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Disparate Impact

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INTRODUCTION

There has been a lot of talk about post-racialism since the 2008 election of Barack Obama as the first black President of the United States. Some have argued that the Obama election illustrates the evolution of the United States from its unfortunate racist past to a more admirable post-racial present in which the problem of invidious racial discrimination has largely been overcome.[1] Others have argued that the Obama election illustrates only that an extraordinar-

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1. *See, e.g.*, Peter Baker, *Court Choice Pushes Issue of "Identity Politics" Back to Forefront*, N.Y. TIMES, May 31, 2009, at A20 (discussing claim that the Obama election "was supposed to usher in a new post-racial age"); Krissah Thompson, *100 Years Old, NAACP Debates Its Current Role*, WASH. POST, July 12, 2009, at A3 (quoting historian David Garrow's suggestion that the election of President Obama has marked the end of the traditional civil rights era by signifying "the complete inclusion of black people at all levels of politics"); *id*. (reporting Professor Darren Hutchinson's suggestion that we are now in a period of "racial exhaustion" when "[a] lot of people are tired of talking about race" and "[t]hey have to find a new language for dealing with these issues"); Jeffrey Toobin, *Comment: Answers to Questions*, NEW YORKER, July 27, 2009, at 19–20 (noting that the Obama election has been invoked to argue that we have now achieved a level playing field that precludes need for remedial racial measures).

ily gifted, mixed-race, multiple Ivy League graduate, Harvard Law Review President was able to overcome the persistent discriminatory racial practices that continue to disadvantage the bulk of less fortunate racial minority group members in the United States.[2]

However, both perspectives fail to engage the feature of race in the United States that I find most significant. Race is relentlessly relevant. Racial differences are so socially salient that racial considerations necessarily influence many of the decisions that we make. Even when racial considerations are tacit or unconscious, the influence of race is still exerted through the reflex habit of deferring to white interests in the belief that such deference is racially neutral. But it is not. The possibility of actual colorblind race neutrality is simply an option that does not exist.

Nevertheless, the culture remains committed to an abstract principle of racial equality, which would be offended by a frank recognition of the role that race inevitably plays in the allocation of societal benefits and burdens. Accordingly, the culture must find some way to mediate the tension that exists between its race-neutral rhetorical aspirations and its race-based operational behavior. The claim that United States culture has now achieved a post-racial status can best be understood as an effort to serve that function. By conceptualizing contemporary culture as post-racial, we can camouflage the role that race continues to play in the allocation of resources. However, masking the relevance of race does not serve to eliminate it. Rather, the post-racial claim ultimately serves to legitimate the practice of continued discrimination against racial minorities.

The Supreme Court has always been complicit in the practice of sacrificing racial minority interests for the benefit of the white majority. In its more infamous historical decisions, such as *Dred Scott*,[3] *Plessy*,[4] and *Korematsu*,[5] the

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2. *See, e.g.*, Baker, *supra* note 1 (suggesting that nomination of then-Judge Sotomayor for the Supreme Court shows that we have not yet reached post-racial age); Sheryl Gay Stolberg, *Obama Gives Fiery Address at N.A.A.C.P. 100th Anniversary Celebration*, N.Y TIMES, July 17, 2009, at A16 (discussing President Obama's address at the NAACP 100-year anniversary convention, where he stated that racial discrimination continues to exist despite civil rights gains); Krissah Thompson, *On Race and Law Enforcement*, WASH. POST, July 23, 2009, at A4 (discussing President Obama's statement that racially charged arrest of Henry Louis Gates illustrates that racial profiling still exists); Krissah Thompson & Cheryl W. Thompson, *After Arrest, Cambridge Reflects on Racial Rift: Forum To Explore Deep-Seated Issues*, WASH. POST, July 26, 2009, at A1 (claiming that Gates arrest illustrates continued existence of deep-seated racial tensions); Krissah Thompson & Cheryl W. Thompson, *Obama Speaks of Blacks' Struggle*, WASH. POST, July 17, 2009, at A1 (same); Toobin, *supra* note 1 (rejecting claim that Obama election has leveled playing field in way that now precludes need for remedial racial measures); *see also* Henry Louis Gates, Jr., *A Conversation with William Julius Wilson on the Election of Barack Obama*, 6 DU BOIS REV. 15, 20–21 (2009) (disputing post-racial claim). President Obama's background is described in his autobiography, BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE (2004).

3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406–07, 453–54 (1857) (holding that blacks could not be citizens within the meaning of the United States Constitution for purpose of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

Court's racial biases have been relatively transparent. More recently, however, the Court has invoked three tacit post-racial assumptions to justify the contemporary sacrifice of minority interests in the name of promoting equality for whites. First, current racial minorities are no longer the victims of significant discrimination. Second, as a result, race-conscious efforts to benefit racial minorities at the expense of whites constitute a form of reverse discrimination against whites that must be prevented in the name of racial equality. Third, because the post-racial playing field is now level, any disadvantages that racial minorities continue to suffer must be caused by their own shortcomings rather than by the lingering effects of now-dissipated past discrimination. I consider actions that are rooted in these assumptions, and that adversely affect the interests of racial minorities in order to advance the interests of whites, to constitute a form of contemporary discrimination that I refer to as "post-racial discrimination."

Despite its youth, the Roberts Court has been particularly prone to this form of post-racial discrimination. Perhaps the most damaging post-racial decision issued by the Roberts Court is its 2009 decision in the *Ricci v. DeStefano* New Haven firefighters case.[6] There, the Court appears to have commenced a campaign to eviscerate the racially disparate impact cause of action that was created by the employment discrimination prohibition of Title VII.[7] A prior Supreme Court decision, *Washington v. Davis*, had held that the equal protection guarantees of the Constitution did not prohibit actions that had an unintended racially disparate impact.[8] But in an arguable usurpation of legislative policymaking power, the *Ricci* Court has now smuggled a similar restriction into the realm of congressionally created, statutory disparate impact claims. Moreover, the Court has even intimated that it might also hold statutory disparate impact remedies to be unconstitutional as a violation of the equal protection rights of whites.[9]

The Roberts Court's assault on disparate impact is disturbing because the recognition of a disparate impact cause of action seems to offer the most realistic hope of ever successfully invoking the legal system to help us overcome our cultural compulsion to discriminate against racial minorities. History has shown that mere prohibitions on intentional discrimination have not been

4. Plessy v. Ferguson, 163 U.S. 537, 548, 550–51 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

5. Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (upholding World War II exclusion order that led to Japanese-American internment).

6. 129 S. Ct. 2658 (2009).

7. *See id.* at 2673–74, 2681 (holding that effort to remedy disparate impact constituted intentional discrimination against whites); *cf. id.* at 2699 (Ginsburg, J., dissenting) (arguing that majority undermines disparate impact cause of action recognized in *Griggs v. Duke Power*, 401 U.S. 424, 431–32 (1971)).

8. 426 U.S. 229, 244–45 (1976) (adopting intent requirement to establish equal protection violation).

9. *See Ricci*, 129 S. Ct. at 2676 (expressly leaving open question of whether measures to comply with Title VII disparate impact provision are constitutional); *cf. id.* at 2681–82 (Scalia, J., concurring) (suggesting that Title VII disparate impact provision was unconstitutional).

adequate to achieve racial equality. Also, because the nature of our racial discrimination problem is systemic rather than episodic in nature, it is unrealistic to think that the problem could ever be resolved through the use of mere particularized remedies directed at identifiable bad actors. Moreover, we should now realize that the enduring persistence of racial discrimination in the United States demonstrates that arguably good intentions are alone insufficient to neutralize what can only be understood as an underlying cultural commitment to white privilege.

We do, however, have it within our power to override predictable cultural compulsions that we cannot control through acts of mere conscious volition. By adopting a precommitment strategy that focuses on collective conduct rather than individual intent, we can force ourselves to behave in ways that correspond to our more noble aspirations. In a culture that was free from even subtle forms of unconscious discrimination, resources would typically be distributed in ways that would be free from any appreciable racially disparate impact. Accordingly, by viewing as suspect any racially disparate allocations of resources that we do encounter, we could detect and remedy the subtle forms of societal discrimination that have to date escaped redress under the Supreme Court's intention-based equality jurisprudence. However, by expanding to Title VII the hostility to disparate impact claims that was first adopted in the constitutional law context by *Washington v. Davis*, the Roberts Court seems to be moving in precisely the wrong direction. It is not only making the attainment of genuine equality more difficult, but in so doing, it is illustrating why the problem of racial discrimination is systemic rather than individualized in nature.

Part I of this Essay discusses the claim that we have now become a post-racial society, arguing that this claim itself constitutes a form of systemic discrimination against racial minorities. Section I.A describes the history of Supreme Court involvement in the sacrifice of minority interests for the benefit of the white majority in order to establish a context in which the racial jurisprudence of the contemporary Supreme Court can be assessed. Section I.B describes how the contemporary Court has used post-racial assumptions to perpetuate discrimination against racial minorities in the name of protecting the equality interests of whites.

Part II discusses the Supreme Court's hostility to disparate impact claims. Section II.A describes how the Court rejected disparate impact claims under its constitutional equality jurisprudence. Section II.B describes how the Roberts Court is extending this hostility to the statutory disparate impact claims created by Congress in Title VII.

Part III argues that the recognition of disparate impact claims is a sensible precommitment strategy for the resolution of the nation's persistent racial discrimination problem. Section III.A argues that racial discrimination is so deeply embedded in United States culture that it cannot be eradicated through mere voluntary efforts to behave in nondiscriminatory ways. Section III.B argues that viewing racially disparate impact as sufficiently suspect to warrant a

presumptive remedy would enable the culture to approximate the genuine racial equality that its ingrained racial attitudes have thus far precluded it from attaining. The Conclusion expresses the fear that Supreme Court jurisprudence will continue to reject disparate impact claims in the name of post-racialism precisely because the Court is one of the institutions on which the culture relies to perpetuate its systemic discrimination against racial minorities.

I. POST-RACIALISM

The term "racialism" has been used by critical scholars to describe the view that racial discrimination in United States culture constitutes a mere aberrational deviation from the norm of colorblind race neutrality that properly should govern the formulation and implementation of our social policies. Critical scholars consider racialism to be artificially reductionist because it fails to appreciate the degree to which racial considerations are themselves embedded in the very institutions on which we rely to make social policy. As a result, the cultural influence of race is not only systemic and inevitable, but it creates a problem that can never be adequately addressed by treating racial discrimination as a mere particularized product of individual bad actors. Any meaningful remedy will have to be as systemic in scope as the nature of racial discrimination itself.[10]

If that view is correct, the suggestion that United States culture has now evolved to a post-racial status actually exacerbates the problem of racial discrimination by pretending not only that the phenomenon of race is particularized rather than systemic but that even particularized instances of discrimination have now largely disappeared. In fact, the Supreme Court is itself one of the social institutions that has historically been responsible for promoting systemic discrimination against racial minorities. Moreover, the contemporary Court has continued that practice by incorporating post-racial assumptions into its equality jurisprudence. Those post-racial assumptions do not simply misidentify the nature of our discrimination problem; they deny that a problem even exists.

A. RACIAL DISCRIMINATION

United States culture has always discriminated against racial minorities. In a variety of ways it has sacrificed the interests of racial minorities in order to advance the interests of the white majority, and the Supreme Court has often been an active participant in those discriminatory endeavors.[11] The 1823 Supreme Court decision in *Johnson v. M'Intosh* upheld the seizure of Indian lands

10. *See* KIMBERLE CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxiv–xxvii (1995).

11. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT 161 (1993) (arguing that Supreme Court has historically performed "veiled majoritarian" function of sacrificing racial minority interests for benefit of white majority).

by the United States.[12] The 1857 decision in *Dred Scott v. Sandford* held that blacks could not be citizens within the meaning of the United States Constitution and that Congress could not interfere with the property rights of white slave owners by trying to limit the spread of slavery in new United States territories.[13] The 1896 case of *Plessy v. Ferguson* upheld the official segregation of publicly regulated facilities.[14] Moreover, Supreme Court decisions issued during post-Civil War Reconstruction permitted Southern states to implement an explicit regime of white supremacy either by refusing to invalidate laws and practices that exploited blacks or by failing to enforce the nominally protective rulings that the Court did issue. Under this regime, slavery was essentially reinstituted through the practice of peonage, black voters were disenfranchised, housing segregation was preserved, and blacks were openly discriminated against in the criminal justice system.[15]

In the middle of the twentieth century, the Court infamously upheld the World War II exclusion order that led to the internment of Japanese-American citizens in *Korematsu v. United States*.[16] Although the Court formally desegregated public schools in the 1954 *Brown (I)* decision,[17] the 1955 decision in *Brown (II)*[18] actually allowed Southern schools to remain segregated for the next decade.[19] In the 1955–56 case of *Naim v. Naim*, the Court also declined to invalidate Virginia's miscegenation statute, even though *Brown* seemed to render such invidious racial classifications unconstitutional.[20] In the 1970s, the

12. 21 U.S. (8 Wheat.) 543, 587–88 (1823) (holding that European discovery and conquest divested original Indian inhabitants of title to land that now constitutes the United States).

13. 60 U.S. (19 How.) 393, 406–07, 452 (1857).

14. 163 U.S. 537, 548, 550–51 (1896) (upholding constitutionality of separate-but-equal regime of racial discrimination in public facilities by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).

15. *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61–97, 117–35, 135–70 (2004) (discussing formal minority victories in Supreme Court that made little practical difference in preventing actual discrimination). *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

16. 323 U.S. 214, 215–19 (1944).

17. *See* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954) (rejecting separate-but-equal doctrine and declaring official school segregation to be unconstitutional).

18. *See* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (tempering effect of *Brown I* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed").

19. *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 473–79 (6th ed. 2009) (discussing delay in implementation of *Brown I*).

20. 350 U.S. 891, 891 (1955) (per curiam). In *Naim*, the United States Supreme Court was asked to hold unconstitutional a Virginia miscegenation statute that had been upheld by the Virginia Supreme Court of Appeals. *See id*. The United States Supreme Court vacated the Virginia decision and remanded for clarification of the record. *Id*. The Virginia Supreme Court of Appeals, however, merely reaffirmed its earlier decision and refused to clarify the record. Naim v. Naim, 90 S.E.2d 849, 850 (1956) (per curiam). Nevertheless, the United States Supreme Court declined to recall or amend the mandate, finding that the constitutional question had not been "properly presented." Naim v. Naim, 350 U.S. 985, 985 (1956) (per curiam). This allowed the Virginia Court's decision to remain in effect. *Id*. Because the

Court then refused to desegregate northern and western schools that were de facto rather than de jure segregated, and those schools remain largely segregated today.[21] *Brown* has since been used to invalidate affirmative action programs on the ground that they violate the principle of colorblind race neutrality.[22]

One might suggest that I am focusing on only Supreme Court decisions that adversely affected the interests of racial minorities while ignoring the decisions in which racial minority interests prevailed. However, my point is not that the Supreme Court never ruled in favor of racial minorities. Rather, it is that the Court has historically served as an institution that did more to keep minorities in a subordinate position than it did to promote racial equality. In fact, such an institution can *enhance* its perceived legitimacy by permitting occasional victories for those whom it subordinates.[23]

In addition, many of the Supreme Court decisions that did purport to protect minority interests ultimately had very limited beneficial effects. As has already been noted, *Brown* turned out to be more useful in outlawing affirmative action than it was in desegregating public schools.[24] Although *Shelly v. Kraemer* refused to enforce racially restrictive covenants in residential real estate transactions, it specifically held that such covenants were legally valid if complied with

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neutrality principle that had been announced in *Brown I* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court's failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court's actions in *Naim* have been vigorously criticized. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) ("[T]here are a very few dismissals similarly indefensible in law."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (noting that dismissal of the miscegenation case was "wholly without basis in the law"). The Supreme Court ultimately invalidated the Virginia miscegenation statute as a manifestation of white supremacy eleven years later in *Loving v. Virginia*, 388 U.S. 1, 6, 11–12 (1967), when only sixteen states still had miscegenation statutes on the books.

21. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208–09, 212 (1973) (adopting expansive interpretation of de jure segregation but reaffirming prohibition on use of race-conscious remedies to eliminate de facto segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971) (same); *see also* STONE ET AL., *supra* note 19, at 479–88 (discussing current de facto school segregation); *cf.* Washington v. Davis, 426 U.S. 229, 244–45 (1976) (reading Equal Protection Clause to permit racially disparate impact not directly caused by intentional discrimination); Milliken v. Bradley, 418 U.S. 717, 733–35, 744–45 (1974) (refusing to allow inter-district judicial remedies for de facto school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

22. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293–95, 307 (1978) (controlling opinion of Powell, J.) (reading *Brown I* to prohibit affirmative action that benefits racial minorities at the expense of whites).

23. *See* SPANN, *supra* note 11, at 19–26, 94–99, 104–60 (1993) (arguing that Supreme Court has historically performed "veiled majoritarian" function of sacrificing racial minority interests for benefit of white majority).

24. *See supra* text accompanying notes 17–22 (discussing *Brown*, school segregation, and affirmative action).

voluntarily.[25] And, of course, *Shelley* did little to eliminate the pervasive housing discrimination that continues to exist even today.[26] The Supreme Court nominally prohibited racial discrimination in jury selection in *Strauder v. West Virginia*,[27] and more recently in *Batson v. Kentucky*,[28] but as the Court indicated in *Hernandez v. New York*, discriminatory jury selection can still be accomplished by using the fig leaf of indirect proxies for race.[29] In *Gomillion v. Lightfoot*, the Supreme Court held that racial gerrymandering could not be used to disenfranchise black voters,[30] but the Court's subsequent decision in *Shaw v. Reno* held that this same principle prohibited racial gerrymandering to equalize the voting strength of historically disenfranchised minority voters.[31] Even the Court's early decisions upholding racial affirmative action have now been largely overruled by subsequent Supreme Court decisions.[32] Throughout its history, the Supreme Court has been more of an opponent than an ally in the minority quest for racial equality.

The Supreme Court's history of ruling against racial minority interests in order to advance the interests of the white majority continues to have lingering effects. Even if one assumes that active discrimination against racial minorities has now ceased to exist—a dubious assumption—our present racially-correlated distribution of societal benefits and burdens indicates that passive discrimination against racial minorities continues to flourish. By acquiescing in the momentum of past discrimination, the Supreme Court helps to perpetuate the

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25. 334 U.S. 1, 13, 19–20 (1948) (prohibiting judicial enforcement of restrictive covenants but not holding such covenants unlawful).

26. *See generally* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM *passim* (2005) (documenting history of intentional residential segregation in United States); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS *passim* (1993) (discussing concept of urban residential "hypersegregation" in United States).

27. 100 U.S. 303, 310 (1880) (prohibiting discrimination in selection of jury venire).

28. 476 U.S. 79, 88–89 (1986) (prohibiting discrimination in selection of petit jury).

29. 500 U.S. 352, 369–70 (1992) (permitting Latino jurors to be struck because they spoke Spanish and might not, therefore, rely on official English translation of Spanish testimony).

30. 364 U.S. 339, 341–42 (1960) (holding that racial gerrymander to disenfranchise black voters would be unconstitutional).

31. 509 U.S. 630, 649–51, 653–58 (1993) (granting white voters cause of action to challenge creation of majority-minority voting districts).

32. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 225–27 (1995) (overruling *Metro Broadcasting* by rejecting application of intermediate scrutiny to some minority-favoring racial classifications and applying strict scrutiny to federal affirmative action program designed to benefit minority contractors), *overruling* Metro Broadcasting Co. v. FCC, 497 U.S. 547, 600–01 (1990). *See generally* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 159–63 (2000) (discussing Supreme Court affirmative action decisions and voting blocs). The Court's current treatment of affirmative action is arguably inconsistent. *Compare* Grutter v. Bollinger, 539 U.S. 306, 327–30, 334 (2003) (upholding University of Michigan law school affirmative action program for student admissions), *with* Gratz v. Bollinger, 539 U.S. 244, 255–57, 275–76 (2003) (invalidating arguably indistinguishable University of Michigan undergraduate affirmative action program on same day that *Grutter* was decided).

racial imbalance that has historically existed in the distribution of resources.[33] However, the momentum of past discrimination is now being supplemented by present discrimination rooted in the Court's adherence to post-racial assumptions. And it is in the context of the Court's past antipathy to racial minority interests that the Court's present attraction to post-racialism should be evaluated.

B. POST-RACIAL DISCRIMINATION

Since Justice Powell retired from the Supreme Court in 1987, the Court has engaged in bloc voting on the issue of race. When the interests of whites and racial minorities have been in conflict, Justices in the conservative bloc have virtually always voted in favor of white interests, while Justices in the liberal bloc have virtually always voted in favor of minority interests. Since Justice Kennedy replaced Justice Powell in 1988, the conservative bloc has constituted a voting majority on the Supreme Court. Accordingly, the Court has typically ruled against racial minority interests in affirmative action, redistricting, and school desegregation cases.[34]

The theory that the Court has commonly used to rule against racial minorities is rooted in three post-racial assumptions. First, the Court has assumed that there is insufficient continuing discrimination against racial minorities to warrant race-conscious remedies. Second, the Court has assumed that the use of race-conscious remedies would constitute unlawful reverse discrimination against whites. Third, the Court has assumed that, because whites and racial minorities now compete on a level playing field, any continuing disadvantages suffered by racial minorities is the result of the choices and abilities of racial minorities themselves.[35]

The Supreme Court's post-racial belief that minorities no longer need special legal protections—protections that, in the Court's view, make minorities the perpetrators rather than the victims of racial discrimination—is a view that has now solidified on the Roberts Court. In the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*, the conservative bloc chose

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33. *See, e.g.*, *Gratz*, 539 U.S. at 299–304 (2003) (Ginsburg, J., dissenting) (discussing, in case that invalidated affirmative action program, striking racial disparities that continue to exist in distribution of societal resources).

34. *See* SPANN, *supra* note 32, at 159–63 (discussing Supreme Court voting record in affirmative action and redistricting cases); *see also* Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 566–75 (2008) (discussing Supreme Court decision in *Parents Involved in Community Schools v. Seattle School District Number 1*, 551 U.S. 701 (2007) (plurality opinion), which invalidated voluntary race-conscious efforts to prevent resegregation of public schools).

35. *See, e.g.*, City of Richmond v. J.A. Croson Co., 448 U.S. 469, 498–508 (1989) (utilizing assumptions to invalidate minority construction set-aside); *see also Adarand Constructors*, 515 U.S. at 226–31 (applying strict scrutiny to construction set-aside that presumed racial minorities to be economically and socially more disadvantaged than whites); Shaw v Reno, 509 U.S. 630, 642–52, 653–58 (1993) (creating cause of action for white voters to challenge majority-minority voting districts as reverse discrimination against whites that is not necessary to remedy past voting discrimination against minorities).

to protect the school-choice preferences of white parents.[36] It did so by invalidating voluntary race-conscious integration plans that had been adopted by the Seattle and Louisville school boards in an effort to prevent the post-*Brown* resegregation of public schools that was occurring as a result of residential population shifts.[37] Chief Justice Roberts actually read the *Brown* prohibition on race-conscious *segregation* of public schools as establishing a principle that barred the race-conscious *integration* of public schools.[38]

Even more strikingly, in the 2009 case of *Ricci v. DeStefano*, the conservative bloc invalidated a refusal by the city of New Haven to utilize the results of a firefighter promotion exam that had a racially disparate impact.[39] Even though the city argued that it was trying to avoid a violation of Title VII's prohibition on employment practices that have an unjustifiable racially disparate impact, the Court held that the city's race-conscious efforts to avoid a disparate impact violation themselves constituted a violation of Title VII's prohibition on intentional discrimination against white firefighters.[40] The Court even suggested that it might in the future be compelled to hold the Title VII disparate impact provision unconstitutional as a violation of the equal protection rights of whites.[41]

United States culture's concern with reverse discrimination against whites has been around for some time.[42] But the election of Barack Obama as the first black President of the United States has now given that concern renewed vitality. The post-racial assumptions on which the Supreme Court's recent race decisions rest simply seem more plausible now that a black person has been elected President. However, those assumptions can also serve as the basis for continued discrimination against racial minorities. The Court's historical decisions illustrate that the Supreme Court has always been a more reliable guardian of white interests than it has been of minority interests.[43] And the Court's more recent conservative bloc decisions illustrate that this Supreme Court partisanship has persisted. What has changed, however, is the justification that the Court is now able to offer for its continued protection of white interests. It can now make the post-racial claim that there is simply no significant discrimination left to be remedied. Stated differently, the Court can now use this claim to engage in a new type of discrimination—post-racial discrimination. And perhaps the most

36. 551 U.S. 701, 711, 722 (2007) (plurality opinion).

37. *Id.* at 709–11.

38. *See id.* at 746–48.

39. 129 S. Ct. 2658 (2009).

40. *See id.* at 2664.

41. *See id.* at 2682 (Scalia, J., concurring) (suggesting that Title VII disparate impact provision was unconstitutional); *cf. id*. at 2676 (majority opinion) (declining to address constitutionality of Title VII disparate impact provision).

42. *See, e.g.*, cases cited *supra* note 35.

43. *See* SPANN, *supra* note 11, at 19–26, 94–99, 104–60 (1993) (arguing that Supreme Court has historically performed "veiled majoritarian" function of sacrificing racial minority interests for benefit of white majority).

significant feature of such post-racial discrimination is its insistence on disregarding the racially disparate impact produced by the ways in which we customarily allocate societal resources.

II. DISPARATE IMPACT

Post-racial discrimination disadvantages racial minorities by refusing to recognize disparate impact as a cognizable form of racial inequality. For more than thirty years, the Supreme Court has declined to view racially disparate impact as a form of discrimination that violates the equal protection principle of the United States Constitution. Now, however, the Roberts Court has begun to extend that constitutional holding to statutory disparate impact claims created by Congress under Title VII. In fact, it is the evisceration of statutory disparate-impact claims that seems to constitute the essence of the Roberts Court's decision in *Ricci*. Although the Supreme Court arguably has the authority to decide what the concept of equality entails under the Constitution, the Court's decision to supplant statutory disparate impact claims under Title VII seems to entail a usurpation of legislative policymaking authority that is inconsistent with the constitutional separation of powers.

A. THE CONSTITUTION

In 1976, the Supreme Court held in *Washington v. Davis* that the equal protection principle of the Constitution prohibited intentional discrimination based on race, but it did not prohibit unintentional actions that had a mere racially disparate impact.[44] The Court further elaborated on the meaning of its intentional discrimination standard in *Personnel Administrator v. Feeney*, where the Court emphasized that the equal protection principle could be satisfied only by actual motivating intent—the intent to take an action "because of . . . its adverse effect" on a racial minority, or some other prohibited purpose.[45] The intent to take an action merely "in spite of" its known disparate impact was not sufficient to establish an equal protection violation.[46]

The Court's *Washington v. Davis* decision was a bit surprising for three reasons. First, some of the Supreme Court's own prior decisions had suggested that a disparate impact principle—an effects principle, rather than an intent principle—should govern equal protection claims.[47] Moreover, a number of lower court decisions had ruled that disparate impact was alone sufficient to establish an equal protection violation.[48] Nevertheless, the only policy justifica-

44. 426 U.S. 229, 238–48 (1976).

45. 442 U.S. 256, 278–79 (1979).

46. *Id.*

47. *See Washington*, 442 U.S. at 242–44 (citing prior Supreme Court decisions); *see also* SPANN, *supra* note 11, at 38–39 (discussing *Washington v. Davis*).

48. *See Washington*, 442 U.S. at 244–45, 245 n.12 (citing 13 courts of appeals decisions and four district court decisions).

tion the Court offered for its adoption of a constitutional intent principle rather than an effects principle was that the adoption of a disparate impact principle might apply to a "whole range of tax, welfare, public service, regulatory, and licensing statutes" that have a racially disparate impact.[49] This justification suggests not that the Court viewed disparate impact as non discriminatory, but rather viewed disparate impact as so *pervasively* discriminatory that it would be awkward to remedy.

A second reason for viewing the *Washington v. Davis* Court's adoption of an intent standard as surprising is that the Court must have been well aware of its own complicity in post-Reconstruction discrimination against former black slaves, which was pervasively practiced by southern white supremacists and northern Democrats. Although the Fifteenth Amendment guaranteed the right to vote without regard to race, southern white supremacists engaged in various forms of murder, fraud, and voter intimidation in order to prevent blacks from voting. Despite the success of these tactics in disenfranchising most southern black voters, the Supreme Court did not meaningfully intervene to protect the franchise that was granted by the Fifteenth Amendment in 1870.[50] Similarly, the Court tolerated most southern white supremacist efforts to evade federal legislation that prohibited discrimination against blacks in jury service, and blacks were largely excluded from southern juries until after World War II.[51] The Court also tolerated the successful southern white supremacist effort to reinstitute post-Reconstruction slavery through peonage, the discriminatory enforcement of vagrancy laws, and harsh convict labor practices.[52] The reason that Supreme Court interventions had little practical effect during this period is that the Court chose to accept at face value the obviously disingenuous claim that race-neutral intent had motivated the discriminatory actions of the southern states that took those actions. The Supreme Court simply ignored the stark racial disparities that those discriminatory actions produced, even though such disparate impact made the state claims of neutral intent wholly implausible.[53] In light of the Court's prior failings to protect racial minority rights during the post-Reconstruction era, it is not immediately apparent why the *Washington v. Davis* Court would have chosen to go down that path again in 1976.

A third reason why the *Washington v. Davis* intent holding is surprising lies in a comment that Justice White made near the end of his majority opinion. He stated that the potentially "far-reaching" consequences of a disparate impact

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49. *Id.* at 248 (discussing breadth of disparate impact principle); *see also* SPANN, *supra* note 11, at 38 (discussing *Washington v. Davis* intent requirement).

50. See KLARMAN, *supra* note 15, at 28–39 (discussing disenfranchisement).

51. *See id.* at 39–43, 55–57 (discussing jury service); *cf.* LANE, *supra* note 15, *passim* (discussing violent Louisiana massacre used to prevent black and white Republican office holders from assuming office).

52. *See* KLARMAN, *supra* note 15, at 71–76, 86–88 (discussing peonage system based on vagrancy laws and convict labor); *see generally* BLACKMON, *supra* note 15, *passim* (same).

53. *See* KLARMAN, *supra* note 15, at 8–10; *id.* at 33–39 (voting); *id.* at 39, 41–43 (juries); *cf. id.* at 72, 86–88, 96–97 (invalidating some peonage laws, but not ending practice of peonage).

standard made its desirability a question of legislative rather than judicial competence.[54] That makes the *Washington v. Davis* holding surprising because Congress *had* spoken. At the time *Washington v. Davis* was decided, the Supreme Court had already read the employment discrimination prohibition of Title VII to contain a disparate impact standard, rather than merely an intentional discrimination standard. If the Court's reading of Title VII was genuinely rooted in congressional intent, the Court should have viewed Congress as having established both the practicability and the policy desirability of a disparate impact standard. Even if the Court's reading of Title VII was a creative reading, rooted in the Court's own understanding of the need to recognize disparate impact claims, the Court should have read the constitutional equal protection principle in the same way that it had read the antidiscrimination principle under Title VII.

B. TITLE VII

In the 1971 case *Griggs v. Duke Power Co.*, the Supreme Court held that the prohibition on employment discrimination contained in Title VII of the Civil Rights Act of 1964 barred both intentional discrimination *and* employment practices that had an unintended racially disparate impact.[55] In the absence of an adequate showing of job-related business necessity, disparate impact was alone sufficient to establish a Title VII violation. The Court stated that its disparate-impact holding was "plain from the language of the statute,"[56] which prohibited subjecting an individual to adverse employment actions "because of such individual's race, color, religion, sex, or national origin."[57] The Court reasoned that a prohibition on disparate impact was necessary to prevent prospective discrimination through the use of neutral practices that would "operate to 'freeze' the status quo of prior discriminatory employment practices."[58] Accordingly, the *Griggs* Court viewed Congress as having adopted a disparate impact policy that was necessary to any meaningful conception of prospective equality.

The nature of the political coalition supporting adoption of Title VII in 1964 makes it unclear whether the *Griggs* disparate impact holding can fairly be attributed to any *actual* intent of Congress, and the *Griggs* decision has been criticized on this ground.[59] Regardless of its original intent, however, Congress has now expressly endorsed the *Griggs* disparate impact understanding. Not only did Congress acquiesce in *Griggs* by letting the decision stand for twenty years without statutory modification, but in 1991 Congress actually codified

54. *See Washington*, 426 U.S. at 248.

55. 401 U.S. 424, 429–32 (1971); *see also* SPANN, *supra* note 11, at 38–40 (discussing *Washington v. Davis* and *Griggs*).

56. *Griggs*, 401 U.S. at 429.

57. 42 U.S.C. § 2000e-2 (2006).

58. *Griggs*, 401 U.S. at 429–30.

59. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506–07, 516–17 (2003) (discussing criticism of *Griggs* and actual intent of Congress).

Griggs 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.[60] 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.

The Supreme Court's 2009 decision in the New Haven firefighters case of *Ricci v. DeStefano* appears to constitute a conservative bloc assault on the concept of disparate impact discrimination.[61] The *Ricci* Court's invalidation of New Haven's decision to reject the racially disparate results of its firefighter promotion exam rested on the Court's conclusion that the City's effort to avoid a disparate impact violation of Title VII under *Griggs* would itself constitute an intentional discrimination, "disparate-treatment" violation of Title VII against the 17 white firefighters, and one Latino firefighter, who had scored well on the exam.[62] Justice Kennedy's majority opinion in the 5–4 decision found that a tension existed between the intentional discrimination and disparate impact provisions of Title VII.[63] The opinion went on to hold that the conscious consideration of race undertaken to avoid a disparate impact burden on racial minorities would entail prohibited intentional discrimination against whites, unless there was a "strong basis in evidence" to believe that a disparate impact violation would otherwise occur.[64] Justice Kennedy borrowed the "strong basis in evidence" standard from the Court's conservative bloc constitutional decisions, which had invalidated voluntary racial affirmative action programs unless a strong basis in evidence existed for believing that affirmative action was necessary to prevent unconstitutional discrimination against racial minorities.[65] Those constitutional affirmative action decisions were, of course, governed by the *Washington v. Davis* standard that had rejected disparate impact claims in favor of intentional discrimination.

Justice Ginsburg's dissent in *Ricci* emphasized that the Supreme Court had never before found even "a hint" of conflict to exist between the Title VII intentional discrimination and disparate impact provisions.[66] Rather, the two provisions were actually complementary prohibitions designed to address the same objective of ending workplace discrimination.[67] Justice Ginsburg also

60. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (making reference to *Griggs* and other Supreme Court decisions recognizing disparate impact claims); *see also* SPANN, *supra* note 11, at 1, 173–74 (discussing Civil Rights Act of 1991); Primus, *supra* note 59, at 516–18 (discussing *Griggs* and Civil Rights Act of 1991).

61. 129 S. Ct. 2658 (2009).

62. *Id.* at 2671.

63. *Id.* at 2604.

64. *Id.* at 2675.

65. *See id.* at 2675–76.

66. *Id.* at 2699 (Ginsburg, J., dissenting).

67. *See id.* at 2700.

argued that the "strong basis in evidence" standard borrowed from equal protection cases was simply inapposite *precisely because* the *Washington v. Davis* standard governing constitutional cases did not recognize the statutory disparate impact claims that were prohibited by Title VII under *Griggs* and the Civil Rights Act of 1991.[68] Justice Ginsburg's dissent went on to argue that the New Haven decision to disregard its racially disparate exam results should survive even under the majority's "strong basis in evidence" standard. That was because it would be difficult to find a defense for the disparate impact produced by the New Haven promotion exam if the results were to be certified. Business necessity can serve as such a defense. But, that defense was not available in this case because there existed ample alternative promotion procedures that could serve any legitimate business-necessity concerns without creating a racially disparate impact. Indeed, those alternatives were being used by two-thirds of the other fire departments in the nation.[69]

The Supreme Court did not expressly invalidate Title VII disparate impact claims in *Ricci*. Indeed, it purported to recognize the continued existence of such claims.[70] However, it undermined the ability of racial minorities to maintain Title VII disparate impact causes of action by holding that disparate impact claims would always be outweighed by the competing intentional discrimination claims of whites, unless minorities could show a "strong basis in evidence" for their disparate impact claims. It seems quite clear that the "strong basis in evidence" standard can be satisfied only in exceptional cases, if it can ever be satisfied at all. The conservative bloc has never found the standard to be satisfied in any of the constitutional affirmative action cases that it cited as giving rise to the standard.[71] In addition, the standard was held not to have been satisfied under the facts of *Ricci* itself, even though the presence of less discriminatory, job-related alternatives would seem to indicate that the standard should have been easily satisfied under the facts of the case.[72]

Justice Kennedy's opinion also illustrated the extreme stringency of the "strong basis in evidence" standard by rejecting the city's "strong basis in evidence claim" on a motion for *summary judgment*. Under any reading of the evidence, there was at least a genuine factual dispute about the existence of less discriminatory, job-related alternatives. But the *Ricci* majority refused even to remand the case for trial.[73]

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68. *See id.* at 2701.

69. *Id.* at 2705.

70. *See id.* at 2673 (majority opinion) (recognizing prima facie disparate impact claim).

71. *See id.* at 2675 (citing constitutional cases that invalidated affirmative action plans under strong basis in evidence standard); *id*. at 2700–02 (Ginsburg, J., dissenting) (same); *cf.* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (upholding educational affirmative action plan as serving compelling state interest in promoting prospective diversity rather than as remedy for past discrimination).

72. *See Ricci*, 129 S. Ct. at 2706–07 (Ginsburg, J., dissenting) (arguing that standard was satisfied).

73. *Id.* at 2677 (majority opinion) (resolving case in favor of white firefighters on summary judgment); *cf. id.* at 2706–07 (Ginsburg, J., dissenting) (arguing that factual disputes precluded summary judgment).

In what appears to be an *in terrorem* maneuver, the *Ricci* majority expressly declined to address the constitutionality of Title VII disparate impact claims, in a context suggesting that the Title VII disparate impact cause of action might itself subsequently be held to violate the Equal Protection Clause of the Constitution.[74] Justice Scalia's concurring opinion even suggested that he was presently prepared to hold the Title VII disparate impact provision unconstitutional.[75] Threatening unconstitutionality in dicta, as part of an effort to advance the Court's regulatory agenda through chill rather than actual adjudication, appears to be a recurring technique employed by the Roberts Court.[76]

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.[77] In *Grutter v. Bollinger*, the Court upheld an affirmative action program adopted to increase racial diversity at the University of Michigan Law School.[78] On the same day, however, the Court also invalidated a similar affirmative action program adopted to increase racial diversity in the University of Michigan undergraduate college in *Gratz v. Bollinger*.[79] In *Grutter*, Justice O'Connor provided the fifth vote to uphold that law school program,[80] but Justice O'Connor has now been replaced on the Supreme Court by Justice Alito.[81] 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*[82] suggests that Justice Alito is unlikely to vote in favor of affirmative action programs for racial minorities.[83] 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. Even if one thinks that such Supreme Court racial policymaking is arguably legitimate for the interpretation of constitutional claims under the Equal Protection Clause, it is not legitimate for

74. *See id.* at 2676 (majority opinion)

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

76. *Cf.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2511–13 (2009) (threatening to declare section 5 of Voting Rights Act unconstitutional if Congress does not modify the statute); *id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part) ("The Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional.").

77. *See* Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 437–38 (2009) (discussing conservative Supreme Court voting bloc on issue of race).

78. 539 U.S. 306, 343 (2003).

79. 539 U.S. 244, 251 (2003).

80. *Grutter*, 539 U.S. at 310 (listing votes of Justices).

81. STONE ET AL., *supra* note 19, at lxxxviii–xc (table showing replacement of Justice O'Connor by Justice Alito).

82. 551 U.S. 701, 708 (2007) (listing votes of Justices).

83. *See* Spann, *supra* note 77, at 437–38 (discussing conservative Supreme Court voting bloc on issue of race).

statutory claims under Title VII.

The Supreme Court opinion in *Washington v. Davis* stated that *Congress* should determine by statute whether the recognition of disparate impact claims is appropriate.[84] That observation is consistent with separation of powers principles because the politically accountable Congress is institutionally more competent than the politically insulated Supreme Court to formulate racial policy for the nation. There is often a perceived zero-sum relationship between the allocation of limited societal resources to whites and the allocation of those resources to racial minorities. Whites want to retain the resources to which they feel entitled by prior cultural practice, while racial minorities want to escape the disadvantages to which they have been consigned through past discrimination. Recognizing this, Congress included a disparate impact provision in its Title VII prohibition on discriminatory employment practices, which it thought would balance the competing employment interests of whites and racial minorities. Racially disparate impact would be tolerated only if it was compelled by job-related business necessity, and only if there was no less discriminatory alternative that could adequately serve an employer's legitimate business needs.[85]

The Title VII disparate impact provision embodies a textbook example of a legislative policy judgment—a judgment made by a politically accountable Congress, whom the doctrine of separation of powers charges with the task of balancing competing constituent interests. Nevertheless, the Supreme Court chose to upset the legislative balance that Congress struck in Title VII. The *Ricci* Court undermined the effectiveness of statutory disparate impact claims, and it suggested that the recognition of such claims might even be unconstitutional. Moreover, it did this despite the fact that Congress, in the Civil Rights Act of 1991, was seeking to overturn precisely the sorts of restrictive Title VII decisions that the Supreme Court had issued in the past—and that it has now issued again in *Ricci*.[86] In its effort to eviscerate Title VII disparate impact claims, therefore, the Roberts Supreme Court has exceeded the legitimate scope of its judicial power. It has usurped legislative policymaking power by overriding majoritarian political remedies directed at entrenched modes of racial discrimination. That usurpation is particularly unfortunate because the disparate impact remedies that the Court has chosen to neutralize offer the most realistic hope of ever achieving a meaningful level of racial equality in the United States.[87]

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84. 426 U.S. 229, 248 (1976).

85. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2672–73 (2009) (describing Title VII disparate impact test).

86. *See id.* at 2696–99 (Ginsburg, J., dissenting) (emphasizing that Civil Rights Act of 1991 was intended to overrule Supreme Court's restrictive Title VII decisions).

87. Although I fear that *Ricci* has sounded an effective death knell for Title VII disparate impact claims, at least one federal district court has upheld a disparate impact claim in the aftermath of *Ricci*. In *United States v. Vulcan Society*, 637 F. Supp. 2d 77, 79 (E.D.N.Y. 2009), the court invalidated New York City's reliance on firefighter selection exams that were used to choose candidates for admission to the New York City Fire Academy, holding that those exams had an impermissible racially disparate

III. PRECOMMITMENT

Post-racial claims notwithstanding, it should now be apparent that racial discrimination is a persistent feature of United States culture. The fact that racial minorities remain underrepresented in the allocation of societal benefits and overrepresented in the allocation of societal burdens illustrates that the inclination to favor the interests of whites over the interests of racial minorities is so deeply embedded in the culture that it cannot be eradicated through mere voluntary efforts to avoid discrimination. Even a sincere commitment to the principle of racial equality will be insufficient to end those forms of subtle and unconscious "societal discrimination" that have become a constitutive feature of the culture.[88] Accordingly, the most realistic hope that United States culture has for ever achieving genuine racial equality lies in its willingness to adopt a precommitment strategy that will force its behavior to approximate the behavior of a culture that has somehow managed to transcend its discriminatory racial attitudes.

Precommitment strategies are commonly used to increase one's fidelity to a desired course of action by eliminating options that are inconsistent with that course of action. Burning your bridges behind you before going into battle is a classic precommitment strategy that is designed to preclude the option of retreat. Similarly, adopting a constitution that supersedes ordinary law is a classic precommitment strategy that is designed to preclude the option of unprincipled political actions that might seem compelling in the heat of the moment.[89]

Recognition of disparate impact as a cognizable form of racial discrimination also constitutes a sensible precommitment strategy. Although our racial biases and predispositions may not permit us to allocate societal resources in a racially nondiscriminatory manner, we can nevertheless force ourselves to approximate the resource allocations that would exist in a culture that was capable of authentic racial equality. But such a precommitment to racial equality is precisely what the Supreme Court now seems intent on preventing.

A. EMBEDDED INEQUALITY

Speaking of United States dependence on foreign energy sources in his 2006 State of the Union address, former President George W. Bush stated that "America is addicted to oil."[90] Even though we know that our voracious

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impact that constituted an employment discrimination violation of Title VII. The *Vulcan* court distinguished *Ricci* by finding that *Ricci* addressed a potential disparate impact violation of Title VII, whereas *Vulcan* addressed an actual violation of Title VII. *Id.* at 83.

88. *See infra* text accompanying note 107 (discussing "societal discrimination").

89. *See* Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present To Liberate the Future*, 94 CORNELL L. REV. 1153, 1193–1200 (2009) (discussing theoretical foundations for precommitment strategies).

90. *See* Elisabeth Bumiller & Adam Nagourney, *Bush, Resetting Agenda, Says U.S. Must Cut Reliance on Oil*, N.Y. TIMES, Feb. 1, 2006, at A1 (quoting President Bush).

appetite for energy leaves us vulnerable to harms ranging from economic hardship, to domestic environmental threats, to foreign political instability, we still seem unable to curb our oil consumption in any meaningful way. Even though we know better, we cannot seem to control our behavior. That is what it means to be addicted.

Likewise, the United States is addicted to racial discrimination. Even though we know that treating racial minorities as inferior to whites is inconsistent with the moral, ethical, and legal theories of equality to which we have long subscribed, the benefits to the white majority of continued discrimination against racial minorities are apparently too compelling for the culture to resist. From the seizure of Indian lands, to slavery, to official segregation, to wartime hysteria, to de facto segregation, to the invalidation of affirmative action,[91] and most recently to the resegregation of public schools,[92] white majoritarian United States culture has been committed to the subordination of racial minority interests in pervasive and persistent ways. That is a form of white supremacy. And our addiction to it is an addiction from which we appear no more able to wean ourselves than we have been able to wean ourselves from our addiction to foreign oil.

The belief that white interests are more important than racial minority interests is simply a constitutive element of United States culture. One of the things that it *means* to be an American is to have internalized, at some very fundamental level, the realization that it is permissible to sacrifice minority interests for the benefit of whites. And that realization is often both deep and unconscious in nature.[93] That is why we tolerate the dramatic discrepancies in the allocation of societal resources that continue to exist between whites and racial minorities. Justice Ginsburg has emphasized that conscious and unconscious biases have caused large racial disparities to continue to exist in unemployment, poverty, access to health care, and access to education.[94] Moreover, minorities continue to suffer discrimination in employment, real estate markets, and consumer transactions.[95] Minorities are also statistically discriminated against in matters as diverse as retail car negotiations, kidney transplants, and bail setting.[96] Recent social cognition research using the Implicit Association Test to measure unconscious racial prejudice has demonstrated that most of us remain

91. *See supra* text accompanying notes 11–22 (describing illustrative cases).

92. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746–48 (2007) (plurality opinion) (citing *Brown II* as authorizing resegregation of public schools).

93. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (arguing that much contemporary racial discrimination is unconscious).

94. *See* Gratz v. Bollinger, 539 U.S. 244, 299 (2003) (Ginsburg, J., dissenting).

95. *See id.* at 299–302 (discussing striking racial disparities that continue to exist in distribution of societal resources).

96. *See* Ian Ayres, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 19–44, 165–232, 233–311 (2001) (documenting statistical discrimination).

influenced by vast amounts of unconscious prejudice.[97] And other recent research has indicated that our culture transmits subtle racial stratification messages so successfully that even young children quickly learn to internalize the culture's commitment to minority inferiority, despite the efforts of their parents to instill in them values of colorblind race neutrality.[98]

Subtle forms of voting discrimination against racial minorities remain serious enough that Congress recently, and overwhelmingly, reauthorized the Voting Rights Act of 1965—even though the Roberts Court has now threatened to hold the Act unconstitutional.[99] And, of course, residential housing segregation continues to exist in the United States at such an alarming rate that it has been referred to as "American Apartheid."[100] The advantages and sense of natural entitlement entailed in being white in the United States remain so strong that Cheryl Harris has characterized whiteness as a property right.[101] Commentators have even suggested that the surprising vitriol that has accompanied conservative assaults on President Obama's undeniably moderate health care and other economic programs—as well as the personal attacks on President Obama himself—are motivated at least in part by lingering racial animosity emanating from the intolerable idea of having a black person serve as President of the United States.[102] Even racial minorities themselves have at times kept a low profile in the health care debate for fear that popular recognition of the degree to which health care reform would benefit minorities might increase the chance

97. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1509–14 (2005) (discussing unconscious racial bias revealed by Implicit Association Test).

98. *See* Po Bronson & Amy Merryman, *See Baby Discriminate: Kids as Young as 6 Months Judge Others Based on Skin Color. What's a Parent To Do?*, NEWSWEEK, Sept. 14, 2009, at 53 (describing racial attitudes in young children).

99. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508–11, 2513–17 (2009) (discussing facts and holding); *id.* at 2511–13 (suggesting that section 5 of the Voting Rights Act of 1965 would now be unconstitutional). Justice Thomas expressed similar sentiments, stating that "[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional." *See id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part).

100. *See generally* LOEWEN, *supra* note 26, *passim* (documenting history of intentional residential segregation in United States); MASSEY & DENTON, *supra* note 26, *passim* (discussing concept of urban residential "hypersegregation" in United States).

101. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714–15 (1993) (discussing sense of white entitlement).

102. *See, e.g.*, Yamiche Alcindor, *Seeking Healing, Seeing Hostility: Some at Black Family Reunion Criticize Protests Against Obama*, WASH. POST, Sept. 14, 2009, at B1 (discussing racially motivated opposition to Obama); Maureen Dowd, *Boy, Oh, Boy,* N.Y. TIMES, Sept. 13, 2009, at WK.17 (same); Colbert I. King, *A Dangerous Kind of Hate*, WASH. POST, Sept. 12, 2009, at A17 (same); Anne E. Kornblut & Krissah Thompson, *Race Issue Deflected, Now as in Campaign: Obama Maintains Criticism Is About Policy Differences*, WASH. POST, Sept. 17, 2009, at A1 (discussing comments of former President Carter that some opposition to President Obama is racially motivated); *cf.* Hendrik Hertzberg, *Comment: Lies*, NEW YORKER, Sept. 21, 2009, at 33 (including race among factors motivating paranoia generated by Obama and his programs).

that reform proposals would be defeated.[103]

If you are white, and you have any lingering doubts about the existence of embedded racial inequalities in the culture, simply ask yourself whether you would mind waking up tomorrow morning as a member of a racial minority group. If the culture has truly freed itself from the influence of embedded racial inequalities, you should be largely indifferent about the race that you will become overnight. But I suspect that most whites are not indifferent. Indeed, one informal survey showed that white college students thought that they would be entitled to $1 million in damages per year if they were suddenly transformed from white into black.[104]

The Supreme Court has recognized the existence of the subtle and often unconscious forms of pervasive racial discrimination that continue to exist in the culture, referring to them as "societal discrimination."[105] But rather than make any effort to remedy those pervasive forms of discrimination, the affirmative action decisions handed down by the Court's conservative bloc have instead held that such societal discrimination is simply beyond the reach of permissible race-conscious remedies.[106] Moreover, the Court has held that voluntary efforts by the white majority to eliminate societal discrimination through the use of such remedies are themselves unconstitutional denials of the equal protection rights of whites.[107]

This is significant because race-conscious remedies often provide the only realistic method of neutralizing the effects of entrenched past discrimination.[108] Nevertheless, the Court has limited the use of race-conscious remedies to identifiable acts of past discrimination for which the defendant, rather than some societal norm, is responsible.[109] As a corollary, it has also prohibited the

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103. *See* Krissah Thompson, *Minority Groups Raise Voices on Reform: Advocates Still Wary of Making Race a Central Issue in Health Care Debate*, WASH. POST, Oct. 8, 2009, at A9 (discussing participation of minorities in health care debate).

104. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE SEPARATE, HOSTILE, UNEQUAL 43–44 (2003) (describing survey). *See generally id. passim* (describing many ways in which blacks and whites continue to live in two different worlds, where blacks are treated as inferior to whites).

105. *See infra* note 107 (citing "societal discrimination" cases).

106. *See infra* note 107.

107. This position was articulated by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307–10 (1978), and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274–79 (1986) (plurality opinion). Lead by Justice O'Connor, this view has since been adopted by a majority of the full Supreme Court. *See* Grutter v. Bollinger, 539 U.S. 306, 323–25 (2003) (citing *Bakke* as rejecting interest in remedying societal discrimination); *id*. at 330 (rejecting racial balancing as "patently unconstitutional"); *see also* Metro Broad. v. F.C.C., 497 U.S. 547, 612–14 (1990) (O'Connor, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494–96 (1989) (plurality opinion) (rejecting societal discrimination); Johnson v. Transp. Agency, 480 U.S. 616, 647–53 (1987) (O'Connor, J., concurring in the judgment) (same); *Wygant*, 476 U.S. at 288 (O'Connor, J. concurring) (same). Most recently, Chief Justice Roberts reiterated this view in the 2007 *Resegregation Cases*. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732–33 (2007) (plurality opinion) (same).

108. *See, e.g.*, *Parents Involved*, 551 U.S. at 848, 850–52 (Breyer, J., dissenting) (emphasizing that race-neutral efforts had failed to prevent school resegregation).

109. *See supra* note 107.

use of quotas or numerical guidelines to promote racial balance.[110] Stated differently, the Court has permitted remedies for the identifiable acts of discrimination that now cause marginal problems, but it has prohibited remedies for the embedded inequalities that cause the major problem of keeping racial minorities in a subordinate position through the modern version of white supremacy. Stated even more starkly, the Supreme Court has read the Constitution to protect, rather than prohibit, subtle and pervasive forms of societal discrimination.

The power of embedded societal discrimination—and the Supreme Court's own implication in the perpetuation of that discrimination—is illustrated by the *Ricci* case itself. The *Ricci* Court required New Haven to utilize the racially disparate results of a standardized firefighter promotion exam that had never been validated to establish the exam's job-related business necessity.[111] Moreover, it did so even though alternatives existed that were *more* job related, and had *less* disparate impact, than the standardized test.[112] The Court knew only two things about the firefighter promotion exam that it required the city to use. It knew that the validity of the exam had been vigorously contested in the record, and it knew that whites typically outperformed racial minorities on such standardized tests.[113] Nevertheless, the Court still chose to adopt performance on the exam as a baseline for promotion, any deviation from which would be viewed as racial discrimination against whites.[114] The Court never explained why it chose to accord such dispositive deference to an exam whose validity was disputed, if not thoroughly discredited. But I have my suspicions.

The reason that the *Ricci* Court displayed such unquestioning deference to the standardized promotion exam is precisely *because* whites outperform minorities on standardized tests. I am not suggesting that the Court conspiratorially chose to utilize an invalid selection criterion in order to favor white firefighters over minority firefighters. I am suggesting something much more troubling. I am suggesting that—despite a mass of contrary evidence—the Court actually *believed* the standardized test to be valid because the results of that test corresponded to the racially-correlated expectations that the culture had taught the Justices equate with merit. 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. As a structural matter, the belief that whites are

110. *See, e.g.*, *Parents Involved,* 551 U.S. at 732–33 (plurality opinion) (prohibiting racial balance); *Grutter*, 539 U.S. at 327 (requiring particularized remedies).

111. Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

112. *See id.* at 2705 (Ginsburg, J., dissenting) (discussing alternative of using assessment centers or different test weightings).

113. *See id.* (discussing alternatives); *id*. at 2668–69 (majority opinion) (discussing evidence that whites outperform minorities on standardized tests).

114. *See id.* at 2681.

better than racial minorities is so deeply embedded in our unstated cultural expectations that the belief can exert influence in ways that do not even rise to the level of conscious awareness. This insight constitutes one of the core tenets of Critical Race Theory.[115]

If racial minorities who were not themselves the products of white acculturation had written the New Haven firefighters exam, I suspect that racial minorities would have outperformed whites. Minority firefighters would have found it easier than white firefighters to understand and relate to the subtle linguistic cues and cultural values that necessarily would have been reflected in the exam. However, similar cultural biases undoubtedly made it easier for white firefighters than minority firefighters to understand and relate to the subtle linguistic cues and cultural values that were necessarily reflected in the firefighters exam that New Haven actually administered. One might be tempted to argue that there is no reason to believe that an exam written by racial minorities, on which racial minorities outperformed whites, should be viewed as a valid test of job-related skills—let alone a test that should be dispositive in making firefighter promotions. But that is the point. There is also no reason to believe that an exam written by whites, on which whites outperformed racial minorities, should be viewed as a valid test of job-related skills—let alone a test that should be dispositive in making firefighter promotions.

The only reason that the *Ricci* Court was willing to disregard conflicting evidence, and view the non-validated New Haven exam as establishing the appropriate baseline for firefighter promotions, is that whites performed in the way that the Court expected. If racial minorities had outperformed whites in the face of conflicting evidence concerning the exam's validity, the Court would almost certainly have viewed the exam results as suspect. Racial expectations are so firmly embedded in United States culture that reversing the races would have been dispositive. And white privilege is so firmly embedded that ignoring a resource allocation scheme that has historically favored whites now constitutes an act of racial discrimination against whites.

Ricci is instructive for one additional reason. Even when the political branches of government achieve some success in resisting the constitutive influence of race in contemporary culture—as Congress arguably did when it adopted the disparate impact provision of Title VII—the interests of racial minorities may still end up being overridden by the interests of whites. That is because the Supreme Court retains the last clear chance to ensure that white interests can ultimately prevail—a function that the Court has historically been very adept at

115. *See, e.g.*, CRENSHAW ET AL., *supra* note 10, at xxv (discussing structural nature of discrimination); SPANN *supra* note 11, at 60–66 (deconstructing distinction between intent and effects standards for discrimination); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1496–1501 (1997) (illustrating ways to invert distinction between bias and merit in affirmative action debate).

performing.[116] The Court can always invalidate representative branch actions on constitutional grounds, as it often does in racial affirmative action cases.[117] Or it can threaten invalidation in the process of imposing a narrow construction on representative branch actions, as it did in *Ricci*.[118] Indeed, one of the interesting features of separation of powers doctrine is that there always seems to be at least one branch of government that can ensure the protection of white majority interests when the need arises. Accordingly, some sort of precommitment strategy would seem to offer the most realistic hope of ever escaping our cultural inclination to engage in societal discrimination. And the recognition of disparate impact claims may offer one of the most promising precommitment strategies that are available.

B. APPROXIMATE EQUALITY

The goal of race neutrality is realistically unattainable in a culture where race is as salient as it has always been in the United States. Race is too deeply embedded in our unconscious motivations simply to be rendered irrelevant by conscious efforts to adhere to a race-neutral intent in the way that we allocate resources. Instead, what passes for colorblind race neutrality is typically just a camouflaged effort to prolong the racial status quo, under which benefits are disproportionately allocated to whites and burdens are disproportionately allocated to racial minorities. Regardless of the degree of sincerity that we bring to the mission, history—and our current maldistribution of resources—indicate that we will never be able to achieve meaningful racial equality simply through an act of will. We do, however, have it within our power to precommit ourselves to constraints on our collective behavior that will enable us to approximate the equality in resource allocation that our embedded racial attitudes apparently preclude us from achieving through mere conscious efforts to suppress our discriminatory impulses. In fact, cognitive dissonance theory predicts that by forcing our behavior to correspond to our aspirational equality values, our embedded racial attitudes may ultimately evolve to conform to our behavior as well.[119]

In a truly race neutral society, resources would be allocated in a way that reflected the racial balance of the society as a whole. Whites and racial minorities would share the benefits and burdens of society in a way that reflected their respective percentages of the population. Occupations such as

116. *See supra* text accompanying notes 11–22 (describing illustrative cases); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711, 722 (2007) (plurality opinion) (permitting resegregation of public schools); *id.* at 745–48 (citing *Brown II* as authorizing resegregation).

117. *See supra* text accompanying notes 77–83 (discussing affirmative action cases).

118. *See supra* text accompanying notes 70–76 (discussing tacit threat and narrow construction in *Ricci*).

119. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–31 (1957) (describing cognitive dissonance theory).

corporate executive, domestic worker, and farm laborer would not be stereotyped by the racial correlates of their practitioners. Election to Congress and the White House would not overwhelmingly be bestowed on the members of a single race. And wealth, education, and social status would just as likely be found in one racial group as in another. Individual differences in merit, talent, or aptitude would continue to exist, but there is no reason to suspect that those differences would in any way correlate with the race of the individuals in whom they were observed. Indeed, such a suspicion would necessarily rest on a belief in inherent racial attributes that would, of course, contradict the aspirational starting assumption of race neutrality on which this thought experiment is based. Such a vision is presently too utopian to be realistically imagined. But it does serve to remind us that a culture in which there was genuine racial equality would look very different from the culture in which we presently reside.[120] Although it is difficult to see how we could ever transform ourselves into a culture from which racial discrimination had finally been eradicated, it is relatively easy to see how we could begin to approximate the allocation of resources that such a culture would contain.

The disparate impact provision of Title VII constitutes a promising precommitment strategy that would hopefully help us achieve more racial equality than our embedded racial habits and attitudes would allow if left to their own devices. By explicitly reaffirming the value of a disparate impact provision in Title VII, Congress apparently appreciated the importance of adopting an antidiscrimination strategy that focused on statistical effects rather than on mere invidious intent.[121] Congress apparently recognized that this focus on disparate impact was a necessary step in its effort to displace the continuing effects of entrenched white advantage in employment. And even the then-conservative Burger Supreme Court recognized this when it implied the existence of a disparate impact provision in *Griggs*.[122] The fact that subsequent Supreme Courts have chosen to back away from disparate impact under the Constitution,[123] and now under Title VII,[124] does not mean that the precommitment strategy adopted by Congress has ceased to be a good strategy. On the contrary, it may show that the strategy is *so* good that the Court feared it would produce

120. A slightly more developed musing on this utopian race-neutral society is contained in Girardeau Spann, *Just Do It*, 67 LAW & CONTEMP. PROBS. 11, 16–21 (2004).

121. *See supra* text accompanying notes 59–60 (discussing inclusion of Title VII disparate impact provision in Civil Rights Act of 1991).

122. *See supra* text accompanying notes 55–58 (discussing implied disparate impact provision in *Griggs*). Subsequent race decisions by the more conservative Rehnquist and Roberts Courts have now made the Burger Court seem more moderate. *See, e.g.*, SPANN, *supra* note 32, at 161–63 (discussing votes of Supreme Court Justices in race cases).

123. *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (adopting intentional discrimination standard).

124. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664–65, 2672–77 (2009) (subordinating disparate-impact provision to intentional discrimination provision of Title VII).

more racial equality than the conservative bloc was willing to bear.[125]

Precommiting ourselves to the recognition of disparate impact claims would have at least three distinct equality benefits. First, it would promote a more racially balanced allocation of societal resources. Second, it would advance what Richard Primus has emphasized is a second-order concern with the expressive function of antidiscrimination law by prompting us to adopt a more mature understanding of the equal protection principle.[126] Third, it would apply to the problem of racial discrimination the idea of "asymmetric precommitment" that Richard Lazarus has applied to the problem of climate change in the context of environmental law.[127] These three benefits might then remind the Supreme Court that it could use disparate impact theory to approximate genuine equality in much the same way that it arguably uses representation-reinforcement theory to approximate genuine democracy.

The recognition of disparate impact claims would redistribute societal resources in a way that is racially more equitable. For example, under the facts of *Ricci*, recognition of disparate impact considerations would have permitted a significant number of firefighter promotions to go to racial minorities, whereas the Court's rejection of disparate impact considerations meant that the promotions went overwhelmingly to whites.[128] Although the explicit white supremacy and de jure discrimination that characterized the eras of slavery and Jim Crow segregation may now have been reduced,[129] the facially neutral discriminations that are an everyday product of our normal cultural practices still have a racially disparate impact that remains potent and persistent.[130] Accordingly, it is difficult to see how the habit of white privilege—which has been solidified by a long and insistent history of racial discrimination—can ever be reversed without attacking the problem of disparate impact directly. A precommitment to disparate *effects* will help override the allocative discrimination that has been perpetuated by our current focus on discriminatory *intent*.

However, even if *Washington v. Davis* were overruled—and the Title VII disparate impact cause of action were applied more generally to all discrimination cases, rather than merely to cases involving employment discrimination—allocative equality would not necessarily ensue. As *Ricci* itself illustrates, ample

125. Recall that members of the Court's conservative-voting bloc have virtually always voted against racial minorities in constitutional affirmative action, redistricting, and school desegregation cases. *See supra* text accompanying note 34 (discussing conservative-voting bloc).

126. *See infra* text accompanying notes 133–138 (discussing expressive function).

127. *See infra* text accompanying notes 139–141 (discussing asymmetric precommitment).

128. *See supra* text accompanying notes 64–65 (describing *Ricci* holding).

129. *See, e.g.*, U.S. CONST. amends. XIII, XIV & XV (abolishing slavery, granting citizenship and certain civil rights to newly freed black slaves, and granting right to vote to newly freed black slaves); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (invalidating de jure school segregation); *see generally* STONE ET AL., *supra* note 19, at 441–88 (discussing evolution of laws protecting racial minorities).

130. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 299–304 (2003) (Ginsburg, J., dissenting) (discussing striking racial disparities that continue to exist in distribution of societal resources).

doctrinal means are available for the perpetuation of allocative inequality by a Supreme Court that is intent on blunting the thrust of a disparate impact cause of action. Not only is the Court free to manipulate the factors of job-related business necessity and less discriminatory alternatives, but it can always find that other competing interests outweigh the societal interest in avoiding disparate impact.[131] The Court can even manipulate levels of generality to expand or contract the minority populations that count for purposes of assessing disparate impact.[132] Accordingly, the recognition of disparate impact claims will operate as a successful precommitment strategy only if it is accompanied by a genuine *commitment* to that strategy.

Richard Primus has written an important article about the interaction between the equal protection guarantee and disparate impact standards.[133] Discussing potential tensions that exist between the Title VII disparate impact provision and the Supreme Court's recent equal protection emphasis on the interests of whites, Primus believes it is unlikely that statutory disparate impact claims would actually be held unconstitutional.[134] However, he does perceive a danger that the constitutionality of disparate impact claims might be secured at the cost of conceptualizing those claims in a diluted way that deprives them of their full potential to promote racial equality.[135]

For Primus, the second order expressive value that can be derived from disparate impact claims lies precisely in the ability of those claims to remind us that present allocative inequalities are the result of enduring, hierarchical group-based historical discriminations that cannot adequately be redressed through a conception of discrimination as an individualized phenomenon.[136] Accordingly, the dynamic interaction that can exist between equal protection and disparate impact has the potential of changing our understanding of equal protection in a way that reveals the inadequacies of the individualized model.[137] Although the cautionary message contained in the Primus article was published six years before the Supreme Court's decision in *Ricci*, the *Ricci* majority appears nevertheless to have adopted the type of diluted disparate impact understanding

131. *See supra* text accompanying notes 64–65 (describing *Ricci* holding).

132. *See, e.g.*, City of Richmond v. J.A. Croson Co., 448 U.S. 469, 498–508 (1989) (discussing inadequacy of statistical evidence to establish history of discrimination in construction trades in Richmond, Virginia).

133. *See* Primus, *supra* note 59.

134. *See id.* at 495. *But see* Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009) (case decided after Primus article was written, expressly reserving question of constitutionality of Title VII disparate-impact provision); *id*. at 2682 (Scalia, J., concurring) (suggesting that Title VII disparate impact provision is unconstitutional).

135. *See* Primus, *supra* note 59, at 494–502 (discussing tension between equal protection and disparate impact).

136. *See id.* at 553–66 (discussing individualized and group conceptions of discrimination).

137. *See id.* at 566–85 (discussing effect of expressive harm on our understanding of equality).

of individualized discrimination that Primus feared.[138]

A more mature conceptual understanding of equality would, of course, pay attention to the historical persistence of our embedded cultural attitudes and behaviors, rather than simply dismissing those attitudes and behaviors as mere reflections of societal discrimination that lie beyond the reach of legal recognition. Richard Lazarus has suggested a way in which we can resist our normal tendency to engage in presently-appealing behavior that, in fact, undermines our long-term objectives. Lazarus notes that the enactment, implementation, and funding of environmental protection measures that address the problem of long-term climate change are often frustrated by the more immediate economic concerns that special interests typically advance at various stages of the regulatory process. However, Lazarus argues that we can resist such predictable impediments to our long-term interests by adopting what he terms "asymmetric precommitment" strategies.[139]

These strategies include institutional design features that make it easier to implement future regulatory modifications when those modifications are likely to advance our climate change objectives, but make it more difficult to implement future modifications when they are likely to undermine those objectives. In the environmental context, such design features could include things like: supermajority requirements, multinational agreements, legislative appropriation restrictions, targeted funding mechanisms to compete with special interest funding, targeted canons of statutory and regulatory construction, expert consultation requirements, participatory rights for stakeholders, and targeted time restrictions.[140] In responding to the argument that precommitment strategies are undesirable because they improperly permit policymakers in the present to bind hypothetical policymakers of the future, Lazarus argues that such precommitment in the context of climate change actually makes it possible for hypothetical policymakers of the future to bind policymakers of the present.[141]

By utilizing the Lazarus idea of asymmetric precommitment to conceptualize the phenomenon of racially disparate impact, I believe that it is possible to capture the expressive benefits of disparate impact claims that Primus believes can move us to a more mature understanding of the equal protection principle. As *Ricci* illustrates, the primary objection to disparate impact claims that is asserted by racial minorities is that the recognition of those claims can be viewed as entailing intentional racial discrimination against whites.[142] That

138. *See supra* text accompanying notes 64–65 (describing *Ricci* elevation of individualized white interest to avoid intentional discrimination over group interests of racial minorities in avoiding disparate impact discrimination).

139. *See* Lazarus, *supra* note 89, at 1158–59, 1193–1204 (discussing asymmetric precommitment).

140. *See id.* at 1205–31 (describing potential institutional design features).

141. *See id.* at 1204–05 (discussing how asymmetric precommitment permits future to govern present).

142. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009) (holding that desire to prevent disparate impact entailed intentional discrimination against whites).

objection, however, rests on the view that whites and racial minorities are similarly situated with respect to a societal resource before its allocation. As a result, taking the resource away from a white applicant simply to prevent racially disparate impact is unfair to the white applicant, whose superior exam performance has created an entitlement to the resource. However, analogizing the Lazarus environmental insight to the issue of race, it becomes apparent that whites and racial minorities are not similarly situated with respect to the unallocated resource.

Just as a preoccupation with immediate economic gain can obscure long-term environmental concerns, a preoccupation with firefighter exam results can obscure the discrimination against racial minorities that is embedded in the use of non-validated promotion exams on which whites perform better than racial minorities. Accordingly, the recognition of disparate impact claims is not a discriminatory deviation from exam-based neutrality at all. Rather, it is an asymmetric precommitment strategy designed to compensate for our predictable cultural inclination to utilize selection criteria that mask an often unrecognized submission to the lure of white privilege. Just as asymmetric environmental precommitment can permit a hypothetical future to bind an existing present, the asymmetric precommitment of disparate impact recognition can permit a hypothetical nondiscriminatory future to bind an existing discriminatory present.

The dynamic relationship between disparate impact and equal protection that is revealed through this understanding of asymmetric precommitment constitutes the sort of expressive benefit that Primus believes can lead us to a more sophisticated and mature understanding of the concept of equality. It can, for example, help us to understand that contemporary claims of post-racialism do not reflect the absence of continuing discrimination, but rather constitute a modern strategy for engaging in a continued form of racial discrimination that is the contemporary analog to old-fashioned discrimination. If the current Supreme Court conservative bloc majority were to share this more fully developed understanding of the relationship between disparate impact and actual equality, it would be in a position to advance, rather than frustrate, our stated aspirational effort to achieve racial equality.

It is difficult to know precisely what a nondiscriminatory society would look like. But it certainly seems sensible to suppose that it would be free from the rampant disparate impact that continues to characterize our supposedly post-racial, current society. When the Supreme Court engages in representation-reinforcement judicial review, it tries to approximate the results that would be produced by a properly functioning democratic process that is not distorted by the influence of invidious discrimination against discrete and insular minorities.[143] The attempt to approximate the features of a hypothetical counterfactual culture can often be a perilous undertaking. But a racially balanced allocation of

143. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that white majority might choose to impose burdens on politically underrepresented discrete and insular minori-

significant societal resources would seem to be as constitutive of such a nondiscriminatory culture as the racially imbalanced allocation of resources appears to be constitutive of the culture in which we now reside. The elimination of identifiable disparate impact seems like such a modest step toward the realization of meaningful racial equality that it is difficult to understand why a Supreme Court committed to the goal of genuine equality would ever resist the chance to remedy disparate impact. But perhaps it is the issue of genuine commitment that is causing the problem.

CONCLUSION

Race is so deeply embedded in the fabric of the United States that racial discrimination is simply a constitutive aspect of the culture. Nevertheless, the United States *did* recently elect Barack Obama as its first black President. Despite contrary suggestions, however, that does not mean that the United States has now evolved to a post-racial stage of development in which the problems of racial discrimination have largely been relegated to the past. Rather, it means that the United States has now evolved to a new stage of development in the sophistication of its techniques for *practicing* racial discrimination.

Racial discrimination used to be both blatant and explicitly rooted in the doctrine of white supremacy. But post-racial discrimination is now more subtly rooted in the very doctrine of racial equality itself. The discriminatory allocation of benefits and burdens, to which United States culture has always been committed, has now simply been folded into the baseline allocation of resources that we treat as the neutral starting point for assessing the racial legitimacy of any reallocation regime. And redistributive efforts to upset that baseline by diverting resources from whites to racial minorities can now be viewed as entailing reverse discrimination against whites. This form of post-racial discrimination has been developing over the last few decades, but the election of President Obama seems to have given the technique more widespread appeal than it has previously been able to command. That makes post-racial discrimination particularly dangerous because both the perpetrators and victims may come to view the practice as morally and legally legitimate.

Post-racial discrimination permits the ways in which the culture generates and perpetuates racial differences among its members to be subsumed by the core concept of racial legitimacy. Historically, the things that we have done to each other in the name of race always seemed legitimate to the white majority at the time that they were being done. Seizing Indian lands was legitimate because conquerors are permitted to keep the spoils of their successful conquests. Slavery was legitimate because white supremacy made slaves subhuman. De jure segregation was legitimate because God and nature established intrinsic

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ties). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980) (elaborating representation-reinforcement theory of judicial review).

differences between the races. Persistent de facto segregation was legitimate, even after the invalidation of de jure desegregation, because the value we place on liberal autonomy precluded compelled association. More recently, the invalidation of affirmative action and antidiscrimination laws has been deemed legitimate because our efforts to prevent discrimination against racial minorities has ended up producing the more serious problem of discrimination against members of the white majority.

As the culture matures, prior justifications for racial discrimination inevitably lose their luster and eventually fall out of favor. New justifications must then be found to take their place. The claim that redistributive efforts to aid racial minorities actually constitute reverse discrimination against whites appears to have considerable present appeal. But the plausibility of that claim *does* depend upon the belief that there is no longer any significant discrimination against racial minorities to be remedied. It is this belief that has given rise to the claim that we now live in a post-racial culture. And it is this pursuit of racial "equality" for whites that has elevated post-racialism into our presently preferred form of discrimination against racial minorities.

Our collective predisposition to sacrifice the interests of racial minorities for the interests of whites seems to be firmly embedded in our cultural attitudes and values. Accordingly, it is difficult to imagine how our inclination to engage in racial discrimination can ever be overcome without adopting some sort of precommitment strategy that forces us to engage in the behavior that would be produced by racial equality even if we do not yet have the capacity to assimilate the values of racial equality. Recognizing the moral and legal legitimacy of disparate impact discrimination might well serve as such a precommitment strategy. By forcing ourselves to allocate societal resources in a way that approximates the resource allocation that would exist in a race-neutral culture, we might be able to escape the gravitational pull of our embedded racial attitudes. Congress appears to have adopted a version of this precommitment strategy in Title VII of the Civil Rights Act of 1964.

However, the Supreme Court has not only refused to recognize the legitimacy of disparate impact claims for constitutional purposes, but its recent *Ricci* decision seems intent on nullifying congressional disparate impact claims for statutory purposes as well. Because it is difficult to imagine a non-invidious explanation for the Court's resistance to such a seemingly sensible precommitment strategy, one cannot help but marvel at the genius of the regime that the culture has created for ensuring the preservation of white privilege. Although the institution of judicial review is sometimes viewed as reflecting an effort to ensure that our transitory baser motives are not permitted to override the more admirable values that are possessed by our better selves, in the context of race the Supreme Court appears to be serving precisely the opposite function. The Supreme Court seems to be the structural institution on which we rely to ensure that our transitory desires to promote racial equality are not permitted to override the less admirable value of white privilege that is possessed by our baser selves.