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## REPLY

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### TESTING THE MASTER TOOLS

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In reply to Guy-Uriel E. Charles, Response, *Do We Care Enough About Racial Inequality? Reflections on The River Runs Dry*, 158 U. Pa. L. Rev. PENNUMBRA 119 (2009), <http://www.pennumbra.com/responses/12-2009/Charles.pdf>; Girardeau A. Spann, Response, *Doctrinal Dilemma*, 158 U. PA. L. REV. PENNUMBRA 129 (2009), <http://www.pennumbra.com/responses/12-2009/Spann.pdf>.

The prime target of my analysis in *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*<sup>1</sup> is the false assumption that “‘affirmative action-less’ admissions policies and plunging minority admissions are the inevitable outcome of compliance with state anti-affirmative action laws.”<sup>2</sup> As I explain in the introduction,

This Article has two central conclusions. First, it concludes that state anti-affirmative action laws do not prohibit race-conscious policies used for the purpose of remedying *unjustified* racial disparities in admissions. Second, the Article establishes that whether such racial disparities in admissions are legally justifiable under Title VI hinges on a normative assessment—whether SAT scores accurately reflect the college performance ability of minority applicants who apply to selective public universities. A major implication of these conclusions is that, although frequently accused of illegally favoring minorities using “under the table” affirmative action, affirmative action-less universities are admitting so few minorities that the racial disparities in admissions to those institu-

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<sup>1</sup> Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009).

<sup>2</sup> *Id.* at 1078.

tions establishes a rebuttable legal presumption of a Title VI disparate impact violation.<sup>3</sup>

*The River Runs Dry* analyzes admissions rates to the top-ranked public universities in the two states that have operated under state anti-affirmative action laws the longest: California and Washington. It shows that there have been racial disparities in admissions to such institutions—African American and Latino applicants have been admitted at consistently lower rates than white applicants—and that those disparities have been sufficiently large to make out a prima facie case of race discrimination under the disparate impact regulations of Title VI of the Civil Rights Act of 1964.<sup>4</sup> *The River Runs Dry* also explains that the text of current state anti-affirmative action laws prohibits “discrimination” and “preferential treatment” on the basis of race,<sup>5</sup> but—contrary to what is often assumed—such laws are not complete bans on race-consciousness or race-based affirmative action. In the article, I suggest that race-based affirmative action in selective admissions may be legal under anti-affirmative action laws if undertaken to remedy racial discrimination, or, more specifically, to comply with Title VI disparate impact law. This is because state courts may decide that considering race to avoid race discrimination either is not a “racial preference” or constitutes racially preferential treatment that is legally permissible under the “federal funding exception” to anti-affirmative action laws.<sup>6</sup>

In his response to *The River Runs Dry*, Professor Girardeau Spann describes my argument as “both analytically sound and enticingly clever.”<sup>7</sup> Nevertheless, he suggests that it might be subject to a “potentially fatal flaw”—that the article’s doctrinal arguments are unlikely to be adopted by courts because of the dispositive role that politics and ideology play in the interpretation of law.<sup>8</sup> In contrast, Professor

<sup>3</sup> *Id.* at 1082.

<sup>4</sup> 42 U.S.C. § 2000d (2006).

<sup>5</sup> See West-Faulcon, *supra* note 1, at 1091 (explaining that “the term ‘affirmative action’ appears nowhere in the[] text” of so-called anti-affirmative action laws and that “[a]ll told, state anti-affirmative action laws do not impose an absolute ban on race-conscious action”).

<sup>6</sup> See West-Faulcon, *supra* note 1, at 1092 (noting that under the exception, anti-affirmative action laws do not prohibit actions taken to become or remain eligible for federal funding, although public colleges and universities have not invoked it).

<sup>7</sup> Girardeau A. Spann, Response, *Doctrinal Dilemma*, 158 U. PA. L. REV. PENNUMBRA 129, 129 (2009), <http://www.pennumbra.com/responses/12-2009/Spann.pdf>.

<sup>8</sup> See *id.* at 132 (“The problem is *not* that Professor West-Faulcon’s doctrinal argument is in any way deficient. The problem is that doctrine itself is typically unable to

Guy-Uriel Charles's response to *The River Runs Dry* commends the article's doctrinal arguments and its broader normative observations.<sup>9</sup> Professor Charles pointedly observes that by demonstrating that "legal tools are available for addressing the problem of racial inequality,"<sup>10</sup> my article raises a fundamental question: "What, then, accounts for the failure of courts, specifically the Supreme Court, to take seriously the problem of racial inequality?"<sup>11</sup> Both responses offer valuable insights with which I agree.

I agree with Professor Spann that broader critiques of racial exclusion are essential to analyzing how state anti-affirmative action laws should and are likely be interpreted. Also, I readily acknowledge, as Professor Spann observes, that I do not offer such a critique in *The River Runs Dry*. As Professor Charles's response recognizes, not only do I seek to end scholarly inattention to the actual doctrinal implications of anti-affirmative action laws, I use my doctrinal analysis to bolster my claim that state anti-affirmative action laws are only partially to blame for the racial disparities in admissions to top-ranked public universities subsequent to the passage of such laws. Through its empirical and doctrinal analysis, my article seeks to reignite intellectual and political interest in considering whether universities required to comply with state anti-affirmative action laws are legally required to be "affirmative action-less." The responses of Professors Charles and Spann to *The River Runs Dry* are important and insightful examples of just such inquiry.<sup>12</sup>

Nevertheless, in this brief Reply, I focus on the conclusions reached by Professors Charles and Spann with which I disagree. First, I address facts both professors seem to presume about the SAT's ca-

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overcome strongly motivated political opposition—especially with respect to the issue of race.”).

<sup>9</sup> See Guy-Uriel E. Charles, Response, *Do We Care Enough About Racial Inequality? Reflections on The River Runs Dry*, 158 U. PA. L. REV. PENNUMBRA 119, 125 (2009), <http://www.pennumbra.com/responses/12-2009/Charles.pdf> (acknowledging that the arguments in *The River Runs Dry* show that “the problem is not singularly legal” and instead reflect that little weight has been afforded to the dignity of minorities in constitutional analysis).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 121.

<sup>12</sup> For example, Professor Charles relies on my analysis to conclude that racial inequality persists because “the Court is self-consciously making a choice, on the basis of variables other than ‘law.’” *Id.* at 125-26. Professor Charles asserts that the Court's political analysis impedes its legal analysis: in his view, the factors the Court considers in its constitutional analysis reflect a lack of “empathy [and] sympathy for the plight of people of color.” *Id.* at 126. Essentially, he argues that courts—particularly the current U.S. Supreme Court—“do not care enough about racial inequality.” *Id.* at 121.

capacity to identify the most qualified college applicants that can be legitimately contested. Second, I elaborate on my conclusion that state anti-affirmative action laws should be interpreted to permit a university to adopt a *remedial* affirmative action policy if justified by sufficient evidence that race-consciousness in admissions is necessary to comply with Title VI disparate impact law. Specifically, I challenge Professor Spann's assertion that the holding in *Ricci v. DeStefano*<sup>13</sup> undermines my article's conclusion that state courts should import the strong-basis-in-evidence standard developed under the Court's Equal Protection jurisprudence to evaluate a university's claim that it must consider race to comply with Title VI federal civil rights law.<sup>14</sup> Justice Kennedy's opinion in *Ricci* does not overtake my argument; it adopts a similar one in the employment context.<sup>15</sup>

### I. CARING ENOUGH ABOUT TEST DEFICIENCY

One of the central observations that I make in *The River Runs Dry* is that selective public universities *could* diminish the large racial disparities in admission rates that have been typical under affirmative action-less policies without violating the legal dictates of state anti-affirmative action laws. Far from seeking to demonstrate that legal doctrine, in and of itself, has the capacity to ameliorate such racial disparities in admissions, my article's central goal is to show that perceptions about the predictive and sorting power of standardized college admissions tests greatly influences Title VI disparate impact anal-

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<sup>13</sup> 129 S. Ct. 2658 (2009). This case, decided after the publication of *The River Runs Dry*, dealt with a "reverse discrimination" lawsuit filed by a predominantly white group of firefighters in New Haven, Connecticut.

<sup>14</sup> See Spann, *supra* note 7, at 135 (arguing that the *Ricci* decision has "overtaken" my argument for the strong-basis-in-evidence standard).

<sup>15</sup> Although the *Ricci* plaintiffs argued differently, the *Ricci* majority opinion accepts that New Haven's consideration of race in deciding whether to use results of an employment test does not violate the disparate treatment provision of Title VII if the public employer has a strong-basis-in-evidence to fear disparate impact liability. Where the four dissenters and Justice Kennedy disagree is whether "good cause" or "strong-basis-in-evidence" is the appropriate evidentiary standard in such a circumstance. In fact, based on Justice Ginsburg's analysis, I would suggest that it is worth considering whether state courts should go further than I suggested in *The River Runs Dry*. Perhaps state courts should interpret the federal funding provision to mean that an employer or university that demonstrates a "good cause" to fear disparate impact liability has demonstrated that remedial race-consciousness would be consistent with the anti-discrimination requirement of state anti-affirmative action laws and would also be legally permissible race-consciousness because it "must be taken" to maintain Title VI federal funding.

ysis in this context.<sup>16</sup> Essentially, *The River Runs Dry* questions the prevalent but insufficiently questioned view that the SAT is a master tool for differentiating between *the best* and *the best of the best* applicants to college.<sup>17</sup>

The facts in the *Ricci* firefighter promotion case (which both Professor Charles and Professor Spann use as an example in their responses) parallel the scenario I consider in *The River Runs Dry*. In my article, I consider the legality, under state anti-affirmative action law, of remedial race-consciousness undertaken by a university that legitimately fears Title VI disparate impact liability because it cannot demonstrate that its disproportionate rejection of the state's most qualified African American and Latino high school students is an educational necessity. In an analogous manner in *Ricci*, the Court assessed the legality, under federal employment discrimination law, of New Haven's fear of Title VII disparate impact liability because it could not justify as business necessity its failure to promote the African American and Latino firefighters.<sup>18</sup> In *The River Runs Dry*, I assert that considering race in admissions is genuinely necessary—essential to maintaining Title VI federal funding—if a university has a strong basis in evidence to fear Title VI disparate impact liability even if it might be possible for the institution to avoid liability by some conceivably race-neutral means.<sup>19</sup> *Ricci* applies the strong-basis-in-evidence standard to remedial race-conscious actions undertaken after an employer has administered an exam.<sup>20</sup>

My point in *The River Runs Dry* is that Title VI disparate impact law prohibits federally-funded universities from relying on differences in tests scores that do not correlate to real-world differences in student

<sup>16</sup> See West-Faulcon, *supra* note 1, at 1109-11 (defining and describing “test deficiency” theories); see also West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. (forthcoming 2010) (considering the legal implications of theoretical and predictive deficiencies of conventional standardized tests).

<sup>17</sup> Interestingly, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1970), the Court characterized the opposite view as the “commonsense proposition” Congress intended to mandate under Title VII disparate impact law—that “tests are useful servants” but “they are not to become masters of reality.” *Id.*

<sup>18</sup> See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness*, 59 UCLA L. REV. (forthcoming 2010) (manuscript at tbl.1), available at <http://ssrn.com/abstract=1507344> (showing the scores and racial identification of candidates passing the New Haven lieutenant test at issue in *Ricci*).

<sup>19</sup> See West-Faulcon, *supra* note 1, at 1084.

<sup>20</sup> See *Ricci*, 129 S. Ct. at 2677 (“To succeed on their motion, then, petitioners must demonstrate that there can be no genuine dispute that there was no strong basis in evidence for the City to conclude it would face disparate-impact liability if it certified the examination results.”).

academic qualifications. In the selective university and *Ricci* firefighter selection contexts, the issue is what happens when the decisionmaker becomes aware that a particular standardized test, although capable of screening out unqualified applicants, has limited capacity to differentiate among high scorers. Is race consciousness legal when a test user cannot prove that the predominantly white group of the highest of the high scorers on the test is truly the *best of the best*? The key evidentiary question becomes whether the scores on a particular standardized test are sufficiently precise measures such that it can be proved with a significant degree of *scientific* accuracy that applicants with higher test scores are the most qualified. Had the Court addressed this question in the *Ricci* firefighter lawsuit, it would have asked: Can a true scientific basis be established for concluding that firefighters with the lieutenant exam top-ten test scores—a group that included no African American firefighters—had *better* supervisory firefighting skills than those who finished in the top sixteen, a group that included three African Americans?<sup>21</sup>

In contrast to less selective public universities that must sift through their applicant pool to weed out *unqualified* applicants, Professor Spann is correct that the focus of highly selective universities is on identifying the *best* applicants.<sup>22</sup> In fact, because the standardized test scores and grade point averages of applicants to top-ranked colleges and universities have risen at such high rates over the past decades,<sup>23</sup> I would go even further. The nation's most selective educational institutions are selecting the *best of the best*. In contrast to *less selective* universities—institutions with pools of applicants with more mixed academic records, some weak and some strong—highly selective universities may find it difficult to prove that a particular standardized test like the SAT can make fine distinctions among large groups of highly qualified applicants, pools of applicants almost all of which have very strong academic records.

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<sup>21</sup> See generally Harris & West-Faulcon, *supra* note 18 (arguing that the Court's treatment in *Ricci* of city's decision to disregard racially skewed employment test results as disparate treatment against white firefighters was inappropriate).

<sup>22</sup> See Spann, *supra* note 7, at 134 n.27 (reviewing my characterization of the difference between selectivity at prestigious private universities and public universities).

<sup>23</sup> See, e.g., WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 29-30 (1998) (pointing out that competition for admission at selective schools has increased dramatically, with SAT scores for both white and African American applicants continuing upward).

Whether courts will be convinced that universities have a strong-basis-in-evidence or “good cause”<sup>24</sup> to conclude that race-conscious admissions are necessary to comply with Title VI depends upon whether rejected nonwhite applicants, universities, courts, federal civil rights enforcement agencies, and legal scholars accept “the operating assumption . . . that large racial disparities in rates of admission to an affirmative action-less university need no explanation because they track racial disparities in SAT scores.”<sup>25</sup>

In my view, how legitimate it is for a university to fear losing federal funding due to the investigation or adjudication of a Title VI disparate impact administrative complaint requires analysis of the capacities or deficiencies of the standardized test that institution uses for selection. The lack of such “test deficiency” analysis explains the lack of legal and policy reaction to the racial disparities in admissions at selective public universities that has followed the passage of state anti-affirmative action laws. Even if state anti-affirmative action laws may be interpreted by state courts to permit remedial race-conscious action to comply with Title VI disparate impact law, whether such action is taken will depend on universities’ assessments of the capacity of tests like the SAT to measure differences in applicants’ comparative academic “merit” and qualifications.

## II. RELEVANCE OF THE NEW *RICCI* RULE

*The River Runs Dry* posits that, in interpreting state anti-affirmative action laws, state courts should borrow the strong-basis-in-evidence standard from the Court’s Equal Protection jurisprudence. I argue that this will enable courts to evaluate the legality, under state law, of the actions of universities that voluntarily consider race in admissions in order to comply with Title VI disparate impact law. A key aspect of my analysis in *The River Runs Dry* is its distinction between “diversity

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<sup>24</sup> Four members of the Court concluded in *Ricci* that the less stringent “good cause” evidentiary standard is consistent with Title VII precedent in this area. *Ricci*, 129 S. Ct. at 2702 (Ginsburg, J., dissenting). I do agree with Professors Charles and Spann that the Court’s strong-basis-in-evidence standard, particularly as applied in *Ricci*, is an onerous one. Again, this may mean that the “good cause” standard, as articulated by Justice Ginsburg’s *Ricci* dissent, is an equally or more appropriate standard for state courts to adopt in evaluating remedial race-consciousness in admissions undertaken by universities to comply with Title VI disparate impact law.

<sup>25</sup> West-Faulcon, *supra* note 1, at 1103-04; *see also id.* at 1104 (“This presumption is so strong that the fact that the rate of admission of African American and Latino applicants may be much lower than the rate of admission for applicants of other races is rarely discussed by commentators who accuse institutions of granting admissions preferences to minority applicants in violation of state anti-affirmative action law.”).

justified” affirmative action and *remedial* affirmative action. To date, diversity-justified action is the type of race-consciousness that universities most often purport to use and it is the type that was recognized as constitutional by a five-Justice majority in *Grutter v. Bollinger*.<sup>26</sup> My project is not considering whether state anti-affirmative action laws are likely to be interpreted by state courts to constitute complete bans on diversity-justified affirmative action. Instead, its focus is the permissibility of a university’s remedial consideration of race under state anti-affirmative action laws.

As noted by Professor Charles, the Court’s ruling in *Ricci* arguably reinforces the analytical soundness of my article’s suggestion.<sup>27</sup> After *Ricci*, a public employer that refuses to base promotions on the results of an already-administered test because the employer thinks racial disparities are unjustified by “business necessity”—and thus violate Title VII—must have a “strong basis in evidence” for a race-conscious decision not to rely on the test results. The rule articulated in *Ricci*<sup>28</sup> would be consistent with a state court’s use of the strong-basis-in-evidence standard or even the less stringent good cause standard to evaluate university claims that race-consciousness in admissions is necessary to comply with Title VI.<sup>29</sup>

Professor Spann suggests that my interpretation of the federal funding exception to state affirmative action laws is less consistent with strict scrutiny than Professor Eugene Volokh’s interpretation of that provision<sup>30</sup> and that the Court’s decision in *Ricci* further supports Professor Volokh’s view.<sup>31</sup> This is an incorrect assessment for several reasons. My point in *The River Runs Dry* is that the plain meaning of

<sup>26</sup> 539 U.S. 306, 328 (2003)

<sup>27</sup> See Charles, *supra* note 9, at 125 (“*Ricci* . . . , as a theoretical matter, entertains the notion that state actors can take race into account (at least under Title VII) to minimize the racial impact of a standardized test . . .”).

<sup>28</sup> *Ricci*’s holding was directed at compliance with Title VII, 42 U.S.C. §§ 2000e–2000e–17 (2006)—the federal civil rights statute upon which Title VI legal doctrine is based.

<sup>29</sup> Professor Charles made this point in his response by contrasting Justice Roberts’s opinion in *Parents Involved* with Justice Kennedy’s opinion in *Ricci*. See Charles, *supra* note 9, at 124–25 (arguing that the *Ricci* approach is preferable because it allows consideration of race to counter regulations with disparate impact).

<sup>30</sup> See, e.g., Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1386–87 (describing the federal funding exception as a tool to counter potential arguments that Proposition 209, the California Civil Rights Initiative, would cost California money).

<sup>31</sup> See Spann, *supra* note 7, at 135–36 (arguing that the *Ricci* standard is nearly impossible to satisfy).



the text of state anti-affirmative action laws, combined with their adoption history, explicitly permits remedial race-consciousness.<sup>32</sup> This permit is irrespective of what seems to be Professor Eugene Volokh's conclusion—that race-consciousness is only permissible under such laws if “genuinely necessary” because no race-neutral action would preserve federal funding.<sup>33</sup>

Professor Volokh's position is that state courts should interpret anti-affirmative action laws to impose what I would describe as “hyperstrict” scrutiny to any type of race-conscious action, whether remedial or diversity-justified.<sup>34</sup> While a significant number of the Justices on the current Court appear inclined to impose hyperstrict scrutiny to racial classifications, Justice O'Connor's version of strict scrutiny—review that is not “fatal in fact”—remains the Court's current constitutional rule. This is evidenced by the fact that the University of Michigan Law School's race-conscious admissions policy survived strict scrutiny in *Grutter v. Bollinger*<sup>35</sup> and by Justice Kennedy's suggestion in his concurring opinion in *Parents Involved* that certain types of non-individualized race-consciousness would, in his view, survive strict scrutiny.<sup>36</sup> More significantly, the analytic framework introduced by *The River Runs Dry* that is missing from Professor Volokh's analysis is recognition that despite the misnomer of “anti-affirmative action laws,” such laws are, in fact, antipreference *and* antidiscrimination laws.

As I explain in *The River Runs Dry*, the language of state anti-affirmative action laws, which contain numerous exceptions allowing racially preferential treatment, does not support interpreting the federal funding exception as imposing a hyperstrict scrutiny standard of review. The strong-basis-in-evidence standard and, perhaps, the good cause standard are sufficiently stringent to fulfill the antipreference goal of anti-affirmative action laws while remaining true to the antidiscrimination objectives of such laws. The argument in favor of interpreting the federal funding exception as I suggest is that the text of state anti-affirmative action laws prohibits racially *preferential* treat-

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<sup>32</sup> See West-Faulcon, *supra* note 1, at 1157 (contrasting this view with Professor Volokh's interpretation of the federal funding exception, which “should be rejected” given that “the text of the exception, if so interpreted, would have no practical effect”).

<sup>33</sup> See Volokh, *supra* note 30, at 1387 (“If it's possible to be eligible [for federal funds] without the discrimination, then the discrimination is prohibited . . . [i]f the state can switch to a nondiscriminatory program that will still provide the federal funds, then the discriminatory conduct remains impermissible.”).

<sup>34</sup> *Id.* at 1386-87.

<sup>35</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>36</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

ment, not all race-consciousness. *The River Runs Dry* does not assert that Title VI *requires* federally funded universities to adopt remedial race-based affirmative action policies. Instead, it makes the point that such policies remain permissible in states with anti-affirmative action laws if a university can meet the appropriate state law standard for demonstrating that the race consciousness is remedial rather than diversity-justified.

While it is certainly true that the positions of Chief Justice Rehnquist and Justices Scalia and Thomas in *Grutter*<sup>37</sup> and of Chief Justice Roberts and Justices Alito, Scalia, and Thomas in *Parents Involved*<sup>38</sup> indicate that these Justices are intent on taking a Volokh-like approach to interpreting the Equal Protection Clause, Justice Kennedy's opinion in *Ricci*<sup>39</sup> stops short of imposing that new rule of hyperstrict scrutiny to all race-consciousness action in the interpretation of federal civil rights statutes.<sup>40</sup> This is all the more reason my suggestion as to how state courts should review remedial affirmative action is superior to Professor Volokh's. The interpretation of anti-affirmative action laws most consistent with these laws' dual prohibitions against racial preference and racial discrimination is one that applies a nonfatal standard of review to a public university's proven need to engage in remedial race-consciousness. *The River Runs Dry* asserts that anti-affirmative action laws should be interpreted to permit a university to present evidence in support of a remedial need to adopt an affirmative action policy.

The political discourse utilized to convince voters to support or oppose state anti-affirmative action laws—particularly that surround-

<sup>37</sup> *Grutter*, 539 U.S. at 378-87 (Rehnquist, C.J., dissenting).

<sup>38</sup> *Parents Involved*, 551 U.S. at 732.

<sup>39</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

<sup>40</sup> Although Professor Spann correctly concludes that the opinions of Chief Justice Roberts and Justices Alito, Scalia, and Thomas seem to evidence an ideological goal to effectively ban the consideration of race to implement the goals of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.), see Spann, *supra* note 7, at 137 n.40, Justice Kennedy's opinions in *Parents Involved* and *Ricci* decline to go as far as the rest of the anti-affirmative action block of the Court. In *Ricci*, Justice Kennedy refused the plaintiffs' invitation to strike down the disparate impact provision of Title VII as violating the Equal Protection Clause. Or, to use the more violent metaphor offered by Justice Scalia in his concurring opinion in *Ricci*, Justice Kennedy did not wage "the war" between the disparate impact provisions of Title VII and the Equal Protection Clause that Justice Scalia views as inevitable. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

ing the first such law, California Proposition 209<sup>41</sup>—has been and is likely to continue to be rooted in ideological opposition to or support for affirmative action as a policy matter. Yet my focus in this Reply is that, in interpreting an anti-affirmative action law after its passage, state courts need not—and in my view, should not—rely on anti-affirmative action ideology. It would be inconsistent with federal antidiscrimination law and the antidiscrimination provisions of state anti-affirmative action laws for state courts to treat remedial race consciousness to avoid Title VI disparate impact liability as racially preferential treatment. In addition, even if some state courts presume that anti-affirmative action laws prohibit diversity-justified affirmative action, such an assessment does not answer the question of how state courts should interpret the antipreference and federal funding provisions of such laws as applied to race-conscious action undertaken by universities to comply with federal civil rights law.

Doctrinal arguments, as Professor Spann makes plain in his response, are not all-powerful master tools. But they do have value. State courts should interpret state anti-affirmative action laws according to their actual language and overall meaning and not according to the anti-affirmative action political agenda of those who campaigned in favor of such laws. That said, I agree with Professor Spann that “[i]t is also worth noting that even though the Supreme Court has used the strong-basis-in-evidence standard under strict scrutiny in some of its constitutional affirmative action race cases, the Court has never found that standard to be satisfied.”<sup>42</sup> In addition to being a central reason that Professor Charles concludes that “courts do not care enough about racial inequality and the dignity of people of color,”<sup>43</sup> the stringency of the strong-basis-in-evidence standard might justifiably prompt some state courts to adopt a good cause evidentiary standard to implement the analytic framework I offer in *The River Runs Dry*.

#### CONCLUSION

Professor Charles answers his own astute question of “why the Clinton and Obama Administrations have not forced public universi-

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<sup>41</sup> See CAL. CONST. art. I, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”). Professor Volokh helped draft California Proposition 209. See VOLOKH, *supra* note 21, at 1387 (using the federal funding exception to mollify arguments that Proposition 209 would have a large impact on the state treasury).

<sup>42</sup> Spann, *supra* note 7, at 135.

<sup>43</sup> Charles, *supra* note 9, at 121.

ties in anti-affirmative action states to justify the wide gap between admission rates of white applicants and applicants of color.”<sup>44</sup> His answer is that we do not care enough about racial inequality. I would add another line of inquiry and potential explanation: it is also possible that we do not care (or know) enough about the deficiencies or limitations of relying on test scores to select the best of a group of very qualified applicants.

Finally, there is unquestionable value in taking seriously Professor Spann’s observations that “the Court’s personnel and the prevailing political climate” are likely to be more determinative in the Court’s analysis than doctrinal arguments, including the ones I make in *The River Runs Dry*.<sup>45</sup> Yet Professor Charles says explicitly what Professor Spann ultimately acknowledges: so long as the ideological underpinnings of courts’ doctrinal analyses are acknowledged to exist, legal scholarship must operate in dual domains—doctrinal and ideological.<sup>46</sup> This is particularly true in an area made exponentially more doctrinally and ideologically complex by the emergence of state anti-affirmative action laws.

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<sup>44</sup> *Id.* at 122.

<sup>45</sup> Spann, *supra* note 7, at 138.

<sup>46</sup> See Charles, *supra* note 9, at 126 (arguing that “legal academics need to meet the challenge in the domain in which it is presented” by acknowledging the political dimensions of the debate).