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## RESPONSE

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### DO WE CARE ENOUGH ABOUT RACIAL INEQUALITY? REFLECTIONS ON *THE RIVER RUNS DRY*

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In response to Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009).

It is remarkable that in the United States, with our legacy of legal slavery, the problem of racial discrimination that most troubles judges, policymakers, and political elites is the affirmative use of race by the state to promote equality for citizens of color. The Supreme Court of the United States has prohibited the City of Louisville, famous for its separate-but-unequal schools, from considering race in its efforts to prevent the voluntary segregation of its public schools.<sup>1</sup> In Chief Justice Roberts's world, to hold otherwise would violate the principal meaning of *Brown v. Board of Education*.<sup>2</sup> Opponents of affirmative action have succeeded in eliminating the use of race by state officials in California, Washington, Michigan, and Nebraska.<sup>3</sup>

Proponents of affirmative action, once beneficiaries of nondiscrimination doctrine, are now on the defensive. They are losing in the courts and in the political process. The Court seems determined to

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<sup>1</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (holding that the school district “ha[d] not carried the heavy burden of demonstrating that [the Court] should allow” the use of racial classifications to determine public school admissions).

<sup>2</sup> *Id.* at 2767 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>3</sup> See Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1078 (2009) (discussing California's Proposition 209, Washington's Initiative 200, Michigan's Proposal 2, and Nebraska's Initiative 424—all state anti-affirmative action initiatives).

eliminate the use of race as a criterion for decisionmaking by state actors, notwithstanding the devastating impact that such action might have on citizens of color.<sup>4</sup> With respect to the political process, judging by the relative success of state anti-affirmative action initiatives, that arena does not appear any more promising. Proponents of racial equality—those who care about reducing the often gaping and shocking disparities between blacks and Latinos on one side and whites on the other—are in need of fresh thinking and a new theoretical framework.

Stepping into the breach, Professor Kimberly West-Faulcon offers just that in her article *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*. The article takes racial inequality seriously and sees its amelioration as possible within the context of extant legal and jurisprudential frameworks. She focuses her analysis on public universities in states that have eliminated the use of race through initiatives and referenda. She shows empirically that admissions policies at public universities in California and Washington have had a statistically significant and disproportionately negative impact on the admissions prospects of black and Latino applicants. For example, in 2004, the University of California, Berkeley accepted 28.5% of white applicants for undergraduate admission; by contrast, only 15.4% of black applicants were granted admission.<sup>5</sup>

Professor West-Faulcon argues that large disparities in admissions between black and white applicants (and between Latino and white applicants) could violate Title VI of the Civil Rights Act of 1964, which, inter alia, prohibits entities receiving public funds from adopting admissions policies that have the effect of discriminating on the basis of race.<sup>6</sup> If Title VI were understood properly and given effect, she argues, it would prohibit the racial disparities in admissions that we have seen as a result of the elimination of affirmative action in many states.<sup>7</sup> Universities would be forced to justify their reliance on standardized tests—the proximate cause of the racial disparities in admissions—or would be required to take race into account in order to comply with federal law, notwithstanding the state prohibition.<sup>8</sup>

In this brief Response, I explore a reasonable assumption that underlies Professor West-Faulcon's article, namely, that the failure to

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<sup>4</sup> See *Parents Involved*, 127 S. Ct. at 2768 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>5</sup> See West-Faulcon, *supra* note 3, at 1133 tbl.1.

<sup>6</sup> 42 U.S.C. § 2000d (2006).

<sup>7</sup> See West-Faulcon, *supra* note 3, at 1082.

<sup>8</sup> *Id.* at 1082-84.

take seriously the problems of inequality that afflict communities of color—e.g., racial inequality in education—is a consequence of the absence of (or the failure to recognize) legal tools sufficient to the task. The assumption implies that we need more legal tools; if more legal tools were available, then we could begin to stem the tide of racial inequality. As Professor West-Faulcon shows in her article, however, legal tools *are* available. What, then, accounts for the failure of courts, specifically the Supreme Court, to take seriously the problem of racial inequality? I suggest that courts do not care enough about racial inequality and the dignity of people of color.

As Professor West-Faulcon shows in *The River Runs Dry*, legal tools are available to address the problem of inequality. In the specific context of higher education and university admissions, university officials have a duty under Title VI to ensure that admissions policies do not have such an unjustified adverse impact on applicants of color as to constitute Title VI effect discrimination.<sup>9</sup> Thus, while universities may rely upon standardized tests, such as the SAT, as a basis for making admissions decisions, they violate Title VI where reliance on those tests has a disproportionate negative impact on applicants of color and they cannot show that their reliance is an “educational necessity.”<sup>10</sup>

University officials in states that have passed anti-affirmative action measures are subject to two different legal duties. State statutes and constitutions forbid states from taking race into account in admissions.<sup>11</sup> Under Title VI, however, they may not employ admissions policies that have a disproportionate negative impact on applicants of color unless the policies are an educational necessity. Where these two duties clash, university officials must reject the state mandate in favor of the federal mandate.<sup>12</sup>

The question, then, is why university officials have opted to follow state law and eliminate the use of race as a criterion in admissions instead of relying upon the broader vision of racial equality offered by Title VI. This is a particularly puzzling question if university officials

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<sup>9</sup> *Id.* at 1124-28 (discussing the Supreme Court’s decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which recognized that discriminatory effect can be a form of racial discrimination).

<sup>10</sup> *Id.* at 1125-26.

<sup>11</sup> *E.g.*, CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; NEB. CONST. art. I, § 30; WASH. REV. CODE § 49.60.400 (2008).

<sup>12</sup> *See* West-Faulcon, *supra* note 3, at 1092 (“According to the federal-funding exception, anti-affirmative action laws ‘do[] not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.’” (alteration in original) (quoting MICH. CONST. art. I, § 26(4); WASH. REV. CODE § 49.60.400(6))).

comply reluctantly with state policies that demand the elimination of race as a consideration in admissions. If university officials were reluctant to comply with the state mandate—and if there were a contrary, and arguably controlling, mandate—one would expect university officials to rely upon the contrary mandate, if there were a legitimate legal basis for doing so.

One possibility is that Title VI is not the strong vehicle that Professor West-Faulcon argues it is. After all, the Supreme Court has held that the disparate impact regulations of Title VI do not provide a private cause of action.<sup>13</sup> Consequently, applicants of color who are categorically disfavored by a university's admissions policy cannot bring suit under Title VI to vindicate their rights.

If there were a private cause of action for disparate impact discrimination under Title VI, state officials would presumably be forced to consider the effect of discriminatory admissions policies. Without a private cause of action, however, anti-affirmative action advocates are the only potential plaintiffs that state officials are incentivized to consider in their litigation-risk calculus.

In the absence of a private right to sue, applicants of color must rely upon enforcement actions by the Department of Justice to vindicate their rights. Such enforcement actions were nonstarters in the Bush Administration, given that the administration was ideologically aligned with opponents of affirmative action. That explanation, however, is obviously not available to explain why the Clinton and Obama Administrations have not forced public universities in anti-affirmative action states to justify the wide gap between admission rates of white applicants and applicants of color.

More substantively, Title VI may be a less-than-compelling legal vehicle for enforcing racial equality in university admissions. An important question for the Title VI analysis in this context is whether university officials are justified in their reliance on standardized tests, the primary cause of the disparate impact documented in *The River Runs Dry*. Under Title VI, the inquiry is whether reliance on standardized tests as part of the admissions process is justifiable as a business or educational necessity.<sup>14</sup> Put differently, in the context of university admissions, the question is whether universities can justify using the

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<sup>13</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286-93 (2001) (finding nothing in the text of Title VI or its legislative history supporting a private right of action).

<sup>14</sup> See West-Faulcon, *supra* note 3, at 1129 n.192 (noting that a showing of educational necessity can rebut a finding that an admissions practice has a discriminatory effect (citing *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 981 n.6 (9th Cir. 1984))).

SAT as an admissions criterion, notwithstanding the resulting disproportionate racial impact, on the ground that its use is necessary to further the purpose of the university.

Much ink has been spilled casting doubt on the presumed linear relationship between exceptional performance (or poor performance) on standardized tests and educational achievement.<sup>15</sup> As valuable as I find that literature, however, I am skeptical that courts will conclude that standardized tests are an unnecessary educational tool—i.e., unrelated to and not necessary for the purpose of the university—and therefore violate Title VI.<sup>16</sup> Courts are more likely to believe that university officials have a legitimate, good-faith basis for relying on standardized tests, either as a necessary sorting mechanism (to help them sort through a large number of applicants for few spots) or as a predictive device (to enable them to assess who will do well at their school).

Even if university officials were to assert the least justifiable reason for the use of standardized tests—i.e., to enhance the prestige of institutions of higher learning—courts would likely defer to the judgment of the officials that there is a relationship between prestige and educational quality. For example, university officials can plausibly argue that, all else equal, alumni are more likely to donate to a school if they feel that the school is on an upward trajectory. Similarly, students are more likely to matriculate at a school that they view as prestigious, all else equal. Evidence to support such arguments is not difficult to amass—or believe. Thus, while courts are likely to conclude that standardized tests are imperfect tools, I doubt that they will find them so flawed as to demand that university officials choose between using standardized tests—to the extent that they preserve or enhance the elite status of their institution (or facilitate its sorting function, or further some other legitimate purpose)—and dispensing with them in favor of eliminating the racial disparate impact in admissions caused by their use.

If courts are sympathetic to the problem of racial inequality in admissions, they are more likely to permit university officials to take race into account to make up for the adverse racial impact of using standardized tests in admissions decisions. But this invites a question: do courts care about racial inequality? To the extent that the Supreme Court determines what courts ought to care about or

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<sup>15</sup> See *id.* at 1103-05 (reviewing much of the literature).

<sup>16</sup> In *Ricci v. DeStefano*, the Supreme Court concluded that, notwithstanding significant disparate impact, the promotional tests at issue were job related. See 129 S. Ct. 2658, 2678 (2009) (finding that the examinations at issue were “consistent with business necessity”).

represents what they do care about, eliminating racial inequality is not at the top of the list.

Consider in this context Chief Justice Roberts's inane statement in *Parents Involved in Community Schools v. Seattle School District No. 1* that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>17</sup> To what extent does the Chief Justice's analysis in *Parents Involved* evince any concern for the vast majority of black and brown children consigned to substandard schools in Louisville and Seattle? Instead of seriously engaging with the problem of racial inequality, the Chief Justice offers empty platitudes. If *Parents Involved* is considered the relevant controlling precedent, race consciousness in admissions per Title VI would simply be viewed, in the parlance of *Parents Involved*, as impermissible racial balancing that violates the Fourteenth Amendment. Using race to counteract the effect of the state's use of standardized tests would surely not be viewed as a compelling state interest.<sup>18</sup>

More promising is Justice Kennedy's approach in *Ricci v. DeStefano*, a case that explicitly disapproved of the use of race to avoid discriminatory impact liability under Title VII.<sup>19</sup> The question in *Ricci* was whether state officials could disregard the results of a promotion test because a sufficient number of test takers of color did not score well enough to be eligible for promotion.<sup>20</sup> Though the Court concluded that state officials could not ignore the results without violating Title VII's equal treatment requirement, Justice Kennedy tried to accommodate both the white employees' legitimate expectations of equal treatment and the expectations of employees of color that entrance and promotion examinations will not be used to preclude them from entering their chosen profession or advancing within it. He reasoned that employers can take race into account to avoid the disparate impact of promotion examinations if the employer has a strong basis in evidence to believe that her failure to do so would violate Title VII.<sup>21</sup>

Though Justice Kennedy's approach in *Ricci* improves upon the Chief Justice's attempt in *Parents Involved*, it does not arrive at Profes-

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<sup>17</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

<sup>18</sup> If the state were to argue that it is required to take race into account under Title VI, the Court would simply retort that Title VI does not compel the state to use standardized tests in admissions.

<sup>19</sup> 129 S. Ct. at 2681 ("Fear of [Title VII disparate impact] litigation alone cannot justify an employer's reliance on race . . .").

<sup>20</sup> *Id.* at 2664-65.

<sup>21</sup> *Id.* at 2677.

sor West-Faulcon's preferred conclusion. Importantly, Justice Kennedy is explicit that *Ricci* does not stand for the proposition that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause.<sup>22</sup> Thus, statutory analysis under Title VI or Title VII in the context of university admissions does not avoid the problem of the unfriendly and sometimes hostile constitutional framework that the Court has developed in the context of race.

Further, Justice Kennedy is also clear that significant disparate racial impact alone is not equivalent to a strong basis in evidence justifying race consciousness.<sup>23</sup> On one of the promotion examinations at issue in *Ricci*, the score disparity between white test takers and test takers of color was nearly twenty-seven percent.<sup>24</sup> Though Justice Kennedy described the gap as "significant," he nevertheless concluded that the strong-basis-in-evidence standard was not met because the promotion tests were job related and because there was no reason to believe that equally valid but less discriminatory alternatives were available.<sup>25</sup> Thus, even under *Ricci*, which, as a theoretical matter, entertains the notion that state actors can take race into account (at least under Title VII) to minimize the racial impact of a standardized test, the concession is stingy at best. The Court was unimpressed by the wide racial gap; it found the use of a standardized test used to determine promotions for firefighters consistent with business necessity, and it went to great pains to note that options contemplated by its statutory analysis might be prohibited by its constitutional analysis.

In *The River Runs Dry*, Professor West-Faulcon proves that legal tools are available for addressing the problem of racial inequality. But the article also shows that the problem is not singularly legal. At its root, I believe, the problem of racial inequality is the failure of the legal system to recognize the dignity of people of color in constitutional analysis. To put it more accurately, the dignity of people of color does not carry the same weight as the dignity of white people.<sup>26</sup> This is a political choice by the Supreme Court. As an initial pass, the Court is self-consciously making a choice, on the basis of variables other than

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<sup>22</sup> *Id.* at 2676.

<sup>23</sup> *Id.* at 2678.

<sup>24</sup> *Id.* at 2677-78.

<sup>25</sup> *Id.* at 2678.

<sup>26</sup> I am influenced and persuaded here by the account of dignity provided by Jeremy Waldron. See generally Jeremy Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-50, 2009), available at <http://ssrn.com/abstract=1461220> (discussing the important role of "human dignity" in the formation of the law).

“law,” between the rights of innocent white victims and (also innocent but rarely viewed as such) supplicants of color. Whether under Title VI, Title VII, or the Equal Protection Clause, it is a choice in which law is not outcome determinative.

The problem is not that the choice is political. Chief Justice Roberts’s opinion in *Parents Involved* is as political as Justice Kennedy’s opinion in *Ricci* and Justice O’Connor’s opinion in *Grutter v. Bollinger*.<sup>27</sup> The problem is that the Court’s political analysis—the determination of who or what counts in the analysis of constitutional equality—does not reflect (or no longer reflects) much, if any, empathy or sympathy for the plight of people of color. The Court’s political analysis fails to take (or is incapable of taking) seriously claims by people of color about what counts or ought to count as a violation of constitutional equality.

Consider, in this vein, Justice Scalia’s concurring opinion in *Ricci*. Justice Scalia writes,

I join the Court’s opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?<sup>28</sup>

If this is true, legal academics need to meet the challenge in the domain in which it is presented. Justice Scalia closes his opinion with an admonition: “The Court’s resolution of these cases makes it unnecessary to resolve these matters today. 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.”<sup>29</sup> If people of color are to have a chance at winning this war, legal academics ought to make a renewed case why we ought to care about racial inequality. To do so, as *The River Runs Dry* intimates, legal academics ought to prepare themselves to fight on two fronts: law *and* politics.

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<sup>27</sup> 539 U.S. 306 (2003).

<sup>28</sup> 129 S. Ct. at 2681-82 (Scalia, J., concurring).

<sup>29</sup> *Id.* at 2683.



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