeting the Elusive Strong Basis in Evidence Standard*, 45 VAL. U. L. REV. 111, 151 (2010) ("[T]he conflicting disparate impact and disparate treatment provisions make it nearly impossible for employers to take any remedial actions to alleviate adverse impact without making themselves susceptible to disparate treatment or reverse discrimination litigation by white class members."); *infra* Section III.A.3–4.

142. *See* Barbara J. Flagg,*"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 960, 987–88, 1007 (1993).

143. 418 U.S. at 744–45.

144. *Id.* at 744, 745.

145. *Id.* at 145.

146. *Id.* at 781–815 (Marshall, J., dissenting) (cataloguing the purposeful actions of the Detroit Board of Education to maintain segregated urban schools in the core of the city with

> By demanding a tight fit between the remedy and the narrowly-defined right in the face of extensive de jure segregation, the Court for the first time rationalized a segregated result in a case where a constitutional violation had been found to exist. . . . The plaintiffs were to be trapped within the city's boundaries, without even an opportunity to demand that those boundary lines be justified as either rational or innocently nonrational. Thus *Milliken* became the first case in which the Supreme Court overruled a desegregation decree, only three years after *Swann*—the case in which the Court had first reviewed such a decree and upheld the sweeping remedial power of the federal district courts.[147]

The sweeping remedial mandate of *Swann v. Charlotte-Mecklenburg Board of Education*,[148] is significantly narrowed in *Milliken*—the Constitution protects equal opportunity, but only in its most narrow and formalistic form:

> The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system *in that district*. . . . The view of the dissenters, that the existence of a dual system in *Detroit* can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions.[149]

Thus, the understanding of remedy and injury in the school context is dramatically altered in *Milliken*: Discrimination is not viewed as a manifestation of structural inequality or systemic bias; rather, discrimination is discrete and particularized. A dual school system can be clearly identified in *Detroit*, and the predominantly white suburban enclaves have no connection to the *urban* segregation in Detroit.[150] Here, inequality (or the existence of

outlying suburbs remaining predominantly white); Derek W. Black, *The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision*, 57 CATH. U. L. REV. 947, 951–52 (2008) ("*Milliken* signaled to whites that they could avoid desegregation and build exclusive enclaves by simply moving across the school district line. In that respect, *Milliken* likely exacerbated segregation." (footnote omitted)).

147. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–19, at 1495 (2d ed.1988) (footnotes omitted).

148. 402 U.S. 1 (1971); *see also* Powell, *supra* note 118, at 397–406 (discussing *Swann* and how the decision embraces a broad view of the scope of federal power to dismantle dual school systems while at the same time limiting the reach of that power based upon how discrimination is defined).

149. *Milliken*, 418 U.S. at 746–47 (first emphasis added).

150. *Id.* at 747, 748–52. This rationale of "natural" discriminatory outcomes—where the interests of African-Americans are ignored and the interests of "displaced" whites are privileged—is employed in both *Parents Involved* and *Ricci.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 750 (2007) (Thomas, J., concurring) ("[R]acial imbalance can also result from any number of innocent private decisions, including voluntary housing choices."); Ricci v. DeStefano, 129 S. Ct. 2658, 2678 (2009) ("[A] prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity . . . is far

predominantly white schools) is "natural" because the Constitution does not guarantee results: "Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts."[151]

Rejecting the Court's process-based interpretation of *Brown* and reaffirming its central holding under the Fourteenth Amendment, Justice Marshall's dissent articulates a substantive view of equality.[152] Justice Marshall explicitly eschews neutrality by stating that African-American students are "not only entitled to neutral nondiscriminatory treatment,"[153] but to a fully integrated school system.[154] The Fourteenth Amendment's constitutional mandate does demand *equal results*: Nondiscriminatory treatment is insufficient because this neutral jurisprudential stance may preserve existing systems of caste.[155] The Fourteenth Amendment permits race conscious remedial approaches to eradicate the present day effects of past discrimination.[156] Nevertheless, the Court has erected nearly insurmountable burdens of proof to valid claims of racial discrimination. *Parents Involved*, a direct doctrinal descendent of *Milliken*, *Davis*, and *Ricci*, with its imported Fourteenth Amendment "strong basis in evidence" standard, followed this same hostile practice of constructing nearly impregnable barriers of proof.[157] As Professor Derrick Bell observes:

> The Supreme Court concedes that its decisions requiring hard-to-obtain evidence of overt discrimination as the prerequisite for challenging facially neutral policies that work clear disadvantage on blacks are founded on the fear that blacks would upset any number of otherwise legitimate government policies if relief from such policies could be based on proof of disparate impact alone. The issues these cases raise are complex, but the proof standards adopted in *Washington v. Davis* . . . reflect a priority for concerns of whites and vested property-type interests over the unfulfilled equality requests by blacks. I fear that these racial priorities differ more in scope than in kind from

from a strong basis in evidence that the City would have been liable under Title VII had it certified the results."); *see infra* Section III.A.

151. *Milliken*, 418 U.S. at 749.

152. *Id.* at 798–808 (Marshall, J., dissenting).

153. *Id.* at 798. This is the Court's literal interpretation of "equal opportunity" (or mere access).

154. *Id.* at 808 ("It is a hollow remedy indeed where 'after supposed 'desegregation' the school remained segregated in fact.'" (quoting Hobson v. Hansen, 269 F. Supp. 401, 495 (D.D.C. 1967))).

155. *Id.*

156. Powell, *supra* note 12, at 930–32.

157. 551 U.S. 701, 754–55 (2007) (Thomas, J., concurring).

> the racial policy formulation that enabled the Constitution's slavery compromises.[158]

The Court's concession underscores its steadfast adherence to a process-based approach to racial claims of discrimination.[159] In the absence of clearly identifiable discrimination, the process is deemed to be functioning appropriately; any disparate impact is explainable as a legitimate outcome that cannot be overturned by an illegitimate guarantee of equality based on race. Thus, any interdistrict remedy in *Milliken* would be constitutionally infirm to the Court because the remedy would exceed the scope of identifiable discrimination within Detroit.[160] "With its emphasis on the significance of local control over the operation of schools, and its caution regarding the essentially political character of the role played by federal courts in devising and enforcing metropolitan school desegregation, *Milliken* signaled the Supreme Court's mounting hesitation in the school desegregation area."[161] Indeed, the local control rationale has been conveniently manipulated by the Court to determine the scope of permissible remedies. For example, in *Milliken*, local control stopped at the district line—it would be disruptive to the process to impose an interdistrict remedy "without an interdistrict violation and interdistrict effect."[162] The scope of the violation determines the scope of the remedy; in the absence of intentional discrimination by the state, there can be no interdistrict remedy.[163]

The disproportionate impact on African-Americans in the segregated schools of Detroit is not directly attributable to interdistrict state action by suburban districts, so a race-conscious remedy is impermissible. To reach this narrow conclusion, the Court had to ignore clear evidence of systemic discrimination[164] and construct a slanted interpretation of the *de jure-de facto* distinction.[165] Since *de jure* discrimination is only identifiable in Detroit, the

158. *Xerces*, *supra* note 32, at 1611 (footnote omitted).

159. *See id.*

160. The same rationale prohibiting remedies that exceed the scope of identifiable discrimination connects *Milliken*, *Davis*, *Parents Involved*, and *Ricci*. *See infra* Sections II.B–C & III.

161. TRIBE, *supra* note 147, §16–19, at 1495 (footnotes omitted).

162. Milliken v. Bradley, 418 U.S. 717, 743, 745 (1974) (posing a number of rhetorical questions to illustrate the inherent problems of consolidating fifty-four independent school districts).

163. *Id*. at 744–45.

164. *See supra* note 147 and accompanying text; *Milliken*, 418 U.S. at 762–63, 770–81 (White, J., dissenting) (noting that the "unquestioned violations of the equal protection rights" of African-American school students in Detroit's segregated schools should not be remedied by a cramped rule that stops integration at the school district line).

165. *Milliken*, 418 U.S. at 785 (Marshall, J., dissenting) ("The constitutional violation found here was not some *de facto* racial imbalance, but rather the purposeful, intentional, massive, *de jure* segregation of the Detroit city schools . . . .").

remedy is limited to Detroit and cannot cross the boundary line into the suburbs.[166]

Milliken essentially says that, with the exception of the inner-city core of Detroit itself, there is nothing to remedy.[167] All of the remaining segregative factors, such as a predominantly black urban core surrounded by nearly all-white suburbs, escalating white flight, and a substantial number of one-race schools, are all *de facto* in origin. Discrimination in fact is yet another formulation of the Court's conception that disproportionate impact is irremediable. *Washington v. Davis* builds upon this theme by specifically referencing the *de jure-de facto* distinction in its discussion of disproportionate impact.[168] This ultimately leads to the "strong basis in evidence" standard in *Ricci*.[169] If there is no identifiable discrimination against African-Americans in school assignments,[170] applications to the D.C. police department,[171] or in promotions in the fire department,[172] then disparate impact is irrelevant.

B. Washington v. Davis

Rejecting a claim advanced by unsuccessful applicants for the police force in Washington, D.C., where there was evidence that African-Americans failed the entrance examination in disproportionately higher numbers than whites, the Court held that disproportionate racial impact standing alone was insufficient to establish a violation of the Fourteenth Amendment.[173] There must be discriminatory purpose and disproportionate impact.[174] What is striking about *Davis* is how it narrowly defines discrimination; while disproportionate impact is not constitutionally irrelevant, it cannot sustain an Equal Protection challenge without discriminatory intent.[175] The decision also references the school desegregation cases for the proposition that there must be

166. Justice Marshall offers a devastating assessment of this cynical reasoning by the Court. *Id.* at 804–05 (discussing white flight and the doughnut effect with core predominantly Black schools in Detroit ringed by all white suburbs).

167. *Id.* at 783–84.

168. 426 U.S. 229, 240 (1976).

169. Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009).

170. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007). ("Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.").

171. *Davis*, 426 U.S. at 245.

172. *Ricci*, 129 S. Ct. at 2673 ("The City's actions [rejecting the test results to avoid disparate impact liability] would violate the disparate-treatment prohibition of Title VII absent some valid defense.").

173. *Davis*, 426 U.S. at 229, 244.

174. *Id.* at 238–48.

175. *Id.*

discriminatory intent.[176] The Court specifically references the *de jure-de facto* distinction to support the following proposition: that there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. "The essential element of *de jure* segregation is 'a current condition of segregation resulting from *intentional* state action.' . . . 'The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.'"[177]

Intent, then, or some identifiable discriminatory action is the touchstone of the Court's analysis under the Equal Protection Clause. In the school cases, the *de jure-de facto* distinction serves as a line of remedial demarcation—if discrimination exists, it must be explained through intent.[178] *Davis* and *Milliken* are ways of explaining the permanence of racial discrimination.[179] In other words, there are aspects of discrimination that cannot be addressed. Societal discrimination is irrelevant because it cannot be traced or connected to any identifiable discriminatory perpetrator.[180] "[I]n *Davis* uncertainty about the cause of racially subordinating impact leads to the default position of no suspicion of racism. In the affirmative action and recent desegregation cases, uncertainty about the motives of those attempting to remedy racial subordination leads to the default suspicion of racism."[181] Since the Constitution protects equal opportunity and access to the process, there is nothing constitutionally suspect about substantial numbers of African-American candidates failing an examination.[182] Moreover, it would be constitutionally suspect to guarantee results on the basis of race.[183] Process is privileged over substance. This doctrinal inversion, where disproportionate

176. *Id.* at 240.

177. *Id.* (quoting Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205, 208 (1973)) (emphasis added); *see also* Powell, *supra* note 118, at 412–13.

178. *See Davis*, 426 U.S. at 240.

179. *Id.* at 245–48; Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

180. *See* Powell, *supra* note 118, at 414–16 (discussing the neutral rhetorical devices employed by the Court to rationalize subordination).

181. *Id.* at 415 (quoting Lawrence, *supra* note 124, at 954).

182. *Davis*, 426 U.S. at 245–46. ("[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.").

183. The *Davis* Court found:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248.

impact is merely circumstantially relevant and race-conscious remedial approaches are presumptively unconstitutional, serves as the foundation for reverse discrimination claims. *Milliken* and *Davis* buttress reverse discrimination claims like those advanced in *Parents Involved* and *Ricci*. In many ways, the merger between Fourteenth Amendment post-racial principles and Title VII is complete.

C. Parents Involved*: Post-Racialism*

> Chief Justice Roberts's plurality opinion in *Parents Involved* represents a doctrinal shift in the Court's Fourteenth Amendment race jurisprudence—the Court reinterprets *Brown*, so that it is no longer a decision grounded in the historic anti-caste and anti-subordination principles of the Reconstruction Amendments; rather, *Brown* is transformed into a decision about the colorblindness of *individual* school choice.
>
> *Parents Involved* is breathtaking in its unbridled judicial determinism—the opinion is virtually an afterthought flowing from the result: it rejects the use of race-conscious remedies, it ignores precedent and rejects the substantive mandate of *Brown*, it extends colorblind constitutionalism, so that the concept of diversity is narrowly cabined to the University context, and it negates local control of the school system directly contradicting its own precedent and principles of federalism.[184]

The local control rationale here is distorted yet again.[185] In cases like *Milliken* and its progeny, the Court relied on the local control rationale to curb the "anti-democratic" reach of federal equitable power in school cases.[186]

184. Powell, *supra* note 118, at 431 (footnotes omitted).

185. *See supra* Section II.A.

186. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 100 (1995) (finding an interdistrict remedy of increased spending to bring whites into the school district was invalid in the absence of an interdistrict violation); Freeman v. Pitts, 503 U.S. 467, 489–91 (1992) (holding the federal courts should return supervisory control to local authorities as soon as possible; indeed, federal control may be withdrawn completely or partially based on good-faith compliance with the desegregation decree); Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991) (finding that, based on good faith finding of compliance, a district court may dissolve a desegregation order where the vestiges of de jure segregation had been eradicated "to the extent practicable"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434–35 (1976) (stressing a temporal limit on federal court intervention, the Court concluded that once a court implemented a racially neutral attendance plan, in the absence of intentional racially discriminatory actions by the school board, the court could not adjust its desegregation order to address population shifts in the school district); Milliken v. Bradley, 418 U.S. 717, 752 (1974) (holding interdistrict remedies must be specifically tailored to address interdistrict violations).

> [I]n a succession of sharply divided opinions issued in 1991, 1992, and 1995, Chief Justice Rehnquist invested "local control" of schooling with a constitutional weight that counterbalanced the earlier Warren Court's concern for racial discrimination and educational injury.
>
> . . . .

Essentially, the Court deferred to local school boards' decision-making powers. Ironically, this deference did not necessarily translate into positive results for integrated school districts. *Milliken* is a paradigmatic example of this.

In *Parents Involved*, the Court shifts course and invalidates *voluntary* plans adopted by the Louisville and Seattle school boards.[187] The Court rejects local decision-making because the sole purpose of both plans was racial balancing: "In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."[188] Racial balancing is unconstitutional because it guarantees a *result*—a specified quantum of racial proportionality in the schools—based on race.[189] The Court advances four distinct doctrinal strands to form the post-racial decision in *Parents Involved*: (i) it elevates the *de jure-de facto* distinction as a standing requirement that essentially eliminates any consideration of race in the absence of specific discrimination; (ii) it promotes liberal individualism as the touchstone of Fourteenth Amendment analysis so that an *individual's* school choice is commodified and the anti-subordination principle is fundamentally displaced; (iii) the spectra of racial politics is employed to emphasize the "illegitimacy" of local decision-making premised on race; and (iv) the protection of the interests of innocent whites is an unifying theme under all of the rationales discussed here.[190]

1. Colorblind Skepticism and Particularized Discrimination

The result in *Parents Involved* is assured after the Court frames the issue as involving the distribution of benefits and burdens on the basis of race subject to strict scrutiny review: "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."[191] Benefits and burdens should be distributed on a race neutral basis. If there is no particularized discrimination to remedy, then race-conscious remedies are presumptively

> Collectively, these decisions send [the] unmistakable [message] that district courts should begin winding up the process of desegregation. . . . Most commentators agree that the unfortunate, but predicted, effect of these decisions was the commencement of a significant trend toward resegregation.

Boyce F. Martin, Jr., *Fifty Years Later, It's Time to Mend* Brown*'s Broken Promise*, U. ILL. L. REV. 1203, 1210–11 (2004) (footnotes and internal quotations omitted); *see also* Lawrence, *supra* note 124, at 934 n.5.

187. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (plurality opinion).

188. *Id.* at 726.

189. *Id.* at 726–35.

190. *See id.* at 701–48.

191. *Id.* at 720 (majority opinion).

unconstitutional because they skew the process toward one race (African-Americans and people of color) over another (whites).[192]

There is no compelling state interest to remedy a constitutional wrong that cannot be identified. Societal discrimination cannot be remedied by racial-balancing.[193] Thus, there is a fundamental shift in the evaluation of constitutionally cognizable harm: The concern is not with the present day effects of past discrimination and the inevitability of resegregation in the absence of race-conscious remedial efforts, but with the harm on white *individuals* whose entitlement to school choice has been prejudiced by race.[194]

2. Liberal Individualism

Reconceptualizing *Brown* as a formalist opinion which focused on the legal separation of children on the basis of race,[195] and not on the stigmatizing effects of caste-based oppression condemned by the Fourteenth Amendment,[196] the Court concludes that there is an *individual* right to school assignments on a nonracial basis.[197] Thus, what gives substance to the "constitutional violation" in *Parents Involved* is that the process is flawed because it seeks to guarantee equal results by employing race in school assignments:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis" is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[198]

To the Court, there is a moral and doctrinal equivalence between the caste-based, racial oppression that was the organizing principle of American life before *Brown* and the good faith, voluntary remedial efforts to avoid the

192. *See id.* at 721.

193. *See Parents Involved*, 551 U.S. at 730–33 (plurality opinion).

194. *Id.* at 719 (majority opinion).

195. *Id.* at 746–47 (plurality opinion).

196. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 261 (2004) ("The effective compromise reached in the United States at the close of the twentieth century is that schools may be segregated by race as long as it is not due to direct government fiat.").

197. *Parents Involved*, 551 U.S. at 746–47 (plurality opinion).

198. *Id.* at 747–48 (citation omitted).

resegregation of public schools.[199] Under this reasoning, any use of race that cannot be justified in neutral terms will be unconstitutional.

3. Racial Politics

In *Parents Involved*, the Court suggests that the school assignment systems in Louisville and Seattle are fundamentally flawed because they are slanted toward a defined range based on demographics, and this is nothing more than a quota to the Court created by a political system committed to unconstitutional racial balancing[200]:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class. Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved.[201]

All of this makes clear that reverse discrimination suits, whether under the Fourteenth Amendment or Title VII, will have great currency and appeal to the Court. The impact on innocent parties, those whites who are entitled to either a colorblind neighborhood school assignment or a promotion based on a test with disparate consequences for African-Americans, will be carefully scrutinized.

4. Limited Duration of Impact on Innocent Parties

Ironically, the Court rejects the First Amendment rationale of viewpoint diversity that is at the core of the *Grutter v. Bollinger* decision,[202] concluding that racial diversity is not a compelling interest to sustain the school assignment programs.[203] Viewpoint and racial diversity are integral components to successful school integration plans,[204] but the Court refuses to

199. *See* OGLETREE, *supra* note 196, at 261 ("[W]hite children attend schools where 80 percent of the student body is also white, resulting in the highest level of segregation of any group.").

200. 551 U.S. at 729 (plurality opinion).

201. *Id.* at 730 (citations and internal quotations omitted).

202. 539 U.S. 306, 325 (2003).

203. *Parents Involved*, 551 U.S. at 732 (plurality opinion).

204. *See* Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in* Parents Involved *and* Meredith*: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 728–32 (2008) (discussing the social science literature documenting the democratizing effects of diverse schools).

extend *Grutter* to the elementary and secondary school context.[205] This is because the use of race has "no logical stopping point,"[206] and this would mean that there would be a burden on innocent (white) parties who had no connection to any alleged discrimination against African-Americans. There is no constitutional right to a result in the form of racial proportionality in the populations of elementary and secondary schools.[207] This is particularly so when racial balancing, for its own sake, displaces the individual right to colorblind school assignments:

> The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.[208]

While this neutral rhetoric is appealing on a superficial level, it represents a fundamentally distorted view of the significance of *Brown* and the Fourteenth Amendment. *Milliken*, *Davis*, and *Parents Involved* all advance the same doctrinal proposition: In the absence of identifiable discrimination, race-conscious remedial approaches are constitutionally suspect.[209] This leaves a substantial portion of structural inequality irremediable. In *Milliken*, inter-district remedies are confined to the district line,[210] in *Davis*, the disproportionate number of African-American candidates who failed the police cadet examination is a rational outcome because the process itself is open and accessible to all,[211] and in *Parents Involved*, resegregation is not even considered as a real possibility because *de facto* societal discrimination is insufficient to support the use of race-conscious remedies.[212] This proposition

205. *Parents Involved*, 551 U.S. at 723–25 (majority opinion).

206. *Id.* at 731 (plurality opinion) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).

207. *See id.* at 723–25 (majority opinion).

208. *Id.* at 732 (plurality opinion).

209. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974); Washington v. Davis, 426 U.S. 229, 248–50 (1976); *Parents Involved*, 551 U.S. at 748 (plurality opinion).

210. 418 U.S. at 744–47 (explaining that without an interdistrict violation, an interdistrict remedy is prohibited).

211. What is striking about *Washington v. Davis* is that the Court rejected disparate impact analysis under Title VII, concluding that the lower court had applied the wrong standard. *Davis*, 426 U.S. at 238. So, the Court ignored *Griggs*, as it would do over thirty years later in *Ricci*: "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239.

212. 551 U.S. at 729–33 (plurality opinion) (explaining that racial balance and proportionality is not guaranteed by the Constitution).

is precisely what underlies the "strong basis in evidence" rationale that the Court advances for the first time in a Title VII case in *Ricci*.[213]

While the Court pretends that the Equal Protection Clause and Title VII have not been merged into one post-racial principle, it is obvious that *Ricci* is a doctrinal extension of all of the Fourteenth Amendment rationales discussed here. All of the themes identified in Section C, *supra*, are present in the *Ricci* decision.[214] Indeed, this trend was already well underway, as Professor Spann noted, over a decade ago when he concluded that "a five-justice majority . . . may be willing to disallow the voluntary affirmative action that the Supreme Court authorized in [*United Steelworkers v.*]*Weber*, [443 U.S. 193 (1979)]," a Title VII decision standing for the proposition that voluntary affirmative action plans are permissible "even in the absence of a showing of prior unlawful discrimination."[215] With an even more conservative bloc of justices—Chief Justice Roberts, Justices Scalia, Kennedy, Thomas, and Alito—this prediction has become a stark reality in *Ricci*.[216]

Doctrinally, the Court has consistently engaged in an assault on voluntary race-conscious remedial measures; the only question is whether different standards are applicable under the Fourteenth Amendment or Title VII. There was doctrinal room for the Court to expand its constitutional colorblindness into its Title VII post-racialism. *Parents Involved* and *Ricci* both explicitly reject voluntary remedial efforts to eradicate the present day effects of past discrimination.[217] Under the Fourteenth Amendment and Title VII, the Court has effectively rejected the political judgment of communities committed to substantive equality.[218] This transforms voluntary remedial efforts to eradicate structural inequality in the workplace into admissions of liability by the

213. 129 S. Ct. 2658, 2677 (2009).

214. *Id.* at 2672–73.

215. GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION 175 (2000).

216. Professor Spann's prescient observation leads directly to *Ricci*:

> It may be that *Adarand* itself renders unconstitutional any reading of Title VII that does not insist on demonstrable prior discrimination as a prerequisite to voluntary affirmative action. . . . it may be that the similar official encouragement to engage in race-conscious employment decisions in order to avoid a potential Title VII violation would also violate the equal protection clause—at least in the absence of a showing that such race consciousness was a narrowly tailored remedy for past discrimination.

Id. at 175 (footnotes omitted). While the Court insists that it does not decide the issue of whether Title VII and the Equal Protection Clause are co-extensive in application and scope, *Ricci*, 129 S. Ct. at 2675–76, it nevertheless borrows heavily from the Fourteenth Amendment to create the strong basis in evidence standard which requires some level of intent (at least in the sense that disparate impact is insufficient to support a good faith attempt to avoid Title VII liability under that provision). *See infra* Section III.4.

217. *Ricci*, 129 S. Ct. at 2677; *Parents Involved*, 551 U.S. at 733–34 (plurality opinion).

218. *Ricci*, 129 S. Ct. at 2677; *Parents Involved*, 551 U.S. at 733–34 (plurality opinion).

employer.[219] Unless there is a strong basis in evidence that a specific disproportionality will lead to a Title VII claim, the Court will presume that there is a cognizable reverse discrimination claim.[220]

III. *RICCI V. DESTEFANO*

The common doctrinal proposition that integrates the Court's post-racial jurisprudence under the Fourteenth Amendment and Title VII is that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[221] All of the underlying post-racial themes underpinning the *Parents Involved* decision are present in *Ricci*: there is a marked skepticism toward any race-conscious remedial approach;[222] the rights of *individual* white test takers who passed the examination are presumptively valid so that a good faith effort by the City to avoid disparate impact liability is inverted into a disparate (reverse discrimination) treatment claim;[223] Justice Alito's concurrence employs stereotypical rhetoric reminiscent of revisionist Reconstruction histories to "illustrate" how race skewed the "neutral" process;[224] and there is an even more pronounced concern here, under Title VII, that the innocent, hardworking white firefighters not be deprived of the awards for their meritorious achievement.[225]

219. *See* Harris & West-Faulcon, *supra* note 27; *supra* note 141 and accompanying text.

220. *See Ricci*, 129 S. Ct. at 2673–81.

221. *Parents Involved*, 551 U.S. at 748 (plurality opinion).

222. *Ricci*, 129 S. Ct. at 2673 ("Without some other justification . . . race-based decision making violates Title VII . . . ."). Likewise, in *Parents Involved*, since race predominated in the school assignment process, the plans in Louisville and Seattle were held to be unconstitutional. 551 U.S. at 723.

223. *Ricci*, 129 S. Ct. at 2674–77 (reasoning that because the promotion tests were job-related and consistent with business necessity, then any attempt to alter the results was nothing more than racial engineering designed to undermine the legitimate individual right to be evaluated on a nonracial basis). This strand of liberal individualism is present in *Parents Involved* when the Court advances the notion of an individual right to attend schools on a non-racial basis. 551 U.S. at 743 (plurality opinion).

224. *Ricci*, 129 S. Ct. at 2684–89 (Alito, J., concurring) (arguing that the City's good faith, voluntary effort to avoid disparate impact liability was merely pretextual; the real reason for decertifying the test results was to "please a politically important racial constituency"). In *Parents Involved*, the Court rejected the voluntary efforts of school officials to maintain integrated schools, in the face of growing resegregation, because there was nothing to remedy. 551 U.S. at 732–33 (plurality opinion). Under Title VII and the Fourteenth Amendment, there must be something identifiable (a constitutional or statutory violation) to remedy; otherwise, the Court will view any race-conscious remedial approach as invalid because it seeks to guarantee a result on a racial basis. *See supra* Section I.

225. The Court itself privileges this narrative in *Ricci*. *See* 129 S. Ct. at 2689 (Alito, J., concurring) (cataloguing the personal sacrifices of Frank Ricci and the only person of color to join the reverse discrimination suit, Latino firefighter Benjamin Vargas); *see also* A.G. Sulzberger, *For Hispanic Firefighter in Bias Suit, Awkward Position But Firm Resolve*, N.Y.

A. Title VII and the Meaning of Discrimination

It was well-settled precedent in the Second Circuit, where the firefighters' reverse discrimination claim arose, that disparate impact on minorities could be avoided without triggering a disparate treatment claim.[226] There was a bright-line between both types of discrimination. In *Ricci*, the Court merges both types of discrimination so that *intentional* caste-based, racial discrimination is no different analytically than an attempt to avoid a disproportionately racial impact on a historically oppressed group. Just as there is no distinction between malign and benign discrimination under the Court's Fourteenth Amendment jurisprudence,[227] there is no distinction between intentional discrimination (disparate treatment) and good-faith, race-conscious remedial attempts to avoid disparate impact liability under Title VII.[228] Race is viewed skeptically, and liberal individualism is the touchstone.[229] This is the context in which *Ricci* was decided. The Court's most glaring departure from precedent was its reinterpretation of *Griggs v. Duke Power Co.* and Title VII.[230]

TIMES, July 3, 2009, at A20. *But see Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting) (concluding that the white firefighters "had no vested right to promotion").

226. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 728–29 (4th ed. 2011) ("It should be noted that civil rights statutes can, and often do, allow violations to be proved based on discriminatory impact without evidence of a discriminatory purpose. For example, Title VII of the 1964 Civil Rights Acts allows employment discrimination to be established by proof of discriminatory impact." (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971))); Luke Appling, *Recent Development*: Ricci v. DeStefano, 45 HARV. C.R.-C.L. L. REV. 147, 148 (2010) ("[T]he majority ignored its own Title VII precedent that tolerated disparate impacts only when the employer could demonstrate true 'business necessity' or 'job related[ness].' In its place, the majority crafted a seemingly difficult to satisfy 'strong basis in evidence' standard out of unrelated Equal Protection Clause cases." (footnote omitted)).

227. *Parents Involved*, 551 U.S. at 743 (plurality opinion) (noting that the Equal Protection Clause protects individuals, not racial groups, and stating that "[s]imply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny").

228. *Ricci*, 129 S. Ct. at 2677 ("[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."). The Court conflates discriminatory intent so that an attempt to avoid disparate impact liability is transformed into disparate treatment of displaced white employees of the fire department. *See infra* Section III.3.

229. *See Ricci*, 129 S. Ct. at 2672–73.

230. 401 U.S. at 425–26.

1. Structural Inequality: *Griggs v. Duke Power Co.*

In the Court's race jurisprudential canon, *Griggs* is the rare decision that rejects neutrality,[231] eschews the narrow intent-perpetrator rhetoric of anti-discrimination law,[232] and embraces the concept of structural inequality as a present day effect of past discrimination.[233] Structural inequality is a way of describing the permanence of racism[234] and its adaptability in the face of incremental societal progress:

> The term *structural inequality* is broad and is in a rough sense the inverse of the state action doctrine. That is, *structural inequality* refers to existing conditions of inequality that are not directly attributable to a specific past act of governmental discrimination that would give rise to a right to race-conscious relief under the Equal Protection Clause. It includes "the institutional defaults, established structures, and social or political norms that may appear to be . . . neutral, non-individual focused, and otherwise rational, but that taken together create and reinforce" segregation and inequality.[235]

Parents Involved and *Ricci* fit squarely within Rhetorical Neutrality[236]: in both decisions, history is ignored so that the present day effects of past discrimination are not analyzed, discrimination is defined so narrowly that it is nearly impossible to advance a discrimination claim, yet reverse discrimination claims are presumptively valid, and neutral rhetoric is advanced to rationalize inequality.[237] Thus, the Court's recent reinterpretation of Title VII is nearly the final step in constructing its post-racial jurisprudence:

> In *Parents Involved*, the Court came within one vote of holding that there is no compelling state interest in ameliorating *de facto* racial segregation. Such a holding, combined with aggressive application of disparate impact doctrine,

231. *Id.* at 430.

232. *Id.* at 430–34. *See generally* Barclay D. Beery, *From Aspiration to Arrogance and Back: The Once and Future Role of "Equal Employment Opportunity" Under Title VII*, 34 VAL. U. L. REV. 435, 464–70 (2000).

233. *Griggs*, 401 U.S. at 430–31.

234. *See Xerces*, *supra* note 32; Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833, 854 (2011) ("[D]iscrimination remains a deep part of our nation's present, whether displayed through educational disparities, home mortgages, loans, voting patterns, racial profiling, or Supreme Court decisions, there is little question that we have not yet moved beyond race."); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 201 (2004) ("More specifically, during Jim Crow and slavery, whites constructed the institutional rules of the game to favor whites, and the game now continues to reproduce that advantage.").

235. Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality after* Ricci *and* Pics, 16 MICH. J. GENDER & L. 397, 399 (2010) (quoting Erica Frankenberg & Chinh Q. Le, *The Post-*Parents Involved *Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1016 n.3 (2008)).

236. Powell, *supra* note 9, at 844 n.100.

237. *Id.* at 858–59.

> would effectively forbid states or the federal government from adopting policies designed to reduce segregation and structural race inequality. Two years after *Parents Involved*, Justice Scalia played out this line of reasoning in his concurrence in *Ricci v. DeStefano*, where he argued that the disparate impact provisions of Title VII of the Civil Rights Act of 1964 are unconstitutional.[238]

The Court has not formally declared that under the Fourteenth Amendment and Title VII race should never be considered to eradicate structural inequality, but it is getting quite close to doing so. This is why the central meaning of *Griggs* should be restored in the Court's Title VII jurisprudence.

In *Griggs*, the Court held that Title VII prohibits not only intentional employment discrimination (disparate treatment), but also disparate impact discrimination:

> Under the Act, practices, procedures, or tests *neutral on their face, and even neutral in terms of intent*, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.
>
> . . . .
>
> . . . The Act proscribes not only overt discrimination but also practices that are *fair in form, but discriminatory in operation. The touchstone is business necessity.* If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[239]

The *Griggs* Court explicitly rejected neutrality and its underlying myths, and instead focused on eradicating the present day effects of past discrimination.[240] *Griggs* is a paradigmatic example of the structural inequality theory—discrimination is embedded in systemic functions that operate to preserve the status quo of inequality—and it seeks to dismantle the enduring features of caste-based oppression.[241] This is beyond the narrow view of discriminatory intent with an identifiable perpetrator.

Concluding that a high school completion requirement and a general intelligence test operated disproportionately to exclude African-Americans from higher paying positions at the plant, the Court held that there was no relationship between job performance and the exclusionary job requirements.[242] Lack of discriminatory intent is not the touchstone; rather

238. Hendricks, *supra* note 235, at 400 (footnotes omitted). While the Court ostensibly did not resolve the issue of whether the same standards apply under Title VII and the Equal Protection Clause, the point here is that the Court is eager to transplant formalistic notions of equality into its post-racial jurisprudence so that a finding of discriminatory *intent* is a statutory or constitutional requirement.

239. 401 U.S. 424, 430–31 (1971) (emphasis added).

240. Powell, *supra* note 9, at 831–59.

241. *See Griggs*, 401 U.S. at 425–26.

242. *Id.* at 431.

"Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[243] Deferring to the legislative expertise of Congress in defining discrimination in the employment marketplace, the Court took a skeptical view toward job tests[244] and acknowledged the present day effects of past discrimination: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[245]

Significantly, the Court draws upon the history of racial segregation in schools and notes that this past invidious practice has a present day effect—African-Americans have long performed poorly in disproportionate numbers on standardized tests.[246] "This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences . . . ."[247] There is an intrinsic unfairness in the process that the Court identifies as statutorily cognizable; in this instance, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[248]

Relying upon the Equal Employment Opportunity Commission's (hereinafter "EEOC") interpretive guidelines, the Court gives "great deference" to the Commission's job relatedness standard.[249] The Court closely scrutinized all of the neutral rationales for the tests and diploma requirements and rejected them because they "were adopted . . . without meaningful study of their relationship to job-performance ability."[250] The non-scientific, anecdotal

243. *Id.* at 432 (emphasis added).

244. *See id.* at 433–34.

245. *Id.* at 429–30.

246. *Id.* at 430.

247. *Griggs*, 401 U.S. at 430.

248. *Id.* at 432.

249. *Id.* at 433–36. These guidelines interpreted Section 703(h) of Title VII of the Civil Rights Act of 1964. *Id.* at 433.

250. *Id.* at 431. The same is no less true in *Ricci*, but the Court privileges the reverse discrimination narrative of the white firefighters. *See* Selmi, *supra* note 234, at 854 (critiquing the rhetorical devices of "hard-working whites" and "complaining" blacks—"In *Ricci*, the Court privileged the hard work and desert of the white firefighters over the demonstrated flaws of the examinations and the importance of diversity within the department."); *see also infra* Section III.A.2–5.

representations of the vice president of the company were rejected based upon the real world *consequences* of the employment practices.[251]

With all of its promise as an expansive articulation of the structural inequality theory, there is a tension in *Griggs* that will be exploited in Justice Kennedy's *Ricci* opinion some twenty-eight years later—the tension between equality of opportunity (process) and results.[252] In *Griggs*, the Court defined disparate impact through the analytical prism of disparate treatment liability;[253] the Court stated that "[w]e do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent."[254] Thus, discriminatory intent was the appropriate starting point for determining whether there was a Title VII violation, yet the Court also articulated the notion that, absent such discriminatory intent, there could still be a cognizable statutory claim if testing mechanisms "operate[d] as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[255] This creates an "either/or" proposition in the eradication of systemic discrimination. In other words, while intentional discrimination is an evil that must be eradicated, there may be neutral explanations for persistent disparities that do not result from intentional discrimination.[256]

For example, the Court stated that "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[257] This passage contains both language of *process* ("the removal of . . . barriers to employment" so that the process is open to all) and *results* (the barriers must be removed because they are present

251. *Griggs*, 401 U.S. at 431–33 ("Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."). By contrast, the Court in *Ricci* totally embraces "meritocracy," as its guiding principle and erects the strong basis in evidence standard as an evidentiary barrier to disparate impact claims. *See* Harris & West-Faulcon, *supra* note 27, at 76. The promotion tests are presumptively valid so the only "discrimination" is the displacement of the white (and one Latino) test takers who were entitled to promotions based upon their test scores. *See* Nicole J. DeSario, Note, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 507–10 (2003).

252. 129 S. Ct. 2658, 2674–77 (2009).

253. *See* Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 228 (1990).

254. *Griggs*, 401 U.S. at 432; *see also* Belton, *supra* note 253, at 228.

255. *Griggs*, 401 U.S. at 432.

256. *See generally* Beery, *supra* note 232, at 465–72 (critiquing the doctrinal limitations of the concept of disparate treatment under Title VII).

257. *Griggs*, 401 U.S. at 431.

day manifestations of *invidious discrimination*, which is a type of intentional discrimination).[258] As Professor Robert Belton explains:

> Endorsing both theories of discrimination [disparate impact and disparate treatment], however, created a theoretical and practical tension. While an equal achievement theory of equality underlies disparate impact, a contradictory view of equality underlies disparate treatment—equal treatment. These two theories of equality and their doctrinal manifestations necessarily conflict because they have different objectives. The equal treatment/disparate treatment model is *process oriented*; it aims to eliminate race and sex from the employer's decision making process, and thus to establish strict race and sex *neutrality*. Conversely, the equal achievement/disparate impact model is *results oriented*; it seeks to improve the economic position of minorities and women by redistributing more desirable jobs to them. This requires employers to consider race and sex in their decisions. In addition, while equal treatment paradigmatically focuses on *individuals*, equal achievement focuses on *groups*—in particular their economic and social status—and legitimates group-based relief. The tension between these two theories is inevitable because civil rights laws cannot as a matter of policy—and employers cannot as a matter of practice—simultaneously ignore and consider race and sex.[259]

Professor Belton highlights the classic tension between equal process and equal results.[260] In its Fourteenth Amendment jurisprudence, the Court has embraced the seminal proposition that the Constitution protects *individuals*, not racial groups.[261] Applying a literal and formalistic conception of equality, rooted in the anti-differentiation principle, the Court has consistently advanced liberal individualism and neutrality.[262] Race is viewed skeptically[263] and can only be used to eradicate the persistent vestiges of discrimination in two *narrow* instances: to promote diversity in higher education[264] and to remedy clearly identifiable discrimination by a discriminatory perpetrator.[265] All other forms of discrimination are either "de facto" or "amorphous" and cannot be remedied by the use of race.[266] It is obvious, then, that *intent* is the touchstone of the Court's Fourteenth Amendment jurisprudence. From *Milliken* to *Davis* to *Parents Involved*, the absence of discriminatory intent proved fatal to race-

258. *See id.*; Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

259. Belton, *supra* note 253, at 228–29 (some emphasis added) (footnotes omitted).

260. *See also* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 238 (1971).

261. *See Adarand*, 515 U.S. at 227.

262. Powell, *supra* note 9, at 831–59.

263. *See Adarand*, 515 U.S. at 223.

264. Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003).

265. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989).

266. *Id.* at 496–98.

conscious remedial approaches or to complaints alleging discrimination.[267] Impact becomes irrelevant unless it can be connected to some form of intent.

In similar fashion, the Court in *Ricci* has made impact irrelevant without some form of *intent*—a "strong basis in evidence" that an employer would be subject to a disparate impact suit.[268] So, in order to engage in "discrimination" (or to adopt a race-conscious approach), there must be a strong basis in evidence that the only way to avoid disparate impact liability is to burden the *individualized* interests of whites. This is the essence of the theoretical and practical tension that Professor Belton cogently describes: race must be ignored in the name of neutrality, but when there is any burden on white privilege, the Court is breathtakingly race-conscious.[269] The Court adopts the process-based, equal treatment/disparate treatment[270] model that focuses on *individuals* and access to the process, not guaranteed racial results for an historically excluded group. Race should be eliminated from the process so that it is neutral and fair; thus, there must be something more than disparate impact to prompt a voluntary race-conscious remedy from an employer.[271] Intent has become the analytical touchstone of the Court's Title VII jurisprudence as well.

The tension between equal opportunity (liberal individualism) and equal results (group-based equality) remained unresolved for nearly eighteen years with the *Griggs* disparate impact standard serving as the basis for Title VII litigation.[272] All of this changed in 1989, when the Court attempted to limit the scope of disparate impact liability in *Wards Cove Packing Co. v. Atonio*[273]:

> In 1989, a bare majority of the Supreme Court, including Justice Kennedy (author of the *Ricci* majority opinion), attempted to limit disparate-impact liability but was reversed by Congress in 1991. In *Wards Cove Packing Co., Inc. v. Atonio*, the Court made it significantly more difficult for plaintiffs to prove disparate impact by diluting the "business necessity" defense into a question of "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . . [T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's

267. *See supra* Section II.

268. 129 S. Ct. 2658, 2675–77 (2009).

269. *See* Flagg, *supra* note 142, at 1006.

270. Essentially, this is another articulation of the anti-differentiation principle that similarly situated individuals should be treated the same without reference to race, context, or the continuing effects of past discrimination. *See* SUNSTEIN, *supra* note 79, at 340–41.

271. *See Ricci*, 129 S. Ct. at 2677.

272. *See* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1518 (2004); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1487 (1990).

273. 490 U.S. 642, 659 (1989).

> business." Yet Congress effectively reversed the Court when it passed the 1991 Civil Rights Act, which explicitly stated that its purpose was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*" and "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate-impact suits under Title VII." To that end, Congress codified the "disparate impact" component of Title VII by adding language that Title VII is violated if an employer "uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." In applying the disparate-impact provision, the Equal Employment Opportunity Commission ("EEOC") has promulgated the "four-fifths rule," under which an employment practice that results in a "selection rate for any race, sex, or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."[274]

By 1989, the Court was well on its way, under the Fourteenth Amendment, to constitutionalizing colorblindness, it decided *City of Richmond v. J.A. Croson Co.*, and for the first time, explicitly stated that race-conscious remedial approaches were unconstitutional in the absence of identifiable discrimination by the state itself.[275] So while the Court was actively engaged in trying to gut *Griggs*, it was simultaneously creating the colorblind Fourteenth Amendment jurisprudence that it would import into Title VII. The Roberts Court goes even farther and adopts a post-racial approach—"[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[276]—and very nearly unifies both Title VII and the Fourteenth Amendment.

It is no doctrinal coincidence that when faced with the choice between substantive equality[277] and process-based outcomes, the Court always chooses process.[278] Even with the doctrinal tension between equal opportunity

274. Appling, *supra* note 226, at 149–50 (footnotes omitted). There was a clear Title VII violation in *Ricci*—there was demonstrable adverse impact that fell squarely within the EEOC guidelines—and the examinations could not be characterized as job-related and consistent with business necessity because they simply replicated the existing system of exclusion so that no African-Americans could be successful. *Id.* at 158; *see infra* Section III.A.4.

275. 488 U.S. 469, 504 (1989) (noting that states may take race-conscious remedial action, but "they must identify that discrimination, public or private, with some specificity" before doing so).

276. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

277. *See* Powell, *supra* note 12, at 846–74.

278. *See* Powell, *supra* note 9, at 826 n.15, 852–53.

(process) and results in *Griggs* discussed above,[279] it still represents a rejection of neutrality and process-based outcomes that embrace procedural access over substantive results. Thus, it is imperative that the Court reaffirm the following thematic concepts in its jurisprudence:

1) Voluntary race-conscious remedial efforts should be presumptively valid, particularly in contexts where there is a clearly identifiable history of discrimination with present day effects;[280]

2) Disparate impact on historically excluded groups should not be rationalized as a *neutral* outcome; and, reverse discrimination claims should be viewed skeptically because they may serve to preserve the status quo of structural inequality;[281]

3) Discriminatory intent, whether under the Fourteenth Amendment or Title VII, should not be the touchstone for analysis of discrimination claims;[282] and

4) The Court should defer to the interpretive guidelines proffered by the EEOC and the institutional competence of Congress to define discrimination.[283]

Of course, the Court ignored all of these doctrinal propositions, creating instead, out of whole cloth, a new post-racial interpretation of Title VII.[284] *Ricci* rejects the structural view of racial inequality, and instead offers a neutral rationale for the exclusion of African-American firefighters from the officer ranks,[285] it inverts the disparate treatment and impact standards under Title VII so that intentional discrimination is the prerequisite for any actions under the statute,[286] it crafts a novel evidentiary standard that presumes the validity of reverse discrimination claims,[287] and, finally, it employs racial politics to reach

279. *See supra* notes 252–71 and accompanying text.

280. *See* Roithmayr, *supra* note 234, at 257–58 (advancing the lock-in model of discrimination which rejects neutrality and instead takes a comprehensive view of the present day effects of past discrimination in political systems, education, housing, and economics).

281. *See id.* at 205 (noting how the "individual intent" view of racism is flawed because it overlooks the structural aspects of inequality such as the "central role of institutions in transmitting th[e] cumulative disadvantage").

282. *See id.* at 201–13.

283. *See infra* Section III.B.

284. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2672–76 (2009).

285. *See id.* at 2674–76.

286. Under this inverted reasoning, disparate impact claims are transformed into disparate treatment (reverse discrimination) claims in the absence of a strong basis in evidence "that, had [the employer] not taken the action, it would have been liable under the disparate-impact statute." *Id.* at 2664. Nothing in the decision gives any clue as to how this exercise in doctrinal and evidentiary prognostication will work.

287. *See id.* at 2676.

the conclusion that the process is flawed because race was the predominant factor in decision-making.[288]

2. "Neutral Facts" and Race

"In 2003, 118 New Haven[, Connecticut (hereinafter "City")] firefighters took examinations to qualify for promotion to the rank of lieutenant or captain."[289] By City charter, a merit system was established, which provided that vacancies in civil service jobs be filled by the most qualified individuals as determined by examinations.[290] "[T]he New Haven Civil Service Board (CSB) certifies a ranked list of applicants who passed the test."[291] The charter's "rule of three" provided that "the relevant hiring authority must fill each vacancy by choosing one candidate from the top three scorers on the list."[292] Applicants for lieutenant and captain positions were screened through a written exam and an oral exam, which represented sixty percent and forty percent of the total score, respectively.[293]

The passage rate for the lieutenant and captains examinations showed stark racial disparities for African-American and Latino candidates:

> Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. *All 10 were white*. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.
>
> Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—*7 whites and 2 Hispanics*.[294]

This meant that while a very small number of African-American or Latino firefighters actually passed the examination, *no African-American* and only *two* Latino firefighters were eligible for promotion under the rules.[295]

288. *See id.* at 2681.

289. *Id.* at 2664.

290. *Ricci*, 129 S. Ct. at 2665.

291. *Id.*

292. *Id.*

293. *Id.* The City hired Industrial/Organizational Solutions, Inc. (hereinafter "IOS") to develop the promotional exam. *Id.* at 2665–66.

294. *Id.* at 2666 (emphasis added) (citations omitted).

295. *Id.*; *see also* Appling, *supra* note 226, at 150 ("There were even greater disparities among those eligible under City policy for promotion based on these results: of the nineteen people who were eligible for promotion to lieutenant or captain, *seventeen were white, while only*

Faced with this racially based adverse impact and the possibility of liability under Title VII and after conducting five hearings involving stakeholders from the designer of the test to the firefighters and community leaders, the CSB voted not to certify the results of the examinations, and no one was promoted.[296] Seventeen white firefighters and one Latino who were eligible for promotion, upon passing the examination, brought suit against the City in federal court.[297] They alleged that the failure to certify the test results violated the Equal Protection Clause of the Constitution and the disparate-treatment provision of Title VII.[298]

Relying upon well-settled Second Circuit precedent, the district court granted the City's motion for summary judgment and concluded that the City's "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent" under Title VII.[299] Significantly, the district court stated that "it would contravene the remedial purpose of Title VII if an employer were required to await a lawsuit before *voluntarily* implementing measures with less discriminatory impact."[300] Thus, voluntary compliance with Title VII was consistent with its statutory mandate, particularly when a prima facie case of disparate impact had been established on the record of this case.[301] "[T]he intent to remedy the disparate impact of [the tests] is not equivalent to an intent to discriminate against non-minority applicants."[302]

The Second Circuit Court of Appeals affirmed,[303] and the United States Supreme Court granted certiorari,[304] accepting Judge Cabranes' invitation to re-examine the scope of race conscious remedies under the Equal Protection Clause and Title VII.[305] From the very beginning of the Court's recitation of the underlying facts of *Ricci*, it is obvious that the post-racial result is a foregone conclusion.

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two were Hispanic and none were black, even though blacks and Hispanics comprised more than 42% of those who took the promotion test.").

296. *Ricci*, 129 S. Ct. at 2667–71.

297. *Id.* at 2671.

298. *Id.* (citing 42 U.S.C. §§ 2000e-2(a) (2006)).

299. Ricci v. DeStefano, 554 F. Supp. 2d 142, 160 (D. Conn. 2006). The district court also held that there was no Equal Protection violation. *Id.* at 161 ("Here, all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted. This does not amount to a facial classification based on race.").

300. *Id.* at 159 (emphasis added).

301. *Id.* at 158–59.

302. *Id.* at 162 (quoting Hayden v. Cnty. of Nassau, 180 F.3d 42, 51 (2d Cir. 1999)).

303. Ricci v. DeStefano, 530 F.3d 87, 87 (2d Cir. 2008).

304. Ricci v. DeStefano, 129 S. Ct. 893, 893 (2009).

305. Ricci v. DeStefano, 530 F.3d 88, 94 (2d Cir. 2008) (Cabranes, J., dissenting from the denial of rehearing en banc); *see also* Appling, *supra* note 226, at 152.

Several neutral rhetorical moves lead to the Court's holding: (i) the case is fashioned as a "contest" for goods with two competing parties: one with the presumption of "merit" and entitlement because they passed the examination, and those who benefitted only because race was used to skew the process; (ii) *Griggs* is literally written out of the case as governing precedent; (iii) the Court begins with the premise that the City discriminated against the white firefighters because the failure to certify the examination results was based on race; and (iv) disparate impact liability is trivialized so that the racial disparities between white, Black, and Latino test takers are irrelevant in the absence of additional proof beyond the EEOC guidelines.[306] Finally, the Court substantially alters Title VII jurisprudence by inverting the analytical principles underlying disparate impact liability and creating a Fourteenth Amendment-derived evidentiary standard ("strong basis in evidence") that will only serve to confuse employers and chill voluntary compliance efforts in the future.[307]

Ricci is an acontextual and ahistorical decision: the Court's analysis does not acknowledge, in any way, the present day effects of past discrimination.[308] The Court goes through the facts of the five CSB meetings in great detail in order to emphasize how the process was flawed because it trammeled the *individual* interests of white firefighters who were entitled to promotions based on their test scores.[309] Liberal individualism is codified and group-based statutory claims based on race take a backseat to Frank Ricci's reverse discrimination claim.[310] Indeed, the Court privileges Mr. Ricci's narrative over the City's good-faith efforts to avoid disparate impact liability.[311] Discrimination is "define[d] . . . so narrowly that whites become the new 'discrete and insular minorit[y]' (systemic oppression against African-Americans and people of color is so amorphous that it cannot be specifically identified (or remedied), and *individualized* reverse discrimination claims are presumptively valid)."[312] Without any reference to history, Rhetorical

306. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664–81 (2009).

307. *See* Appling, *supra* note 226, at 157–59 (discussing how the Court's decision in *Ricci* might impact decisions made by employers).

308. *See Ricci*, 129 S. Ct. at 2690–91 (Ginsburg, J., dissenting) (arguing that "[i]t is against [a] backdrop of entrenched inequality that the promotion process at issue in this litigation s*hould* be assessed" (emphasis added)).

309. *Id.* at 2664–72 (majority opinion).

310. *See id.* at 2667–70.

311. *See id.* at 2667; Harris & West-Faulcon, *supra* note 27, at 118 (discussing how the issue was framed as whites as racial victims notwithstanding the fact that there was no "injury" because no one was promoted).

312. Powell, *supra* note 9, at 858 (emphasis added).

Neutrality[313] is particularly appealing as a doctrinal tool because it provides a rationale for how disparate impact can be ignored.

The Court constructs a neutral factual narrative of basic "fairness": the white firefighters, "at considerable personal and financial cost," simply outperformed the minority candidates; the process worked well until race infected it; and the City took the side of those who did not perform well based solely on complaints about a "statistical racial disparity" that could be explained as the objective outcome of a job-related examination.[314] "In the end the City took the side of those who protested the test results. It threw out the examinations."[315] To the Court, the City chose the "wrong side" because its decision was not neutral.[316]

In much the same way as the Court ignored history and context under the Fourteenth Amendment in order to adopt a literal and formalistic interpretation of the anti-differentiation principle,[317] here the Court codifies the anti-differentiation principle. Similarly situated white firefighters were discriminated against on the basis of race. The process guarantees equal opportunity, not equal results[318]—this would certainly be true if the process was free from the lingering effects of past discrimination:

> In the early 1970's, African-Americans and Hispanics composed 30 percent of New Haven's population, but only 3.6 percent of the City's 502 firefighters. The racial disparity in the officer ranks was even more pronounced: "[O]f the 107 officers in the Department only one was black, and he held the lowest rank above private."
>
> . . . .
>
> . . . New Haven's population includes a greater proportion of minorities today than it did in the 1970's: Nearly 40 percent of the City's residents are African-American and more than 20 percent are Hispanic. Among entry-level firefighters, minorities are still underrepresented, but not starkly so. As of 2003, African-Americans and Hispanics constituted 30 percent and 16 percent of the City's firefighters, respectively. In supervisory positions, however,

313. See *id.* at 831–59 for a discussion of "Rhetorical Neutrality."

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

315. *Id.*

316. *Id.* The court concluded that:

> [R]ace-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. . . . [T]he City's action in discarding the tests was a violation of Title VII.

Id.

317. *See* Powell, *supra* note 7, at 227–29, 242–43.

318. *Ricci*, 129 S. Ct. at 2674 ("[O]ur decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.").

> significant disparities remain. Overall, the senior officer ranks (captain and higher) are nine percent African-American and nine percent Hispanic. *Only one of the Department's 21 fire captains is African-American.*[319]

So, it is obvious that white firefighters and African-American firefighters did not start at the same place in the process. Next, the Court finds a neutral rationale to explain the cavernous disparity between white and African-American test takers.[320] To do so, the Court offers a novel reinterpretation of *Griggs*.[321]

Only two years before *Ricci*, the Court radically reinterpreted *Brown v. Board of Education* to stand for the proposition that individual reverse discrimination claims take precedence over voluntary community attempts to maintain integrated schools in the spirit of the anti-subjugation and anti-caste principles of the Fourteenth Amendment.[322] Since race is "neutral," any decision based upon race is inherently unconstitutional.[323] Likewise, under Title VII, the Court concludes that "[w]hatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white."[324] The Court inverts the central premise of *Griggs*: ostensibly neutral practices, procedures, or tests may nevertheless "operate to 'freeze' the status quo of prior discriminatory practices."[325] "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[326] As the quoted language above illustrates, the Court shifts the analytical focus from the consequences of

319. *Id.* at 2691 (Ginsburg, J., dissenting) (emphasis added) (citations omitted).

320. *Id.* at 2678–81 (majority opinion).

321. *Id.* at 2672–73.

322. *See* Parents Involved in Cmty. Sch.v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007) (plurality opinion) ("Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny."). Even Justice Kennedy did not join this section of the Court's decision. *Id.* at 782–83 (Kennedy, J., concurring in part and concurring in the judgment). *But see id.* at 803–68 (Breyer, J., dissenting); Powell, *supra* note 118, at 386–421 (discussing the true meaning of *Brown* as the eradication of caste-based oppression).

323. *Parents Involved*, 551 U.S at 743–48 (plurality opinion).

324. *Ricci*, 129 S. Ct. at 2674. It is no small irony that the post-racial, orginalist Court is selective in its recognition of race. *See* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 30–41 (1996) (discussing how white privilege has undermined the efficacy of Title VII); SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES 31 (2002) (critiquing constitutional originalism and noting its analytical failure because it must make racial distinctions while claiming to ignore such distinctions).

325. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

326. *Id.* at 432 (emphasis added).

employment practices to the "discriminatory" intent of the City[327]—there must be a "lawful justification for its race-based action."[328] The Court takes this doctrinal leap by ignoring a long line of established Title VII precedent that permits voluntary compliance efforts to avoid disparate impact liability.[329] Once this core Title VII theme is dismantled by the Court, it goes on to construct a new presumption that radically modifies disparate impact liability.[330]

Any use of race is presumptively a statutory violation unless there is a lawful justification for its use.[331] The Court's analysis does not even begin from a point of deference to the City's good faith attempt to avoid disparate impact liability, the EEOC guidelines that clearly define the disparity here as a statutory violation, or Congress' legislative purpose of removing the present day ("neutral") effects of past discrimination.[332] Instead, the Court all but determines the result of this case by starting with the premise that "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."[333]

In much the same manner that the Court focuses on the discriminatory perpetrator through intent in its equal protection jurisprudence, *Ricci*'s approach, under Title VII, emphasizes discriminatory intent so that the African-American firefighters' legitimate claim of disparate impact is subsumed under the premise that the only statutorily valid claim is that of the white firefighters.[334] The white firefighters become "victims" of their own performance on the examination: "[T]he City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"[335] The City's voluntary attempt to comply with Title VII becomes intentional discrimination. Impact, whether under the Fourteenth Amendment or Title VII, is constitutionally or statutorily irrelevant in the absence of something more.[336]

327. Specifically, if the purportedly neutral testing system is left intact, "entrenched inequality" will continue to operate to exclude African-American firefighters from the officer ranks. *See Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting); Harris & West-Faulcon, *supra* note 27, at 133–57 (proving that the lieutenant and captain examinations violated the EEOC's 4/5ths rule and that the tests were unfair to people of color and whites).

328. *Ricci*, 129 S. Ct. at 2674.

329. *See id.* at 2701–02 (Ginsburg, J., dissenting).

330. *Id.* at 2676 (majority opinion).

331. *Id.* at 2673.

332. *See id.* at 2699–2700 (Ginsburg, J., dissenting).

333. *Id.* at 2673 (majority opinion).

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

335. *Id.* (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006)).

336. *Id.* at 2673–74.

The Roberts Court's post-racial jurisprudence is based on the central theme that, even if there are significant disproportionalities between people of color and whites, actionable discrimination must be based on clearly identifiable intent. This narrow doctrinal rationale unifies the Court's affirmative action,[337] school desegregation (integration),[338] and, most recently, Title VII decisions. *Ricci* is an extraordinary decision because it acknowledges the existence of a significant adverse impact which establishes "a prima facie case of disparate-impact liability," but nevertheless concludes that this "significant statistical disparity" is meaningless (or natural) in the absence of some *additional* proof of liability[339]:

> The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity *and nothing more*—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results.[340]

The Court reaches this conclusion by inverting disparate treatment and impact with a contrived tension that distorts the meaning of Title VII, and by creating a new strong basis in evidence standard.

3. The Inversion of Disparate Treatment and Disparate Impact

Writing for the Court, Justice Kennedy attempts to chart a "middle" doctrinal course between what he views as the absolutist arguments advanced by the firefighter petitioners and the City.[341] He dismisses, as "overly simplistic and too restrictive of Title VII's purpose," the petitioners' argument 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."[342] Referencing "Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII,'" Justice Kennedy expresses concern that a requirement of certainty of a disparate impact violation "would bring compliance efforts to a near standstill."[343]

Justice Kennedy is equally adept at rejecting the City's argument that its good-faith attempt to avoid disparate impact liability permits it to use race-conscious remedies. Concluding that the 1991 amendment to Title VII contained no good faith exception for race-based compliance efforts under the disparate impact provision, Justice Kennedy posits that "[a]llowing employers

337. *See supra* notes 32–37 and accompanying text.

338. *See supra* Section II.

339. *Ricci*, 129 S. Ct. at 2678.

340. *Id.* (emphasis added) (citation omitted).

341. *Id.* at 2674.

342. *Id.*.

343. *Id.* (quoting Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 515 (1986)).

to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact."[344] This would lead to an exclusive focus on statistics with employers adopting a racial quota system designed to avoid even the "slightest hint of disparate impact."[345]

What is really telling about Justice Kennedy's discussion of the arguments advanced by the parties is that he embraces the core value of Title VII—voluntary compliance—while simultaneously rejecting such compliance as statutorily prohibited, race-based decision-making in violation of the disparate treatment provision.[346] This is because the Court's analysis starts with the premise that the City violated the disparate treatment prohibition of Title VII: The white firefighters were discriminated against because of their race when the CSB failed to certify the results of the examinations due to the overwhelming disparate impact on the African-American firefighters.[347] The Court itself acknowledges that this is a case where there is prima facie evidence of disparate-impact liability.[348] The pass rate for Black [31.6 percent] and Latino [20 percent] candidates "[fell] well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII."[349] Based on rankings and the "rule of three," if the examination had been certified, no African-American candidates could have been considered for promotion.[350] Finally, the disparity here is directly connected to an ostensibly neutral procedure which freezes the exclusionary practices of the past.[351] Yet, this was insufficient for the Court.

Discarding the EEOC's 80-perecent standard, the Court constructed a new standard that shifts the focus from voluntary compliance to discriminatory intent.[352] Employers will be presumed to have discriminated in violation of the disparate-treatment prohibition of Title VII "absent some valid defense."[353] It is insignificant whether the employer was trying to avoid disparate impact

344. *Id.* at 2675.

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

346. *Id*. at 2673–2676.

347. *Id.* at 2673.

348. *Id.* at 2677–78.

349. *Id.* at 2678.

350. *Id.* at 2665.

351. The Court itself in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252. 269 (1977), held that there could be statistical disparities so stark that they could only be explained by reference to an invidious purpose based on race. Impact is determinative in these rare instances, and the history surrounding the adoption of an ostensibly neutral policy with disparate impact on African-Americans is relevant. There is no such analysis in *Ricci*. 129 S. Ct. at 2676–77.

352. *Ricci*, 129 S. Ct. at 2677–78.

353. *Id.* at 2673.

liability if its decision was based on race, there must be a "strong basis in evidence" to support it.[354] This means that even a prima facie case of disparate impact is insufficient because this "*threshold* showing of a significant disparity" does not meet the newly minted "strong basis in evidence" standard.[355]

Justice Kennedy fabricates a "tension" between the two Title VII provisions—disparate treatment and disparate impact—and then "resolves" it by transplanting Fourteenth Amendment colorblind principles into Title VII jurisprudence.[356] But these colorblind principles take on an even narrower gloss. While the use of race is narrowly cabined to particularized discrimination or diversity under the Fourteenth Amendment, such use is presumptively forbidden here because disparate impact on the African-American firefighters is a natural part of the process.[357] Thus, an employer cannot "guarantee" race-based results through disparate treatment of the white firefighters.[358] Eschewing the voluntary compliance mandate of Title VII, the Court viewed the City of New Haven's suspension of the test results to avoid disparate impact liability as disparate treatment in violation of Title VII.[359] "Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[360] The "other" justification is the strong basis in evidence standard.

4. The "Strong Basis in Evidence" Standard: A New Evidentiary Presumption?

By creating "intra-statutory discord,"[361] Justice Kennedy sets up an either/or choice between the presumption that the City has violated the disparate treatment prohibition of Title VII and the validity of disparate impact liability.[362] To "reconcile" this contrived conflict, Justice Kennedy looks to the

354. *Id.* at 2675.

355. *Id.* at 2678 (emphasis added).

356. *Id.* at 2674 ("We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. Courts often confront cases in which statutes and principles point in different directions."). *But see id.* at 2699–2700 (Ginsburg, J., dissenting) ("Neither Congress' enactments nor this Court's Title VII precedents (including the now-discredited decision in *Wards Cove*) offer even a hint of "conflict" between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions.").

357. *Id.* at 2674 (majority opinion).

358. *Ricci*, 129 S. Ct. at 2674.

359. *Id.*

360. *Id.* at 2673.

361. *Id.* at 2700 (Ginsburg, J., dissenting).

362. *Id.* at 2681 (majority opinion).

Court's Fourteenth Amendment jurisprudence.[363] Analytically, the Fourteenth Amendment decisions cited to support the newly transplanted "strong basis in evidence" standard are all reverse discrimination cases where the Court ignored the present day effects of past discrimination to preserve the entitlement interests of non-minority plaintiffs.[364] The Court's equal protection decisions are perfect conduits for the Court's post-racial jurisprudence: Since it is "impossible" for the Court to distinguish between invidious racial discrimination and good faith efforts to eradicate caste-based discrimination, the strong basis in evidence standard is essential to "smoke out" impermissible employment decisions.[365] "The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[366]

The strong basis in evidence standard purportedly resolved the tension, under the Fourteenth Amendment, between invidious discrimination and race-based government decision-making—there must be evidentiary support for race-conscious remedies.[367] This support is "crucial when the remedial

363. *See id.*; *id.* at 2675 (majority opinion).

364. *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting). While Justice Ginsburg's dissent distinguishes *Wygant* and *Croson* as cases involving "absolute racial preferences," *id.*, these decisions are properly understood as *voluntary* efforts to eradicate the present day effects of past discrimination in the employment marketplace. It is not only appropriate, but necessary to use race-conscious remedies in this context. By contrast, the Court has been selective in how it applies the discriminatory intent requirement under the Equal Protection Clause: "[W]here the disparate impact is on innocent whites, the Court is willing to *assume* that there is some underlying discriminatory purpose." Powell, *supra* note 7, at 242. Likewise, under the Court's novel interpretation of disparate impact under Title VII, it is presumed that there is a disparate treatment violation because the burden is on the innocent white firefighters. *Ricci*, 129 S. Ct. at 2673. Disparate impact, like societal discrimination under the Fourteenth Amendment, cannot be remedied unless there is some evidence of discriminatory intent. Here, that would mean that there must be "a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision." *Id.* at 2676. Obviously, this standard has a built-in evidentiary protection for the white firefighters—promotion tests will rarely, if ever, be deemed deficient and discarding test results based on race will be held to be disparate treatment discrimination. This is analogous to the compelling state interest test under the Fourteenth Amendment which is "strict in theory, but fatal in fact." *See* James E. Fleming, *"There is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2308–09 (2006). Professor Gerald Gunther created this phrase to underscore the inevitability of strict scrutiny analysis. *Id.* at 2308; Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 77 (1995).

365. Spann, *supra* note 364, at 89 n.420; *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

366. *Ricci*, 129 S. Ct. at 2675 (majority opinion) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

367. *Id.* at 2677.

program is challenged in court by nonminority employees."[368] The process must be open, and racial outcomes cannot be guaranteed.[369] Extrapolating this rationale into its Title VII jurisprudence, the Court concludes that:

> The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII. Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation." *But it has also prohibited employers from taking adverse employment actions "because of" race*.[370]

Thus, one form of "discrimination" (discarding the flawed test and starting over to avoid disparate impact liability) should not be excused in the name of voluntary compliance. Without a strong basis in evidence, the government's action is nothing more than disparate treatment discrimination.[371] Stating that process values, equal opportunity, and access should be the touchstone of an employer's efforts in the employment marketplace, the Court concludes that the expectation interests of the white firefighters should not be disturbed on the basis of race,[372] racial preferences are prohibited, and "before an employer can engage in *intentional discrimination* for the asserted purpose of avoiding or remedying an *unintentional disparate impact*, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the *race-conscious, discriminatory action*."[373] This italicized passage illustrates the inversion of disparate impact and disparate treatment. Voluntary compliance to avoid disparate impact liability is transformed into intentional discrimination; the present day effects of past discrimination evinced in the status quo of exclusion of African-Americans from the firefighting officer ranks is "unintentional disparate impact" (there is no identifiable discriminatory perpetrator who is responsible for this neutral

368. *Id.* at 2675 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

369. *Id.* at 2677.

370. *Id.* at 2675–76 (emphasis added) (citations omitted).

371. *Id.* at 2676 (emphasizing the neutral quality of employment tests and concluding that "the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics").

372. *Ricci*, 129 S.Ct. at 2677; *see* William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 18–29 (2011) (noting that since there was *no* formal unequal treatment or racial subordination in *Ricci*, the Court constructs a novel "injury" of expressive harm in reverse discrimination suits). *Contra Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting) (stating the white firefighters "had no vested right to promotion. Nor have other persons received promotions in preference to them").

373. *Ricci*, 129 S. Ct. at 2677 (emphasis added).

disparity); and the strong basis in evidence standard serves as an evidentiary device for the employer, who acts in good faith, to "convict" itself.[374]

Under the Fourteenth Amendment, and, now under Title VII, *unintentional* discrimination is little more than circumstantial evidence.[375] In a classic neutral rhetorical move of inversion, disparate impact must be established on the very terms that define disparate treatment liability. Essentially, an intent requirement now serves as an analytical bridge between the Equal Protection Clause and Title VII. While the Court notes that it did not address the constitutionality of the measures taken to comply with Title VII, this issue is all but decided when the Court adopts the strong basis in evidence standard.[376]

It is unclear how the strong basis in evidence standard will work. There are a number of concerns here: (i) when will it be appropriate to presume discriminatory intent on the part of an employer when it acts pursuant to the voluntary mandate of compliance under Title VII, (ii) how are burdens of proof assigned under the strong basis in evidence standard, and (iii) what quantum of proof is sufficient to establish "a strong basis in evidence to believe" that an employer will be subject to disparate impact liability? All of these doctrinal queries point to the conceptual incompleteness of the Court's decision—there is no analytical framework for establishing when a disparity is transformed from a mere "threshold showing of a significant statistical disparity"[377] to a remediable disparity under Title VII.

Moreover, the Court never defines what a "strong basis in evidence" is: an inference (a permissive fact that may be accepted or not as conclusive proof of an asserted proposition),[378] a presumption (conclusive proof unless rebutted with counterproof),[379] or simply a reference to the *quality* of proof needed to establish a strong basis in evidence?[380] Based on the outcome in *Ricci*, it appears that the latter definition is the most accurate denotation. The City is presumed to have engaged in intentional discrimination against the white firefighters, it must proffer a justification for such discrimination, and the justification must be supported by a strong basis in evidence that the City would be liable for disparate impact discrimination because "the examinations

374. *See id.* at 2701 (Ginsburg, J., dissenting) (critiquing the strong basis in evidence standard and noting that "[i]t is hard to see how these requirements differ from demanding that an employer establish 'a provable, actual violation' *against itself*").

375. *See id.* at 2677 (majority opinion).

376. *Id.* at 2676.

377. *Id.* at 2678.

378. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 112–13 (3d ed. 2003).

379. *See generally id.* at 109–13.

380. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

were not job related and consistent with business necessity."[381] This is a narrower view of race than even that espoused in *Parents Involved*.

Ironically, Justice Kennedy is open to the use of race in limited circumstances in the context of school integration.[382] In fact, his concurrence in *Parents Involved* is quite explicit in its rejection of the plurality's absolutist post-racial approach.[383] Endorsing a diversity interest in integrated schools, Justice Kennedy notes that race could be used in a "general way" to ensure that equal education opportunity was available to all.[384] The key is that race conscious remedies can be used in a neutral way.[385] Race can be used as one of many factors to ensure that the *process* is open to all.[386] *Parents Involved* does not appear anywhere in Justice Kennedy's opinion for the Court in *Ricci*.[387]

While the Court borrows liberally from its rigid Fourteenth Amendment jurisprudence, it does not embrace a diversity interest in the public service employment marketplace.[388] Perhaps this is because the issue in *Ricci* is *not* the process—every eligible firefighter can take the promotion examination; the issue is whether the City used race to reach a certain result.[389] The decision to decertify the test results and trammel the individual interests of the white firefighters is precisely such an impermissible race-based decision. To the Court, this is a disparate treatment violation; the white firefighters are penalized based on their success on a neutral examination.[390] Racial decision-making is prohibited under the Equal Protection Clause and Title VII—*Parents Involved* and *Ricci* are linked doctrinally through this proposition.[391] What is telling about this line of reasoning is that the disparate impact on the African-American firefighters is virtually ignored; more specifically, the "discriminatory" impact on the white firefighters must be justified as job related and necessary or appropriate in the absence of suitable alternatives.[392]

This leads to the most troubling aspect of the strong basis in evidence standard: In analyzing reverse discrimination claims, once it is presumed that

381. *Ricci*, 129 S. Ct. at 2678.

382. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–90 (Kennedy, J., concurring in part and concurring in the judgment).

383. *Id.* at 788 ("The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion.").

384. *Id.* at 788–89.

385. *Id.* at 790.

386. *Id.* at 789.

387. 129 S. Ct. 2658 (2009).

388. *See id.* at 2681.

389. *Id.* at 2664.

390. *Id.* at 2678–81.

391. *See Parents Involved*, 551 U.S. at 719; *Ricci*, 129 S. Ct. at 2673.

392. *Ricci*, 129 S. Ct. at 2678.

an employer has intentionally discriminated, it will be difficult, if not impossible, for an employer to meet this test.[393] To make matters worse, the strong basis in evidence standard serves to reinforce the Court's initial analytical premise that "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."[394] As *Ricci* graphically illustrates, a valid defense will be difficult to articulate as the Court discounts disparate impact and instead presumes that neutrality means that there is no statutorily cognizable discrimination.[395] Rather, if there is any cognizable discrimination, it is the claims of the displaced white firefighters that will resonate.[396] This is antithetical to *Griggs* and its doctrinal progeny, the 1991 amendment to Title VII, and to the statutory goal of voluntary compliance.

a. Job Relatedness and Business Necessity

There is a disturbing inevitability about the Court's decision in *Ricci*: starting from the premise that the City engaged in disparate treatment discrimination, the Court constructs a new standard that serves to buttress reverse discrimination claims while neutralizing the valid claims of historically oppressed groups. The Court gives little more than cursory treatment to whether the examinations were job related and consistent with business necessity.[397] Of course, not much analysis is required after the Court starts with its disparate treatment premise, imports a heightened standard of review from the Fourteenth Amendment, and concludes that "there is no strong basis in evidence to establish that the test was deficient" in job relatedness and business necessity or the existence of a less-discriminatory alternative.[398]

The Court misconstrues the job relatedness and business necessity standard. The Court in *Griggs*, deferring to the legislative intent of Congress, concludes that there are two distinct discriminatory practices proscribed by Title VII— overt discrimination and "practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited*."[399] Significantly, in 1971, when *Griggs* was decided, the concern was with the present day effects of past discrimination—neutral systems should be viewed skeptically because

393. *Id.* at 2701–02 (Ginsburg, J., dissenting)
394. *Id.* at 2673 (majority opinion).
395. *Id.* at 2675–76.
396. *See id.* at 2678.
397. *See id.* at 2678–79.
398. *Ricci*, 129 S. Ct. at 2678.
399. 401 U.S. 424, 431 (1971) (emphasis added).

they could replicate the effects of the recently dismantled formalized system of discrimination.[400]

The same is no less true today: When a neutral "employment practice which operates to exclude [African-American firefighters] cannot be shown to be related to job performance, the practice is prohibited."[401] Since the practice is statutorily prohibited, employers are free to avoid disparate impact liability by taking measures to voluntarily comply with Title VII.[402] Voluntary compliance, where an employer throws out a flawed evaluative mechanism because it freezes the status quo of exclusion,[403] cannot be equated to disparate treatment discrimination. "Here, Title VII's disparate-treatment and disparate-impact proscriptions must be read as complementary."[404]

There is no doctrinal trace of *Griggs* in the Court's analysis of job-relatedness and business necessity.[405] Instead, basing its conclusion on the anecdotal and subjective statements of several witnesses,[406] the Court concludes that "[t]here is no genuine dispute that the examinations were job-related and consistent with business necessity."[407] Without critically assessing the design and format of the examination, the Court summarily rejects the City's assertions that the examinations were not job-related and consistent with business necessity.[408] The Court's bare analysis consisted of crediting the statements of Chad Legel, an IOS[409] vice president, about the meticulous detail IOS used in developing and administering the examinations, one outside witness, with firefighting experience, who had reviewed the examinations and concluded that the "questions were relevant for both exams," and a competing test designer who "stated that the exams 'appea[r] to be . . . reasonably good.'"[410] Legitimate claims that the examinations were not job related were categorically dismissed by the Court, relying on Legel's statement that IOS "reviewed those challenges and provided feedback" to the City.[411] The Court's process-based analysis merely rubberstamps the reverse discrimination claim

400. *Id.* at 430.

401. *Ricci*, 129 S. Ct. at 2673 (quoting *Griggs*, 401 U.S. at 431).

402. *Id.* at 2701–02 (Ginsburg, J., dissenting) (stating that voluntary compliance is "the preferred means of achieving [Title VII's] objectives" (quoting Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 515 (1986))).

403. *Griggs*, 401 U.S. at 430.

404. *Ricci*, 129 S. Ct. at 2699 (Ginsburg, J., dissenting).

405. *See, e.g.*, *id.* at 2690 (Ginsburg, J., dissenting) ("In arriving at its order, the Court barely acknowledges the pathmarking decision of *Griggs v. Duke Power Co*." (citation omitted)); *see also id.* at 2675–78 (majority opinion).

406. *Id.* at 2668–79.

407. *Id*. at 2678.

408. *Id.* at 2677–79, 2681.

409. *See supra* note 293.

410. *Ricci*, 129 S. Ct. at 2678–79 (citation omitted).

411. *Id*. at 2679.

of the white firefighters. It is astonishing that the Court based its landmark holding on such a thin reed.[412] Another scholar characterized the decision as follows:

> In a characteristically arrogant tone, the Court proclaimed the test to be valid . . . . The Court boldly made this assertion even though no evidence regarding the test's validity had been submitted in the various proceedings. Not only was no evidence presented, but the Court was almost certainly wrong in finding it valid.[413]

Indeed, as many scholars have concluded, the design flaws alone in the promotion examinations are sufficient to support the conclusion that the examinations were *not* job related and consistent with business necessity.[414] Several flaws have been identified: (i) the test did not evaluate the *practical aspects* of the job of lieutenant and captain in the fire department;[415] (ii) the 60-40, written (multiple choice) to oral weighting of the examination is arbitrary;[416] (iii) rank order promotions based on combined, differently weighted examination scores may lead to the exclusion of candidates of color;[417] and (iv) "the arbitrary designation of the passing score as seventy."[418] These core measurement flaws are described by Professors Harris and West-Faulcon:

> [T[here were critical omissions of steps central to ensuring that the tests at issue adequately measured the candidates' ability to perform the jobs in question. First, . . . IOS failed to identify "leadership skills" and "command presence" as knowledge, skills, and abilities that supervisory fire officers must possess to perform well on the job, and thus, no component of the 2003 promotional exams even attempted to assess candidates' abilities with regard to these job-critical skills. Second, the City never asked—nor did the test designer consider—whether, as compared to a 100-question multiple-choice test and a standardized oral interview test, alternative methods . . . could better measure the qualities of a fire officer. Third, the relative weighting of the

412. Harris & West-Faulcon, *supra* note 27, at 143 ("Without any acknowledgement of the central role that the testimony of professional employment testing experts, professional testing standards, and the Uniform Guidelines [of the EEOC] have typically played in Title VII disparate impact lawsuits, the *Ricci* majority essentially presumed the scientific validity of the 2003 exam results because the test designer had made efforts at facial fairness—involving minorities in the test design process and scrubbing test questions of visible racial discrimination or undertones. This racing of test fairness replaced the stronger scientific and substantive professional standards that should be applied when tests have skewed results." (footnote omitted)).

413. Selmi, *supra* note 234, at 850 (footnote omitted).

414. *See, e.g.*, Harris & West-Faulcon, *supra* note 27, at 143.

415. *Id.*

416. *Id.* at 135, 143, 152 (noting that white firefighters have a claim for unfair testing as well).

417. *Id.* at 143.

418. *Id.*

> multiple-choice and oral parts of the exam as 60 percent and 40 percent respectively, was based not on any objective determination of the numerical score that reflected minimum competence but, instead, was arbitrarily set based on the union-negotiated agreement.[419]

The disparate impact in *Ricci* is directly traceable to the flawed tests used to evaluate the firefighters.[420]

b. Alternative Means

In equally cursory fashion, the Court concludes that there is no strong basis in evidence that the City refused to adopt "an equally valid, less-discriminatory alternative" than the promotion examinations.[421] Noting that the 60/40 written-oral weighting of the examination was required by the City's contract with the firefighters union and that changing the weighting to 70/30 could violate Title VII's prohibition against racially altering test results, the Court held that a 70/30 weighting was *not* an equally valid alternative.[422] The Court adopted the same rationale to reject the argument that "a different interpretation of the 'rule of three' . . . would have produced less discriminatory results."[423] Finally, the Court dismissed statements by Christopher Hornick, an organizational psychologist and competitor of IOS, that an assessment center process which evaluates candidates' performance in specific job tasks, "would have demonstrated *less adverse impact*."[424] To the Court, this was merely one of a few "stray (and contradictory) statements" made by Hornick who was more interested in "marketing his services for the future" than in critically analyzing the examination and any valid alternatives.[425]

Again, it is the presumption of validity that guides the Court's analysis—there are no valid, less discriminatory alternatives because the test measured "merit," and the City cannot racially alter the results to ensure representation of African-American firefighters.[426] To do so would create a racial *quota* in

419. *Id.* at 126–27 (footnotes omitted); *accord* Selmi, *supra* note 234, at 850–51 ("[M]ultiple-choice tests often reward test-taking skills, which have little to nothing to do with leadership in a fire department."); Ricci v. DeStefano, 129 S. Ct. 2658, 2703 (2009) (Ginsburg, J., dissenting).

420. Selmi, *supra* note 234, at 846 ("[T]he City sought to create an inexpensive written examination with the hope that the results would not be discriminatory even though the test it purchased was precisely the kind of examination that has historically had the greatest disparate impact.").

421. *Ricci*, 129 S. Ct. at 2678, 2679–81.

422. *Id.* at 2679. *But see id.* at 2703 n.11 (Ginsburg, J., dissenting).

423. *Id.* at 2679 (majority opinion).

424. *Id.* at 2680–81 (emphasis added).

425. *Id*. at 2680.

426. *Id.* at 2678–79, 2681; *see also* Harris & West-Faulcon, *supra* note 27, at 157–59.

violation of Title VII (and the Equal Protection Clause).[427] As Professors Harris and West-Faulcon note:

> Ironically, *Ricci*'s failure to apply Title VII's requirements regarding test validation actually enacts a presumption that *white overrepresentation is the natural product of merit selection*; Title IV's requirement that employers justify a racially skewed status quo, even in the pursuit of a fair test that actually measures job performance, is portrayed as making nonwhites "the special favorite[s] of the law."[428]

The Court's blind deference to the uncritical assessments cited in its opinion causes it to ignore a much broader context—promotion tests like the one at issue in *Ricci* have been uniformly criticized, and there is a move away from such tests as evaluative tools.[429] The true irony here is that the City chose the very type of examination that perpetuates systemic disparities—the same disparities it would seek to avoid by not certifying the disproportionate examination results.[430] The fact that there were a range of less discriminatory, viable alternatives underscores the fact that the City would be subject to disparate impact liability, not that it discriminated against the white firefighters.[431] Indeed, if the Court is truly concerned about inequality, it should analyze whether the test is *unfair to all test takers*.[432] A reverse discrimination claim should not trump a city's good faith efforts to avoid disparate impact liability under Title VII. This is why voluntary compliance is central to the statutory purpose of Title VII—formal discriminatory barriers may have receded, but ostensibly neutral practices may preserve the enduring features of past discrimination.[433]

427. *Ricci*, 129 S. Ct. at 2664–65. This is another doctrinal strand of the Court's importation of Fourteenth Amendment rationales into its Title VII jurisprudence. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726–33 (2007) (plurality opinion) (holding school integration plans of Seattle and Louisville unconstitutional and stating that "[w]e have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake'" (quoting Freeman v. Pitts, 503 U.S. 467, 494 (1992))).

428. Harris & West-Faulcon, *supra* note 27, at 157 (emphasis added) (quoting The Civil Rights Cases, 109 U.S. 3, 25 (1883)).

429. *See* Selmi, *supra* note 234, at 850–51; Harris & West-Faulcon, *supra* note 27, at 144–57.

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

431. Harris & West-Faulcon, *supra* note 27, at 154–57.

432. *Id.* at 133–35.

433. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432–36 (1970) (stating that tests must be job-related to prevent the use of purportedly neutral tests that perpetuate systemic inequality).

c. Rejection of Voluntary Compliance Efforts

Neutrality is central to the Court's formalistic conception of equality.[434] Thus, in *Parents Involved*, the Court construes the Fourteenth Amendment to prohibit "racial balancing" in the schools so that any resegregation is natural.[435] There is a bright line distinction between *de jure* (state action) and *de facto* discrimination.[436] Likewise, under Title VII, since there has been "no discrimination" against the African-American firefighters, their disproportionate failure rate on the examination is natural, and any attempt to avoid this result is statutorily prohibited racial balancing (disparate treatment discrimination).[437] Under both the Fourteenth Amendment and Title VII, the Court is acutely attuned to preserving an *individual* right to a racially neutral process—there is a personal interest to attend neighborhood schools[438] and there is a personal interest to rely on the results of the firefighters examination.[439] "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of *individuals* who passed the examinations and qualified for promotions."[440]

It is difficult to discern where the Fourteenth Amendment ends and Title VII begins—it is almost as if *Davis* has crystallized in the strong basis in evidence standard. There can be no voluntary, race-conscious efforts to remedy the present day effects of past discrimination in the absence of intent. Under Title VII, this means that there must be "a strong basis in evidence to believe [that the City] would face disparate-impact liability if it certified the examination results."[441] Of course, in the context of a reverse discrimination claim, it will be very difficult to proffer this strong basis in evidence. From the outset of the *Ricci* opinion, it is obvious that the City made the wrong choice.[442] The Court concludes that the City should have sided with the white firefighters.[443] Specifically, an employer should resolve the manufactured

434. *See* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1083–88 (2011) (arguing for rejection of the rigid, tiered approach to equal protection analysis and the intent requirement, and advancing a theory of substantive equality).

435. 551 U.S. 701, 736 (2007) (plurality opinion); *see also* Anthony V. Alfieri, *Integrating into a Burning House: Race- and Identity-Conscious Visions in* Brown's *Inner City*, 84 S. CAL. L. REV. 541, 564–66, 573–81 (2011) (reviewing MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010)) (discussing the rhetoric of choice, liberal individualism, and the legacy of *Brown*).

436. *Parents Involved*, 551 U.S. at 736 (plurality opinion).

437. Ricci v. DeStefano, 129 S. Ct. 2658, 2675, 2677 (2009).

438. *Parents Involved*, 551 U.S. at 743 (plurality opinion).

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

440. *Id.* (emphasis added).

441. *Id.*

442. *Id.* at 2664.

443. *Id.*

doctrinal "conflict" between the disparate-treatment and disparate-impact provisions by rejecting the statutory objective of voluntary compliance:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.[444]

So, an employer should certify disproportionate test results based on the "hope" that, with a reverse discrimination suit looming on the horizon, it made the right choice to avoid disparate treatment liability.[445] This circularity is astounding because it privileges reverse discrimination (disparate treatment) claims over disparate impact claims. The claims of the white firefighters are more important than those of the African-American firefighters because the Court concludes that the process is tainted by racial decision-making.[446]

Obviously, a strong basis in evidence is whatever the Court says it is. This is the only explanation for the result in *Ricci*: Nearly every relevant conceptual or factual element of the case is distorted, neutralized, or ignored.[447] The Court's sole concern is the reverse discrimination claim and how such "intentional" discrimination by the City can be justified.[448] Of course, under the Court's post-racial analysis, any justification will be viewed skeptically and generally rejected. This is particularly true when the Court invokes the racial politics rationale.

5. Racial Politics: Justice Alito's Concurrence

Purportedly to correct the dissent's factual "omissions," Justice Alito advances a racial narrative reminiscent of the stereotypical devices employed during the Reconstruction Era.[449] There is an interesting rhetorical twist to Justice Alito's modern day racial narrative: African-Americans are not ignorant, lazy, dishonest, or extravagant, they are simply too powerful

444. *Id*. at 2681.

445. *See Ricci*, 129 S. Ct. at 2681.

446. *See* Harris & West-Faulcon, *supra* note 27, at 121.

447. *See Ricci*, 129 S. Ct. at 2702–10 (Ginsburg, J., dissenting).

448. Powell, *supra* note 9, at 859–62; 865–62.

449. *Ricci*, 129 S. Ct. at 2683 (Alito, J., concurring); *see also* Caleb A. Jaffe, *Obligations Impaired: Justice Jonathan Jasper Wright and the Failure of Reconstruction in South Carolina*, 8 MICH. J. RACE & L. 471, 473–78 (2003) (discussing historical stereotypes of African-American Reconstruction legislators as lazy, ignorant, and incompetent, and the progressive scholarship aimed at dismantling these bogus claims); *accord* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 711–12 (1992); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 xx–xxi (Henry Steele Commager & Richard B. Morris eds., 1988); Powell, *supra* note 7, at 218–19.

politically, and this led to racially skewed results in the process.[450] Title VII and the Fourteenth Amendment protect an open and neutral process, not race-based results. Justice O'Connor employed an identical rhetorical device in *Croson*.[451]

Justice Alito cites very little case law in his concurrence; rather, he elicits stock characters in a racial narrative constructed on the premise that the City's attempt to avoid disparate impact liability was "pretextual."[452] Indeed, "the City's real reason was illegitimate, namely, the desire to placate a politically important *racial* constituency."[453] The most prominent member of this racial constituency was Reverend Boise Kimber who was described as a "powerful New Haven pastor and self-professed 'kingmaker' who "call[ed] whites racist" and had previously "threatened a race riot during a murder trial."[454] Justice Alito portrays Reverend Kimber as a skilled practitioner of racial politics and powerful political player who was selected to chair the Board of Fire Commissioners "despite the fact that he had no experience" because he was an "invaluable political asset."[455]

Justice Alito goes on to recount how Reverend Kimber dominated the process with his demands that the test be discarded because of its disparate impact on the African-American firefighters.[456] The City, through the Mayor, simply wanted to please Rev. Kimber and his constituents.[457] So much so that Justice Alito reasoned that the process was tainted because the Mayor had the ultimate authority to "overrule a CSB decision accepting the test results."[458] The Mayor did not exercise this power because the CSB concluded that the test results should not be certified.[459] However, since the Mayor *intentionally* chose not to exercise his corollary power to overrule the CSB's decision rejecting the test results, this proved "that the City's asserted justification [to avoid disparate impact liability] was pretextual."[460] Again, in resolving the "tension" between potential disparate impact and disparate treatment claims, the City made the wrong choice. It chose the racial claims of a group over the

450. Harris & West-Faulcon, *supra* note 27, at 84, 136.
451. *See* Powell, *supra* note 9, at 865–68.
452. *Ricci*, 129 S. Ct. at 2683–84 (Alito, J., concurring).
453. *Id.* at 2684 (emphasis added).
454. *Id*.
455. *Id*. (citations omitted).
456. *Id.* at 2685–86.
457. *Id.* at 2687.
458. *Ricci*, 129 S. Ct at 2689 (Alito, J., concurring) (emphasis omitted).
459. *Id.* at 2687.
460. *Id*. at 2689.

individualized claims of Frank Ricci and Benjamin Vargas.[461] Liberal individualism has been codified in *Ricci*.

6. *Parents Involved* and *Ricci*: Comparative Notes

Ricci fits squarely within the jurisprudential canon of Fourteenth Amendment Rhetorical Neutrality: the history of racial discrimination in the firefighting ranks is ignored; disparate impact is redefined so that *any* impact on white interests (or privilege) is a violation of Title VII; and neutral rhetoric is employed to explain the present day effects of past discrimination as natural, rational, and inevitable.[462] The only reason that the African-American firefighters failed in disproportionate numbers is that they did not study hard enough—the white firefighters cannot be displaced by a race-conscious remedial approach designed to equalize results.[463] *Ricci* reads like a Fourteenth Amendment decision rather than a Title VII decision.[464] Discrimination has been redefined again in the Court's race jurisprudence.[465] *Parents Involved* and *Ricci* rely exclusively on affirmative action decisions to erect a seminal, post-racial principle[466]: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[467]

461. It is quite interesting that the Court privileges the individualized narratives of a white firefighter (Ricci) and a Latino firefighter (Vargas) over the claims of a group that has been historically discriminated against and excluded to this day in the firefighting profession. *See Ricci*, 129 S. Ct. at 2689 (Alito, J., concurring) (describing the personal sacrifices of Ricci and Vargas); Harris & West-Faulcon, *supra* note 27, at 74–85.

462. Powell, *supra* note 9, at 831–59.

463. *See Ricci*, 129 S. Ct. at 2689 (Alito, J., concurring).

464. Harris & West-Faulcon, *supra* note 27, at 112–13.

465. *Id.* at 116–17.

466. *Id.*

467. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion).

The chart below illustrates how the Fourteenth Amendment and Title VII overlap doctrinally to form the Court's post-racial jurisprudence:

Post-Racialism Conceptual Themes Under the Fourteenth Amendment and Title VII	
Fourteenth Amendment:	**Title VII:**
Parents Involved 1. The Fourteenth Amendment prohibits discriminatory state action. 2. Discriminatory impact, in the absence of identifiable discriminatory intent, is insufficient to establish a claim under the Fourteenth Amendment.[468] There must be a strong basis in evidence to adopt a race-conscious remedy.[469] 3. The *de jure-de facto* distinction in school cases sets the parameters of constitutionally cognizable violations: *Intentional* discrimination is actionable, while *de facto* discrimination cannot be remedied by employing race-conscious remedies.[470] 4. The mandate of *Brown* is a prohibition against race-based decision-making by the state. The Fourteenth Amendment protects neutral process (opportunity), not equal results. A school board cannot use race to maintain integration in the schools. The Constitution protects individuals, not racial groups.[471] 5. Voluntary remedial efforts will be overturned in the interest of *individual rights*. So, the fact that a school system needs to use race, as one of many factors, to achieve and maintain integration will be ignored to advance the interest of individual school choice.[472]	**Ricci** 1. Title VII prohibits discrimination in the workplace by public or private employers. 2. While there may be significant evidence of disparate impact, this is insufficient to prevail on a Title VII claim.[473] Where there is no strong basis in evidence to believe that the employer would be subject to disparate impact liability, an employer cannot engage in "intentional" discrimination to avoid "unintentional" disparate impact.[474] 3. The "tension" between disparate treatment and disparate impact liability must be resolved so that a good faith attempt to avoid disparate impact liability does not result in disparate treatment discrimination against whites.[475] 4. *Ricci* stands for the proposition that race-based decision-making by an employer is prohibited because every *individual* is entitled to participate in an open and fair process.[476] Title VII protects equal opportunity, not race-based results: "[O]nce that process has been established and employers have made clear their selection criteria [even if that criteria has a disparate impact on Blacks], they may not invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."[477] 5. Disparate impact on people of color will be tolerated to avoid displacing the *individual* rights of whites.[478]

468. Barnes & Chemerinsky, *supra* note 434, at 1080–83.

469. *Id.* at 1080–83.

470. *Parents Involved*, 551 U.S. at 749–50, 756–57 (Thomas, J. concurring).

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

472. *See id.* at 745, 748 (overturning voluntary remedial efforts to integrate in interest of individual rights of white parents); Spann, *supra* note 23, at 596–617.

473. Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 37 (2009).

474. Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

475. *Id.* at 2675–77.

476. *Id.* at 2677, 2681.

477. *Id*. at 2677.

478. Spann, *supra* note 37, at 1147.

It is no coincidence that virtually all of the Court's race jurisprudence is based on *reverse* discrimination suits. Therefore, the seminal issue in these cases is how *any* burden on white privilege can be explained, accounted for, or justified. This is the hallmark of Justice O'Connor's race decisions for the Court.[479] The Roberts Court goes even farther. The propositions referenced above serve to rationalize the continuing effects of past discrimination (or structural inequality). *Parents Involved* and *Ricci* are the Roberts Court's explicit articulations of a post-racial theory: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[480] Thus, anything that remotely benefits people of color is viewed as presumptively invalid because the "neutral" process has been skewed to produce a racial result. Racial balancing, whether to preserve integrated schools or to ensure inclusion in the historically segregated officer ranks of the fire department, is constitutionally infirm and statutorily prohibited.

Conversely, the claims of reverse discrimination claimants are presumptively valid because the Court starts with the proposition, under either the Fourteenth Amendment or Title VII, that there is an actionable discrimination claim due to the burden on white interests. The inversion is complete under the Fourteenth Amendment and Title VII—the anti-caste principle is transformed into a literal anti-differentiation principle, and disparate impact is redefined to include *intent* as an element of proof—and whites are now the injured party.[481] Their individualized claims trump the claims of subjugated racial groups. This approach should be rejected, and instead the Court should embrace the true substantive core of the Fourteenth Amendment and Title VII.

B. An Argument for Substantive Symmetry

Ricci is a provocative decision because it decides so much without explicitly doing so. While its holding did not address the constitutionality of measures designed to comply with Title VII or whether the newly minted strong basis in evidence standard "would satisfy the Equal Protection Clause in a future case,"[482] *Ricci* nevertheless synthesizes the Roberts Court's post-racial jurisprudence.

In *Ricci*, the Court is audacious in its exercise of unrestrained judicial power: it ignores the very EEOC guidelines that serve as a baseline for establishing potential disparate impact liability,[483] it casually discards its own

479. Powell, *supra* note 9, at 859–73.

480. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion).

481. Powell, *supra* note 7, at 199–220.

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

483. *See* Harris & West-Faulcon, *supra* note 27, at 135–42.

precedent which acknowledged voluntary efforts by employers to avoid disparate impact liability,[484] and it substitutes its own judgment for that of Congress by "rewriting" the 1991 Amendment to Title VII and "overruling," to some extent, *Griggs v. Duke Power* and resuscitating the discredited reasoning of *Wards Cove Packing Co. v. Atonio*.[485]

1. The Section 5 Power and Substantive Equality

It is not an exaggeration to state that *Ricci* "overrules" Congress' 1991 Amendment to Title VII;[486] at the very least, it substantially modifies how disparate impact discrimination will be defined. This is a doctrinal attack on Congress' Section 5 power.[487] The Rehnquist Court ushered in the New Federalism,[488] and now the Roberts Court has gone even farther in promoting post-racial federalism. Rather than attempting to limit the reach of congressional power under the doctrines of congruence and proportionality, the Roberts Court reinterprets the boundaries of institutional power by radically altering its own precedent so that it directly contradicts the legislative purpose of Congress.[489] While the Court has never fully conceptualized how Title VII and the Fourteenth Amendment overlap doctrinally to permit race-conscious remedial efforts, the Court has noted previously that "Title VII and the Equal Protection Clause are the same for the purpose of analyzing voluntary race-conscious remedial measures implemented by public employers."[490] This meant that the Court subscribed to a narrow symmetry between Title VII and the Equal Protection Clause—there is an intent-based justification for disparate

484. *See id.* at 116–18.

485. *Id.* at 113–18.

486. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105. Stat. 1071, 1071 ("The purposes of this Act are— . . . (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*; (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et. seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." (citations omitted)). *Ricci* directly undermines the legislative purpose of the 1991 Amendment: the "strong basis in evidence" standard supplants the concepts of "business necessity" and "job relatedness." *See supra* Section III.A.4.a.

487. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

488. *See* Randy Lee, *The New Federalism: Discerning Truth in American Myths and Legends*, 12 WIDENER L.J. 537, 539–43 (2003); *see also* Cedric Merlin Powell, *The Scope of National Power and the Centrality of Religion*, 38 BRANDEIS L.J. 643, 702–16 (2000).

489. Powell, *supra* note 488, at 711–12.

490. Powell, *supra* note 12, at 930 (citing Johnson v. Transp. Agency 480 U.S, 616, 649 (1987) (O'Connor, J., concurring)).

impact liability.[491] This justification should be rejected because it does not address, in any form or fashion, structural inequality.[492]

Equal opportunity means dismantling not only formal barriers to access, but the persistent and current obstacles that are directly traceable to past discrimination. Under this definition, reverse discrimination claims should be rejected.[493] Advancing a moral theory of disparate impact, Rebecca Giltner argues that Congress' Section 5 power should be exercised to "maximize[] the aspiration of equal citizenship."[494] Equal citizenship includes the right to participate meaningfully and substantively in every aspect of the American polity; education and employment are integral to equal citizenship.

Congress has more than simply a remedial or preventive power under Section 5 of the Fourteenth Amendment, it has the power to legislate for the Nation and this means that some interpretation of the Constitution is essential.[495] "The assumption that the Court has always been the primary interpreter of the Constitution is simply not true."[496]

In order to restore the meaning and doctrinal power of *Griggs*:

> Congress should employ its powers, under Section 5 of the Fourteenth Amendment, to clarify the reach of Title VII—that is, employers, private and public, should be allowed to adopt race-conscious (and gender-conscious) remedies in response to *societal* or identifiable discrimination that results in a manifest imbalance in the workplace. There would be symmetry between the Court's equal protection and Title VII jurisprudence, and there would be congruence between the Court's powers and those of Congress. The Court would not cramp the power of states to adopt race-conscious remedies, nor would it prohibit Congress from exercising the positive grant of legislative power rooted in Section 5 of the Fourteenth Amendment. Moreover, Congress could amend Title VII to include a more flexible conception of race. Congress could make clear that race can be a positive factor in Title VII cases, and that colorblindness is not the touchstone of Title VII analysis.[497]

491. *See* Rebecca Giltner, Note, *Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship*, 10 MICH. J. RACE & L. 427, 434–35 (2005).

492. *See id.* at 437 (discussing how "a strict intentionality approach" privileges claims of those who have not been historically oppressed and impedes access to people of color).

493. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) (noting that white firefighters "had no vested right to promotion").

494. Giltner, *supra* note 491, at 460.

495. *See id.* at 458–60; Powell, *supra* note 12, at 931–32.

496. Giltner, *supra* note 491, at 458. Indeed, it is precisely in situations where the Court renders ill-conceived decisions like *Ricci* when Congress' Section 5 power is most important.

497. Powell, *supra* note 12, at 931–32 (footnote omitted).

This approach "acknowledges the existence of societal discrimination and seeks to incorporate such an analysis into the Court's constitutional and statutory jurisprudence."[498]

2. The Fourteenth Amendment and Title VII

Formalistic definitions of discrimination, including the rigid intent requirement, should be rejected and replaced with a comprehensive, *structural* interpretation of inequality. A substantive-symmetrical approach to the Fourteenth Amendment and Title VII would provide a doctrinal framework that moves away from intent as a conceptual absolute. "Substantive" refers to an approach that critically assesses process—neutrality is viewed with skepticism.[499] "Symmetry" means that the Fourteenth Amendment and Title VII are complementary and should be interpreted to guarantee substantive equality.[500] Good faith, voluntary efforts to include those who have been historically excluded in the employment marketplace should be viewed favorably:

> The substantive-symmetrical approach provides a ready response to these doctrinal problems [the Court's attempt to reconcile "the degree to which principles establishing an employer's liability under Title VII and the equal protection clause overlap"]. Just as Section 1 of the Fourteenth Amendment should not be read to cramp *voluntary* race-conscious remedial efforts by the state, and the Court's notion of congruence, as articulated in *Adarand*, should not be read to limit federal power to enact race-conscious remedies pursuant to its Section 5 powers, the Court should not limit the same voluntary remedial efforts by a public employer under Title VII. Title VII and the Fourteenth Amendment both embrace an antidiscrimination principle that prohibits *racial subordination through the maintenance of a caste system*. Where public entities *voluntarily* embrace this principle, their efforts should be accorded substantial deference.[501]

This would bring the Court in line with the EEOC guidelines, its own precedent, and principles of institutional competence. The importance of acknowledging that racism is adaptable and that structural inequalities adjust to changing times is illustrated by a recent decision by the Court.[502]

498. *Id.* at 930.
499. *Id.*
500. *Id.* at 931–32.
501. *Id.* at 929–30 (footnote omitted).
502. *See* Lewis v. City of Chicago, 130 S. Ct. 2191, 2196 (2010).

3. Structural Inequality: *Lewis v. Chicago*

While *Lewis v. Chicago* addresses the timeliness of a charge with the EEOC as a prerequisite to a federal lawsuit under Title VII, it offers some doctrinal clues to the Court's conception of discrimination.[503] In a unanimous decision by Justice Scalia, the Court concluded that the petitioners, who were African-American firefighters, could assert a timely disparate impact claim where they challenged the City of Chicago's later application of an employment practice rather than after its initial adoption.[504] The City's "ongoing reliance" on a cut off score of eighty-nine or higher, which excluded qualified African-American candidates who otherwise passed the examination, constituted a "continuing violation of Title VII."[505] While the City conceded that there was a disparate impact on African-American applicants, it nevertheless argued that they "had failed to file EEOC charges [as required under Title VII] within 300 days after their claims accrued."[506] Rejecting the City's procedural argument that the claims were time-barred because there was no challenge to its initial unlawful decision (and no violation occurred thereafter), the Court concluded that "[i]f petitioners could prove that the City 'use[d]' the 'practice' that 'causes a disparate impact,' they could prevail."[507] "[A] Title VII plaintiff must show a 'present violation' within the limitations period,"[508] and the petitioners did so because "their allegations, based on the City's actual implementation of its policy, stated a cognizable claim."[509] The Court noted a clear difference between disparate treatment claims, which required evidence of discriminatory intent, and disparate impact claims, which have no such requirement.[510]

While *Lewis* may lead to some confusion in assessing an employer's potential liability under Title VII's disparate impact provision, particularly in light of the undefined "strong basis in evidence" standard in *Ricci*,[511] there are some noteworthy aspects of the decision. First, the Court noted that disparate impact claims are distinct and do not require discriminatory intent—this seems

503. *See id.* at 2197.

504. *Id.* at 2195.

505. *Id.* at 2196 (internal quotations omitted).

506. *Id.* (citing 42 U.S.C. § 2000e–5(e)(1) (2006)).

507. *Lewis*, 130 S. Ct. at 2198–99.

508. *Id.* at 2199 (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

509. *Id.* at 2198.

510. *Id.* at 2199.

511. Harris & West-Faulcon, *supra* note 27, at 161–62 ("*Lewis* effectively expands the window within which an employer might be liable for disparate impact even as *Ricci* raised the bar for employers who might seek to avoid disparate impact liability by ceasing to rely on racially or gender skewed tests. *Ricci* thus tends to compel employers to use tests that produce racially disparate impact, while *Lewis* suggests that each time it does, it will be subject to yet another lawsuit.").

to be a clearer articulation of what disparate impact is under Title VII. There is no merging of the intent requirement as in *Ricci*.[512] There is no "conflict" between the disparate treatment and disparate impact provisions in Title VII.[513] Of course, *Lewis* may be an "easier" case than *Ricci*; here, the City of Chicago conceded that its actions were unlawful, and there was no reverse discrimination suit by "displaced" white firefighters.[514] So, no "choice" had to be made between "intentional" discrimination to avoid liability based on an "unintentional" disparate impact unsupported by a strong basis in evidence. Also, the Court did not address the quantum of proof required to meet the strong basis in evidence standard in *Ricci*.[515]

Second, the Court, at least on a superficial level, acknowledges the systemic and structural nature of discrimination—the conclusion that the African-American firefighters' claims are not time-barred is based on the fact that the City's practice continued over time (not simply within the 300 day pleading period after its initial unlawful decision).[516] Thus, there was a "present violation," with a disparate impact on the excluded firefighters, within the limitations period.[517] Adopting a deferential approach to Congress' definition of disparate impact, the Court rejects the City's contention that it would be subject to new disparate impact suits "for practices they have used regularly for years."[518] Essentially, a disparate impact with continuing effects over the years is statutorily cognizable.[519]

Most significantly, the Court expressed the need to defer to a co-equal branch of government's legislative decision-making power:

> Our charge is to give effect to the law Congress enacted. . . . Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past.[520]

512. *See supra* Section III.A.3.

513. *See Lewis*, 130 S. Ct. at 2199.

514. *Id.* at 2198.

515. *Id.* (noting that the issue of whether petitioners adequately proved disparate impact liability was not before the Court).

516. *See id.* at 2196.

517. *Id.* at 2199.

518. *Id.* at 2200.

519. *See Lewis*, 130 S. Ct. at 2200 ("Under the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact."). In order to reject this reasoning, the Court implicitly acknowledged the systemic and structural nature of inequality. *Id.*

520. *Id.*

Certainly, this same deference would have been welcomed in *Ricci* only a year earlier. "[T]o give effect to the law Congress enacted" would mean restoring *Griggs* to the Court's analysis of Title VII cases.[521]

A number of conceptual propositions emerge from this discussion:

1) The Fourteenth Amendment and Title VII reinforce each other, and should be interpreted so that intentional discrimination and the present day impact of past discrimination are addressed through race-conscious remedies;

2) *Voluntary* remedial efforts to eradicate structural inequality should be presumptively valid as they represent the constitutional mandate of the Fourteenth Amendment (to dismantle caste-based oppression) and the statutory purpose of Title VII (to remove persistent barriers to substantive opportunity in the workplace);

3) The intent requirement of *Washington v. Davis* and the strong basis in evidence standard should be rejected as intractable obstacles to injured plaintiffs who have valid racial discrimination claims;

4) Reverse discrimination claims should be viewed skeptically because they are advanced by individuals who have not been historically discriminated against and their claims are based upon entitlement (and white privilege) rather than caste-based oppression;

5) Congress should exercise its power, under Section 5, to clarify the meaning of disparate impact and to explicitly reject the Fourteenth Amendment doctrinal gloss added to Title VII by the Court in *Ricci*; and

6) The Court should defer to the legislative power of Congress whenever it legislates to end structural inequality in society.

CONCLUSION

Ricci and *Parents Involved* are much more than decisions about a firefighter's promotion examination and integrated schools, these decisions are seminal doctrinal events in the Roberts Court's post-racial jurisprudence. The arguments advanced in this Article are unlikely, at least at the present time, to change the direction of the Court. There is, however, a much broader, comprehensive objective here—analysis of the complex issues underlying race and racism must shift from neutrality to substantive conceptions that advance race-conscious remedial approaches to eradicate structural inequality in all segments of American society. This is even more urgent given the recent report detailing the cataclysmic wealth disparity between whites, African-Americans, and Latino/as.[522]

521. *Id.*

522. Rakesh Kochhar, Richard Fry & Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CTR. (July 26, 2011), http://pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/ (discussing

There is hope, it is important to note that both *Ricci* and *Parents Involved* were voluntary actions by political communities committed to substantive equality in the most public of spaces—the workplace and schools. Yet, the Roberts Court went out of its way to overturn both decisions. Certainly, we cannot place our hopes and aspirations for a new conception of equality in the hands of an openly hostile Court, we must build from the ground up. We need to harvest new conceptions of equality: The seeds of substantive equality are planted firmly in the anti-caste principle of the Fourteenth Amendment and the statutory mandate of Title VII. We should embrace a new conception of equality in which opportunity means more than procedural access, results are rooted in a theory of substantive equality, and neutrality is viewed skeptically as we actively work toward the eradication of structural inequality.[523]

median wealth of white households which is twenty times that of African-American households—$113,149 median net worth of white households compared to $5,677 for African-American households).

523. *See, e.g.*, United States v. City of New York, 683 F. Supp. 2d 225, 260–66 (E.D.N.Y. 2010) (citation omitted) (noting the thirty-four year history of discriminatory firefighter hiring policies with present day disparate impact on African-American firefighters and stating that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face").