

**UP FROM COLORBLINDNESS:
EQUALITY, RACE, AND THE LESSONS
OF *RICCI V. DESTEFANO***

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ABSTRACT

This essay weighs the merits of the ascendant interpretation of the Equal Protection Clause of the 14th Amendment: a colorblind reading of equality that received a boost in the Court's Ricci v. DeStefano decision of 2009. In Ricci, the Court concluded that the City of New Haven had acted illegally when it scrapped a promotion exam for firefighters on which whites had vastly outperformed black and Hispanic candidates. The article opens by surveying the major twists and turns of the Supreme Court's view of racial classifications since the 14th Amendment was adopted in 1868. It continues with an analysis of Justice Kennedy's majority opinion in Ricci and Justice Ginsburg's forceful dissent. The essay then explores three possible reasons to push for a colorblind conception of racial equality. While two of these arguments are fatally weak, one is instructive. Colorblindness may be a poor reading of the 14th Amendment's Equal Protection guarantee, but overt color-consciousness has its costs as well. I conclude that "color-wariness," for lack of a better term, may be the optimal strategy for policymakers and government officials.

INTRODUCTION

Satirist Stephen Colbert, the pseudo-conservative host of the ironic *Colbert Report* on Comedy Central, frequently tells his audience he is colorblind and unable to discern a person's race, even his own: "Now, I don't see color. People tell me I'm white and I believe them because police officers call me 'sir'."¹ Other punchlines draw upon a range of racial stereotypes. Colbert says he trusts those who tell him he is white

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¹ *The Colbert Report*: Season 3 (Comedy Central television broadcast Jan. 8, 2007).

“because I own a lot of Jimmy Buffet albums,”² “because I can’t say the N-word,”³ “because I shop at Eddie Bauer,”⁴ and “because I think Barack Obama is black.”⁵

Of course, the humor in Colbert’s recurring joke turns on a number of characteristics typically thought to be associated with “whiteness.” But its bite is directed elsewhere: at the understanding of racial equality dictating that the state should remain strictly colorblind. Such a perspective abjures all classifications by race, all racial privileges, all attempts to “use” race politically in hopes of making society more just and more equal. Colbert’s stinging critique makes colorblindness sound absurd. No one can really be colorblind, Colbert implies: the position is pretense, not principle. Any policy or constitutional rule that flows from such a perspective will be similarly flawed. And even a position of sincerely held colorblindness entails absurdities, for it ignores a constitutive aspect of our culture and political society.

Colbert picks on colorblindness in a way that frames it in the worst possible light. And yet colorblindness—as a legal and constitutional principle—is enjoying a resurgence of support in the judiciary and political culture.⁶ The most frequently cited evidence for such a shift is the historic election of a black president in 2008.⁷ And some have noted that President Obama has brought something approaching a colorblind perspective into the White House by failing to “create programs tailored specifically to African-Americans, who are suffering disproportionately in the recession.”⁸ For better or worse, colorblindness is on the rise.⁹ The question is whether it ought to be.

² *The Colbert Report*: Episode No. 2138 (Comedy Central television broadcast Nov. 2, 2006).

³ *The Colbert Report*: Episode No. 3053 (Comedy Central television broadcast April 23, 2007).

⁴ *The Colbert Report*: Episode No. 2150 (Comedy Central television broadcast Nov. 30, 2006).

⁵ *The Colbert Report*: Episode No. 3020 (Comedy Central television broadcast Feb. 8, 2007).

⁶ Some see the United States as having evolved into “post-racial” society in which racial discrimination has largely vanished, rendering race-based policy measures unnecessary. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (identifying, critiquing and proposing suggestions for reversing a recent retreat from race-conscious decision-making and race-based political organization) and Helen Norton, *The Supreme Court’s Post-Racial Turn: Towards A Zero-Sum Understanding Of Equality*, 52 WM. & MARY L. REV. 197, 229 (2010) (depicting recent Supreme Court decisions as evidence of a post-racial jurisprudence in which “a decision maker’s attention to the disparities experienced by members of traditionally subordinated racial groups” are “inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification.”) Other commentators deny that the United States is post-racial while at the same time sketching the foundation of an equal protection doctrine that may be workable within such a framework. See, e.g., Mario Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L. J. 967 (2010).

⁷ Armstrong Williams, *A Colorblind America*, WASH. TIMES, Feb. 1, 2010.

⁸ Sheryl Gay Stolbert, *For Obama, Nuance on Race Invites Questions*, N.Y. TIMES, Feb. 8, 2010, at A14. But see BARACK OBAMA, *THE AUDACITY OF HOPE*, 232-232 (2006), where Obama clearly disavows a post-racial attitude:

[W]hen I hear commentators interpreting my speech to mean that we have arrived at a “postracial politics” or that we already live in a color-blind society, I have to offer a word of caution. To say that we are one people is not to suggest that race no longer matters—that the fight for equality has been won, or that the problems that minorities face in this country today are largely self-inflicted. We know the statistics: On almost every single socioeconomic indicator, from infant mortality to life expectancy, to employment to home ownership, black and Latino Americans in particular continue to lag far behind their white counterparts....To suggest that our racial attitudes play no part in these disparities is to turn a blind eye to both our history and our experience—and to relieve ourselves of the responsibility to make things right.

⁹ Some commentators suggest that the post-racial paradigm (with its more universal appeal) has replaced colorblindness (and its association with political conservatism) as the dominant ideology with regard to race in the United States. See, e.g., Cho, *supra* note 6 at 1598-99, 1645. Leaving aside the question of the extent to which post-racialism converges with or departs from colorblindness, this essay focuses on and assesses the latter as the ascendant judicial interpretation of equal protection.

This essay asks this normative question through an examination of *Ricci v. DeStefano*,¹⁰ a case involving contentious questions of racial equality in the New Haven, Connecticut, fire department. Scholarly commentary on *Ricci* has been considerable. Most of the commentary has focused on the case's implications for future litigation under Title VII¹¹ or has criticized the decision for putting the brakes on legislative remedies that had, prior to *Ricci*, led to decades of progress toward racial equality.¹² This article aims to look at how the 5-4 decision—which factored heavily into the Senate confirmation hearings of Justice Sotomayor¹³—can illuminate the running dispute over whether “colorblindness” or “color-consciousness” better captures the constitutional meaning of racial equality.¹⁴

I begin in Part I by offering a thumbnail account of the Supreme Court's view of racial classifications since the adoption of the 14th Amendment. Part II updates that history by describing the circumstances and outcome of the New Haven firefighters case from the perspective of Justice Kennedy's majority opinion. In Part III, I analyze Justice Ginsburg's forceful dissent in *Ricci* in light of arguments in Elizabeth Anderson's recent scholarship on racial integration. Finally, in Part IV, I consider the merits of three possible reasons—contra Colbert, Ginsburg and Anderson—to push for a colorblind conception of racial equality. While two of these commonly presented arguments are fatally weak, one is more persuasive. Colorblindness may be a poor reading of the 14th Amendment's Equal Protection guarantee, but overt color-consciousness has its costs as well. In my Conclusion, I suggest that “color-wariness,” for lack of a better term, may be the optimal strategy for policymakers and government officials.

¹⁰ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

¹¹ See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010) (outlining three possible readings of the disparate impact provision of Title VII that are consistent with the Court's decision in *Ricci*); Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci* and PICS, 16 MICH. J. GENDER & L. 397 (2010) (arguing that equal protection doctrine in the wake of *Parents Involved* and *Ricci* permits government actors to address specific identifiable instances of unequal treatment but does not countenance remedial legislation to end structural racial and gender discrimination); Michael Zimmer, *Ricci's Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*, Loyola University Chicago School Of Law Public Law & Legal Theory Research Paper No. 2009-0020, available at <http://ssrn.com/abstract=1529438> (last accessed March 2, 2011), 5 (claiming that *Ricci* may make it easier to advance plaintiffs' claims in disparate treatment cases and thereby promote “the general antidiscrimination agenda”); Charles Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. L. REV. COLLOQUY 201 (2009) (suggesting that, post-*Ricci*, Congress may need to amend the Civil Rights Act of 1964 in order to enable policymakers to address racially disparate impacts).

¹² See, e.g., Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 8 UCLA L. REV. 73 (2010) (arguing that *Ricci* disingenuously reframes racial discrimination as bias against whites and spins efforts to develop fairer employment tests as favoritism for minorities) and Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case and the Triumph of White Privilege*, Boston College Law School Faculty Papers, Paper 310. Available at <http://lawdigitalcommons.bc.edu/lsp/310> (last accessed March 2, 2011); forthcoming in S. CAL. REV. L. & SOC. JUST. (2011) (critiquing employment testing trends and arguing that *Ricci* upends decades of progress in reducing unequal representation of minorities in firehouses).

¹³ Suzanne Sataline et al., *A Sotomayor Ruling Gets Scrutiny*, WALL ST. J., May 29, 2009, at A3.

¹⁴ These interpretations of race equality have been dubbed the “anticlassification” and “antisubordination” principles, respectively. See Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004). In a recent article, Siegel identifies a third “analytically distinct” principle of “antibalkanization” held by “race moderates” on the Supreme Court. Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278 (2011). I analyze and critique this position in the Conclusion, *infra*.

I. A SHORT HISTORY OF COLORBLINDNESS AND ITS CRITICS

The turn toward a colorblind interpretation of equality in *Ricci v. DeStefano* has a legal context that is worth spending a few pages unfolding before turning to the New Haven firefighters case itself. As Andrew Kull demonstrates in *The Color-Blind Constitution* (1992), there is no evidence that the framers of the Fourteenth Amendment intended to “require color blindness on the part of government.”¹⁵ In fact, there is ample evidence to the contrary. In 1865, members of Congress considered several proposed amendments that would have prohibited racial classifications altogether. One proposal, from Thaddeus Stevens, read as follows: “All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color.”¹⁶ This proposal and similar ones were eventually rejected in favor of a looser, less specific, and less demanding standard authored by Congressman John Bingham of Ohio: “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁷ This formulation became the Equal Protection Clause of the 14th Amendment. Explicitly bypassing an amendment that would have banned racial distinctions outright, the 39th Congress decided *against* a principle of colorblindness in the Reconstruction Amendments. The implications of such a decision, for the times, were worrisome:

The absence of any clear meaning to Bingham’s guarantee meant that its enforcement, in an unsympathetic climate, would narrow to the vanishing point. And although it added to the Constitution in so many words a promise of equal treatment, a guarantee of “equal protection,” unlike the rule of nondiscrimination, had no content of its own; it could impose no constitutional limitation independent of the social and political values of judges.¹⁸

These fears were not fully realized until several decades later, when *Plessy v. Ferguson* (1896) announced the doctrine of “separate but equal.”¹⁹ Before *Plessy*, some of the Court’s rulings in this area were encouraging from an egalitarian perspective. Eschewing a literal reading of the phrase “equal protection of the laws”—under which discriminatory laws may have been seen as constitutional as long as they are *applied* equally—the Court embraced a more meaningful standard. In *Yick Wo v. Hopkins* (1883), the Court clarified that “the equal protection of the laws is a pledge of the protection of equal laws.”²⁰ In striking down a San Francisco ordinance that discriminated against Chinese launderers, it also determined that the guarantee applies to groups other than African Americans.

¹⁵ ANDREW KULL, *THE COLOR-BLIND CONSTITUTION*, vii (1992).

¹⁶ *Id.* at 67.

¹⁷ U.S. CONST. amend. XIV, §1.

¹⁸ KULL, *supra* note 15, at 87.

¹⁹ 163 U.S. 537 (1896).

²⁰ 118 U.S. 356, 369 (1883).

The infamous decision in *Plessy* held that “reasonable” racial classifications were permissible under the Constitution.²¹ The Court held that an 1890 Louisiana law separating races on railcars was reasonable as a way to promote peace between the races. Justice Henry Brown wrote that the framers of the Fourteenth Amendment “could not have intended to abolish distinctions based on color.”²² More dubiously, he argued that any feelings of inferiority that may be felt by “colored” citizens riding in a separate car were “not by reason of anything found in the Act, but solely because the colored race chooses to put that construction upon it.”²³

In a vehement dissent, Justice John Harlan penned the first clear statement that the Constitution requires colorblindness. Following the disturbing and little-quoted passage affirming that the white race is the nation’s “dominant race” and “will continue to be for all time if it remains true to its great heritage,”²⁴ Justice Harlan drew a bright line between the reality of social inequality and the constitutional norm of political equality:

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.* In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.²⁵

On its face, Justice Harlan’s dissent presents an unsettling paradox for contemporary liberals who favor affirmative action and other color-conscious policies to heal racial inequalities. If we laud Justice Harlan’s dissent as a prescient nineteenth-century account of constitutional equality, we run into trouble when we examine the terms in which he made this argument. If the Constitution is in fact colorblind, and places an absolute prohibition on distinctions between citizens on the basis of race, no public university may favor racial minorities in admissions, no preference may be granted to minority-owned businesses in government contracting, and no consideration may be given to race when drawing voting district lines.

These conclusions clash with today’s prevailing liberal view of racial equality. But the ascendant theme animating much twentieth- and twenty-first-century Supreme Court jurisprudence on this issue is the aspiration toward colorblindness that we find in Justice Harlan’s *Plessy* dissent. It is the theory of constitutional equality first stated by a majority on the Court in a case in which racial classifications were (ironically) found

²¹ *Plessy*, 163 U.S. at 550.

²² *Id.* at 544.

²³ *Id.* at 551.

²⁴ *Id.* at 559 (Harlan, J., dissenting).

²⁵ *Id.* (emphasis added).

to be *consistent* with Equal Protection: *Korematsu v. United States* (1944). “All legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must be regarded with “the most rigid scrutiny,” Justice Black wrote.²⁶ But he claimed that the internment of Japanese Americans during World War II met that threshold: national security considerations were weighty enough to permit the government to take the striking move of forcibly removing a subset of American citizens from their homes and detaining them in internment camps.

This theory also animates the Court’s more recent rulings in cases such as *City of Richmond v. J.A. Croson Co.* (1989),²⁷ *Adarand Constructors, Inc. v. Peña* (1995),²⁸ *Gratz v. Bollinger* (2003),²⁹ and *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).³⁰ In each of these decisions, the Court evinced little tolerance for race-conscious attempts to ameliorate social ills caused by racial disadvantage or *de facto* racial segregation. In *Croson* and *Adarand*, the Court struck down state and federal affirmative action plans for minority businesses, applying a strict-scrutiny standard according to which any use of racial classifications must be narrowly tailored toward a compelling governmental interest. While not “fatal in fact,” according to Justice O’Connor’s majority opinion in *Adarand*,³¹ such a rule nevertheless sets a very high barrier to any categorization of individuals by race for the purpose of distributing social goods. In both *Gratz* and *Parents Involved*, the Court showed how close strict scrutiny comes to a colorblind principle. *Gratz* invalidated the University of Michigan’s racially conscious admissions policy designed to increase student diversity, while *Parents Involved* reversed decades of rulings upholding the constitutionality of local attempts to integrate formerly segregated public schools.

Alongside this ascendant interpretation of racial equality, however, is an intellectually powerful but much-battered rival: color-consciousness. This view suggests that not all racial classifications are alike: we must distinguish between malign classifications that target a disfavored group and those that are benign attempts to address racial inequities. This is the theory underlying the opinion of four justices in *Regents of the University of California v. Bakke* (1978).³² It also finds a (much) narrower expression in Justice Powell’s plurality decision in *Bakke* and in the Court’s ruling in *Grutter v. Bollinger* (2003),³³ where Justice Kennedy upheld the University of Michigan Law School’s admissions policy seeking a “critical mass” of students from certain racial minorities. Justice Brennan’s dissent in *Bakke* provides the most robust expression of the color-conscious view:

[C]laims that law must be “colorblind” or that the datum of race is no longer relevant to public policy must be seen as aspiration, rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and

²⁶ 323 U.S. 214, 216 (1944).

²⁷ 488 U.S. 469 (1989).

²⁸ 515 U.S. 200 (1995).

²⁹ 539 U.S. 244 (2003).

³⁰ 551 U.S. 701 (2007).

³¹ 515 U.S. 200, 237 (1995).

³² 438 U.S. 265 (1978).

³³ 539 U.S. 306 (2003).

oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many “created equal” have been treated within our lifetimes as inferior both by the law and by their fellow citizens. . . . Properly construed . . . our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have, and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.³⁴

Today, Justice Brennan’s insistence on a fundamental distinction between classifications that harm disadvantaged minorities and those which serve legitimate state aims fails to move many, or possibly any, members of the Supreme Court. Since *Adarand*, there is no such thing as a presumptively benign racial classification; all uses of race are suspect, and all are examined with great scrutiny. But this is not to say that the use of race by agents of the state is totally out of bounds from a constitutional point of view. While it now shrinks from Justice Brennan’s clear malign/benign distinction, the Court does permit race some sway in certain limited contexts. This narrow conduit for color-consciousness³⁵ is found even in cases where the colorblind forces prevailed. In the *Parents Involved* case, for example, Justice Kennedy (writing in concurrence) carved out some room for policies aiming at racial integration of the public schools through alternative—race-neutral—strategies:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, 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. These 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, so it is unlikely any of them would demand strict scrutiny to be found permissible.³⁶

For Justice Kennedy, the two great conceptions of racial equality reach something of a middle ground. On one hand,

[t]he idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.³⁷

³⁴ *Bakke*, 438 US at 327, 369 (1978).

³⁵ Siegel characterizes the jurisprudence of limited color-consciousness as “antibalkanization,” a principle concerned with “social cohesion” rather than with “remedy[ing] group inequality.” See Siegel, *supra* note 14, at 1282.

³⁶ *Parents Involved in Comm. Schools v. Seattle School Dist. No. 1*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

³⁷ *Id.* at 788.

But on the other hand, some awareness of race on the part of the state is necessary to address America's social problems: "In the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle."³⁸

II. RICCI: A NEW STANDARD OF COLORBLINDNESS

Justice Kennedy sounded a similar note in *Ricci v. DeStefano* (2009), providing the crucial fifth vote to invalidate a race-conscious decision involving firefighter promotions in New Haven, Connecticut. The issue in *Ricci* was statutory: it addressed the meaning of Title VII of the Civil Rights Act of 1964 (as amended in 1991), not the Equal Protection Clause of the 14th Amendment. But the meaning of racial equality is at stake in both the legislation and the Constitution—how the state may (or must) treat individuals with regard to their race if it hopes to treat them equally. And although the *Ricci* court did not resolve the constitutional question, there is reason to believe that the issues may be identical in the Court's eyes.³⁹

The decision that most dogged Sonia Sotomayor in her confirmation hearings in 2009 was her terse eight-sentence ruling in *Ricci* as a judge on the Second Circuit Court of Appeals. Sotomayor had ruled in favor of the City of New Haven and against nineteen firefighters who thought they had won promotions by scoring highly on standardized tests.⁴⁰ The firefighters sued the city when New Haven decided to throw out the results of these tests in 2004 after discovering that white candidates had vastly outperformed their minority counterparts. The City feared that if it were to certify the results of the examinations and promote firefighters to captain and lieutenant positions based on these racially disparate results, it would expose itself to a lawsuit under the disparate impact provision of Title VII. But the Supreme Court disagreed. A 5-4 majority held that failing to certify the results was the city's legal error. By discarding the tests, New Haven had illegitimately discriminated against the high-scoring firefighters (including one Hispanic candidate) "because of race."⁴¹ It was in violation of the disparate treatment provisions of Title VII. While it did not reach the constitutional question, several members of the Court—and almost certainly Justice Scalia, who wrote a short concurrence warning of a day of reckoning ahead—seemed ready to argue that it violated the 14th Amendment as well.⁴²

Much of the *Ricci* decision revolves around how to balance two provisions of Title VII that—on the Court's reading—lie in tension with each other. According to the disparate treatment rule, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁴³ But according to the disparate impact provision, which Congress added to the legislation in 1991, it may be

³⁸ *Id.*

³⁹ See Primus, *supra* note 11 at 1344: "Title VII's prohibition of disparate treatment and the Fourteenth Amendment's guarantee of equal protection are substantively interchangeable."

⁴⁰ 530 F.3d 87 (2008).

⁴¹ *Ricci*, 129 S.Ct. at 2674.

⁴² *Ricci*, 129 S.Ct. at 2682-83 (Scalia, J., concurring).

⁴³ 42 U.S.C. § 2000e-2(a)(1) (2006).

unlawful for an employer to use “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”⁴⁴

In other words, an employer is generally barred from treating employees differently based on their race *and* barred from making hiring or promotion decisions that operate to disadvantage members of a certain race, even if this disparate impact is unintentional. The Court’s decision in *Ricci* focused on how to reconcile these two provisions. Without a clear understanding of how the provisions fit together, employers could be caught between a rock and hard place: in treating individuals in a nondiscriminatory manner, unlawful disparate impacts on racial minorities may occur. But in efforts to avoid these adverse impacts, employers might illegally take account of race and be held liable for treatment discrimination.

Justice Kennedy explained the Court’s resolution to the impasse by prioritizing the two provisions. The disparate treatment rule constrains the disparate impact rule, in his eyes. That is, no employer needs to fear a lawsuit on the basis of disparate impact unless a specific, and quite tall, order is met. According to the statute, disparate impacts are not illegal if (1) they are associated with a hiring practice that is “job related for the position in question and consistent with business necessity,” and if (2) there existed no alternative, equivalent “job related” business practice that would have resulted in a smaller disparate impact. Just how tall an order is this? Justice Kennedy adopted a standard from 14th Amendment jurisprudence to make sense of it. Quoting *Croson*, Kennedy writes, “the Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.”⁴⁵ Absent a “strong basis in evidence” that its decision to discard the test results was “necessary” to ameliorate an adverse impact on racial minorities, New Haven acted illegally. This approach effectively negated the second prong of the disparate impact test: it made it unnecessary for the City to show that it could have promoted firefighters in a meaningful but not racially imbalanced way.

Why was Justice Kennedy so dismissive of New Haven’s defense? It was not for lack of a *prima facie* case of disparate impact liability. Indeed, as Kennedy acknowledges, the test results showed markedly lower scores for blacks and Hispanics. The pass rate on the lieutenant exam was 58.1 percent for the white candidates, 31.6 for blacks and 20 percent for Hispanics. On the captain exam, the results were equally stark: 64 percent of whites passed, compared to 37.5 percent of blacks and Hispanics.⁴⁶

These numbers, according to a standard set by the Equal Employment Opportunity Commission, clearly demonstrate a disparate impact.⁴⁷ But for Kennedy, none of this matters if New Haven had a good reason for promoting its firefighters with this test. And, he argued, it did. The test itself was racially neutral and unbiased toward white firefighters, according to Kennedy, and there was no “strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, by certifying the

⁴⁴ *Id.* § 2000e-2(k)(1)(A)(i).

⁴⁵ *Ricci*, 129 S.Ct. at 2675.

⁴⁶ *Id.* at 2678.

⁴⁷ *Id.* The EEOC’s so-called “80-percent” standard holds that a disparate impact exists where members of a protected race are chosen for a job or promotion 20 percent less frequently than are whites.

examination results, would necessarily have refused to adopt.”⁴⁸ The City’s arguments to the contrary were found to be unpersuasive. Although it could have devised another assessment originally—one that may have prevented or decreased the disparate impact on minorities—New Haven settled on *this* test as its tool for promotion and created a “legitimate expectation”⁴⁹ for all candidates that *this* test would be the standard. It could not, after the fact, use racially conscious means to close a racial gap.

III. ‘CONTEXT MATTERS’: A PLEA FOR COLOR-CONSCIOUSNESS

Justice Ginsburg began her dissenting opinion in *Ricci* by broadening the perspective from one episode in one small northeastern city regarding two tests and nineteen disgruntled firefighters. She urged consideration of the story in Connecticut in light of the history of “municipal fire departments across the country, including New Haven’s, [which] pervasively discriminated against minorities.”⁵⁰ Since 1972, when Congress extended Title VII to cover public employment, “decades of persistent effort” slowly opened the doors of fire departments to blacks and Hispanics. By ruling against the city in this case, Ginsburg argued, the Court is ordering that “New Haven, a city in which African Americans and Hispanics account for 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions.”⁵¹

Ginsburg’s impassioned dissent is helpful in putting the issue in context. The last sentence quoted from her opinion, however, may give the mistaken impression that diversity of fire departments should be pursued for aesthetic reasons. Fans of Justice Thomas may sneer in response just as Thomas characterized the University of Michigan Law School’s goal to create diverse student body as “racial aesthetics.”⁵² Justice Ginsburg’s phrasing elides the real reasons that racially integrated fire departments are a worthy goal. For a full analysis of those reasons, we can turn to philosopher Elizabeth Anderson’s book on the recent history and tragedy of racial segregation in the United States.⁵³

Anderson supplies a theoretically and empirically rich defense of integrationist policies, which she characterizes as the unfulfilled mission of the Civil Rights Movement. Her initial foils in the book are on the left—multiculturalists and black nationalists—and not the proponents of colorblindness on the Supreme Court. But she reserves space to critique the anti-integrationist forces on the right as well. For Anderson, both sets of intellectual opponents suffer from an under-appreciation of the evils of segregation—both *de jure* and *de facto*—and reject crucial remedies thereto. Throughout, Anderson abjures a group-based ontology, remaining individualist to the core. Her central claim, though, is that too often individuals in American society are dealt injustices in virtue of their membership in a particular racial group: “African-

⁴⁸ *Id.* at 2679.

⁴⁹ *Id.* at 2676.

⁵⁰ *Id.* at 2690 (Ginsburg, J., dissenting).

⁵¹ *Id.*

⁵² *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part).

⁵³ ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010).

Americans are worse off than the average American, and worse off than whites, on virtually all major objective measures of well-being.”⁵⁴ Blacks’ lives are five years shorter than whites’, on average; the black infant mortality rate is twice the national average; 25 percent of blacks are poor, compared to 8 percent of non-Hispanic whites; black men are 10.9 times more likely to be murdered than white men; black men have a 32.2 percent chance of serving time in prison over the course of their lives, compared to 5.9 percent for white men.⁵⁵

These widespread inequalities, Anderson then argues, are caused in large part by segregation. When neighborhoods, schools, workplaces, and public institutions manifest racial segregation, everyone suffers; but the results are particularly harmful for minorities. One dimension of the segregation effect on blacks is particularly relevant to the firefighters case: the “capital-mediated effects” of segregation.⁵⁶

Capital—in Anderson’s words, assets that constitute one’s socioeconomic standing or that serve as tools to raise one’s standing⁵⁷—may be analyzed in several distinct forms. Differentiating among financial, human, cultural, and social types, Anderson argues that segregation makes it difficult for blacks to acquire adequate supplies of any of the four. The class-race link is notorious: housing values in black neighborhoods are low, and rise much more slowly than values in white neighborhoods; blacks pay higher mortgage rates and hold riskier mortgages⁵⁸; blacks lack financial assets and intergenerational entrepreneurial skills, and thus have a much harder time starting businesses.⁵⁹ Because comparatively few blacks own their own businesses or secure elite jobs, one might expect to see a relatively higher representation of African Americans in careers like firefighting. But segregation-fueled inequalities in other forms of capital continue to keep them out of these positions as well. Specifically, segregation operates to severely limit blacks’ social and cultural capital: social networks that provide job-seekers with leads, information, connections, job skills and modes of job-appropriate conduct that are essential to finding and securing employment.⁶⁰ The effects of these discrepancies are highly significant:

Workers often use their personal networks to find out about job opportunities, with weak ties—mere acquaintances—providing a surprising number of successful leads. However, racial segregation depresses blacks’ access to white social networks. Such access is important because half of employers frequently recruit new employees by word-of-mouth through a firm’s employees or business contacts. If a firm is overwhelmingly white and recruits new employees by employee referral, segregation at work, school, churches, and neighborhoods practically guarantees that few blacks will learn about the firm’s job openings.⁶¹

⁵⁴ *Id.* at 24.

⁵⁵ *Id.* at 24-26.

⁵⁶ *Id.* at 33.

⁵⁷ *Id.* at 31.

⁵⁸ Michael Powell, *Banks Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES, June 7, 2009, at A16.

⁵⁹ ANDERSON, *supra* note 53, at 33-34.

⁶⁰ *Id.* at 33-39.

⁶¹ *Id.* at 35.

With the benefit of this analysis, we can confront the elephants in the room: Why did the minority firefighters do so poorly on the captain and lieutenant exams? Why do inequalities in fire departments remain so stark, nearly 50 years after passage of the Civil Rights Act?⁶² According to Justice Ginsburg's account, inequality of human and social capital are the likely culprits. After the racially disparate results of the exams came to light, some firefighters argued that "unequal access to study materials"⁶³ was to blame:

Some individuals, they asserted, had the necessary books even before the syllabus was issued. Others had to invest substantial sums to purchase the materials and "wait a month and a half for some of the books because they were on back-order." These disparities, it was suggested, fell at least in part along racial lines. While many Caucasian applicants could obtain materials and assistance from relatives in the fire service, the overwhelming majority of minority applicants were "first-generation firefighters" without such support networks.⁶⁴

This clear inequality of social and cultural capital can help explain why minority candidates underperformed compared to their white peers on the standardized exam, and why similar exams have, for years, produced similar results in other cities. Justice Ginsburg also noted that the exam may have been of limited value in assessing the skills of a firefighter occupying a position of leadership—and no evidence exists that the exam or its 60/40 weighting of the written and oral sections was "business related" or necessary to the success of the fire department.⁶⁵ Alternative assessments—exams more heavily weighted toward an oral component or on-the-job simulations conducted at assessment centers—could more accurately measure the problem-solving skills essential to quick decision making in emergencies.⁶⁶ These assessments, when used in other locales, have demonstrated two virtues: more targeted measurement of firefighting skills and reduced disparate impact on minority applicants. So while the test itself may have been "facially neutral" and not "racist," there seemed to be alternative, equally valid assessments much less likely to result in a gross racial inequality.⁶⁷ In other words, New Haven would not have passed the second prong of

⁶² Another prominent example is the fire department of New York City. In 2007, the city's black residents made up 25.6 percent of the population while only 3.4 percent of its firefighters were black. In January 2010, a federal judge ruled that New York was liable for racial discrimination by continuing to use an examination it knew operated to exclude black and Hispanic applicants. See Al Baker, *Judge Cites Discrimination in N.Y. Fire Department*, N.Y. TIMES, January 14, 2010, at A30.

⁶³ *Ricci*, 129 S.Ct. at 2706 (Ginsburg, J., dissenting).

⁶⁴ *Id.* at 2693.

⁶⁵ *Id.* at 2699, note 5.

⁶⁶ See generally Brodin, *supra* note 12. Brodin describes the history of employment testing beginning in 1850, *Id.* at 45-46, and criticizes the multiple choice tests as "having little relation to job success." *Id.* at 51. He notes that practical assessments are commonly recognized as superior measures of firefighter competence: "Multiple assessors observe and rate how candidates actually handle the problems and challenges of the job as they role-play while viewing videos of a fire scene, respond to questions and formulate appropriate orders. Some 60% to 70% of fire departments reportedly now use them, and there is a consensus among industrial psychologists that, as measures of skills rather than knowledge, they are better predictors of job performance than other forms of promotional testing." *Id.* at 62 (citations omitted).

⁶⁷ *Ricci*, 129 S.Ct. at 2704-5 (Ginsburg, J., dissenting)..

the test to determine which disparate impacts are legal, and would have been liable for damages under disparate impact law had minority firefighters sued the city. For this reason, canceling the results of the exam was a proper move in the eyes of Justice Ginsburg. It was color-conscious decision, to be sure, but it was motivated by the goal of averting a racially disparate impact on minority applicants—a legal requirement of the Civil Rights Act.

IV. THREE DEFENSES OF COLORBLINDNESS

I noted in the introduction that colorblindness is enjoying a resurgence of support in the courts and in political culture.⁶⁸ With the advent of Obama's presidency, it is perhaps too easy to claim that the United States has progressed beyond a period in which, to use Justice Blackmun's words, "in order to get beyond racism, we must first take account of race. There is no other way."⁶⁹ Today, maybe there is a way. Maybe, despite Anderson's analysis, racism is waning on its own, pushed along by larger numbers of prominent African-American public figures in the limelight and particularly by the election of our first president with African roots.

But this diagnosis is too easy, too quick. Racism has not ended in America; it pervades our cities. Segregation is a fact of our public schools.⁷⁰ Blacks in prestigious professions earn 72 cents for every dollar earned by whites.⁷¹ Race is still fueling inequalities in wealth, longevity, education, and political standing.⁷² So, if we are to adopt a colorblind perspective on equality, the arguments must be very persuasive.⁷³ Below I consider three such arguments, in increasing levels of plausibility. The first, from Chief Justice John Roberts, is the defense provoking the easiest refutation—though it is the most influential. The second, advanced by legal historian Andrew Kull, puts forward a pessimistic account of the ability of political actors to handle racial matters in a principled and reasoned way. It too, despite some persuasive elements, fails to justify a *per se* rule against color-conscious policies. A third defense, coming from the radical left rather than from political conservatives, is built upon a more compelling foundation. Barbara Jeanne Fields's theorizing about racial ideology overreaches but has some lessons for contemporary liberals. Although her complete intolerance for racial identification seems difficult to fathom, Fields has a point worth pondering as liberals develop more strategic, less overtly race-based policies for improving racial equality.

A. Colorblindness Defense #1: Chief Justice Roberts' Faulty Tautology

The first defense of colorblindness to examine comes from the Chief Justice of the United States, John G. Roberts, Jr. In a plurality opinion he authored in the 2007 case

⁶⁸ See *supra* notes 6-9 and accompanying text.

⁶⁹ *Bakke*, 438 U.S. at 407 (Blackmun, J., dissenting in part and concurring in part).

⁷⁰ See generally GARY ORFIELD & CHUNGMEI LEE, *RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION*, Cambridge, MA: The Civil Rights Project at Harvard University (2006).

⁷¹ See William M. Rodgers III, *Understanding the Black-White Earnings Gap*, *AMERICAN PROSPECT* (Sept. 22, 2008), http://prospect.org/cs/articles?article=understanding_the_black_white_earnings_gap.

⁷² See ANDERSON, *supra* note 53, chapters 2-4.

⁷³ For a summary of additional statistical data on racial inequality in the United States, see Barnes, Chemerinsky & Jones, *supra* note 6 at 982-91.

striking down racially based student assignment policies in Louisville and Seattle, Chief Justice Roberts concluded his argument with this much-quoted sentence: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁷⁴ In order to unpack the reasoning behind this tautology, we need to look closely at the arguments directly preceding it. (Tautologies do not necessarily make for incoherent arguments. As Wittgenstein hinted, a proper tautology can actually be illuminating.⁷⁵)

Roberts built his contention on two premises concerning the negative effects of race-conscious policies. The first and more general premise states that “the costs [of racial classifications] are undeniable.”⁷⁶ When the government classifies by race, Roberts wrote, it engages in a practice that is “odious to a free people” (citing *Adarand v. Peña*)⁷⁷; it “promotes ‘notions of racial inferiority and leads to a politics of racial hostility’” (citing *Richmond v. Croson*)⁷⁸; and it “‘demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities’” (citing *Rice v. Cayetano*).⁷⁹ In cobbling together language from these disparate opinions concerning other types of race-based policies, Roberts suggested that all are of a piece: whether the context is government contracting, voting district lines, or elections of state officers, taking account of race is despicable in concept and pernicious in effect. But it is unclear how any of these cases is apposite to the issue of racially based school assignment policies in *Parents Involved*—the case that was actually before the Court. For example, in contrast to an affirmative action case, the issue in *Parents Involved* had absolutely nothing to do with “judging” students on the basis of their race; the plan to promote a racially integrated school system neither drew upon nor communicated any assumptions about the capacities or merits of members of any race. It was designed only to avoid *de facto* segregation of the schools, heralding integration as beneficial to all students.⁸⁰

Roberts’ second premise, while more attuned to the specific context of K-12 public education, is even more problematic; it is demonstrably self-defeating. Turning back to the *Brown v. Board of Education* decision for support, Roberts described the rationale this way: “[W]e held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because *government classification and separation* on grounds of race themselves denoted inferiority.”⁸¹ Readers might be tempted to reflexively accept Roberts’ characterization of the *Brown* holding, for *Brown* did indeed focus on “the effect of segregation...on public education” and concluded that “to separate [children] from others of similar age and qualifications solely because of their race generates a

⁷⁴ *Parents Involved*, 551 U.S. at 748.

⁷⁵ See, e.g., LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 34, 60 (trans. D.F. Pears and B.F. McGuinness, 1974): “Tautologies and contradictions are not, however, nonsensical” (4.4611); “The fact that a tautology is yielded by *this particular way* of connecting its constituents characterizes the logic of its constituents” (6.12). On these terms, we mischaracterize Roberts’ statement if we label it a tautology: as I show below, its constituents are not locked in logical reflexivity.

⁷⁶ *Parents Involved*, 551 U.S. at 746.

⁷⁷ 515 U.S. at 214.

⁷⁸ 488 U.S. at 493.

⁷⁹ *Parents Involved*, 551 U.S. at 746.

⁸⁰ See generally *Id.* at 701.

⁸¹ *Id.* at 764 (emphasis added).

feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁸² All this *Brown* did say. But it did not say, contrary to Roberts’s claim, that “government classification” by race was to blame for the sense of inferiority felt by black children. *Separation* is the problem, according to the *Brown* court, not *classification*. Roberts thus fudged by slipping in a word—“classification”—not found anywhere in the text of the *Brown v. Board* decision.⁸³ The implications of this disingenuous reading of *Brown* are huge. If Roberts is to make his case that all racial classifications are equally suspect—whether they are used to segregate the races or to integrate them—he needs to look elsewhere.⁸⁴

The extent of Roberts’ misreading becomes clear in this passage of his opinion where he referenced *Brown*: “It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.”⁸⁵ (“ ‘The impact [of segregation] is greater when it has the sanction of the law’ ”).⁸⁶

This quoted passage asserts that segregation has a more profound effect on the hearts and minds of black children when it is *de jure* rather than *de facto*. The force of law behind a separation of the races exacerbates the stigma and makes it more difficult for black students to learn effectively. But this implies that even *de facto* segregation has some significant negative effect on black children. The quote from *Brown* continues beyond Roberts’ citation: “Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.”⁸⁷

Brown thus tells us two things, both missing from Roberts’ analysis: (1) Racial segregation of students in public schools—whether *de jure* or *de facto*—is damaging to the educational experience of black children; and (2) integrated school systems bring educational benefits to black students.⁸⁸ It is a mystery how Roberts can draw upon *Brown* to argue that a school district violates the 14th Amendment when it attempts to cure *de facto* segregation with a race-conscious policy aiming to provide an integrated school system. Nothing in the logic of *Brown* precludes such a solution.⁸⁹

We return, then, to the Chief Justice’s pithy but pitiable tautology.⁹⁰ On what basis can he claim that “the way to stop discrimination on the basis of race is to stop

⁸² *Brown v Board of Education*, 347 U.S. 483, 494 (1954).

⁸³ See Siegel, *supra* note 14, at 1547, for an account of how the anticlassification principle “emerged from struggles over the ... enforcement” of *Brown* but was not found in the decision itself.

⁸⁴ Chief Justice Roberts might have turned to *Brown, et al. v. Board of Education of Topeka, et al.*, 349 U.S. 294 (1955), to try to make his point, where Chief Justice Warren uses the term “racial discrimination” five times. *Id.* at 298-299. But only an untenably reductionist understanding of “discrimination” as “any classification whatsoever” would lend support to Roberts’ view. Under such a broad reading of “discrimination,” the U.S. Census, which groups individuals into fifteen racial and ethnic categories, would be a gross violation of the 14th Amendment.

⁸⁵ See *Brown*, 347 U.S. at 494.

⁸⁶ *Parents Involved*, 551 U.S. at 746 (quoting *Brown*, 347 U.S. at 494).

⁸⁷ *Brown*, 347 U.S. at 494, quoting the District Court which had decided the case below (emphasis added).

⁸⁸ See generally *Brown*, 347 U.S. 483.

⁸⁹ As Justice Breyer argued in his *Parents Involved* dissent, the logic of *Brown* may actually necessitate such measures. See 551 U.S. at 825 (2007).

⁹⁰ For another critique of Chief Justice Roberts’ perspective, see John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 789 (2008). According to Powell, “the conservative mode of race blindness has been at times extremely callous” in failing to take account of the lived reality of racial inequality *Id.* at 787;

discriminating on the basis of race”? This statement is meant as a truism: “to put an end to the evil x, stop doing x. Period.” But x_1 and x_2 are not identical in this case. We can assign x_1 as “official government policies that take account of race,” while x_2 is “mistreatment of individuals on the basis of their race by the government, social institutions, and individual citizens.” Ending official uses of race would entail no similar change of policy on the part of social institutions or private citizens who may continue to discriminate against racial minorities in myriad ways, whether consciously or not. As the history of racial inequality in the United States demonstrates, discrimination can proceed apace even as state-action discrimination ebbs. And as Anderson shows in her book, segregation has harmful effects on racial minorities that go well beyond the harms stemming from discrimination.⁹¹ Chief Justice Roberts’ plea for colorblindness is based on faulty readings of precedent and errors of logic.

B. Colorblindness Defense #2: Andrew Kull’s Radical Pessimism

In *The Color-Blind Constitution* (1992), Andrew Kull is mainly concerned with detailing the history of race-blind and race-conscious understandings of equality in the United States, both before and after the adoption of the 14th Amendment. The book has been praised as a piece of detached legal history, un-slanted by an agenda. “Being a work of history,” Alex Kozinski wrote in his review, “Kull’s book is primarily an objective summary of the past, rather than a blueprint for the future.”⁹² This is not quite right. While its main aim is to track the development of the colorblindness ideal through American legal history in an even-handed way, *The Color-Blind Constitution* is not shy about taking a position on that ideal. Kull approves of the concept. In fact, he asserts that any other understanding of the 14th Amendment is fraught with intractable problems.

Kull’s embrace of colorblindness proceeds on a quite different trajectory from that which informs Chief Justice Roberts’ view. Where Roberts produces unpersuasive tautologies conflating all forms of color-consciousness with illegitimate discrimination, Kull advances a more nuanced view. And unlike Roberts, who tendentiously hails *Brown v. Board* as a triumph of colorblindness, Kull excoriates Chief Justice Warren for writing a “historically and legally jejune” opinion in one of the twentieth century’s most important cases.⁹³ Kull argues not with the *Brown* holding, but with the rationale that “separate” educational facilities were—because of their negative effects on black children—inherently unequal. This move, for Kull, was an “artificial,”⁹⁴ disingenuous explanation for a ruling that should have been justified on far broader grounds.

Kull has a point. In the segregation decisions that followed *Brown*, the Court curiously applied the same ill-fitting “separate is inherently unequal” principle to non-

“Colorblind conservatives purport not to be concerned with racial conditions, but only with purity of mind with respect to intent. They see the evil to be guarded against as the noticing of race—the psychological state, not the condition of racial groups and the distribution of opportunity itself” *Id.* at 788.

⁹¹ See ANDERSON *supra* note 53, ch. 4.

⁹² Alex Kozinski, *Color and Caution: Reviewing “The Color-Blind Constitution,”* THE NEW REPUBLIC, Feb. 1, 1993, at 72.

⁹³ KULL, *supra* note 15, at 152.

⁹⁴ KULL, *supra* note 15, at 155.

educational settings in civil society. Legally segregated public beaches,⁹⁵ buses,⁹⁶ city parks,⁹⁷ and golf courses,⁹⁸ among other examples, all soon became violations of the Equal Protection guarantee. But as Kull writes, “in each instance, the Court struck down the challenged practice without any explanation at all” and simply cited the *Brown* rule in a series of *per curiam* decisions.⁹⁹ It borders on ridiculous, Kull implies, for the Court to try to justify desegregating golf courses on the same logic that animated *Brown*. Imagine how such reasoning would spin out: under the cloud of segregation, black golfers would be psychologically harmed and wouldn’t be able to hit the ball with as much force or accuracy, feeling that they had been branded as inferior players by a rule keeping the races separate on the greens. For Kull, nondiscrimination should not be contingent on a footnote full of social science studies demonstrating the psychological harm of racial segregation.¹⁰⁰ Such a ruling leaves the *Brown* result vulnerable, theoretically, to new studies contesting the purported link between separate-race schools and lower levels of educational achievement among blacks. For Kull, only a broad ruling that racial distinctions are *per se* illegitimate under the 14th Amendment can supply the real rationale behind desegregation.

Kull argues that a blanket, colorblind “nondiscrimination principle” is what judges should find in the 14th Amendment.¹⁰¹ The only alternative is a strategy that permitted the court to find separate railcars consistent with the 14th Amendment in *Plessy v. Ferguson*. If some types of color-consciousness are allowed, “racial preferences are permissible that strike a majority of the justices, for whatever combination of reasons, as reasonable under the circumstances.”¹⁰² Kull argues that this alternative to a *per se* rule against racial categorization is bound to be applied in a capricious manner. It has led justices to a series of unprincipled rulings, many of them 5-4 decisions with scores of conflicting written opinions, in which a racial classification seemed reasonable or struck a majority as unsuitable.¹⁰³ This, for Kull, is no way to interpret the Constitution. Nor is the method of asking whether a racial classification serves a “compelling governmental interest” and is “narrowly tailored” to that purpose.¹⁰⁴ All of these “arid” distinctions do nothing to constrain justices or guide their decisions; they only provide more complex adjudicative frameworks for hiding their subjective judgments about what types of racial policies are “reasonable” and which are not.¹⁰⁵

⁹⁵ *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955)

⁹⁶ *Gayle v. Browder*, 352 U.S. 903 (1956)

⁹⁷ *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958)

⁹⁸ *Holmes v. Atlanta*, 350 U.S. 879 (1955)

⁹⁹ KULL, *supra* note 15, at 160.

¹⁰⁰ Some scholars rightly downplay the role of the social science research in justifying the *Brown* holding and argue that psychological harms suffered by black students are not the root problem with segregated schools. According to Elizabeth Anderson and Richard Pildes, the real impetus behind the *Brown* ruling, and the subsequent Equal Protection decisions that Kull mentions, was the expressive injury of segregation. Whether or not a black golfer feels inferior on a segregated course, segregation is unconstitutional because of its expressive meaning: such a separation marks black citizens with the stigma of untouchability. See Elizabeth Anderson & Richard Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 at 1542-1543.

¹⁰¹ KULL, *supra* note 15, at 222.

¹⁰² KULL, *supra* note 15, at 210.

¹⁰³ KULL, *supra* note 15, at 210.

¹⁰⁴ KULL, *supra* note 15, at 210.

¹⁰⁵ *Id.* at 210.

Kull's argument is made with additional force and clarity by Justice Thomas in his *Parents Involved* concurrence.¹⁰⁶ Thomas echoed Kull's concern that judges, legislators and local school board officials are ill equipped to wield the tool of racial classification.¹⁰⁷ Entrusting decisions involving race to these individuals, Thomas warned, is to invite the return of pernicious discrimination.¹⁰⁸ Harking back to decisions in which the Court upheld "reasonable" racial distinctions, he asked,

Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.¹⁰⁹

"If our history has taught us anything," Thomas concluded, "it has taught us to beware of elites bearing racial theories."¹¹⁰ For both Kull and Thomas, the patron saint of the 14th Amendment is Justice John Marshall Harlan, author of the dissent in *Plessy v. Ferguson*. Here, again, is Harlan's most celebrated passage:

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.* In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.¹¹¹

Normally circumspect, Kull can't help himself when searching for the right adjective to describe Harlan's dissent. Gushing, Kull calls Harlan's opinion not only "famous" and "celebrated," but "majestic," "luminous" and even "breathtaking."¹¹² He's a fan. Kull sees Harlan's essential insight this way: "[C]lassification by race, regardless of its reasonableness in a particular instance, is beyond the legislative competence."¹¹³ Pointing to a radical pessimism that he claims to share with Harlan, Kull explains the fundamental reason for a strict rule of colorblindness:

Harlan's famous dissent in *Plessy* is customarily praised as a glowing affirmation of human rights, but its darkly skeptical premise is that American society is incapable of benign self-government on the fatal issue of race. Brown's opinion for the majority, though unpalatable for its racist assumptions, embodies an optimistic political response: the confidence that

¹⁰⁶ *Parents Involved*, 551 U.S. at 781-82 (Thomas, J., concurring).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 780-81.

¹¹¹ *Plessy*, 163 U.S. at 559 (emphasis added).

¹¹² KULL, *supra* note 15, at 1, 113, 1, 119, 124.

¹¹³ *Id.* at 123.

on the issue of race as on any other, American government (subject to the vigilant oversight of judges) can ameliorate our social condition by choosing good measures over bad ones.¹¹⁴

Kull's worry is that judges and legislators cannot be entrusted with the responsibility to make decisions about what types of race-based policies are legitimate and which are not. Harlan "was careful to place the legal objection on racially neutral grounds," Kull argues, and gives us good reason to "abjure altogether" those "tools of government we know to be capable of much harm."¹¹⁵

As an argument for colorblindness, Kull's appeal is more coherent and historically attentive than that of Chief Justice Roberts. But for four reasons, his claims are unpersuasive. The first follows from Elizabeth Anderson's reasoning discussed above in Part III: a principle of colorblindness would preclude solutions to scores of race-related inequalities in the United States today. In the name of strict adherence to a *per se* rule, racial oppression and segregation—and countless inequalities—would continue to define American society. Second, Kull's reading of Justice Harlan's *Plessy* dissent fails to appreciate the clear anti-caste flavor of his message. When Harlan wrote "there is in this country no superior, dominant, ruling class of citizens"¹¹⁶ in the eyes of the law or the Constitution, he was criticizing official government actions that impose or entrench racial hierarchies. He did not "abjure altogether" the consideration of race by government officials; in fact, Harlan was obviously conscious of the meanings of race and racial politics in the post-Reconstruction era.

Third, and related, Kull's skepticism reaches too far. By his logic, race is a subject that is simply untouchable by any public official. Public policy must be not only race-neutral but also unmotivated by any racial goals. Thus, even the top ten percent plan instituted in 1998 in Texas¹¹⁷—designed, in a rather clumsy way, to increase the proportion of racial minorities in the state university system—would be precluded by Kull's principle. For Kull is clear that the problem with race-based legislation is the mistaken assumption that we can trust anyone to decide which racially based measures are reasonable and which are not. He derides "benign racial sorting" as an oxymoron. This applies just as strictly to race-conscious, facially neutral policies as it does to overt racial distinctions.

Fourth, and perhaps most damning, Kull's profound lack of faith in the ability of judges to exercise reason and judgment when handling matters of race would entail a *reductio ad absurdum* with regard to vast areas of constitutional law. In jurisprudence, absolutes are relative. Look at the Establishment Clause, or any of the guarantees of the First Amendment. All are stated in absolutist terms; they are a series of apparently *per se* rules forbidding Congress (and later, through incorporation, the states and local governments) from passing laws limiting freedom of speech, freedom of assembly, or

¹¹⁴ *Id.* at 130.

¹¹⁵ *Id.* at 224.

¹¹⁶ *Plessy*, 136 U.S., at 559.

¹¹⁷ TEX. EDUC. CODE ANN. § 51.803(a) (West 2010). See also Jim Yardley, *Desperately Seeking Diversity: The 10 Percent Solution*, N.Y. TIMES, April 14, 2002, at 4A (describing the Texas policy whereby students in the top ten percent of their high school graduating classes are admitted to a state university).

freedom of religious practice: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹¹⁸

A literal, strict reading of these provisions (“no law”) would preclude bans on false advertising, direct incitement to violence, obscenity or libel. Freedom of religious practice, it turns out, is actually a right to religious belief—not action—and is routinely limited in ways that cohere with state interests.¹¹⁹ And there is nothing about a Christmas tree or an 18-foot menorah on public property that amounts to an “establishment” of religion, in the eyes of the Court.¹²⁰ Now, there might be good reasons for the exceptions the Court has carved out to these otherwise absolutist pronouncements of the Constitution, but that is exactly the point. There are excellent—and necessary—exceptions to a *per se* no-racial-distinctions rule as well. Even if the 14th Amendment included such a nuance-free provision, colorblindness would remain partial at best. In a representative democracy, there is no choice but to entrust certain individuals with the power to make policy and render judgments concerning sensitive and contentious matters. Kull’s fear of racial classifications is really a fear of democracy itself.

C. Colorblindness Defense #3: Barbara Fields on Racial Ideology

Chief Justice Roberts and Andrew Kull both advance bold defenses of colorblindness in 14th Amendment jurisprudence. But as we have seen, both fail to justify this principle. Roberts’s argument is disingenuous and illogical, while Kull’s misreads Justice Harlan and untenably undermines the legitimacy of democratic self-government. Another scholar, though she overstates her case, gives voice to a more empirically and theoretically sound objection to color-conscious policy-making. This perspective comes from American historian Barbara Jeanne Fields.

In her much-discussed 1990 article,¹²¹ Fields makes three main contentions. Fields’ first point is the now-familiar and near-universally accepted idea that race is “real” only in the sense that it is a social fact, an ideology that governs our thinking and social practices. Believing that race is a “physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists” is akin to believing that Santa Claus or the Easter Bunny are anything but fictional characters.¹²² Second, she claims, contrary to the conventional wisdom, racism did not fuel the rise of American slavery from the seventeenth to nineteenth centuries. Instead, racial ideologies grew *out* of the institution of slavery as ways to justify the oppression of African slaves.¹²³

¹¹⁸ U.S. CONST. amend. I.

¹¹⁹ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (upholding the constitutionality of a law that banned polygamy, a religious teaching the Mormon church at the time): “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”

¹²⁰ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that although a crèche in the Allegheny County courthouse violated the Establishment Clause, menorah and Christmas tree displays did not).

¹²¹ Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, *NEW LEFT REV.*, May/June 1990, at 95.

¹²² *Id.* at 96.

¹²³ *Id.* at 106.

Fields' third point brings her historical analysis to the present and sketches a critique of race-conscious decisions akin to the choice that New Haven made—illegally, in the Supreme Court's eyes—with regard to its firefighters.

This argument sprouts from Fields' analysis of ideology. She argues that ideologies develop in the context of specific societal institutions and practices, and they are sustained only so long as those institutions and practices endure.¹²⁴ In contrast to many other accounts of race, which hold that race “takes on a life of its own” after the historical conditions that give rise to it pass, Fields' version holds that race and racial prejudice will disappear when they are no longer being re-created in the media, in politics, in schools and in daily interactions.¹²⁵ If we still face a “race” problem, then it is our responsibility to root it out ourselves:

[R]ace is neither biology nor an idea absorbed into biology by Lamarckian inheritance. It is ideology, and ideologies do not have lives of their own. Nor can they be handed down or inherited: a doctrine can be, or a name, or a piece of property, but not an ideology. If race lives on today, it does not live on because we have inherited it from our forebears of the seventeenth century or the eighteenth or nineteenth, but because we continue to create it today.¹²⁶

Who creates race today? Not only racists, not only white supremacists, but well-intentioned people who remain convinced that human beings are best categorized in racial terms, or who take official actions “because of race.” That includes a mother who laughs when her four-year-old calls a friend “brown” rather than black, and it includes “the Supreme Court and spokesmen for affirmative action.”¹²⁷ Liberals who advocate color-conscious policies are “unable to promote or even define justice except by enhancing the authority and prestige of race; which they will continue to do forever so long as the most radical goal of the political opposition remains the reallocation of unemployment, poverty and injustice rather than their abolition.”¹²⁸

For Fields, then, rooting out racism can be accomplished in only one way: by ignoring race entirely. Considering the *Ricci* case through this lens, we could say that New Haven verified and re-created race when it made the decision to throw out the test results. Had it chosen to stick to a colorblind view—in which race simply does not matter to its decision-making—Fields might well argue that the public spectacle of *Ricci v. DeStefano* would have been avoided. It may be implausible to require individuals to banish thoughts of race from their minds—as Stephen Colbert's satire suggests—but there is nothing far-fetched about the prospect of ignoring the racially disparate character of exam scores and promoting firefighters on their basis. With such a colorblind policy, on Fields' view, fewer observers would have been alerted to the poor performance of test-takers from traditionally disfavored minority groups. No Republican senator would have held a racially divisive legal decision over the head of

¹²⁴ *Id.* at 110.

¹²⁵ *Id.*

¹²⁶ *Id.* at 117.

¹²⁷ *Id.* at 118.

¹²⁸ *Id.* at 117-18.

the first Hispanic Supreme Court nominee.¹²⁹ And no one would have complained of yet another episode of “reverse discrimination” against whites. The flames of racial resentment and hatred would have been quelled, not stoked, and the currency of race itself would have declined.

CONCLUSION: FROM COLORBLINDNESS TO “COLOR-WARINESS”

Part IV considered three possible lines of reasoning that might lead us to adopt the colorblind understanding of equality in *Ricci*. Chief Justice Roberts’s tautology that racial discrimination is overcome only by refusing to draw racial distinctions was exposed as a disingenuous and fallacious reading of *Brown v. Board of Education*. The racial inequalities that prevail in many of our public schools, universities, fire departments, neighborhoods, and work places are not rooted in the bare fact of a policy that distinguishes between individuals based on race. The root of the problem is segregation. That today’s segregation is *de facto* rather than *de jure* does little to ameliorate its negative effects on the lives of individuals and on civil society.

Demanding colorblindness in a color-conscious world is to give in to prevailing racist attitudes and patterns of discrimination. Andrew Kull’s alternate approach to defending colorblindness is pragmatic rather than principled: we should remove the issue of race from the portfolios of policymakers and judges altogether because we cannot trust them to exercise good judgment in racial matters. Kull builds his argument, though, on a distorted reading of Justice Harlan’s *Plessy* dissent, an uncritical faith in the workability of *per se* rules in constitutional law, and an untenable skepticism about the ability of judges to exercise judgment.

Barbara Fields is the only author whose arguments concerning race should give us pause and counsel “color-wariness” when using racial categories to address racial injustice. If the point of the 14th Amendment and of civil rights legislation is to move toward a society in which color, ethnicity, gender, and national origin do not determine an individual’s career prospects, educational opportunities, or life chances, some overtly race-conscious policies may put a damper on that pursuit even as they also achieve some gains in decreasing segregation. This is because race *is* an ideology: it is a set of assumptions about human beings that animate all kinds of private and public social institutions and interactions.

Let me be clear: *Ricci* was wrongly decided. The majority opinion callously dismissed alternative, less racially divisive, and more useful assessments that New Haven could have used in promoting its firefighters. It invalidated state efforts to ameliorate one of our society’s most damaging and most entrenched inequalities. Nevertheless, it seems clear that the phenomenon of *Ricci*—and particularly its coverage in the media—made matters worse for race relations and the cause of racial equality in New Haven, in fire departments nationwide, and in the United States as a whole. Integration of our workplaces and schools is a significant value in its own right. But integration through overt race-consciousness—when there are readily identifiable losers, as were the high-scoring white firefighters in this case—comes at a cost.

¹²⁹ Liz Halloran, *Conservatives Redraw Plan of Attack on Sotomayor* (Nat’l Pub. Radio broadcast June 10, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=105173070> (last visited Feb. 24, 2011).

In speculating on the future of disparate impact law after *Ricci*, constitutional theorist Richard Primus sketches three possible roads that the Supreme Court may take. One such road—the “visible victims” path—takes its cue from reasoning much like that which flows from Fields’ worry about the re-creation of racial ideologies through overt attentiveness to race. According to Primus’s analysis, in the next few years, the Court might choose to interpret the *Ricci* rule to prohibit race-conscious policymaking and government actions only under circumstances in which there is a clear winner and loser—where individuals of one race are advantaged while members of another race suffer. “Even as colorblindness has become increasingly dominant as the metaphor guiding equal protection,” Primus writes, “center-right constitutional actors have often drawn a distinction between race-conscious measures that visibly burden specific innocent parties and race-conscious measures intended to improve the position of disadvantaged groups but whose costs are more diffuse.”¹³⁰

Based on this reading, New Haven’s legal error was not being conscious of race in its decision-making—its error was being conscious of race in a way that cost nineteen firefighters a promotion.¹³¹ No tangible harm, no foul; but to injure specific individuals when considering race is to risk an Equal Protection violation. Primus notes other examples of race-conscious policymaking that were regarded by some as constitutionally legitimate: Justice Kennedy’s suggestion of racially neutral strategies to integrate public schools in *Parents Involved*¹³² and President Bush’s preference for the Ten Percent Plan in Texas as an alternative to the University of Michigan Law School’s race-conscious admissions policy upheld in *Grutter v. Bollinger*.¹³³ In both of these examples, any “losers”—white students drawn out of a desirable school district, or applicants to Texas universities whose qualifications surpass those of applicants from weak high schools finishing in the top ten percent of their graduating class—are harder to pinpoint. Measures like these may be thought to be less worrisome from a constitutional point of view because they do not raise the ire of readily identifiable whites and thereby entrench racial resentment and stereotypes.

The visible victims approach resembles the “antibalkanization principle,” which Reva Siegel presents as an alternative to colorblindness and color-consciousness. Siegel identifies this approach as animating Justice Powell’s plurality opinion in *Bakke*, Justice O’Connor’s majority opinion in *Shaw v. Reno*,¹³⁴ Justice Kennedy’s *Parents Involved* concurrence, and the *Ricci* majority opinion. The antibalkanization orientation is “concerned about the risk of racial resentment that policies of racial rectification engender.”¹³⁵ Rather than simply eschew or embrace racial classifications intended to remedy racial disparities, these “race moderates” focus on the impact of specific policies on racial stratification and racial conflict. Where race-conscious

¹³⁰ Primus, *supra* note 11, at 1369.

¹³¹ This is the way the decision was interpreted by the aggrieved firefighters as well as by the Supreme Court. But it is worth pointing out that no one would have been denied a promotion had the City been permitted to jettison the exams. Instead, a new method of promoting the firefighters would have been implemented, and all nineteen of the high-scoring individuals—as well as all of the lower-scoring applicants, of all races—would have been able to compete anew on an equal basis for the captain and lieutenant positions.

¹³² *Parents Involved*, 551 U.S. at 789 (concurring opinion).

¹³³ See Adam Liptak, *Racial Math: Affirmative Action by Any Other Name*, N.Y. TIMES, Jan. 19, 2003, at § 4, at 1.

¹³⁴ 509 U.S. 630, 657 (1993).

¹³⁵ Siegel, *From Colorblindness to Antibalkanization*, *supra* note 14, at 1296.

remedies can improve the position of a disadvantaged race without threatening social cohesion, they may be held as constitutional; but where they “become a locus of racial conflict” and spark “resentments among the racially privileged,” these policies are presumptively unconstitutional.¹³⁶

Siegel’s analysis of these swing justices’ views on race equality has merit, though it seems to capture Justice O’Connor’s position most keenly. Justice O’Connor explicitly used the language of balkanization in her opinions: “Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.”¹³⁷ It seems inaccurate to ascribe this position to Justice Powell, however. In *Bakke*, his argument for diversity as a compelling interest justifying a nonquota policy of affirmative action proceeded primarily on epistemic grounds and not with an eye to breaking down racial inequalities.¹³⁸ And while Justice Kennedy’s stances in *Parents Involved* and *Ricci* do seem closer to what Siegel describes as an antibalkanization view,¹³⁹ his position might be better characterized in other terms.

Contrary to Siegel’s claims, antibalkanization seems to be a triangulation—not an “analytically distinct” rival—of colorblindness and color-consciousness. In their rulings on race equality, justices from right to left evince some concern about social cohesion, and all find racial classifications inherently suspicious and in need of a very good justification. So some version of antibalkanization seems evident across the jurisprudential spectrum. The differences among the justices’ decisions in race equality cases turn on how these two concerns are weighed and on the justices’ empirical assessments of policy outcomes.

Like the race moderates to whom Siegel attributes the antibalkanization principle, race progressives’ main motivation is to repair rifts in racial relations and to break down barriers that create and entrench racial stratification. And like these moderates, progressives are often aware of the potential ill effects of racial classifications—though they are less likely to conclude that these effects outweigh the advantages to be gained through legislative remedies.¹⁴⁰ From the other side of the spectrum, race conservatives share moderates’ concern about social cohesion. They worry, however, that *all* racial classifications (and sometimes race-conscious, facially neutral policies) balkanize the polity by dealing injustices to individuals.¹⁴¹ Justice Kennedy’s concerns in *Ricci* are

¹³⁶ *Id.* at 1300.

¹³⁷ *Shaw*, 509 U.S. at 657.

¹³⁸ See *Bakke*, 438 U.S. at 313-14, where Justice Powell, quoting *Sweatt v. Painter*, 339 U.S. 629 at 634, emphasized that educational diversity is valuable because of the “interplay of ideas and the exchange of views” it enables. Epistemic diversity in the classroom holds the promise of further benefits down the line, but these are better characterized as improved delivery of medical services rather than as “social cohesion” of the races (Siegel, *supra* note 14, *From Colorblindness to Antibalkanization*, at 1298).

¹³⁹ See Siegel, *From Colorblindness to Antibalkanization*, *supra* note 14, Pt. IIID.

¹⁴⁰ Even the most robustly color-conscious member of the court today agrees that strict scrutiny is necessary for any racial classification. See *Adarand*, 515 U.S. 200.

¹⁴¹ The colorblind anticlassification view is typically, and accurately, understood to be motivated by “threats to individualism” (see Siegel, *From Colorblindness to Antibalkanization*, *supra* note 14, at 1300) posed by race consciousness. But the individualistic thrust of race conservatives’ views often appears in a context of threats to social unity or to interracial harmony that can result from violations of individual rights. See, e.g., Justice Scalia’s concurrence in *Adarand*: “To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred” (515 U.S. at 200; Scalia, J., concurring in part and concurring in the judgment); and Justice Harlan’s dissent in *Plessy*: “The destinies of the two races in this country are indissolubly linked together, and the interests of

not analytically divorced from justices' concerns from either side of the spectrum. He simply has a different appraisal of the empirical effects of New Haven's decision to cancel the exam than we find in either Justice Scalia's colorblind concurrence or Justice Ginsburg's color-conscious dissent.

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The visible victims reading of disparate impact—and the range of pathways between colorblindness and color-consciousness suggested by the antibalkanization principle—may lead to the disturbingly unprincipled position that it is acceptable to make racially conscious decisions only indirectly, or under cover of a proxy, to effect progressive social change. If a race-conscious policy is necessary for the long-term cause of racial equality, it should be pursued even if there is an obvious short-term cost to some individuals and even if racial resentments among members of majority races temporarily rise. Continued segregation of vast segments of American society has more pervasive social effects than transient damage to the interests of individual whites who are rejected from a specific university, drawn out of a formerly majority-white school district, or asked to compete on a new and fairer basis for a promotion in a firehouse.

In situations like that presented in *Ricci*, however, there is a pragmatic reason to favor less disruptive, less ostensibly race-based methods of achieving advances in racial integration, when these are available. Justice Ginsburg captured this idea at the end of her dissent: “This case presents an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place.”¹⁴² Given all that New Haven officials should have known about the flaws of these standardized tests when they have been used in other municipalities, they could have predicted the racially disparate impact that was likely to result from administering them. New Haven should have chosen a more appropriate assessment from the outset that was likely to yield more equitable results—and measure candidates' in-the-field firefighting skills rather than multiple-choice prowess.

The ascendant principle of colorblindness on the Supreme Court is blind to the continued realities of racial inequality in the United States. Reading Justice Kennedy's majority opinion in *Ricci v. DeStefano*, we find that even race moderates can arrive at rulings that prohibit remedial efforts to address racial injustice. Though disappointing for the cramped conception of Equal Protection that it implies, *Ricci* offers a useful lesson for government actors: be cautious, and creative, when contemplating racially conscious remedies for social inequalities. Consider not only the intended results of your policy but the side effects of the strategies it employs. Such a principle of “color-wariness” is sensitive to group-based inequalities and retains a commitment to progressive social change.

both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law” (163 U.S. 560; Harlan, J., dissenting).

¹⁴² *Ricci*, 129 S.Ct. at 2658.

It shares the color-conscious strategy of pushing for racial justice through consideration of racial categories, where necessary. But a “color-wary” policy-maker acknowledges the dual edge of moves that aim to reduce racial disparities: while integration efforts may achieve important benefits, they sometimes reach these goals through unnecessarily divisive means. Moving forward, the wisest course for racial equality may often correspond to the path of lesser judicial resistance: the pursuit of integration in ways that strive to avoid aggrieving specific individuals or arousing renewed racial resentment.