

# DISPARATE IMPACT AND THE ROLE OF CLASSIFICATION AND MOTIVATION IN EQUAL PROTECTION LAW AFTER INCLUSIVE COMMUNITIES

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*At least since the Supreme Court's 2009 decision in Ricci v. DeStefano, disparate-impact liability has faced a direct constitutional threat. This Article argues that the Court's decision last Term in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., which held that disparate-impact liability is available under the Fair Housing Act, has resolved that threat, at least for the time being.*

*In particular, this Article argues, Inclusive Communities is best read to adopt the understanding of equal protection that Justice Kennedy previously articulated in his pivotal concurrence in the 2007 Parents Involved case—which argued that state actions that do not classify individuals based on their race are not constitutionally suspect simply because they are motivated by the purpose of integrating the races. Applying that understanding, Inclusive Communities makes clear that disparate impact need not surrender to equal protection, but that the Constitution demands some limitations on disparate-impact liability. Although the limitations should make a difference at the margins, they are not nearly as severe as some may have feared.*

*The broader goal of this Article is to offer an account of how the principle that Justice Kennedy articulated in Parents Involved, and that the Court seems to have adopted in Inclusive Communities, fits into prior equal protection doctrine. The Article argues that this interpretation of equal protection represents the most attractive approach consistent with the*

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† Frank G. Millard Professor of Law, University of Michigan Law School. I presented an earlier version of this Article at the 2015 Colloquium on Scholarship in Employment and Labor Law. Thanks to the colloquium participants for helpful feedback, and thanks, as always, to Margo Schlanger for many conversations about this Article. I should note that I filed a brief in the *Inclusive Communities* case on behalf of a bipartisan group of former Department of Justice officials. See Brief for John R. Dunne et al. as Amici Curiae in Support of Respondent, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405726. That brief articulated a number of the constitutional arguments discussed in this Article. All views expressed in this article are mine alone.

*decided cases. But although the Inclusive Communities approach to equal protection represents the best path available to the Court in light of prior cases, it has substantial drawbacks. In addition to ignoring key normative considerations, the Court's formalistic focus on the existence or nonexistence of a classification as a trigger for strict scrutiny is likely to prove unstable.*

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#### INTRODUCTION

At least since the Supreme Court's 2009 decision in *Ricci v. DeStefano*,<sup>1</sup> antidiscrimination statutes providing for disparate-impact liability have faced a direct constitutional threat. Justice Scalia's concurring opinion in *Ricci* made the threat explicit. "[T]he war between disparate impact and equal protection will be waged sooner or later," he argued, so "it behooves

<sup>1</sup> 557 U.S. 557 (2009).

us now to begin thinking about how—and on what terms—to make peace between them.”<sup>2</sup> When the Court granted certiorari to decide whether disparate-impact liability is available under the Fair Housing Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*<sup>3</sup>—the third time in four Terms in which the Court had taken a case presenting that question—the Court’s action hardly seemed auspicious for supporters of disparate impact prohibitions. Yet the Court surprised most observers by ruling that actions causing an unjustified disparate impact do violate the FHA.<sup>4</sup>

I argue in this Article that Justice Kennedy’s opinion for the Court does more than resolve a persistent statutory question. That opinion also promulgates terms for a peace settlement between disparate impact and equal protection. The *Inclusive Communities* defendant, and several amici, argued that disparate-impact liability at least raised serious constitutional questions, and the plaintiff and its amici specifically contested the point. In his opinion for the Court, Justice Kennedy responded to these arguments by making clear that the disparate impact prohibition does not in and of itself violate the Equal Protection Clause, but that some applications of that prohibition might raise serious constitutional questions absent the imposition of certain limitations on disparate impact cases.

Those conclusions reflect a particular understanding of equal protection doctrine, one Justice Kennedy previously articulated in his pivotal concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>5</sup> In that case, Justice Kennedy argued that state actions that do not classify individuals based on their race are not constitutionally suspect simply because they are motivated by the purpose of integrating the races.<sup>6</sup> A fair reading of *Inclusive Communities*, I argue, is that five justices have now endorsed that principle. My first goal in this Article is to establish that point. I attempt to do this in Part I.

In that Part, I also explore what the Court’s *Inclusive Communities* ruling means for disparate impact law. Although the Court resolved the war between disparate impact and equal

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<sup>2</sup> *Id.* at 595–96 (Scalia, J., concurring).

<sup>3</sup> 135 S. Ct. 2507 (2015).

<sup>4</sup> *See id.* at 2525.

<sup>5</sup> 551 U.S. 701 (2007).

<sup>6</sup> *See id.* at 788–90 (Kennedy, J., concurring in part and concurring in the judgment).

protection without forcing a surrender, its holding does impose some limitations on disparate impact claims—and, depending on the views of the justice who replaces Justice Scalia, these limitations may well apply to the employment context as well as to the fair housing context. Although the limitations should make a difference at the margins, they are not nearly as severe as some civil rights advocates may have feared.

This Article has a broader goal, as well. That is to offer an account of how the principle that Justice Kennedy articulated in *Parents Involved*, and that the Court seems to have adopted in *Inclusive Communities*, fits into prior equal protection doctrine. Although some scholars, notably Reva Siegel, have defended Justice Kennedy's *Parents Involved* opinion, they have not tended to defend it in terms of its consistency with existing doctrine,<sup>7</sup> notably *Adarand Constructors, Inc. v. Peña*<sup>8</sup> and *Washington v. Davis*.<sup>9</sup>

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<sup>7</sup> Professor Siegel's Supreme Court Foreword, for example, takes a self-consciously historical rather than doctrinal perspective. See Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 30–31 (2013) [hereinafter Siegel, *Equality Divided*]. Professor Siegel's piece describing the antibalkanization approach, in turn, is avowedly focused on elaborating the “emergent independent view” of the “Justices in the middle of Supreme Court conflicts over race equality,” notably Justice Kennedy, without attempting to integrate that view systematically into the Court's doctrine. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011) [hereinafter Siegel, *Antibalkanization*]. Professor Siegel's recent Meador Lecture is an exception, see Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015) [hereinafter Siegel, *Race-Conscious*], though even there she focuses primarily on understanding the implications of recent Roberts Court cases such as *Parents Involved*, *Ricci*, and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), as opposed to a more systematic doctrinal argument. Professor Robinson defends Justice Kennedy's analysis in doctrinal terms as well, though she does not intensively engage with the question of how that analysis can be squared with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and *Washington v. Davis*, 426 U.S. 229 (1976). See Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 277 (2009). Andrew Carlon reaches conclusions broadly similar to mine on the role of classification and motivation in the Court's jurisprudence in Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151 (2007), though he does not engage, as I do, with the analytic instability and second-best nature of the Court's doctrine. And of course his piece precedes *Ricci* and *Inclusive Communities*. A distinctive contribution of this Article is to deepen the doctrinal analysis and explain why Justice Kennedy's *Parents Involved* principle fits as well with a fair understanding of equal protection doctrine as it has developed over the past 40 years. This Article also explains, to a degree other commentators have not, what that principle means for statutory disparate impact doctrine—particularly in light of the recent *Inclusive Communities* opinion.

<sup>8</sup> 515 U.S. 200 (1995).

<sup>9</sup> 426 U.S. 229 (1976).

Below, I attempt to demonstrate that Justice Kennedy's interpretation of equal protection is fully consistent with a plausible reading of the prior cases, including *Adarand* and *Davis*. The Court has never held that all government actions motivated by an effort to achieve racially defined ends trigger strict scrutiny. Rather, the Court has held that all racial *classifications* trigger strict scrutiny, but it has left the crucial term, classification, ambiguous.<sup>10</sup> Though the Court has held that a racially discriminatory purpose can transform a facially neutral policy into the equivalent of a classification, it has never held that the purposes of integrating the races or closing racial gaps constitute discriminatory purposes. And with good reason. A holding that the effort to close racial gaps triggers strict scrutiny, even of laws that do not individually classify anyone based on his or her race, would lead to results that virtually nobody defends. I elaborate on Justice Kennedy's apparent interpretation of what constitutes a classification, and argue that it reflects a reasonable understanding of prior doctrine, in Part II.

Although I believe that the *Inclusive Communities* approach to equal protection represents the best path available to the Court in light of prior cases, it has substantial drawbacks. In addition to ignoring key normative considerations, the Court's formalistic focus on the existence or nonexistence of a classification as a trigger for strict scrutiny is likely to prove unstable. In the Conclusion, I offer some speculation about possible future paths that the doctrine might travel.

## I

### HAS THE COURT MADE PEACE BETWEEN DISPARATE IMPACT AND EQUAL PROTECTION?

This Part, in Section I.A., describes the origins of the "war" between equal protection and disparate impact, as well as the state of play as of the time the Court granted certiorari in *Inclusive Communities*. It then turns to how *Inclusive Communities* addressed the issue. I argue that the Court's opinion contains terms for a peace between equal protection and disparate impact, one in which neither side must surrender, but in which disparate impact is nonetheless forced to give up some ground. These terms are rooted, I argue in Part I.B., in the approach to equal protection articulated by Justice Kennedy in

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<sup>10</sup> See Siegel, *Equality Divided*, *supra* note 7, at 48–49 (noting that the Court has "never once defined" the term).

his *Parents Involved* concurrence. In Part I.C., I attempt to describe in detail what the peace terms mean for disparate impact doctrine.

A. The “War” Between Disparate Impact and Equal Protection, *Pre-Inclusive Communities*

Since the Supreme Court first interpreted Title VII in the 1971 *Griggs* case to impose liability without discriminatory intent<sup>11</sup>—and especially since the 1980s—disparate impact has been a political target.<sup>12</sup> At least since the Court’s 1995 *Adarand* decision,<sup>13</sup> disparate impact has been a constitutional target as well. *Adarand* held that strict equal protection scrutiny applies to federal laws that discriminate based on race, even where those laws have “benign” motives.<sup>14</sup> That holding appeared to make disparate impact constitutionally vulnerable in two respects.

First, laws providing for a disparate impact theory of liability might be understood as being themselves discriminatory. On one reading of the theory—a reading that finds support in *Griggs* itself<sup>15</sup>—the whole point of disparate impact is to ensure that minorities are not disproportionately shut out of jobs, at least not without a good reason.<sup>16</sup> Combining *Washington v. Davis*<sup>17</sup>—which seems to treat facially neutral laws with a discriminatory intent as the equivalent of racial classifications<sup>18</sup>—with *Adarand*—which specifically rejects the argument that a

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<sup>11</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 424 (1971).

<sup>12</sup> See, e.g., RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 172-73 (2013) (describing Reagan-era attacks on disparate impact); Siegel, *Race-Conscious*, *supra* note 7, at 663 (“[B]y the 1980s, critics of disparate impact in and allied with the Reagan administration increasingly attacked the framework, arguing that it did not protect equality of opportunity but instead protected ‘equality of results.’” (quoting Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1312-1313 (1986))); Siegel, *Equality Divided*, *supra* note 7, at 26 (describing political attacks by the Reagan Administration).

<sup>13</sup> *Adarand*, 515 U.S. 200.

<sup>14</sup> See *id.* at 225-27.

<sup>15</sup> See *Griggs*, 401 U.S. at 430 (targeting “barriers that have operated in the past to favor an identifiable group of *white employees* over other employees”) (emphasis added); *id.* at 432 (targeting “employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for *minority groups* and are unrelated to measuring job capability”) (emphasis added).

<sup>16</sup> See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 523-25 (2003); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1506-07 (2004).

<sup>17</sup> 426 U.S. 229 (1976).

<sup>18</sup> See *id.* at 243-48.

good motive can avoid strict scrutiny<sup>19</sup>—one might argue that laws providing liability for disparate impact themselves reflect intentional discrimination.<sup>20</sup>

Second, the disparate impact theory might be unconstitutional because of what it encourages employers and other regulated entities to do. Opponents of disparate-impact liability have long expressed a worry that such liability will lead employers to hire “by the numbers.”<sup>21</sup> Except in rare cases, government-imposed quota systems are unconstitutional.<sup>22</sup> To the extent that disparate impact encourages employers to engage in such behavior, that theory of liability itself would raise significant constitutional questions.<sup>23</sup>

The Supreme Court itself seemed to endorse at least the second point in two cases narrowing *Griggs* in the 1980s. In the 1988 decision of *Watson v. Fort Worth Bank & Trust*,<sup>24</sup> Justice O'Connor's plurality opinion endorsed the proposition “that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures.”<sup>25</sup> Justice O'Connor endorsed the imposition of “high standards of proof in disparate impact cases” in order “to avoid giving employers incentives to modify any normal and legitimate practices by introducing

<sup>19</sup> 515 U.S. 200, 226 (1995).

<sup>20</sup> Carlon presents the argument in the form of a syllogism:

Major premise: No distinction is made between “benign” or malign motives for racial classification—in both cases, such classifications are considered discriminatory, and subject to equally strict scrutiny.

Minor premise: Facially neutral actions motivated by racially discriminatory motives are to be treated as racial classifications.

Conclusion: Facially neutral actions that have benign racial purposes will also be treated as racial classifications and subject to strict scrutiny.

Carlon, *supra* note 7, at 1155. I discuss this syllogistic argument extensively in *infra* Part II.B.

<sup>21</sup> *E.g.*, Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” A Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 306 (1993).

<sup>22</sup> *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system.”). The exception involves cases like *United States v. Paradise*, 480 U.S. 149, 185 (1987), where such quotas are adopted as a temporary remedy for pervasive and long-standing identified discrimination and repeated noncompliance with orders to redress it.

<sup>23</sup> *See* *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (finding it “axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish”) (quoting *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)).

<sup>24</sup> 487 U.S. 977 (1988).

<sup>25</sup> *Id.* at 992 (plurality opinion).

quotas or preferential treatment.”<sup>26</sup> The next year, in *Wards Cove Packing Co. v. Atonio*,<sup>27</sup> the Court held that plaintiffs in disparate impact cases could not simply identify a statistical disparity between different racial groups at the defendant’s workforce; to succeed, the Court held, the plaintiffs must point to some employer policy that caused the disparity and that lacked a sufficient business justification.<sup>28</sup> The Court based its holding on the concern that, absent stringent standards for bringing a disparate impact claim, “[t]he only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof . . . .”<sup>29</sup>

Congress overturned *Wards Cove* in the Civil Rights Act of 1991—though the precise effect of those changes has remained unclear.<sup>30</sup> In the period leading up to the statute’s passage, many opponents—including President George H.W. Bush, who vetoed an earlier version of the statute—criticized the bill as promoting hiring quotas.<sup>31</sup> Although President Bush abandoned that characterization after Congress softened the provisions relating to *Wards Cove*, many other opponents did not. Emblematically, a *Wall Street Journal* editorial that appeared the day after President Bush signed the law was headlined, simply, “It’s a Quota Bill.”<sup>32</sup>

Between Congress’s decision in 1991 to eliminate some of the constraints on which the Court had relied to ensure that disparate impact did not cause constitutional problems,<sup>33</sup> and the Court’s decision in 1995 to apply strict constitutional scrutiny to discriminatory federal laws<sup>34</sup>—even those with a benign motivation—the constitutional risk to the disparate impact

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<sup>26</sup> *Id.* at 999.

<sup>27</sup> 490 U.S. 642 (1989).

<sup>28</sup> *See id.* at 656.

<sup>29</sup> *Id.* at 652.

<sup>30</sup> *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 45 (2006) (arguing that “the vagueness of the Civil Rights Act of 1991 gives courts ample opportunity to translate their hostility toward disparate impact into restrictive doctrine”).

<sup>31</sup> For a discussion of President Bush’s approach to the Civil Rights Act of 1991, see generally Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 983–99 (1993) (describing the political maneuvering between the Bush White House, Congress, and other interested groups over the provisions of the Civil Rights Act of 1991).

<sup>32</sup> *It’s a Quota Bill*, WALL ST. J., Nov. 22, 1991, at A12.

<sup>33</sup> *See, e.g.*, H.R. Rep. No. 102-40 (II), at 1 (1991) (describing one of the primary purposes of the Civil Rights Act of 1991 as being “to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions”).

<sup>34</sup> *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995).



doctrine should have been apparent. In the early 2000s, a few scholars—notably Professors Richard Primus and Charlie Sullivan—wrote about that risk.<sup>35</sup> At around the same time, the Court continued to make clear its distaste for disparate-impact liability. In *Alexander v. Sandoval*,<sup>36</sup> for example, the Court held that private plaintiffs could not enforce regulations, adopted under Title VI of the Civil Rights Act of 1964, which prohibited federal funding recipients from engaging in conduct with an unjustified disparate impact.<sup>37</sup> The Court's opinion emphasized the distance between the demands of disparate impact and Title VI's—and the Constitution's—nondiscrimination requirement.<sup>38</sup>

Constitutional challenges to the disparate impact theory did not emerge immediately. But the 2009 decision in *Ricci v. DeStefano*<sup>39</sup> seemed to indicate that members of the Supreme Court had very serious concerns about whether that theory could be reconciled with the principles of *Adarand*. *Ricci* involved pen-and-paper tests administered to candidates for promotion in the New Haven, Connecticut, fire department.<sup>40</sup> After the city administered the tests, it discovered that all ten of the candidates with high enough scores to be eligible to promotion to its then-vacant lieutenant positions were white, even though forty-four percent of the candidates who took the lieutenant's examination were black or Latino.<sup>41</sup> And of the nine candidates with high enough scores to be eligible to promotion to then-vacant captain positions, seven were white and two were Latino, even though 19.5 percent of the candidates who took the captain's examination were black.<sup>42</sup>

Believing that use of the tests would violate Title VII's prohibition on employing selection criteria with an unjustified disparate impact, the city decided not to certify the results of the examination.<sup>43</sup> Eighteen of the firefighters who would have been eligible for promotion under the test sued; they claimed

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<sup>35</sup> Professor Primus devoted a leading article to assessing the constitutional vulnerability of disparate impact following *Adarand*. See Primus, *supra* note 16. In a more limited vein, Professor Sullivan argued that, after *Adarand*, “limiting disparate impact to minorities and women cannot survive equal protection analysis.” Sullivan, *supra* note 16, at 1512.

<sup>36</sup> 532 U.S. 275 (2001).

<sup>37</sup> See *id.* at 293.

<sup>38</sup> See *id.* at 280–86.

<sup>39</sup> 557 U.S. 557 (2009).

<sup>40</sup> See *id.* at 562.

<sup>41</sup> See *id.* at 566.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 572–74.

that the refusal to certify the test violated their own rights under Title VII and the Equal Protection Clause.<sup>44</sup> The Supreme Court, in an opinion by Justice Kennedy, agreed that the city's action violated Title VII, so it did not reach the constitutional question.<sup>45</sup>

Although the Court limited its analysis to the statutory issues, its opinion appeared to lend support to the notion that laws imposing disparate-impact liability might themselves violate the Constitution. Most notably, the Court ruled that the refusal to certify the examination results constituted intentional discrimination—even though the city did not choose to promote one candidate over another because of his race and indeed even though the city's decision did not in fact determine that *any* particular candidate would or would not get a promotion.<sup>46</sup> It was enough that “the City chose not to certify the examination results because of the statistical disparity based on race—i.e., how minority candidates had performed when compared to white candidates.”<sup>47</sup> “Without some other justification,” the Court held, “this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.”<sup>48</sup> The Court also found it irrelevant—at least for purposes of determining whether the city intentionally discriminated—that the city’s motivation was to avoid the threat of disparate-impact liability rather than to harm whites. The Court explained: “Whatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.”<sup>49</sup>

It is easy enough to see how these holdings, though phrased in statutory terms, could threaten the constitutionality of disparate-impact law. If a decision to avoid one selection criterion for a particular job, even where motivated by the desire to avoid a disparate impact, is a “decision because of race,”<sup>50</sup> it would seem to constitute intentional discrimination under the Constitution just as much as it does under Title

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<sup>44</sup> See *id.* at 574–75.

<sup>45</sup> See *id.* at 576–77.

<sup>46</sup> See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Raising Test Fairness*, 58 UCLA L. REV. 73, 106–07 (2010) (“In fact, the City’s actions were both racially attentive and race neutral; the tests were cancelled for everyone, not for any particular racial group. Everyone would have to prepare and take the tests again.”) (footnote omitted).

<sup>47</sup> *Ricci*, 557 U.S. at 579.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 579–80.

<sup>50</sup> *Id.*

VII.<sup>51</sup> And though the *Ricci* Court said that an employer could avoid Title VII liability for such a decision if it had a “strong basis in evidence” for believing that the rejected selection criterion would violate Title VII’s disparate impact doctrine,<sup>52</sup> the Court’s statement would offer cold comfort in a constitutional case. The Court explained that it was allowing a “strong basis” defense under Title VII to avoid a “conflict” between the two forms of liability expressly authorized by Congress.<sup>53</sup> But the Constitution trumps Title VII, and the Court expressly refused to “hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.”<sup>54</sup> To the extent that Title VII’s disparate impact principle requires employers to engage in intentional discrimination of the sort the Court found in *Ricci*, it would be perfectly easy to read that case as supporting the conclusion that disparate-impact liability was unconstitutional.<sup>55</sup>

If the Court’s opinion in *Ricci* left any doubt about the matter, Justice Scalia filed a concurrence that specifically flagged the constitutional question. The Court’s decision, he said, “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of

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<sup>51</sup> See Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 877 (2011) (“Under *Ricci*’s logic, the government does not act neutrally when it takes action to integrate the workplace or other setting to avoid a racially disparate impact.”); Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 229 (2010) (“The Court now, however, appears to treat a decision maker’s attention to the disparities experienced by members of traditionally subordinated racial groups—that is, its antisubordination ends—as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification.”); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010) (“For these purposes, Title VII’s prohibition of disparate treatment and the Fourteenth Amendment’s guarantee of equal protection are substantively interchangeable.”).

<sup>52</sup> See *Ricci*, 557 U.S. at 582–84.

<sup>53</sup> *Id.* at 583.

<sup>54</sup> *Id.* at 584.

<sup>55</sup> See, e.g., Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2163 (2013) (“*Ricci* means that disparate-impact liability is vulnerable to constitutional attack. After all, *Ricci* characterizes a decision to abandon a promotional practice because of the race of successful candidates as a form of racial discrimination, meaning that disparate-impact liability, triggered as it is by the race of successful candidates, is a type of racial classification subject to strict scrutiny, which Gerald Gunther once famously labeled “strict” in theory and fatal in fact.”); see also Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1873 (2012) (“In effect, the conservative Justices ruled five-to-four that considering racial impact in order to avoid potential discrimination itself constituted racial discrimination. That bears repeating, though the logic induces vertigo: to consider race, even in order to avoid discrimination, is discrimination.”).

1964 consistent with the Constitution's guarantee of equal protection?"<sup>56</sup> He went on to explain why the Court's analysis suggested that disparate impact is in fact unconstitutional:

Whether or not Title VII's disparate-treatment provisions forbid "remedial" race-based actions when a disparate-impact violation would *not* otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result. But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, state, or municipal—discriminate on the basis of race. As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.<sup>57</sup>

He concluded that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."<sup>58</sup>

To be sure, *Ricci* did not *require* a holding that disparate impact laws are unconstitutional.<sup>59</sup> It may have been significant that the city refused to certify the test *after* learning the races of those who took it and would have been promoted under it. The case thus looked more like a case of intentional discrimination against an identifiable set of victims than would an employer's decision, in first designing the test, to seek to avoid any unjustified disparate racial impacts.<sup>60</sup> At least some language in the Court's opinion supports that reading, though it too is ambiguous.<sup>61</sup> Notwithstanding any comfort a reader

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<sup>56</sup> *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

<sup>57</sup> *Id.* (citations omitted).

<sup>58</sup> *Id.* at 595–96.

<sup>59</sup> See Siegel, *Antibalkanization*, *supra* note 7, at 1316 ("On an initial reading, Justice Kennedy's opinion is ambiguous, unclear in its implications for disparate impact law and for equal protection.").

<sup>60</sup> See Primus, *supra* note 51, at 1369–75.

<sup>61</sup> See *Ricci*, 557 U.S. at 585 ("Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."). The language is ambiguous, because "fair opportunity for all individuals" may or may not include efforts to avoid unjustified disparate impacts. On the importance, and ambiguity, of this language, see Adams, *supra* note 51, at 861–63.

might have taken from that language, the *Ricci* opinion as a whole seemed to threaten the constitutionality of disparate impact law. And that is where the law stood when the Court took up *Inclusive Communities*.

### B. *Inclusive Communities* and the Path to Peace

Unlike *Ricci*, *Inclusive Communities* did not involve employment discrimination and Title VII. It involved housing discrimination and the Fair Housing Act. In an echo of *Ricci* (at least as it was decided), the question formally before the Court was a statutory, not a constitutional one. The Court granted certiorari to decide “whether disparate-impact claims are cognizable under the Fair Housing Act.”<sup>62</sup> Endorsing the holdings of every court of appeals to have decided the question, the Court answered that question in the affirmative.<sup>63</sup>

Although the question presented was a statutory one, the Court’s opinion demonstrates a deep engagement with the constitutional questions that *Ricci* teed up. The defendants argued that interpreting the Fair Housing Act to incorporate disparate-impact liability would “raise[] serious constitutional questions.”<sup>64</sup> Several of the defendants’ amici similarly argued that a disparate impact prohibition was unconstitutional.<sup>65</sup> Defendants and their amici relied on *Ricci*, among other cases, to support their arguments.<sup>66</sup> And the plaintiff and its amici specifically responded that laws imposing disparate-impact liability in housing were consistent with the Court’s precedents interpreting the Constitution.<sup>67</sup> Because the Fair Housing Act

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<sup>62</sup> Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, 135 S. Ct. 2507, 2513 (2015).

<sup>63</sup> *Id.* at 2525.

<sup>64</sup> Brief for the Petitioners at 42–46, *Inclusive Communities*, 135 S. Ct. 2507 (No. 13-1371), 2014 WL 6466935, at \*42–46.

<sup>65</sup> See Brief Amici Curiae of Gail Heriot and Peter Kirsanow in Support of Petitioners at 29–36, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 6660913, at \*29–\*36; Brief of Amici Curiae Judicial Watch, Inc. & Allied Educ. Found. in Support of Petitioners at 5–12, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 6706834, at \*5–12; Brief Amicus Curiae of Pac. Legal Found. et al. in Support of Petitioners at 20–26, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 6706836, at \*20–26; Brief Amicus Curiae of the Project on Fair Representation in Support of Petitioners, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 6660915.

<sup>66</sup> See, e.g., Brief for the Petitioners, *supra* note 64, at 43–45.

<sup>67</sup> See Brief for Respondent at 63, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 7242817, at \*63; Brief for John R. Dunne et al. as Amici Curiae in Support of Respondent at 6–7, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 7405726, at \*6–7; Brief Of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Respondents at 24–32, *Inclusive Communities*, 135 S. Ct. (No. 13-1371), 2014 WL 7477679, at \*24–32, .

does not expressly provide for disparate-impact liability, if a majority of the Court had serious constitutional concerns about disparate impact claims *per se*, the Court would likely have avoided the constitutional problem by reading the statute not to provide for such claims.<sup>68</sup> By holding that the Fair Housing Act *does* provide for disparate-impact liability, the Court must therefore have rejected the argument that disparate impact law is unconstitutional. More than that, Justice Kennedy's opinion for the Court specifically adverted to the constitutional arguments the parties and their amici had raised. The opinion made clear that, in the Court's view, disparate impact prohibitions *do* raise constitutional concerns—but, crucially, that those concerns involve the application and not the existence of disparate impact law.<sup>69</sup>

The Court explained that merely considering race in an effort “to foster diversity and combat racial isolation” was proper:

Just as this Court has not “question[ed] an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process,” *Ricci*, 557 U. S., at 585, it likewise does not impugn housing authorities’ race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.<sup>70</sup>

On this analysis, laws imposing liability for unjustified disparate impact are not themselves unconstitutionally discriminatory, even though they aim to achieve a racially defined result (racial integration). The Court explained that “[i]n striving to achieve our ‘historic commitment to creating an integrated society,’ we must remain wary of policies that reduce homeowners to nothing more than their race,”<sup>71</sup> but that disparate impact under the Fair Housing Act plays “an important part in

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<sup>68</sup> See Richard Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact after Ricci and Inclusive Communities*, in *TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR* 295, 298 (2015).

<sup>69</sup> *Inclusive Communities*, 135 S. Ct. at 2521–24.

<sup>70</sup> *Id.* at 2525.

<sup>71</sup> *Id.* (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in judgment)).

avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal"—and perforce in "moving the Nation toward a more integrated society."<sup>72</sup>

Although the Court found no constitutional problem in the *existence* of disparate impact prohibitions, it did conclude that those prohibitions might raise such problems in their *application*. In particular, the Court determined that "serious constitutional questions" would arise if the disparate impact doctrine were applied "[w]ithout adequate safeguards" to ensure that it did not "cause race to be used and considered in a pervasive way" that "'would almost inexorably lead' governmental or private entities to use 'numerical quotas.'"<sup>73</sup> In so holding, the Court appeared to constitutionalize some of the limitations on the disparate impact doctrine that it had previously adopted under Title VII—limitations that Congress overturned, at least in part, in 1991.<sup>74</sup> As I explain in the next section, this aspect of the Court's opinion has implications for the application of disparate impact law in and out of the fair housing context. Depending on the composition of the post-Scalia Court, this aspect of *Inclusive Communities* could put some aspects of the Civil Rights Act of 1991 at constitutional risk. But the opinion makes clear that any frontal constitutional assault on disparate-impact liability should fail.

A fair reading of *Inclusive Communities*, then, would understand the Court's opinion as taking up Justice Scalia's invitation to "make peace" between "disparate impact and equal protection."<sup>75</sup> In the Court's peace settlement, the disparate impact doctrine was required to give up some territory, but it was not called upon to surrender. That settlement closely follows the constitutional analysis Justice Kennedy—the author of the Court's *Inclusive Communities* opinion—articulated in his pivotal concurrence in *Parents Involved*. In that concurrence, Justice Kennedy argued that "individual classifications"—laws and practices that assign racial categories to individuals and treat them differently as a result—are what trigger strict constitutional scrutiny.<sup>76</sup> But, he concluded,

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<sup>72</sup> *Id.* at 2525–26 (quoting NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968)).

<sup>73</sup> *Id.* at 2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

<sup>74</sup> See Browne, *supra* note 21, at 304–11.

<sup>75</sup> *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring).

<sup>76</sup> *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

merely “race-conscious measures”<sup>77</sup> that are neutral in their operation but aim to promote integration and overcome “racial isolation”<sup>78</sup> do not raise the same constitutional concerns.<sup>79</sup>

In his *Parents Involved* concurrence, Justice Kennedy said that the political branches “may pursue the goal of bringing together students of diverse backgrounds and races through other means [than individual classifications], including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>80</sup> Because “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race,” he declared, “it is unlikely any of them would demand strict scrutiny.”<sup>81</sup> As Michelle Adams put it, “[f]or Justice Kennedy, the government may seek to achieve integration but may not pursue the integration objective using racial classifications.”<sup>82</sup> And that, I argue, is the view that five justices adopted in *Inclusive Communities*.

Justice Kennedy’s opinion for the Court in *Inclusive Communities* explicitly invokes his pivotal *Parents Involved* concurrence.<sup>83</sup> *Inclusive Communities* is fairly read to rely on the constitutional analysis in that concurrence. Because prohibitions on disparate impact do not individually classify people based on their race, in this view, the prohibitions are not themselves constitutionally suspect simply because they seek to achieve the “race-conscious” goals of promoting integration and closing racial gaps.<sup>84</sup> To the extent that they operate to encourage regulated entities to classify individuals based on race, though, disparate impact prohibitions raise “serious constitutional questions” and must be appropriately cabined.<sup>85</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 788.

<sup>79</sup> *See id.* at 789.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* Professor Rosenthal is therefore just wrong to suggest that Justice Kennedy “advocat[es] the use of strict scrutiny for any race-conscious governmental action.” Rosenthal, *supra* note 55, at 2202.

<sup>82</sup> Adams, *supra* note 51, at 854.

<sup>83</sup> *See* Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, 135 S. Ct. 2507, 2525 (2015) (citation omitted).

<sup>84</sup> *Parents Involved*, 551 U.S. at 796–97 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>85</sup> *Inclusive Communities*, 135 S. Ct. at 2523.



C. What *Inclusive Communities* Means for Disparate Impact Law

As I have shown, although the *Inclusive Communities* Court did not believe that disparate-impact liability inherently violates the Constitution, it suggested that such liability might well be unconstitutional in its application. In particular, the Court concluded that disparate impact would raise “serious constitutional questions” if it was applied in such a way as to encourage potential defendants to “adopt racial quotas” to avoid liability.<sup>86</sup> This concern fits well with Justice Kennedy’s *Parents Involved* concurrence, which allows the achievement of racial integration through race-neutral means but is highly skeptical of practices that classify individuals based on their race.<sup>87</sup> As the Court put it in *Inclusive Communities*, quoting that concurrence, “[i]n striving to achieve our ‘historic commitment to creating an integrated society,’ we must remain wary of policies that reduce homeowners to nothing more than their race.”<sup>88</sup>

The Court’s understanding of what are—and what are not—the serious constitutional questions posed by disparate-impact liability had a number of implications for its elaboration of what, precisely, disparate-impact liability demands. *Inclusive Communities* involved the Fair Housing Act, so the Court’s discussion was driven by that context. But because the Court’s ruling was based on its understanding of the constitutional limitations on disparate impact, it has implications for all of the race discrimination statutes that impose that form of liability. In particular, as I show in Part I.C.1. below, the Court’s opinion makes clear that Justice Scalia was wrong to think that disparate impact law could constitutionally be based only on an effort to uncover covert discrimination. But, as I show in Part I.C.2. below, the Court’s opinion raises constitutional concerns about some of the rules Congress adopted for disparate impact in employment in the Civil Rights Act of 1991. Unless the justice who replaces Justice Scalia joins with the four justices who dissented in *Parents Involved* to embrace a broader view of disparate impact, the *Inclusive Communities*

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<sup>86</sup> *Id.*

<sup>87</sup> See *Parents Involved*, 551 U.S. at 796–97 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>88</sup> *Inclusive Communities*, 135 S. Ct. at 2525 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted) (quoting *Parents Involved*, 551 U.S. at 797).

decision is likely to result in a reversion to some pre-1991 law in this area.

### 1. *On the Justifications for Disparate Impact Law*

Since *Griggs*, scholars have disagreed about the goal of disparate impact law. Some have seen disparate impact's function as merely evidentiary—as identifying circumstances in which defendants are engaging in covert intentional discrimination.<sup>89</sup> Others have seen the law's function as more distributive—as aiming to overcome an unfair group-based distribution of jobs or other resources.<sup>90</sup> The distribution may be unfair, in particular, because it reflects past societal discrimination.<sup>91</sup> And still others have seen disparate impact's function as protecting individuals against arbitrary barriers to opportunity.<sup>92</sup> The *Griggs* decision offers support for all three of these possible goals.<sup>93</sup>

#### a. *Integration as a Principal Goal*

The *Inclusive Communities* opinion makes clear that identifying hidden intentional discrimination is *one* of the functions of disparate impact law, but that it is not the only one.<sup>94</sup> To the contrary, the first function that the Court listed for disparate impact law was to challenge practices that “unfairly . . . exclude minorities from certain neighborhoods without any sufficient

<sup>89</sup> See George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1303 (1987).

<sup>90</sup> See Primus, *supra* note 16, at 523–24.

<sup>91</sup> See Siegel, *Race-Conscious*, *supra* note 7, at 658–59. As *Griggs* put it, “Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

<sup>92</sup> See JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 165–66 (2014) (demonstrating that disparate impact has been used to strike down “artificial, arbitrary, and unnecessary” barriers to employment); Samuel R. Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 TEX. L. REV. 415, 424–25 (2014) (arguing that the disparate impact doctrine has been used to eliminate “unjustified bottleneck[s]” to opportunity).

<sup>93</sup> On covert intentional discrimination, see *Griggs*, 401 U.S. at 427–28 (noting that the defendant had adopted the challenged selection criteria for positions from which it had in the past excluded black applicants “on July 2, 1965, the date on which Title VII became effective”). On distribution, see *id.* at 429–30 (describing Title VII’s purpose to “remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”). On protecting individuals against arbitrary barriers to opportunity, see *id.* at 436 (“What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.”).

<sup>94</sup> See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2520–21 (2015).

justification.”<sup>95</sup> And the Court said that the disparate impact prohibition “has allowed private developers to vindicate the FHA’s objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units.”<sup>96</sup>

Later in its opinion, the Court made clear just what it meant when it referred to “the FHA’s objectives” of eliminating “unfair” and “arbitrary” exclusions. It meant that disparate impact serves the function of eliminating practices that, without sufficient justification, entrench the continuing effects of past housing segregation. In the closing paragraphs of its opinion, the Court declared that the Fair Housing Act “must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.’”<sup>97</sup> And the Court “acknowledge[d] the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”<sup>98</sup> Disparate impact claims, the Court made clear, promote “race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns” and incentivize government decisions “to foster diversity and combat racial isolation with race-neutral tools.”<sup>99</sup> Nothing in the Court’s analysis suggests that this goal of disparate impact law is driven by a desire to respond only to the defendant’s own past intentional discrimination. Rather, the goal is to combat “racial isolation” and “segregated housing patterns”—results that exist in the world, independent of whose actions caused them in the first place.<sup>100</sup>

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<sup>95</sup> *Id.* at 2522.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2525 (quoting NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968)).

<sup>98</sup> *Inclusive Communities*, 135 S. Ct. at 2525–26.

<sup>99</sup> *Id.* at 2525.

<sup>100</sup> As Justice Kennedy noted in his *Parents Involved* concurrence, the pattern of segregation and racial isolation was caused by a mixture of government and private actions. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole.”). For extensive recent discussions of this interrelationship, see RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014. But although some of the factors influencing present-day racial isolation may not result from government action, Justice Kennedy’s *Parents Involved* concurrence noted that the government retains a “moral and ethical obligation to fulfill its historic commitment to creating an integrated society.” *Parents Involved*,

b. *Intentional Discrimination as Including Unconscious Bias*

Just as important, the *Inclusive Communities* Court made clear that that intentional discrimination includes, for legal purposes, not just animus-based actions but also those that are driven by unconscious biases. The Court explained that “[r]ecognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent.”<sup>101</sup> In describing the sorts of “intent” that the disparate impact doctrine “uncover[s],” the Court referred not just to “disguised animus” but also to “unconscious prejudices.”<sup>102</sup>

That is an exceptionally important statement, because the Court had never before explicitly held that actions driven by unconscious bias constitute intentional discrimination. To be sure, that conclusion was implicit in the Court’s longstanding test for discriminatory intent—that an action was taken “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>103</sup> The Court has explained that a plaintiff need not “prove that the challenged action rested *solely* on racially discriminatory purposes.”<sup>104</sup> If I treat someone worse than I treat someone else, and I do so at least in part because I harbor a bias (unknown to me) against members of the disfavored person’s race, that person’s race has caused a difference in treatment, which should count as intentional discrimination under the Court’s cases. The fact that I may have harbored no conscious animus should be of no moment.<sup>105</sup> Still, many commentators have previously failed to appreciate that discrimination actuated by unconscious bias counts as

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551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). In his opinion for the Court in *Inclusive Communities*, Justice Kennedy quoted that very “historic commitment” passage in describing the work of the Fair Housing Act. See *Inclusive Communities*, 135 S. Ct. at 2525.

<sup>101</sup> *Id.* at 2522.

<sup>102</sup> *Id.*

<sup>103</sup> *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>104</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (emphasis added).

<sup>105</sup> Judge Kozinski gave the following analogous example:

Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have.

*Garza v. Cty. of L.A.*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991).

“intentional.”<sup>106</sup> By stating clearly that it does, the *Inclusive Communities* opinion represents an important step in the law.

c. *Rejecting Justice Scalia’s Ricci Suggestion*

The opinion also represents a response to Justice Scalia’s suggestion in *Ricci* that racial disparate impact prohibitions are unconstitutional because they are not tied to preventing intentional discrimination. In Justice Scalia’s apparent view, disparate impact could be valid only if it served the “evidentiary” function of identifying “genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment.”<sup>107</sup> But, he suggested, even such an understanding would not save disparate impact as it exists under Title VII: “[A]rguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable.”<sup>108</sup>

If, as *Inclusive Communities* says, actions triggered by unconscious bias count as intentional discrimination, a good-faith defense is hardly necessary or appropriate. The distinctive aspect of unconscious bias is that the person who harbors that bias does *not* perceive it. Such a person can believe, in complete good faith, that she is not biased; to let her off the hook because she acts in good faith would be to eliminate much prospect of responding to unconscious bias. And of course disparate impact doctrine already includes a defense for actions driven by “business necessity” (in an employment case) or, “analogous[ly],” if the actions are “necessary to achieve a valid interest” (in a housing case).<sup>109</sup> A more lenient defense, which would allow actions that cause a significant disparate impact if they were merely reasonable, does not seem appropriate—and certainly is not necessary to tie the disparate impact prohibition to the elimination of intentional, unconscious discrimination. When a person treats another adversely, and does

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<sup>106</sup> Even those who urge that the law should take account of unconscious bias too often assume that unconscious bias falls outside of the legal concept of intentional discrimination. See, *e.g.*, Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1180–82 (2008) (arguing that the Court’s Intent Doctrine does not reach unconscious bias).

<sup>107</sup> *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

<sup>108</sup> *Id.*

<sup>109</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2522–23 (2015).

so because of the other's race, that is discrimination even if we could tell a reasonable, non-race-based story for the difference in treatment.

In any event, the constitutional principle underlying *Inclusive Communities* renders Justice Scalia's point largely moot. If a disparate impact prohibition does not itself constitute a racial classification that triggers strict scrutiny, there is no reason why, constitutionally, such a prohibition should be limited to the evidentiary function of smoking out hidden intentional discrimination. Rather, the goals of eradicating the effects of segregation, ending racial isolation, and closing racial gaps are entirely permissible ones. And the structure of disparate impact law, which requires the plaintiff to show a practice that causes a significant disparate impact, then gives the defendant the opportunity to show that the practice was supported by "business necessity" or the equivalent, is an entirely appropriate way of achieving those goals. I turn, in the next section, to what *Inclusive Communities* has to say about how courts should apply that structure.

## 2. *On the Implementation of Disparate Impact Law*

Although the *Inclusive Communities* Court evidently did not believe that disparate impact prohibitions themselves constitute racial classifications, the Court did believe that, unless appropriately limited, those prohibitions risk encouraging potential defendants to comply by adopting racial classifications of their own. Indeed, Justice Kennedy's opinion for the Court said that "serious constitutional questions" would arise if disparate impact prohibitions did lead to the adoption of racial classifications.<sup>110</sup> In order to avoid these questions, the Court articulated a series of limitations on disparate-impact liability.<sup>111</sup> Strictly speaking, the Court's discussion applies only to the Fair Housing Act—which contains no provisions spelling out precisely how courts should analyze disparate impact cases. But because that discussion was based on an understanding of background constitutional principles rather than of the specific statutory structure, there is every reason to expect that the justices expected the limitations the Court imposed on

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<sup>110</sup> *Id.* at 2522–24.

<sup>111</sup> See *id.* at 2512 ("Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.").

disparate impact in *Inclusive Communities* also to apply to race-based disparate impact cases in employment under Title VII.<sup>112</sup>

This is a matter of some significance. Many of the constitutional concerns articulated by *Inclusive Communities* echo concerns expressed by the Rehnquist Court in its Title VII cases in the 1980s. Indeed, *Inclusive Communities* specifically points to the most noted (many would say notorious) case of that period, *Wards Cove*,<sup>113</sup> to support its concerns.<sup>114</sup> In order to avoid the risk that Title VII disparate impact would encourage employers to adopt quota systems, *Wards Cove* adopted a number of limitations on that theory of liability.<sup>115</sup> After extensive debate, a presidential veto, and further negotiations, Congress overturned some of those limitations in the Civil Rights Act of 1991.<sup>116</sup> Yet *Inclusive Communities* revives key aspects of the *Wards Cove* reasoning. And because the Court clothed that reasoning in constitutional garb, its decision threatens to revive aspects of the *Wards Cove* holding as well—even in the Title VII context in which Congress sought to overturn it. This may not be a matter of great practical significance, as disparate impact cases under Title VII have not been exceptionally successful even after the Civil Rights Act of 1991.<sup>117</sup> But it might take some of the glisten off of the victory liberals won in *Inclusive Communities*.<sup>118</sup>

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<sup>112</sup> Whether they will, in fact, apply to Title VII cases depends on two factors: first, whether the appointee who replaces Justice Scalia takes a position to the left of Justice Kennedy on this question; and, if so, whether that new appointee, together with the four justices who dissented in *Parents Involved*, wishes to confine this aspect of *Inclusive Communities* to Fair Housing Act cases and accordingly defend the rules Congress wrote for disparate impact employment cases in the Civil Rights Act of 1991.

<sup>113</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

<sup>114</sup> See *Inclusive Communities*, 135 S. Ct. at 2523.

<sup>115</sup> See *Wards Cove*, 490 U.S. at 652–53, 657–58 (detailing how a party can make out a prima facie case to demonstrate a disparate impact).

<sup>116</sup> See *supra* text accompanying notes 27–32.

<sup>117</sup> See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 735, 744–48 (2006).

<sup>118</sup> One of the limitations the Court imposed—that remedies in disparate impact cases should where possible concentrate on eliminating the practice that causes the disparate impact and otherwise on “eliminat[ing] racial disparities through race-neutral means,” *Inclusive Communities*, 135 S. Ct. at 2524—deserves little discussion. Although this is an important remedial limitation, it is one that courts have applied to disparate impact cases under Title VII for years. See, e.g., Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1238 (2003) (“The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group.”). Cases like *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. E.E.O.C.*, 478 U.S. 421 (1986), which upheld racial affirmative action as a remedy for disparate impact

The principal tool the Court employed in *Inclusive Communities* to ensure that disparate impact did not violate the Constitution was to require plaintiffs to identify a particular practice or set of practices imposed by the defendant that caused the disparate impact. The Court stated that “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”<sup>119</sup> As the next two sentences of the Court’s opinion make clear, that “causality” requirement comes directly from *Wards Cove*:

A robust causality requirement ensures that “[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S. Ct. 2115, 104 L.Ed.2d 733 (1989), superseded by statute on other grounds, 42 U.S.C. §2000e-2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and “would almost inexorably lead” governmental or private entities to use “numerical quotas,” and serious constitutional questions then could arise. 490 U.S., at 653, 109 S. Ct. 2115.<sup>120</sup>

In the Civil Rights Act of 1991, Congress attempted, at least in part, to overrule this aspect of *Wards Cove*.<sup>121</sup> Codifying disparate-impact liability under Title VII, the statute stated that plaintiffs must presumptively identify “a particular employment practice that causes a disparate impact.”<sup>122</sup> But only presumptively: If the plaintiff “can demonstrate to the court that the elements of a respondent’s decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.”<sup>123</sup> These carefully wrought provisions were the subject of a partic-

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violations “where an employer or a labor union has engaged in persistent or egregious discrimination,” *id.* at 445 (plurality opinion), are basically unicorns today.

<sup>119</sup> *Inclusive Communities*, 135 S. Ct. at 2523.

<sup>120</sup> *Id.*

<sup>121</sup> To be sure, only in part. One leading management lawyer described Congress as having “appear[ed] to have accepted a substantial portion of the *Wards Cove* and *Watson* formulation.” Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1017 (1993). That lawyer is the sister of then-Judge, now Justice, Alito.

<sup>122</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

<sup>123</sup> 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2012).



ularly intensive negotiation and debate in Congress.<sup>124</sup> If the *Inclusive Communities* analysis applies to Title VII, all of that effort may prove to have been for nothing. It is now unclear whether a plaintiff may ever succeed on a disparate impact claim—even under Title VII—without identifying a particular practice that caused the disparate impact.

To be sure, the practical significance of this change may not be great. Even before *Inclusive Communities*, courts were wary about allowing Title VII disparate-impact plaintiffs to proceed without challenging some discrete policy or practice of the employer.<sup>125</sup> And by referring to a “policy or policies causing th[e] disparity,”<sup>126</sup> perhaps the Court’s holding leaves space for plaintiffs to challenge a connected series of practices without separating them out for analysis. Still, the reliance on *Wards Cove* is striking.

In addition to the “causality” requirement, the *Inclusive Communities* Court offered a second “important and appropriate means of ensuring that disparate-impact liability is properly limited”—that courts should give defendants “leeway to state and explain the valid interest served by their policies.”<sup>127</sup> Here again, the Court’s opinion echoes the decision in *Wards Cove*—though without, this time, explicitly invoking that case. One of the most significant issues that divided the Court in *Wards Cove* was how strong an employer’s interest in a challenged practice must be to defeat disparate-impact liability. The majority stated that “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”<sup>128</sup> The dissenters argued that the “legitimate employment goals” standard set the bar of justification far too low; they believed that the proper test was one of “business necessity.”<sup>129</sup> The majority, in turn, re-

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<sup>124</sup> See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 127–28, 208–09, 229, 231 (1993); Peter M. Leibold et. al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1067–70 (1993); see generally Michael Selmi, *The Supreme Court’s Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 287–89 (2011) (describing the disagreements among President George H.W. Bush, Senate Republicans, and Senate Democrats over proposed provisions of both the Civil Rights Act of 1990 and 1991).

<sup>125</sup> See Bagenstos, *supra* note 30, at 13.

<sup>126</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2523 (2015).

<sup>127</sup> *Id.* at 2522–23.

<sup>128</sup> *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659 (1989).

<sup>129</sup> *Id.* at 671–72 (Stevens, J., dissenting).

sponded that such a stringent standard “would be almost impossible for most employers to meet” and would therefore put pressure on employers to adopt quota systems.<sup>130</sup> Congress responded to this aspect of *Wards Cove* in another hard-fought, carefully negotiated provision of the Civil Rights Act of 1991. That provision states that, where an employment practice causes a disparate impact, the employer must “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>131</sup> This compromise, which combined relatively lenient language (“job related,” “consistent with”) with stringent language (“business necessity”), has left courts uncertain of just how strong an employer’s interest must be to justify a practice with a disparate impact.<sup>132</sup> But there is little question that Congress increased the burden of justification on employers in such cases.

How strong an interest does *Inclusive Communities* require in the housing context? The Court’s opinion contains language pointing both ways. On the one hand, some of the opinion’s language seems to suggest any valid interest will do. For example, the Court said that “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.”<sup>133</sup> But elsewhere the Court described the defendant’s burden in much more stringent terms, at least in terms of tailoring: “housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.”<sup>134</sup>

Although *Inclusive Communities* emphatically does not resolve the question, the latter, more stringent, reading of the defendant’s burden seems more consistent with the overall thrust of the Court’s opinion. If disparate impact plays a key role in “our Nation’s continuing struggle against racial isolation,”<sup>135</sup> liability ought not to be defeasible based on any old legitimate interest. Rather, it should be met by an interest that

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<sup>130</sup> See *id.* at 659.

<sup>131</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

<sup>132</sup> See generally Melissa Hart, *From Wards Cove to Ricci: Struggling Against the “Built-in Headwinds” of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 271 (2011) (“[A]lthough the 1991 Act was quite explicit in rejecting *Wards Cove*, the statute still left considerable uncertainty about core interpretive questions—including what constitutes an ‘employment practice’ subject to challenge and precisely what ‘business necessity’ means—in disparate impact litigation.”).

<sup>133</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2522 (2015) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>134</sup> *Id.* at 2523.

<sup>135</sup> *Id.* at 2525.

is weighty enough to justify prioritizing it, in a given instance, over “our ‘historic commitment to creating an integrated society.’”<sup>136</sup> As the Court’s opinion explains, one such instance might occur where the challenged practices serve real health and safety interests.<sup>137</sup> In other cases, concerns about integration and avoiding racial isolation may appear on both sides of a challenged decision—such as where a government agency must choose between improving housing in “a blighted inner-city neighborhood” or creating new low-income housing in the suburbs.<sup>138</sup> But all of this is a far cry from holding that any merely legitimate interest will justify a practice with a significant disparate impact. Still, the Court’s “valid interest” language will doubtless cause confusion and disagreement. Whether the opinion effects a meaningful weakening of the burden of justifying practices with a disparate impact will only become apparent with time.

## II

### THE ROLE OF CLASSIFICATION AND MOTIVATION IN EQUAL PROTECTION

In this Part, I turn from *Inclusive Communities* itself to the constitutional analysis that underlies that decision. I elaborate on what that constitutional analysis means and argue that it fits with a fair reading of the prior cases. In defending the Court’s analysis doctrinally in the light of prior cases, I do not mean to suggest that the Court’s analysis tracks the way I would have decided the case if I could write on a blank slate. To the contrary, I believe that there are substantial problems with the Court’s approach, as I show particularly in Part II.D. below. But I nonetheless hope to show that the Court’s approach probably reflects the best available one consistent with prior cases.

Two points deserve emphasis here. First, although it does not represent the right-most available position on race and equal protection, nobody should mistake the *Inclusive Communities* analysis as a turn to the left.<sup>139</sup> In drawing a distinction

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<sup>136</sup> *Id.* (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>137</sup> *See id.* at 2524 (stating that governments “must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes”).

<sup>138</sup> *Id.* at 2523.

<sup>139</sup> Professor Siegel shows how even the more “liberal” race decisions of the Roberts Court are best seen, when “situat[ed] . . . in a wider equal protection field,”

between individual racial classifications and race-conscious-but-race-neutral efforts to overcome segregation and racial isolation, *Inclusive Communities* made clear, as Justice Kennedy's concurrence in *Parents Involved* did before it, that a majority of the Court remained extremely skeptical of affirmative action programs that give weight to an individual's race in hiring, school admission, or otherwise. Whether Justice Scalia's departure from the Court will alter this situation depends entirely on whether his replacement takes a position to Justice Kennedy's left on these issues.

Second, in rejecting the syllogistic position that *Washington v. Davis* plus *Adarand* means that disparate impact prohibitions are necessarily unconstitutional, the *Inclusive Communities* ruling shows that the principle of "consistency" that the *Adarand* Court identified—that "[t]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"<sup>140</sup>—is crucially dependent on whether a particular action counts as a "classification" in the first place. The Court has never been clear as to what constitutes a "classification."<sup>141</sup> *Inclusive Communities* continues to leave questions regarding the circumstances in which a formally race-neutral action will be labeled a "classification," but it does make clear that simply intending to achieve a racially defined goal is not sufficient to warrant that label.<sup>142</sup> I defend the Court's analysis on that point, in light of prior cases, below.

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as applying a quite conservative jurisprudence. See Siegel, *Equality Divided*, *supra* note 7, at 61–62.

<sup>140</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

<sup>141</sup> For prior work highlighting the uncertainty regarding what counts as a "classification" under the Court's equal protection jurisprudence, see generally Primus, *supra* note 16, at 509–13; see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1542–43 (2004) ("American antidiscrimination law has no determinate criteria for deciding what practices are group-based classifications, and while courts sometimes articulate such criteria, they often apply them inconsistently; as this inconsistency reveals, judgments about whether practices are constitutionally suspect classifications are normative as well as positive."). Probably the most systematic attempt to unpack the way the Court has interpreted the concept of classification appears in Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525 (2013).

<sup>142</sup> See *Inclusive Communities*, 135 S. Ct. at 2525 ("When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.").

A. Why the Effort to Achieve Racial Integration or Close Racial Gaps Should Not Trigger Strict Scrutiny Under the Court's Cases

At some level, it should be obvious that merely seeking to achieve goals like integrating the races, avoiding racial isolation, or reducing racial disparities cannot render unconstitutional actions that do not themselves classify individuals based on race. Countless public policy interventions, supported by liberals and conservatives, aim at achieving these sorts of racial goals, even though the interventions are race-neutral on their face.<sup>143</sup> As Professor Kim Forde-Mazrui explained a decade and a half ago, if all efforts to close racial gaps are constitutionally suspect, then the government cannot engage in a range of undoubtedly salutary, facially race-neutral actions without satisfying strict scrutiny:

The government cannot, in response to the poor academic achievement of minority schoolchildren, seek to address the conditions that undermine their education, such as poor quality schools, poverty, or family breakdown, even if disadvantaged children of all races, including white, are benefited. The government cannot, in response to the high rates of unemployment and crime in minority communities, seek to enhance employment opportunities or strengthen law enforcement, even if such services are provided to communities of all races experiencing similar conditions. The government cannot, in response to the high rate of AIDS and other diseases among minorities, increase public health education even if high-risk communities of all races are targeted.<sup>144</sup>

In fact, the problem is worse than Forde-Mazrui suggests. Even laws prohibiting *intentional* race discrimination aim at the

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<sup>143</sup> See Norton, *supra* note 51, at 233–34; Siegel, *Antibalkanization*, *supra* note 7, at 1313–14 (“When proponents of colorblindness contest the constitutionality of race-conscious but facially neutral laws that employ no racial classifications, the claim is potentially vast in reach (does it reach all civil rights laws? the census?), and the value that colorblindness vindicates is by no means clear.”). In the field of education alone, the No Child Left Behind Act specifically describes a purpose of closing “the achievement gaps between minority and nonminority students.” 20 U.S.C. § 6301(3) (2012). Many conservatives explicitly invoke the desire to close racial achievement gaps as a justification for supporting a broad policy of school choice through vouchers. None of these programs would treat minority children differently than nonminority children based on individual classifications, but they are clearly aimed at least in part at improving the position of members of a particular racial group.

<sup>144</sup> Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2348 (2000). To similar effect, see R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 580–81 (2003).

race-based goal of closing economic and other gaps between majority and minority groups.<sup>145</sup> If such a race-conscious motivation is enough to render a facially race-neutral law constitutionally suspect, then *all* of our race-based antidiscrimination laws are in trouble—not just the ones that prohibit actions with an unjustified disparate impact.<sup>146</sup>

The Court has not, of course, held that laws prohibiting intentional racial discrimination deny equal protection. Indeed, a number of aspects of the Court's pre-*Inclusive Communities* jurisprudence support the conclusion that such laws—and other race-neutral actions designed to promote integration and close racial gaps—raise no serious constitutional concerns.<sup>147</sup> The *Adarand* opinion itself, Professor Banks points out, “arguably signal[ed] the Court's unease with the implications of the coupling of the discriminatory purpose standard and the consistency principle”<sup>148</sup> by going out of its way to “note” that “this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race-neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose.”<sup>149</sup>

And in *Schuette v. Coalition to Defend Affirmative Action*,<sup>150</sup> the Court upheld Proposal 2, a Michigan state constitutional amendment that prohibited state agencies from any intentional

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<sup>145</sup> See, e.g., KENNEDY, *supra* note 12, at 174 (“To assist black workers, within the confines of equal opportunity competition, was the primary aim animating the coalition that ultimately succeeded in passing Title VII.”); Primus, *supra* note 16, at 525 (“African Americans and members of other disadvantaged groups are the net beneficiaries of a ban on intentional discrimination, and the legislators who passed Title VII understood that this was so.”).

<sup>146</sup> See KENNEDY, *supra* note 12, at 173–74 (arguing that “[c]olor-blind immediatism” threatens “old-fashioned disparate-treatment antidiscrimination law”); Harris & West-Faulcon, *supra* note 46, at 108–09 (“Because all remedial measures on behalf of racial minorities can at some level be characterized as racially attentive, treating racial attentiveness—attending to the racial consequences of one’s actions—as a form of discriminatory motivation destabilizes virtually all remedial options, even those expressly authorized by settled doctrine and federal statutory law.”); Primus, *supra* note 16, at 525 (“If racially allocative motives raise equal protection problems in the context of affirmative action and disparate impact liability, one might well ask whether such motives also present problems for bans on intentional discrimination.”).

<sup>147</sup> See Rich, *supra* note 141, at 1586 (arguing that “*Croson*, *Grutter*, *Gratz*, and *Parents Involved*” show “that even moderate and conservative members of the Court have refused to equate all race conscious motivations with illicit discriminatory purposes of the type that would trigger either strict scrutiny or invalidation under *Washington v. Davis* and its progeny”).

<sup>148</sup> Banks, *supra* note 144, at 578 n.30.

<sup>149</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995).

<sup>150</sup> 134 S. Ct. 1623 (2014) (plurality opinion).

racial discrimination, including affirmative action programs. Justice Kennedy's plurality opinion affirmed that "[g]overnment action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend."<sup>151</sup> But Justice Kennedy said that a neutral law like Proposal 2 is not unconstitutional unless it "target[s] racial minorities" and thereby effects or aggravates "invidious discrimination."<sup>152</sup> In his concurrence in the judgment, Justice Scalia disagreed with aspects of Justice Kennedy's analysis, but he nonetheless found it significant that the amendment did not "distribut[e] burdens or benefits on the basis of individual racial classifications."<sup>153</sup> He explained that "[a] law that 'neither says nor implies that persons are to be treated differently on account of their race' is not a racial classification."<sup>154</sup>

In addition, the Court's affirmative action jurisprudence has long encouraged governments to engage in "race-neutral" efforts to overcome patterns of discrimination.<sup>155</sup> As a matter of narrow tailoring, the Court has required governments first to engage in a "serious, good faith consideration of workable race-neutral alternatives" for achieving its compelling interests before employing racial classifications.<sup>156</sup> Notably, none of the justices who joined the majority opinion in *Fisher v. University of Texas* expressed any doubt that the "Top Ten Percent plan," which was framed in race-neutral terms but plainly aimed at increasing racial diversity,<sup>157</sup> was constitutional.<sup>158</sup> Even Jus-

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<sup>151</sup> *Id.* at 1634–35.

<sup>152</sup> *See id.* at 1632.

<sup>153</sup> *Id.* at 1648 (Scalia, J., concurring in the judgment) (quoting *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007)).

<sup>154</sup> *Id.* (quoting *Crawford v. Bd. of Educ.*, 458 U.S. 527, 537 (1982)).

<sup>155</sup> *See id.* at 1639 (Scalia, J., concurring in the judgment) ("Universities in other States can *and should* draw on the most promising aspects of these race-neutral alternatives as they develop." (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003))).

<sup>156</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (quoting *Grutter*, 539 U.S. at 339–40).

<sup>157</sup> *See id.* at 2433 (Ginsburg, J., dissenting). Justice Ginsburg concluded that this racially driven motivation rendered the Top Ten Percent Plan not race-neutral but race-conscious. *See id.* ("I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious."); *id.* ("It is race consciousness, not blindness to race, that drives such plans."). But a plan can be formally race-neutral at the same time that it is designed with a goal toward achieving integration or closing racial gaps. It is precisely those policies that fall within that overlap, *Inclusive Communities* makes clear, that pose no serious constitutional problem.

<sup>158</sup> *See* Siegel, *Race-Conscious*, *supra* note 7, at 674. Writing after *Ricci*, Professor Marcus argued that "Title VII's disparate impact provision, as currently drafted, cannot survive a challenge based on the Equal Protection Clause." Ken-

tice Scalia—who believed that race-based affirmative action is *never* constitutional<sup>159</sup>—agreed that governments may constitutionally engage in efforts to promote minority businesses “in many permissible ways that do not involve classification by race.”<sup>160</sup> For example, he said in *Croson*, a state “may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.”<sup>161</sup> As Professor Siegel points out, “Justice Scalia . . . never reconciled” his *Ricci* suggestion “that disparate impact may be unconstitutional” with “his own support for race-conscious, race-neutral state action in the affirmative action cases.”<sup>162</sup>

One can attempt to explain these examples away. Perhaps the race-neutral-alternatives language in the affirmative action cases describes policies that will *satisfy* strict scrutiny, not that will avoid strict scrutiny altogether.<sup>163</sup> On this reading, formally race-neutral tools, like small-business preferences, may be more narrowly tailored than policies that explicitly classify based on race, but their avowedly race-conscious motivation should subject them to strict scrutiny to ensure that they

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neth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 83. Notably, Marcus argued that, under his reading of *Ricci*, the Texas Ten Percent Plan would trigger strict scrutiny because of its racial motive. See *id.* at 73.

<sup>159</sup> Justice Scalia said that he would have accepted preferences only for “identified victim[s] of state discrimination” at the hands of the government agency that is providing the preference—preferences that would not be based on race but on victim status. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 526–27 (1989) (Scalia, J., concurring in the judgment). He would have allowed states to engage in race-based action only “where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.” *Id.* at 524. “If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of ‘all black employees’ to eliminate the differential.” *Id.*; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (Scalia, J., concurring in part and concurring in the judgment) (stating that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction,” that “[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole,” and that “under our Constitution there can be no such thing as either a creditor or a debtor race”).

<sup>160</sup> *Croson*, 488 U.S. at 526.

<sup>161</sup> *Id.*

<sup>162</sup> Siegel, *Race-Conscious*, *supra* note 7, at 676.

<sup>163</sup> See Banks, *supra* note 144, at 579 (arguing that the Court’s affirmative action cases “leave open the question whether race-neutral alternatives are constitutional because they satisfy strict scrutiny or because they are exempt from strict scrutiny”).



are adopted for the right reasons. After all, the Court has told us that “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race” and to “ensure[] that the means chosen fit [a] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”<sup>164</sup>

But that explanation does not fit. If a race-neutral policy like a small-business preference is subject to strict scrutiny, it must *both* serve a compelling interest *and* be narrowly tailored. Even if the lack of a formal racial classification makes the policy narrowly tailored, we still must identify a compelling interest. And that compelling interest, the Court has said, cannot be the interest in remedying the effects of societal discrimination;<sup>165</sup> instead, the unit of government that adopts the challenged policy must be responding to its own past discrimination or to private discrimination in which it participated.<sup>166</sup> A small-business preference is likely to have as difficult a time satisfying that compelling interest standard as was the racial set-aside in *Croson*—yet a majority of justices in *Croson* said that the formally race-neutral preference would be constitutional.<sup>167</sup> It is therefore not plausible that the Court’s

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<sup>164</sup> *Adarand*, 515 U.S. at 226 (internal quotation marks omitted) (quoting *Croson*, 488 U.S. at 493 (plurality opinion)); *accord* *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). As Professor Siegel notes, the Court has sometimes described narrow tailoring “as probing for suspect motives,” but it has other times—even in the same cases—described narrow tailoring as “serv[ing] a very different function” of “protecting ‘innocent persons’ from harm . . . when government is pursuing important public ends.” Siegel, *Equality Divided*, *supra* note 7, at 46; *see also* Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 440 (1997) (“Strict scrutiny is no longer a means of smoking out *concealed* violations of constitutional principles. It is a means of ‘justifying[]’ a *conceded* constitutional ‘injury.’” (quoting *Adarand*, 515 U.S. at 230)). For a historical argument that “cost-justification,” rather than “smoking out,” was the “original point” of strict scrutiny, but that “[u]ntil the Burger and Rehnquist Court’s affirmative action decisions, heightened scrutiny of suspect classifications was used to ferret out illicit motive while strict scrutiny of fundamental interests focused on cost-justification,” *see* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 *AM. J. LEGAL HIST.* 355, 394, 403–04 (2006).

<sup>165</sup> *See* *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest.”). Note that in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the plurality described this principle with specific reference to racial *classification*: “Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.” *Id.* at 276 (plurality opinion).

<sup>166</sup> *See, e.g., Croson*, 488 U.S. at 492 (plurality opinion) (“[I]f the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”).

<sup>167</sup> *See id.* at 509.

decision contemplates applying strict scrutiny to such race-neutral preferences.

What about *Schuette*? That case, after all, involved a state law that did nothing more than prohibit racial classifications.<sup>168</sup> How can a law that prohibits racial classifications itself constitute a racial classification? But that response seems to me to give away the ball game. To say that laws prohibiting racial classifications raise no constitutional problems, we must believe *either* that facially neutral laws always raise no constitutional problems *or* that a mere racial motivation for a facially neutral law does not raise a constitutional problem—at least where it is the *right* sort of motivation. Either way, the fact that lawmakers have race on the mind is not sufficient to subject such a law to strict scrutiny. The *Schuette* plurality clearly suggested that what matters is whether the state intended to harm minorities—not simply whether it was attempting to achieve a racial result.

Perhaps *Schuette* seems like too easy a case, because Proposal 2 applied only to state action, not to private action. The Equal Protection Clause already prohibits most racial classifications by states, so a state's decision to go a step farther and prohibit itself from engaging in *all* racial classifications hardly seems problematic.<sup>169</sup> But do we seriously think the result in *Schuette* would have been any different if the case had involved a law regulating private action? Imagine a state decided that: (a) members of racial minority groups were, in general, in worse economic situations than whites; (b) intentional discrimination by private employers was a significant reason for that disparity; (c) most intentional discrimination by private employers operated to the detriment of members of minority groups; and therefore (d) to close the racial economic gap, it would pass a law prohibiting *all* intentional racial discrimination by private employers. (This is surely the analysis many Members of Congress went through in deciding to vote for the Civil Rights Act of 1964.) If the obvious racial motive behind the law rendered it the equivalent of a racial classification, subject to strict scrutiny under the Supreme Court's precedents, the law might have a hard time satisfying the compelling interest standard. It is certainly possible to tell a story that state discrimination en-

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<sup>168</sup> See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014).

<sup>169</sup> See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir.) ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."), *cert. denied*, 522 U.S. 963 (1997).

couraged and interacted with private discrimination such that a prohibition on private employment discrimination responds to the state's own past discrimination. After all, there can be little doubt that all levels of government have been deeply involved in various systems of private discrimination throughout our history. It is not clear the Court would find that the government's involvement was closely enough related to all acts of private discrimination to constitute a compelling interest, though.<sup>170</sup> And is there any reason to believe that the state would be put to the burden of establishing the causal link between its own past discrimination and current private discrimination to justify a law that does nothing more than prohibit private intentional discrimination? No Supreme Court case since perhaps the *Civil Rights Cases*<sup>171</sup> has come close to saying that the state must carry any such burden.

Nonetheless, I believe that many people see a distinction between prohibitions on intentional discrimination by private parties and prohibitions on practices with an unjustified disparate impact. The former prohibit conduct that most of us believe to be wrong in itself, while the latter prohibit conduct that is wrong, if at all, only because of its effects in the world. The former seem to rectify an injustice, while the latter seem redistributive.<sup>172</sup> But private entities generally have the power to hire and fire particular employees for any reason or no reason at all.<sup>173</sup> A law overriding that baseline rule to prohibit intentional race discrimination by private employers does not simply restore what the Constitution itself requires; it goes beyond what the Constitution requires in order to achieve a racially defined result.<sup>174</sup> If such a law is not a racial classification, despite its racial motivation, it's hard to see why an equally neutrally phrased law overriding that baseline rule to prohibit practices with an unjustified disparate impact would be. In

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<sup>170</sup> The Court has, for example, tended to require proof of a close link between private housing choices and school segregation in its desegregation cases. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992).

<sup>171</sup> 109 U.S. 3 (1883). The *Civil Rights Cases*, of course, involved the extent of federal power rather than the limitations imposed by equal protection.

<sup>172</sup> See Primus, *supra* note 16, at 527. As Professor Siegel notes, this baseline question was central to debates over disparate impact in the 1980s. See Siegel, *Race-Conscious*, *supra* note 7, at 663–65.

<sup>173</sup> See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 244–45 (2013).

<sup>174</sup> Civil rights laws that prohibit private intentional discrimination have long been controversial for precisely this reason. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1207 (2014).

other words, if it is permissible to shift from an at-will baseline to one in which private employers do not engage in *intentional* discrimination, it should not be any less permissible to shift from an at-will baseline to one in which private employers do not adopt selection criteria that have an unjustified disparate impact. In both cases, the law changes the preexisting common-law baseline in order to achieve a racially defined end. In both cases, the law does so to overcome the legacy of segregation and racial isolation.<sup>175</sup>

### B. Explaining *Ricci*, *Adarand*, and *Davis*

The conclusion that formally race-neutral laws that aim to overcome racial gaps and the legacy of segregation are constitutional without strict scrutiny thus seems to accord with first principles, as well as key holdings from the Supreme Court. But that conclusion nonetheless strikes many as inconsistent with the Court's cases.<sup>176</sup> What accounts for this reaction? I would argue that the reaction is based on an understandable, but unnecessary and unduly formalistic, reading of *Ricci*, *Adarand*, and *Washington v. Davis*. Exploring how the principle of Justice Kennedy's *Parents Involved* concurrence and the *Inclusive Communities* opinion can in fact be reconciled with these earlier cases helps us understand the scope of that principle, and of the role of classification and motivation in current equal protection jurisprudence.

In *Ricci*, New Haven's refusal to certify the promotion tests could be understood as formally race-neutral.<sup>177</sup> All the city decided was that it was not going to use the tests that it had administered as a basis for deciding whom to promote.<sup>178</sup> The city did not say that any particular firefighters would or would not get promotions based on their race, nor did it even choose how it would ultimately make promotion decisions. Yet the Court nonetheless concluded that the city's decision constituted intentional discrimination.<sup>179</sup>

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<sup>175</sup> For an analogous argument rejecting efforts to distinguish between antidiscrimination and accommodation rules on the ground that the former involve mere corrective justice while the latter are redistributive, see Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003).

<sup>176</sup> See, e.g., Rosenthal, *supra* note 55, at 2180 (arguing that, based on *Ricci* and prior equal protection cases, "Title VII's disparate-impact provision can withstand constitutional attack only if it satisfies strict scrutiny—that is, if it is narrowly tailored to achieve a compelling governmental interest").

<sup>177</sup> See *Ricci v. DeStefano*, 557 U.S. 557, 574 (2009).

<sup>178</sup> See *id.*

<sup>179</sup> See *id.* at 592–93.

One way of reading the *Ricci* Court's holding, as we have seen, is that even formally race-neutral efforts to avoid racially disparate impacts are the equivalent of racial classifications.<sup>180</sup> But that was never the only way to read the Court's holding. The *Ricci* Court appeared to find it crucial that the city acted *after* it administered the examinations and saw who had high enough scores to be promoted, candidates identified only by their race.<sup>181</sup> A fair reading of the *Ricci* opinion is that, by refusing to certify the test after learning which firefighters would be affected, because of the race of those firefighters, the city classified *those* firefighters on the basis of *their* race.<sup>182</sup> As Professor Siegel puts it, "[w]hat made New Haven's actions problematic" was "the irregular way in which the City complied with disparate impact law: by offering openly race-related reasons for changing promotion standards for an identified group of applicants who had already tested for the job."<sup>183</sup> The Court may thus have concluded that the city's action was not a formally race-neutral action with a racial intent but instead a racial classification. This reading of *Ricci*, which overlaps with what Richard Primus called the "visible-victims" reading, was always at least a plausible understanding of the case.<sup>184</sup> And it is fully consistent with the Court's holding in *Inclusive Communities*.<sup>185</sup>

What about *Adarand* and *Davis*? The argument that the *Parents Involved-Inclusive Communities* principle conflicts with these cases is straightforward enough: *Adarand*'s "consistency" principle provides that "[t]he standard of review under the Equal Protection Clause is not dependent on the race of those

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<sup>180</sup> See *supra* Part I.A.

<sup>181</sup> See *Ricci*, 557 U.S. at 585, 593 ("[O]nce that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.").

<sup>182</sup> See Adams, *supra* note 51, at 842 ("The central problem in *Ricci* was that the government refused to certify the examination results only *after* it learned that 'white candidates had outperformed minority candidates.' From this perspective, the government created racial harm when it divested specific, identifiable individuals of a 'vested right' to their promotions.") (footnote omitted).

<sup>183</sup> Siegel, *Race-Conscious*, *supra* note 7, at 682.

<sup>184</sup> See Primus, *supra* note 51, at 1345. Professor Primus defines the "visible-victims reading" as holding "that the problem in New Haven's case was not the race-consciousness of the city's decision per se but the fact that the decision disadvantaged determinate and visible innocent third parties—that is, the white firefighters." Primus, *supra* note 51, at 1345.

<sup>185</sup> See Primus, *supra* note 68, at 18 ("*Inclusive Communities* again sounded the basic concerns of the visibility paradigm as they apply to disparate-impact standards.").

burdened or benefited by a particular classification.”<sup>186</sup> The *Adarand* Court held that strict scrutiny applies to all racial classifications, because it concluded that “all governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited’—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.”<sup>187</sup> And the Court held that whether a racial classification has a good or bad motivation is relevant only to whether the classification *satisfies* strict scrutiny, not to the prior question whether strict scrutiny applies.<sup>188</sup> *Davis*, of course, held that “an invidious discriminatory purpose” triggers “the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”<sup>189</sup>

Adding these precedents together, as we have seen, it might seem that a law that is race-neutral in operation but designed to achieve the goal of racial integration triggers strict scrutiny. Whether the legislature’s motive is good or bad should not matter, per *Adarand*, and a racial purpose will, per *Davis*, transform a facially neutral law into the equivalent of a racial classification.

Consider “strategic site selection of new schools,” which Justice Kennedy in *Parents Involved* gave as an example of race-neutral actions that do not trigger strict scrutiny.<sup>190</sup> If a district chose to place a new school in the middle of an overwhelmingly white area, and it did so in order to ensure that the student body was itself overwhelmingly white, there is no question that the district’s action would violate the Constitution.<sup>191</sup> The Court held as much in *Keyes v. Denver School District No. One*.<sup>192</sup> Given *Adarand*’s consistency principle, how can the result be any different simply because a school district seeks to

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<sup>186</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

<sup>187</sup> *Adarand*, 515 U.S. at 227 (citation omitted) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

<sup>188</sup> *See id.* at 226.

<sup>189</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976) (citation omitted).

<sup>190</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>191</sup> *See Michelle Adams, Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. 1, 33 (2012) (“If the government were to take facially race-neutral actions with an intent to segregate, there is little question that strict scrutiny would not only apply but that such actions would be struck down as a violation of the Equal Protection clause.”).

<sup>192</sup> *See* 413 U.S. 189, 213–14 (1973).

integrate, not separate, students of different races? Perhaps the use of school site-selection to integrate will satisfy strict scrutiny, where the effort to separate will not, but is there any reason to avoid engaging in the inquiry?

I believe this analysis makes too much of some of *Adarand*'s language and ignores the context in which that language appeared. Although the Court said that "all governmental action based on race" triggers strict scrutiny,<sup>193</sup> it did not specify whether an action is "based on race" for these purposes simply because it has a race-conscious motivation. *Adarand*, of course, involved a government program that on its face discriminated on the basis of race—and the Court's statement of its "consistency" principle expressly refers only to laws that, similarly, classify individuals on the basis of their race: "[t]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular *classification*."<sup>194</sup> As we have seen, the *Adarand* Court expressly distanced itself from the conclusion that its holding would apply to "facially race neutral" laws.<sup>195</sup> And though *Davis* holds that a facially neutral law with "an invidious discriminatory purpose" is the equivalent of a racial classification,<sup>196</sup> the Court has never applied this principle to hold that a facially neutral law that was intended to overcome segregation or close racial gaps was such an equivalent.<sup>197</sup>

Perhaps the closest the Court has come is in subjecting redistricting plans that are neutral on their face, and lack an intent to dilute any group's voting strength, to strict scrutiny if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."<sup>198</sup> "To make this showing," the Court has said, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial

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<sup>193</sup> *Adarand*, 515 U.S. at 227.

<sup>194</sup> *Id.* at 224 (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

<sup>195</sup> *Id.* at 213; see *supra* text accompanying notes 148–149.

<sup>196</sup> *Washington v. Davis*, 426 U.S. 229, 241–42 (1976).

<sup>197</sup> See Siegel, *Race-Conscious*, *supra* note 7, at 671 ("Not all race-conscious purposes are discriminatory purposes within the meaning of *Davis-Feeney*; government may engage in race-conscious state action to remedy past discrimination, promote equal opportunity, and achieve diversity, in cases where the law is facially neutral in form.")

<sup>198</sup> *Miller v. Johnson*, 515 U.S. 900, 916 (1995). For discussion of these cases, see Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573–94 (2002); Rich, *supra* note 141, at 1547–58.

considerations.”<sup>199</sup> These cases may be understood as based on the unique dynamics of the districting process, as the Court has not applied the “predominant motive” standard elsewhere. Instead, it has found a discriminatory purpose where racial harm was merely a motivating factor, not the predominant motive.<sup>200</sup> Moreover, it is worth noting that the Court understood these redistricting cases as involving facially neutral practices that, far from integrating the races, in fact were designed to “segregate” them.<sup>201</sup> Disparate impact prohibitions, by contrast, both are designed to integrate and, by incorporating a business-justification defense, necessarily lack the *predominant* racial motive the redistricting cases would demand.

### C. Reasons for Using Classification as a Trigger for Strict Scrutiny

The pre-*Inclusive Communities* cases provide plausible reasons to distinguish between actions that themselves classify individuals based on their race—to which strict scrutiny always applies, regardless of the motivation behind them—and those that are neutral in their operation—which trigger strict scrutiny only when their intent is to segregate or exclude, rather than to integrate or close racial gaps. Most of the Court’s modern jurisprudence on “benign” discrimination has focused directly on the specific harms that occur when the government classifies individuals, and distributes benefits or burdens to them, based on their race.<sup>202</sup> The Court has thus explained that “judicial review must begin from the position

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<sup>199</sup> *Miller*, 515 U.S. at 916. As Professor Karlan shows, the Court has interpreted this standard not to demand strict scrutiny even in cases where the Court seems to have concluded there was a discriminatory motivation in the *Davis* sense. In *Easley v. Cromartie*, 532 U.S. 234 (2001), she notes, “it seem[ed] quite clear that the Supreme Court [wa]s prepared to conclude that North Carolina selected the challenged plan ‘at least in part “because of,” not merely “in spite of,”’ the racial composition of the districts,” but “the Court did not apply strict scrutiny,” because “race was just one factor among many.” Karlan, *supra* note 198, at 1586.

<sup>200</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985) (stating that when the law’s challengers show racial discrimination was a motivating factor, the burden “shifts to the law’s defenders”).

<sup>201</sup> *Shaw v. Reno*, 509 U.S. 630, 649, 652 (1993) (finding plaintiffs had stated a claim that the challenged districting plan “rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification”).

<sup>202</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”) (emphasis added); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (“Laws classifying citizens on the basis of race cannot be upheld



that ‘any official action that *treats a person differently on account of his race* or ethnic origin is inherently suspect.’”<sup>203</sup> And the Court has justified strict scrutiny based on the premise that “when government decisions ‘*touch upon an individual’s race or ethnic background*, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.””<sup>204</sup> Justice Kennedy’s *Parents Involved* concurrence explained that individual racial classifications like these present unique dangers—dangers that he believed do not exist to the same extent when the government seeks to achieve race-conscious ends through race-neutral means:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.<sup>205</sup>

Unpacking this passage, it points to a number of distinct harms caused by laws that classify individuals based on their race. Such government actions may reify racial categories, thus denying individuals the opportunity to exploit the fluidity of a socially constructed status and define their identities for themselves. “[F]orc[ing]” someone “to live under a state-mandated racial label” that she “is powerless to change” raises libertarian concerns<sup>206</sup> at the same time as it has uncomfortable historical resonances.<sup>207</sup> And requiring different treatment of

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unless they are narrowly tailored to achieving a compelling state interest.”) (emphasis added).

<sup>203</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)).

<sup>204</sup> *Id.* at 2417 (emphasis added) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.)).

<sup>205</sup> *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>206</sup> *Id.*; see also Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 119 (2007) (“When the state moves from . . . the domain to the individual, Kennedy’s libertarian instincts reemerge.”).

<sup>207</sup> See, e.g., *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (“If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First

people who are assigned to different racial categories (“command[ing] people to march in different directions based on racial typologies”) may increase divisiveness and entrench the significance of race as a source of social conflict and individual animus.<sup>208</sup> Although formally race-neutral policies might also lead to divisiveness if the public understood them as “really” aiming to assist members of a particular racial group,<sup>209</sup> the concerns about reification, individual freedom, and historical resonances seem more attenuated for such policies.

On the other side of the ledger, if strict scrutiny applied to any action taken to reduce racial gaps or bring the races together—no matter how race-neutral that action was in its operation—the law would impose daunting barriers to efforts to promote integration.<sup>210</sup> And the law would do so without a powerful justification. To be sure, it is possible to envision an extreme form of colorblindness under which the government must not even consider the racial effects of its actions. Such a view would rest on a thoroughgoing individualism, which would dictate that the government should care only about the welfare of individuals and not about the position of any of the groups of which they are members.<sup>211</sup> But precious few people hold to this position, and virtually nobody holds to it consistently.<sup>212</sup> Our political discourse is filled with assertions, from all points on the political spectrum, that particular policies (race-neutral in form) will operate to close racial gaps.<sup>213</sup> Liberals argue that infrastructure spending and jobs programs will close racial gaps in economics, while conservatives argue that school choice will close racial gaps in education. Although there are great disputes about which policies will in fact close racial gaps, there is little disagreement in our political system

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Regulation to the Reichs Citizenship Law of November 14, 1935 . . .”). In his dissenting opinion in the *Metro Broadcasting* case, after quoting Justice Stevens’s reference to the Nuremberg Laws, Justice Kennedy said: “Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).” *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting).

<sup>208</sup> See Siegel, *Antibalkanization*, *supra* note 7, at 1307.

<sup>209</sup> See Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 *YALE L.J.* 2838, 2852–54 (2014).

<sup>210</sup> See *supra* text accompanying notes 143–146.

<sup>211</sup> See Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 14 (2013) (quoting statements of Ward Connerly seemingly espousing such an individualist view).

<sup>212</sup> See *id.* at 14–15 (arguing that Connerly’s “rigorous and immediatist color-blind constitutionalism is yet to be fully ascendant,” and that it should be rejected).

<sup>213</sup> See *id.* at 2–3.

that closing those gaps is a proper function of public policy. And, as I have noted, the Court has never challenged the constitutionality of such a legislative goal.

The failure to appreciate this point has led some commentators astray. Professor Rosenthal, for example, finds “formidable doctrinal obstacles” to the “visible-victims” reading of *Ricci*.<sup>214</sup> Rosenthal argues that “the existence of something approaching a vested or reliance interest in obtaining a governmental benefit is not required to attack a race-conscious remedial program.”<sup>215</sup> For support, he points to the Court’s holdings that “even when a litigant cannot prove that he will receive a concrete benefit absent the use of race-conscious criteria—in other words, even absent a ‘visible victim’—the litigant nevertheless may challenge the practice because being subjected to a discriminatory competitive process is a legally cognizable injury.”<sup>216</sup>

If the reading I have offered is correct, Professor Rosenthal is missing the point. The visibility of the victims mattered in *Ricci* not because that made the Court more certain of who suffered an injury, but because that made the Court more certain that what looked like a race-neutral act (declining to certify the tests and refusing to promote anyone) was a racial classification.<sup>217</sup> In each of the cases Professor Rosenthal cites—*Parents Involved*, *Gratz*, and *Adarand*—the defendants were concededly acting on the basis of the race of the particular individuals who sought a benefit from them.<sup>218</sup> Students of the “right” racial group got a preference in admissions to the schools they desired in *Parents Involved* and *Gratz*,<sup>219</sup> and business owners of the “right” racial group got a preference in receiving contracts in *Adarand*.<sup>220</sup> Whether or not we knew precisely who was denied a seat in school, or a government contract, as a result of the challenged preferences, we knew that the defendants classified each individual who applied for these benefits on the basis of that individual’s race. In *Ricci*, the mere act of refusing to certify the test did not classify any

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<sup>214</sup> Rosenthal, *supra* note 55, at 2199.

<sup>215</sup> *Id.* at 2200.

<sup>216</sup> *Id.* (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718–19 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 260–62 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995)).

<sup>217</sup> *See id.* at 2169 (discussing the idea that refusing to promote anyone was racial classification).

<sup>218</sup> *See Parents Involved*, 551 U.S. at 701; *Gratz*, 539 U.S. at 244; *Adarand*, 515 U.S. at 200.

<sup>219</sup> *See Parents Involved*, 551 U.S. at 718; *Gratz*, 539 U.S. at 272.

<sup>220</sup> *See Adarand*, 515 U.S. at 205.

individual based on his race; rather, it was the act of refusing to certify the test specifically because city officials did not want to promote individuals with known racial identifications, and even more specifically because of the effect that promoting them would have on the racial composition of the supervisory force in the fire department.<sup>221</sup> Absent such a classification, the Court has *never* held that the use of race-neutral tools to achieve integration or close racial gaps is subject to strict scrutiny.<sup>222</sup>

Similarly, Professor Rosenthal argues that strict scrutiny of disparate impact laws is inevitable because “unless one is prepared to endorse any kind of preference for women or minorities, no matter what the justification, it is extraordinarily difficult to disentangle such preferences from strict or at least some form of heightened scrutiny.”<sup>223</sup> But the *Parents Involved* concurrence and the opinion for the Court in *Inclusive Communities* show that, at least for Justice Kennedy, there is a big difference between a classification—a practice that assigns a racial label to individuals and accords them different treatment because of it—and a practice that does not classify individuals based on race but that seeks to achieve the goal of racial integration.<sup>224</sup> Classifications, in Justice Kennedy’s view, are subject to strict scrutiny. Race-neutral efforts to promote integration and close racial gaps are not. Whatever the justifications for the “consistency” principle when the government actually classifies individuals based on race, the Court has not applied that principle to such race-neutral efforts.

If that is so, a critic might ask, why should race-neutral policies that aim to *harm* minorities be subject to strict scrutiny? We know from *Davis*, *Keyes*, and many other cases that a facially race-neutral act with a motivation to harm minorities is the constitutional equivalent of a racial classification. But if

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<sup>221</sup> See *Ricci v DeStefano* 557 U.S. 557, 563 (2009).

<sup>222</sup> To be sure, as Professor Rich notes, the ambiguity in what constitutes a “classification” does give the Court room to require strict scrutiny for those “facially neutral measures” that appear to the Court to risk “the same constitutional equality harms ordinarily associated with the use of explicit racial classifications[, which] are being perpetrated by facially neutral means.” Rich, *supra* note 141, at 1586. *Ricci* is an example of such a case. But that is not the same thing as saying that all efforts to achieve racial integration through race-neutral means constitute classifications that trigger strict scrutiny. Still, it reflects an instability in the formalistic concept of classification that makes the Court’s approach less than ideal. I address this point in Part II.D., below.

<sup>223</sup> Rosenthal, *supra* note 55, at 2207.

<sup>224</sup> See *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (stating that there is a difference between racial classification and race conscious decisions that lead to integration).

equal protection doctrine aims at the unique harms caused by formal racial classifications, why should it be a constitutional problem to adopt a facially neutral policy with a discriminatory intent, at least outside a case like *Ricci* in which the policy targets identified individuals because of their race? Is there a principled way to distinguish between the intent to integrate the races and close racial gaps, on the one hand, and the intent to harm minorities, on the other? Or is it just a matter of whose ox is gored?<sup>225</sup>

It is plausible to argue, as Professor Banks does, that the cases leave room for a jurisprudence that *does* depend on whose ox is gored.<sup>226</sup> But even if that is not the best reading of those cases, there is an important distinction between efforts to harm members of particular racial groups and efforts to promote integration or close racial gaps. It may be easiest to see this in the context of promoting integration. When policymakers seek to promote the integration of schools (as through the race-conscious but race-neutral tools Justice Kennedy identified in *Parents Involved*) or of workplaces (through the race-conscious but race-neutral tool of disparate-impact liability), they are not seeking to harm any particular group—or any individual member of such a group. Instead, they are seeking to create circumstances in which all members of all racial

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<sup>225</sup> Professor Siegel reads *Davis*, *Keyes*, and related cases as reflecting judicial deference or withdrawal. On her account, the Burger Court in these cases was making the decision that the courts were not well suited to address discriminatory effects, but that “few imagined equal protection as a judicially enforceable limit on representative government’s authority to redress de facto segregation.” Siegel, *Equality Divided*, *supra* note 7, at 11. As a historical account of what was on the justices’ minds at the time, Siegel’s argument is persuasive. But that is a different question than whether the doctrinal principle the Court adopted must nonetheless be read to render it constitutionally suspect for the government to seek to overcome de facto segregation. Siegel notes that *Davis* itself states that extension of disparate-impact liability should depend on “legislative prescription,” *Washington v. Davis*, 426 U.S. 229, 248 (1976), not judicial fiat. Siegel, *Equality Divided*, *supra* note 7, at 21. But whatever that says about the justices’ expectations, that is not the same as a holding that the Court would necessarily uphold a disparate impact provision if challenged. For example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), the Court held that classifications based on intellectual disability do not trigger heightened scrutiny, but its language suggested that a “congressional direction” to the contrary would be “controlling.” In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), however, the Court held that Congress had exceeded its authority in making just such a direction. In text, I attempt to explain why the logic of *Davis* and related cases accords with the justices’ expectations and does not require strict scrutiny of race-neutral efforts to respond to de facto segregation.

<sup>226</sup> See generally Banks, *supra* note 144 (arguing that whether a policy is characterized as benign or invidious usually influences the level of scrutiny to which the policy will be subject).

groups have fair access to opportunity.<sup>227</sup> And they are trying to promote an outcome that has benefits for members of *all* races, as well as for democracy as a whole.<sup>228</sup> Such efforts do not represent a mere imposition of harm on a disfavored racial group or a transfer to a favored group. They represent an effort to disestablish entrenched divisions in American society, divisions created by historic and continuing injustices.

Of course, whether these entrenched divisions reflect past injustices or simply different choices and abilities that happen to correlate with group membership is a longstanding subject of debate. As Professor Siegel emphasizes, critics of disparate impact and other civil rights laws have long tended to see “underrepresentation of minorities as evidence of racial group differences in taste or aptitude.”<sup>229</sup> In his dissent in *Inclusive Communities*, Justice Thomas made precisely the point Professor Siegel highlights. Invoking examples across time and continents in which racial and ethnic minorities have had disproportionate success in several spheres, he argued that “[t]o presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.”<sup>230</sup> But the question here is not whether “all . . . measurable disparities”<sup>231</sup> are products of discrimination. It is whether persistent racial isolation in housing patterns, consistent racial disparities in wealth accumulation, ongoing racial gaps in education, and so forth, are likely attributable to the effects of discrimination *in the United*

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<sup>227</sup> See, e.g., *Associated Gen. Contractors of Cal. v. S.F. Unified Sch. Dist.*, 616 F.2d 1381, 1386 (9th Cir. 1980) (describing integration programs as “reshuffle” programs, in which the state neither gives to nor withholds from anyone any benefits because of that person’s group status, but rather ensures that everyone in every group enjoys the same rights in the same place,” and distinguishing them from “stacked deck” programs, in which the state specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all”), *cert. denied*, 449 U.S. 1061 (1980).

<sup>228</sup> See generally ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 93 (2010) (“The promise of political equality is a sham without social equality in the institutions of civil society. Political equality in the realm of governance cannot be realized without a democratic *culture* pervading civil society.”). For an argument that integration in housing and education benefits democracy, see KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, *THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY* (2009). For an argument about the democratic benefits of integration in the workplace, see CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

<sup>229</sup> Siegel, *Antibalkanization*, *supra* note 7, at 1320 & n.128.

<sup>230</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2530 (2015) (Thomas, J., dissenting).

<sup>231</sup> *Id.*

*States*, with a documented history of massive, past and continuing, public and private discrimination. As Professor Kennedy aptly puts it, “[i]n every aspect of American life, racial differentials in well-being don’t just exist—they erupt, showering the social landscape with stark familiar patterns.”<sup>232</sup> In any event, the question, for constitutional purposes, is *not* whether attributing the current imbalances to discrimination is certainly correct. Instead, the relevant question is whether legislatures should be permitted to make such an attribution.

Perhaps it should nonetheless be suspect for the government to respond to this situation by classifying individuals according to their race and treating them differently as a result. And perhaps a government agency ought not to be permitted to use such racial classifications if it cannot draw a direct line between continuing racial isolation and its own past unconstitutional discrimination. But the mere intent to promote integration should not be suspect; to the contrary, that intent is praiseworthy.

As the quote from Professor Kennedy suggests, the same point can be made for efforts to close racial gaps. Given the salience of race in American society, the persistence of racial gaps in education, health care, and economic achievement breeds social division, spurs prejudice, and harms our democracy.<sup>233</sup> Although those harms might not justify a government policy that expressly classifies individuals based on their race, the mere effort to close such racial gaps should not be constitutionally suspect.

One might object that there is no difference between efforts to harm a racial group and efforts to close racial gaps. From one perspective, these are merely two sides of the same coin.<sup>234</sup> In a world of limited resources, efforts to close racial gaps will mean that some individuals receive less than they would have before (for example, by the schools they attend getting less funding, in the case of efforts to close educational gaps)—just as efforts to integrate schools will mean that some individuals

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<sup>232</sup> KENNEDY, *supra* note 12, at 178.

<sup>233</sup> See, e.g., Lawrence D. Bobo, *Somewhere Between Jim Crow & Post-Racialism: Reflections on the Racial Divide in America Today*, 140 DÆDALUS J. AM. ACAD. ARTS & SCI. 11, 14–15 (2011) (“[B]asic racial boundaries are not quickly and inevitably collapsing . . . . [T]here remain large and durable patterns of black-white economic inequality as well, patterns that are not overcome or eliminated even for the middle class and that still rest to a significant degree on discriminatory social processes.”).

<sup>234</sup> Cf. Sullivan, *supra* note 16, at 1511 (noting that “[b]y definition, the choice of a cut-off that makes proportionately more minorities eligible necessarily makes proportionately fewer whites eligible”).

do not get to attend the precise school they would have attended before. But the assertion that efforts to close racial gaps are the same as efforts to harm members of a racial group assumes that the world in which racial gaps exist reflects a just baseline. Why, however, should a government agency be dis-entitled to conclude that that world instead reflects an accumulation of harms and acts of discrimination, “some influenced by government, some not,”<sup>235</sup> that were in fact unjust? There is ample evidence to support such a conclusion.<sup>236</sup> At least so long as the government does not classify individuals by race, it ought to be free to respond to those injustices without having to satisfy strict scrutiny. Certainly, there is nothing in the pre-*Inclusive Communities* holdings of the Court that would stand in the government’s way. There is, however, an important reason to worry that the formalist line drawn by the Court will be subject to efforts at evasion, which will make the line unstable. I discuss that concern in the next section.

#### D. Concerns About the Court’s Analysis

I have argued that *Inclusive Communities* rests on the premise that government actions aimed at promoting racial integration or closing racial gaps do not trigger strict scrutiny unless they classify individuals based on their race. And I have argued that *Inclusive Communities*’ approach to equal protection doctrine fits the prior cases. This is not to say that the Court’s approach represents the best possible equal protection doctrine. In this section, I point out some problems with that approach. Nonetheless, I argue that is the best available approach consistent with prior doctrine.

By placing so much weight on whether a government action is categorized as a classification or not, the *Inclusive Communities* approach has many of the flaws that often accompany formalistic rules. For one thing, that approach is over- and under-inclusive. Government actions that do not formally classify individuals based on their race might well raise some of the same concerns regarding social divisiveness, or even their effects on individual dignity, as do formal classifications. This might be true of government actions that aim at closing racial gaps,<sup>237</sup> as well as of government actions that have no race-

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<sup>235</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>236</sup> See *supra* note 100.

<sup>237</sup> See Bagenstos, *supra* note 209, at 2854–55.



related motivations at all but have manifest racial effects.<sup>238</sup> Whether an individual feels demeaned by such an action, and whether it has divisive effects, is a matter of the expressive social meaning of the action and not its form<sup>239</sup>—and this is even before we get to values beyond avoiding divisiveness and individual indignity, such as the desire to disestablish a system of group based subordination, that many believe are an important subject of equal protection concern but that the focus on classification poorly fits.<sup>240</sup> Conversely, even some classifications may not raise any especial concerns about dignity, divisiveness, entrenching or subordination.<sup>241</sup>

We might also worry that the asserted effort to close racial gaps will sometimes in practice serve as a cover for an effort to harm members of a particular racial group.<sup>242</sup> To spin out an example drawn from Justice Thomas's *Inclusive Communities* dissent,<sup>243</sup> what if a legislature sought to "close racial gaps" in

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<sup>238</sup> Although Professor Lawrence articulates his "cultural meaning" test—which would "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance"—as a means of determining whether a formally race-neutral action is driven by unconscious bias, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987), it should be apparent that even laws that lack any racial motivation or formal classification can have such a meaning.

<sup>239</sup> See Primus, *supra* note 51, at 1371–73; Siegel, *Antibalkanization*, *supra* note 7, at 1360–65; see also Bagenstos, *supra* note 209, at 2864–65 (arguing that it is "plausible that many laws will have a social meaning that does not turn on such formalities" as whether they "specifically treat[] people differently based on their group status, or require[] judges, administrators, or regulated entities applying the law to consider individuals' group status").

<sup>240</sup> See generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–10 (2003) (arguing that the anticlassification and antisubordination principles overlap and that their application shifts over time in response to social struggle).

<sup>241</sup> Professor Primus notes that some practices that seem to meet even a narrow definition of express racial classifications—notably "the police use of racial descriptions of criminal suspects, the Census Bureau's collection of demographic data, state legislatures' race-based redistricting practices, and social service agencies' race-conscious adoption placements"—are not invariably subjected to strict scrutiny. Primus, *supra* note 16, at 505 (footnotes omitted). Perhaps that is because courts deem these sorts of classifications as not raising the same concerns as other racial classifications. *But cf.* Siegel, *Antibalkanization*, *supra* note 7, at 1360–65 (arguing that courts should see police use of racial descriptions in apprehending suspects as raising these concerns).

<sup>242</sup> It is reasons like this that led even the more liberal bloc in *Bakke* to support heightened—but not strict—scrutiny for benign racial classifications. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall, Blackmun, J.J., concurring in the judgment in part and dissenting in part). As I discuss in text, we might have similar concerns about facially neutral laws that purportedly aim at benign racial ends.

<sup>243</sup> See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2530 (2015) (Thomas, J., dissenting).

the National Basketball Association by, say, requiring all players to have attended high-socioeconomic-status high schools? We would be rightly suspicious of the legislature's motivation, but the lack of a racial classification would deprive us of a basis to subject it to heightened scrutiny.

The slippage between the formal anti-classification rule and the purposes served by that rule puts pressure on courts to define "classification" elastically. *Ricci* is an example: Unless "classification" encompasses formally race-neutral actions that are taken because of the effects they will have on particular individuals, identified because of their race, the anti-classification rule will be easy to evade. Yet once we expand the concept of classification to such formally race-neutral actions, it is hard to know where to stop without encompassing all racially motivated actions. The principle that a motivation to achieve integration does not in itself trigger strict scrutiny, while a motivation to harm a particular racial group does, provides some limitation. But, because of the close analytic and practical connection between closing racial gaps and harming members of particular racial groups, it is fuzzy in practice. In the end, courts are likely to determine that government actions are or are not classifications based on the degree to which the judges believe that the actions raise normative concerns.<sup>244</sup> But because the courts will frame the inquiry around the seemingly formal question of whether a classification exists, the normative considerations will likely be balanced offstage.<sup>245</sup>

One way of responding to these problems, of course, would be to adopt the syllogistic *Adarand-plus-Davis* reading I have been arguing against. One could simply say that government action triggers strict scrutiny any time it is motivated by the desire to achieve a racially defined objective. As I showed in the previous two sections, though, such a doctrine would contravene widely held intuitions. It would mean that even the No Child Left Behind law or Obamacare would trigger strict scrutiny—because they are at least in part intended to improve education and health care for minorities. Indeed, it would even

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<sup>244</sup> This is the major point of Professor Rich's analysis of the Court's classification jurisprudence. See generally Rich, *supra* note 141, at 1587–92 (explaining that the "application of strict scrutiny always reflects a choice by the reviewing court"); see also Primus, *supra* note 16, at 514 (arguing that "courts' decisions about whether state action uses racial classifications are often tied to their view of the acceptability of the underlying state action").

<sup>245</sup> For a recent critique of a similar sort of formalism in another Title VII context, see Samuel R. Bagenstos, *Formalism and Employer Liability Under Title VII*, 2014 U. CHI. LEGAL F. 145, 146–47 (2014).

mean that government prohibitions of private-sector intentional discrimination would be suspect. And because an effort to overcome societal discrimination cannot satisfy strict scrutiny, these laws would likely fail that test, even though they are formally race-neutral. Even if a rule that all racially motivated actions trigger strict scrutiny would be consistent with pre-*Inclusive Communities* doctrine, it is not a rule that we should want the Court to have adopted.

There is another way to respond to these concerns. That would be to adopt some version of the equal protection doctrine advocated by Justices Marshall and Stevens when they were on the Court. Under their approach, neither a racial classification *nor* a racial motivation would be necessary in every case to trigger searching scrutiny of a government action with manifest racial effects.<sup>246</sup> And when a racially discriminatory action *did* trigger such scrutiny, actions designed to promote inclusion or overcome past discrimination would forthrightly receive more lenient review than actions designed to exclude or maintain racial hierarchy.<sup>247</sup> Rather than applying pre-set tiers of scrutiny, the intensiveness of the review the court applied would depend on open consideration and weighing of the relevant equal protection interests in the particular setting.<sup>248</sup> Crucially, those interests would include counteracting subordination as well as avoiding divisiveness and preventing individual indignity.<sup>249</sup> Under such an approach, laws like Title VII or No Child Left Behind could receive some degree of scrutiny—to ensure that they, unlike my hypothetical law seeking to “integrate” the NBA, were not exclusionary policies in disguise—without being forced to satisfy the ordinary strict scrutiny standards that they would likely fail.

There is much to be said for the Marshall/Stevens approach to equal protection.<sup>250</sup> But it is not an approach that is

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<sup>246</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) (“[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.”).

<sup>247</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243–49 (1995) (Stevens, J., dissenting); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 356–62 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

<sup>248</sup> See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451–55 (1985) (Stevens, J., concurring); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–110 (1973) (Marshall, J., dissenting).

<sup>249</sup> See *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).

<sup>250</sup> See James E. Fleming, “*There is Only One Equal Protection Clause*”: *An Appreciation of Justice Stevens’s Equal Protection Jurisprudence*, 74 *FORDHAM L. REV.* 2301 (2006). For what I regard as an effort to elaborate on and perfect the

consistent with the case law as it existed as of *Inclusive Communities*. To the contrary, the Court had squarely rejected that approach in *Davis*, *Adarand*, and *Gratz*, among other cases. For all its problems, the equal protection approach that underlies *Inclusive Communities* likely represents the most normatively defensible reading of the then-existing precedent. It is in any event far preferable to the most realistic alternative, which would have subjected all laws with a racially defined object to strict scrutiny.

#### CONCLUSION: LOOKING TOWARD THE FUTURE

My argument in this Article has been largely backward-focused. I have attempted to tease out just what the Court held in *Inclusive Communities* and show that it fits with a fair reading of prior cases. But I have also suggested that the approach to equal protection that underlies *Inclusive Communities* is not optimal, and that it is unstable. By formalistically relying on the existence of a classification as the trigger for strict scrutiny, the Court's approach puts great pressure on the definition of "classification." The Court is likely to respond to that pressure by interpreting the concept elastically, by balancing the equal protection interests it finds salient, but doing so offstage. It is therefore worth offering some thoughts about the future course of doctrine in this area, even if those thoughts are necessarily speculative.

It is tempting to think that the instability in the doctrine will be resolved by a new appointment to the Court. Before Justice Scalia's unexpected death, Professor Siegel at least allowed herself to "imagine" that a liberal appointment would productively move the Court towards a more progressive jurisprudence in this area.<sup>251</sup> Should Justice Scalia be replaced by a justice whose views on these issues lie to the left of Justice Kennedy's—which will happen only if the Senate confirms an appointee of President Obama or a Democratic successor—it is possible that Professor Siegel's imaginings will come to pass.

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Marshall/Stevens approach, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CALIF. L. REV. 481 (2004); see also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011) (proposing a more progressive race jurisprudence); Siegel, *Equality Divided*, *supra* note 7, at 93–94 (imagining a more progressive approach to race jurisprudence than that adopted by the current Court).

<sup>251</sup> Professor Siegel at least allows herself to "imagine" that a liberal appointment will productively move the Court towards a more progressive jurisprudence. Siegel, *Equality Divided*, *supra* note 7, at 93–94.

But a new appointment seems to me unlikely to resolve the instability of the doctrine. An appointment that gives a majority to the race-liberal bloc might well lead the Court to relax the standard of scrutiny for classifications that seek to integrate. If that happens, less will turn on the formalistic determination whether a government action constitutes a racial classification. But no member of the current liberal bloc has squarely endorsed an approach that would eschew formalistic lines like classification or tiers of scrutiny. The last justice to endorse such an approach was Justice Stevens.<sup>252</sup> It is possible that a new appointment will lead the four more liberal justices to rethink their jurisprudence more extensively. More likely, though, if the race liberals get a majority we are likely to continue to see an unstable and formalistic doctrine—albeit one whose problems will be muted.

If Justice Scalia is replaced by a Republican appointee, and a Republican president goes on to replace Justice Kennedy or one of the race liberals, the Court will quite likely hold, notwithstanding *Inclusive Communities*, that disparate impact laws are unconstitutional.<sup>253</sup> In so ruling, the Court might say that all government actions with a racial motive trigger strict scrutiny. But the Court is still unlikely to follow the *Adarand-plus-Davis* syllogism to its logical conclusion, for doing so would imperil many laws that have wide support from conservatives and liberals alike.<sup>254</sup> The obvious way the Court might find to manage the dilemma is by ratcheting up the requirement for proving intent. One way of reading the racial redistricting cases is that they were driven by just such a dynamic.<sup>255</sup> In *Shaw v. Reno*,<sup>256</sup> the Court held that strict scrutiny is required for facially neutral redistricting plans that, without diluting anyone's vote, have lines that cannot be explained on grounds other than race. But because race is, in American society, so closely connected with partisan affiliation

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<sup>252</sup> See *City of Cleburne*, 473 U.S. at 451–55 (Stevens, J., concurring); *Rodriguez*, 411 U.S. at 98–110 (Marshall, J., dissenting).

<sup>253</sup> To avoid expressly overruling *Inclusive Communities*, the Court could offer the fig leaf that *Inclusive Communities* did not explicitly hold that disparate impact laws are constitutional. But that is a mere fig leaf, as I discussed in *supra* Part I.B.: The Court's opinion necessarily rests on the premise that disparate impact laws are, in fact, constitutional, and the Court explicitly adverted to the question in determining what aspects of disparate impact law do—and do not—raise serious constitutional issues.

<sup>254</sup> See *supra* Part II.A.

<sup>255</sup> For discussion of these cases, see *supra* text accompanying notes 198–201.

<sup>256</sup> 509 U.S. 630 (1993).

and other shared interests—perfectly appropriate considerations in redistricting, and central concerns of political actors—the Court soon realized that it could not subject districting plans to strict scrutiny whenever race played a role in their crafting.<sup>257</sup> Responding to this problem, the Court erected a special heightened burden for proving discriminatory intent in non-dilutive racial gerrymandering cases. Instead of succeeding by proving that race was a “motivating factor”—the usual equal protection standard—plaintiffs in these cases must prove that race was the “predominant” motive, and that other factors were “subordinated” to race in redistricting. Applying that heightened standard, the Court has refused to apply strict scrutiny in cases in which race and political affiliation were coordinate considerations for those drawing district lines. This mode of analysis has recently bled back into lower-court cases involving states’ limitations of opportunities to register to vote and cast ballots—cases to which the “predominant motive” standard does not, in terms, apply.<sup>258</sup> In those cases, courts have held that a partisan motivation for limiting these opportunities shields the government’s action from strict scrutiny, despite the strong overlap between racial and partisan identification. It is likely that any broader-scale ratcheting up of the discriminatory intent requirement will similarly redound to the detriment of minorities.<sup>259</sup>

Another means a race-conservative majority might employ to limit the disruptive effects of the *Adarand-plus-Davis* syllogism is to introduce flexibility into the strict scrutiny analysis. Instead of requiring the same degree of compelling interest for every government action motivated by race, the Court could permit a lesser interest—such as countering societal discrimination—to justify measures that do not classify individuals based on their race. Such an approach would move strict scrutiny toward a straightforward proportionality analysis.<sup>260</sup> But a doctrine that subjected *every* one of the vast number of racially motivated but non-classifying policies to judicial supervi-

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<sup>257</sup> See Karlan, *supra* note 198, at 1577.

<sup>258</sup> See generally Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 70–73 (2014) (discussing standards that courts apply in cases involving voter identification laws).

<sup>259</sup> In other words, it will further entrench the pattern of “divided equal protection” that Professor Siegel discusses in Siegel, *Equality Divided*, *supra* note 7, in which the equal protection claims of members of majority groups receive more solicitude than those of members of minority groups.

<sup>260</sup> On the Court’s vacillation between smoking-out and proportionality readings of strict scrutiny, see *supra* note 164.

sion via proportionality review would likely strike a conservative majority as too reminiscent of *Lochner*.<sup>261</sup>

Should neither the race-liberals nor the race-conservatives achieve a majority, and should Justice Kennedy retain his position as the median justice—as will happen if a Republican president replaces Justice Scalia and no further vacancies on the Court occur soon—it is entirely possible that the Court will evolve away from a formalist, classification-dependent equal protection doctrine. Justice Kennedy has been the justice who has seemed least in the thrall of formalist tiers-of-scrutiny analysis in Fourteenth Amendment cases. As many have noted, and some have decried, he avoided invoking that form of analysis in any of his key gay rights cases over the past twenty years<sup>262</sup>—a pattern that continued in *Obergefell v. Hodges* this past Term. Justice Kennedy might well come to conclude that the antibalkanization concerns that have led him to focus on classification as a trigger for strict scrutiny,<sup>263</sup> are present in some cases that do not involve classifications as well. He might determine that legal doctrine should focus directly on the indignity and divisiveness caused by a particular practice rather than on an imperfect mediating proxy such as the existence or nonexistence of a classification. And he might just persuade four other justices to go along with him. As today's most prominent and divisive racial issues—those involving criminal justice and immigration—inevitably make their way to the Court, the justices will have ample opportunity to consider these matters.

Or the Court might just muddle through. Unstable doctrines can last for a long time. And the instability of the equal protection doctrine applied in *Inclusive Communities* likely fits well with the median American voter's ambivalent views of racial issues. If the application of the Court's classification-focused framework is unstable, that fits the instability of the fitful American political response to the past and continuing effects of slavery, segregation, and racial discrimination. We might, therefore, be applying the *Inclusive Communities* approach for a long time.

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<sup>261</sup> Note the emphasis Chief Justice Roberts placed on the *Lochner* analogy in his dissent in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

<sup>262</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>263</sup> See Siegel, *Antibalkanization*, *supra* note 7.

