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***RICCI V. DESTEFANO* AND DISPARATE TREATMENT: HOW THE CASE MAKES TITLE VII AND THE EQUAL PROTECTION CLAUSE UNWORKABLE**

ALLEN R. KAMP*

I. INTRODUCTION

Although early commentators have focused on *Ricci v. DeStefano*'s¹ discussion of disparate impact,² I see what *Ricci* is saying about disparate treatment as being more important. The majority and concurring opinions make proving disparate treatment much easier than under prior law.³ One

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¹ 129 S. Ct. 2658 (2009).

² See, e.g., Lynda L. Arakawa & Michele Park Sonen, Comment, *Caught in the Backdraft: The Implications of Ricci v. DeStefano on Voluntary Compliance and Title VII*, 32 U. HAW. L. REV. 463, 464 (2010) (arguing that the standard created to solve *Ricci*, the strong-basis-in-evidence standard, discourages proactive and voluntary responses by employers to rectify problems of disparate impact); Joseph L. Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences than the U.S. Government's 'Four-Fifths' Rule: An Examination of the Statistical Evidence in Ricci v. DeStefano*, 8 L. PROBABILITY & RISK 171, 173 (2009) (explaining how statistics can be used to clarify the disparate impact issues in *Ricci*); Hannah L. Weiner, Note, *The Subordinated Meaning of "Color-Blind": How John Marshall Harlan's Words Have Been Erroneously Commandeered*, 11 J.L. & SOC. CHALLENGES 45, 46–47 (2009) (arguing that Justice Harlan supported protections against disparate impact, but the original intent and meaning behind his words have been undermined by conservatives); Bruce Willoughby, *Effect of the Ricci v. DeStefano Decision on Private Employers*, 17 NEV. LAW. 31, 31 (2009) (concluding that employers can avoid liability for testing results under *Ricci* by "continu[ing] with the [test] selection process and ignor[ing] any disparate impact that may occur"); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness 1–2* (Loyola U. L. Sch., Research Paper No. 09–49, 2009), available at <http://ssrn.com/abstract=1507344> (considering the facts of *Ricci* in light of prior disparate impact cases and concluding that *Ricci* weakened disparate impact law).

³ See, e.g., *Ricci*, 129 S. Ct. at 2674–77 (referring to the adoption by the Court of the strong-basis-in-evidence standard); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (continued)

would think that such a change in the law would further the cause of ending discrimination both under Title VII and the Equal Protection Clause of the Fourteenth Amendment, but paradoxically, it may utterly defeat that cause.

One can see *Ricci* as the case in which the Court came down in favor of one of two competing interpretations of the Equal Protection Clause and Title VII.⁴ Hannah L. Weiner describes the two approaches as “anti-subordination” and “anti-classification.”⁵ The anti-subordination principle “is most concerned with actions of a majority race to intentionally subjugate members of a minority race [I]t is when government serves to ‘perpetuate . . . the subordinate status of a specially disadvantaged group’ that the Fourteenth Amendment is most implicated.”⁶

The anti-classification principle instead sees equal protection as invalidating all distinctions based on race.⁷ Whether the classification is malicious or benign, or whether an individual belongs to a historical or contemporary dominant or subordinate race, does not matter.⁸ All such classifications are invalid.⁹

(1988) (exemplifying the law of disparate treatment and disparate impact prior to *Ricci*); Michael J. Zimmer, *Ricci’s “Color-Blind” Standard in a Race Conscious Society: A Case of Unintended Consequences?* 3–4 (Loy. U. Chi. Sch. of L., Research Paper No. 2009–0020, 2009), available at <http://ssrn.com/abstract=1529438> (explaining how the conservative majority in *Ricci* may have inadvertently made it easier for plaintiffs to prove their disparate treatment cases by creating a defense to disparate treatment in disparate impact law and using the strong basis in evidence standard to prove such defense).

⁴ See *Ricci*, 129 S. Ct. at 2681–82 (Scalia, J., concurring) (questioning the constitutional validity of disparate impact, and thus, favoring disparate treatment as the antidiscrimination principle that will eventually carry the day).

⁵ Weiner, *supra* note 2, at 47; see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

⁶ Weiner, *supra* note 2, at 47–48 (quoting Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976)).

⁷ *Id.* at 48.

⁸ *Id.*

⁹ *Id.* But see Harris & West-Faulcon, *supra* 2, at 1 (“This Article explicates how *Ricci* facilitates this racial project in two distinct but interrelated ways: by whitening discrimination—that is reframing anti-discrimination law’s presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim; and by race-ing test fairness—that is, treating efforts to use job-related assessment tools that correct racial imbalance and better measure merit as racially disparate treatment of whites.

(continued)

The best way to understand the differing judicial opinions in *Ricci* is to see them as applying two different interpretations of antidiscrimination law: anti-classification and anti-subordination.¹⁰ Professor Reva B. Siegel's article, *Equality Talk*, lays out the convoluted (and ironic) history of these two views by focusing on the early debates over *Brown v. Board of Education*.¹¹ As she states: "The debates over *Brown's* implementation show the complex ways in which concerns about legitimacy have moved courts to mask and to limit a constitutional regime that would intervene in the affairs of the powerful on behalf of the powerless."¹²

The first debates over *Brown* focused on the opinion's emphasis on the harm segregation inflicted on black schoolchildren: "To separate [children] from others of similar age and qualifications solely because of their race generates a 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."¹³ Critics of *Brown* attacked the case by arguing that no such racial harm existed, but if it did exist, it did not rise to the level of a Constitutional injury justifying the relief of desegregation.¹⁴ Supporters of *Brown*, in response, then attempted to shift the debate to one concerned with racial classification, thus, avoiding the empirical and legal debates about harm.¹⁵ So, originally, the pro-segregationists preferred the discourse of anti-subordination; the integrationists, anti-classification.¹⁶

In the 1960s and 1970s, however, anti-classification discourse came to have a double function: as well as justifying *Brown*, it also limited its reach.¹⁷

Ricci whitens discrimination in part by treating all forms of racial attentiveness—here the City's assessment of the promotional exams' racial impact—as racial discrimination.”).

¹⁰ See *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 11–12 (2003) (arguing that these two principles of antidiscrimination law are legacies of the civil rights movement: “Cases like *Brown* . . . contained language condemning the practice of classifying citizens by race as well as language condemning practices that enforced subordination or inflicted status harm.”).

¹¹ 347 U.S. 483 (1954); see Siegel, *supra* note 5, at 1474–75.

¹² Siegel, *supra* note 5, at 1475.

¹³ *Brown*, 347 U.S. at 494; Siegel, *supra* note 5, at 1476.

¹⁴ Siegel, *supra* note 5, at 1484–87.

¹⁵ *Id.* at 1476.

¹⁶ See *id.* (arguing that the Court's southern critics framed their arguments by asking which harms the Court should intervene to redress).

¹⁷ *Id.* at 1477.

This dynamic played itself out in any number of areas: in matters concerning the scope of remedy in the South, liability for so-called de facto discrimination in the North, and the question whether state actors were permitted to correct racial imbalance in the absence of judicial decree—a question that evolved into the modern debate over affirmative action.¹⁸

Harriet Weiner, in an excellent student note, takes up the story with the opinions of Clarence Thomas.¹⁹ Justice Thomas's opinions have continually referred to Justice Harlan's statement, "our Constitution is color-blind," as the basis for his attack on affirmative action.²⁰ It is this slogan and the adoption of the anti-classification principle that underlie the majority opinion in *Ricci*.

Ricci (or at least the majority five justices) rejects the anti-subordination approach:²¹ the fact that there were few minority firefighters in the New Haven fire department was of no consequence.²² The fact that the results of the test only perpetuated their under-representation would excuse discarding the first test only if there were a strong basis in evidence of disparate impact.²³ Moreover, Justice Scalia called into question the constitutionality of disparate impact because it necessitates racial classification.²⁴ As stated by Professor Kermit Roosevelt, "in fact [Scalia's] five-justice majority has been responsible for changing Equal Protection jurisprudence from a doctrine that protects minorities into one that prohibits certain kinds of classifications, regardless of who's benefited and who's burdened."²⁵ One can read *Ricci* as holding that an employer's adoption of the anti-subordination principle is itself illegal

¹⁸ *Id.*

¹⁹ See Hannah L. Weiner, Note, *The Next "Great Dissenter"? How Clarence Thomas Is Using the Words and Principals of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 DUKE L.J. 139, 161–70 (2008).

²⁰ *Id.* at 164–65; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring).

²¹ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673, 2681 (2009).

²² See *id.* at 2691 (demonstrating the Court's awareness of the fact that minorities were underrepresented in the fire department).

²³ *Id.* at 2676.

²⁴ *Id.* at 2681–82. Justice Alito's concurrence, joined by Justices Scalia and Thomas, makes the same point. *Id.* at 2683–84.

²⁵ Kermit Roosevelt, *Justice Scalia's Constitution—and Ours*, 8 J.L. & SOC. CHANGE 27, 32 (2005).

discrimination.²⁶ Employment is seen as a zero-sum game: changing the system for the benefit of minorities necessarily constitutes discrimination against non-minorities.²⁷

This article's thesis is that this approach, as applied in *Ricci*, leads to several disturbing questions about both employment and equal protection law, including whether Title VII and the Equal Protection Clause will have to be repealed to achieve their purposes.

II. THE CASE

To fill eight vacant lieutenant and seven vacant captain positions in its fire department, the City of New Haven, Connecticut issued two job related exams, one written and one oral, to determine relevant qualifications for promotion.²⁸ As mandated by its charter (Charter), New Haven was required to place in those vacant positions the most qualified individuals as determined by the results of the tests.²⁹ According to the Charter's "rule of three," one eligible candidate from the top three overall scorers was to be chosen for each vacancy.³⁰ It was the responsibility of the New Haven Civil Service Board (CSB) to certify the ranks given to each test taker who passed the written test.³¹

The results would determine both the eligibility and the order of eligibility for a promotion in the next two years.³² Preparation for the exam came at a high mental and financial cost to many of the firefighters.³³ The result of the exams administered to 118 firefighters in 2003 was that the white candidates disproportionately outperformed minority candidates.³⁴ At the final New Haven CSB meeting, the CSB ultimately voted not to certify the results to avoid liability under the disparate impact

²⁶ See Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 229 (2010) ("The Court now, however, appears to treat a decision maker's attention to the disparities experienced by members of traditionally subordinated racial groups—that is, its antisubordination ends—as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification.").

²⁷ *Id.* at 233, 248.

²⁸ *Ricci*, 129 S. Ct. at 2665–66.

²⁹ *Id.* at 2665.

³⁰ *Id.*

³¹ *Id.* at 2665, 2667.

³² *Id.* at 2664.

³³ *Id.* at 2664, 2689.

³⁴ *Id.*

provision of Title VII of the Civil Rights Act of 1964.³⁵ In the end, the examinations were thrown out, and those who performed well were denied promotions.³⁶

A group of white firefighters (including Benjamin Vargas, a Latino), who likely would have been promoted based on their high scores, sued claiming the City violated both Title VII and the Equal Protection Clause of the Fourteenth Amendment.³⁷ With much fanfare and notoriety, the case reached the United States Supreme Court.³⁸ In a highly publicized opinion, the Court reversed the decision of the Second Circuit Court of Appeals and ruled in favor of the plaintiffs.³⁹ The five-to-four majority held that race-based action, like that taken by New Haven in dismissing the results of the racially neutral and fair tests, is impermissible under Title VII unless the employer can demonstrate a strong basis of evidence that it would have been liable under the disparate impact statute had it not taken the action in question.⁴⁰ The Court determined because New Haven was liable under Title VII, it need not address the Equal Protection violation.⁴¹

III. HOW *RICCI* DEFINES DISPARATE TREATMENT

A. *Prior Law*

Anyone who tries to describe how *Ricci* changed the definition of “disparate treatment” is immediately faced with a problem: the Court has never been precise in defining what constitutes disparate treatment.⁴²

³⁵ *Id.* at 2671.

³⁶ *Id.*

³⁷ *Id.* at 2664, 2689.

³⁸ See Joan Biskupic, *Firefighter Case May Keep Sotomayer in Hot Seat*, USA TODAY, June 1, 2009, at 2A; Joan Biskupic, *The Supreme Court Tackles Race, Series of Cases Could Alter Civil Rights Laws*, USA TODAY, Apr. 21, 2009, at 1A; Adam Liptak, *Justices to Hear White Firefighters' Bias Claims*, N.Y. TIMES, Apr. 10, 2009, at A1; Kimberly West-Faulcon, *A Test Case for Diversity*, L.A. TIMES, Apr. 24, 2009, at A33.

³⁹ See *Ricci*, 129 S. Ct. at 2664.

⁴⁰ *Id.*

⁴¹ *Id.* at 2664–65.

⁴² See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (indicating disparate treatment of men and women in employment includes “requiring people to work in a discriminatorily hostile or abusive environment”); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985–86 (1988) (speaking only to “‘disparate treatment’ cases, which involve ‘the most easily understood type of discrimination’”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977) (“‘Disparate treatment’ . . . is the most easily understood
(continued)

Intent is a necessary element,⁴³ but what is meant by “intent” and how do you prove it? A large part of the problem is caused by the fact that, as Professor Michael Zimmer points out, there is no literal direct evidence of a state of mind.⁴⁴ Thus, some objective evidence must show “intent” under disparate treatment.⁴⁵

But what objective evidence proves intent? Here the Court’s opinions are muddled:

Disparate treatment doctrine, whether individual or systemic, relies ultimately on a finding of intent or motive to discriminate, and no consensus exists as to what those concepts embrace or, indeed, whether they are synonymous. Certain core conduct is clearly prohibited, namely conscious decision making to exclude members of particular races either because of animus or other reasons. But the extent to which less conscious influences count is unclear forty years after Title VII’s passage, and equally unclear is when a trait will be viewed as sufficiently linked to race or sex to count as race or gender discrimination based on that trait.⁴⁶

What was clear under pre-*Ricci* law was that “action based on knowing the race of the individuals affected by the decision . . . was not sufficient proof that the employer acted with an intent to discriminate.”⁴⁷ As stated by Professor Michael Selmi, liability for discrimination did not “attach based on the torts standard of knowledge of the probable effects of [the

type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”)

⁴³ See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (stating that the employer’s decision must be motivated by the employee’s protected trait).

⁴⁴ Michael Zimmer, *The Employer’s Strategy in Gross v. FBL Financials*, CONCURRINGOPINIONS.COM (Nov. 4, 2009, 10:43 AM), <http://www.concurringopinions.com/archives/2009/11/the-employers-strategy-in-gross-v-fbl-financials.html>.

⁴⁵ See *Washington v. Davis*, 426 U.S. 229, 246 (1976); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989) (plurality opinion).

⁴⁶ Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 940 (2005).

⁴⁷ Michael Zimmer, *Ricci: The Interaction of Disparate Treatment and Impact Discrimination*, CONCURRINGOPINIONS.COM (Nov. 22, 2009, 11:55 AM), <http://www.concurringopinions.com/archives/2009/11/ricci-the-interaction-of-disparate-treatment-and-impact-discrimination.html>.

defendant's] acts."⁴⁸ Professor Selmi was referring to *Washington v. Davis*,⁴⁹ which held that the disparate impact theory did not apply to § 1983 actions seeking redress for violations of the Fourteenth Amendment.⁵⁰ Thus, the fact that a governmental action (there, a qualifying examination) had a differing effect on whites and blacks was not sufficient to constitute a cause of action.⁵¹ "Intent" was necessary, which meant that knowledge of differing effects as to race was not enough.⁵² The district court in *Ricci* ruled that having a racial motive for an action did not make it illegal.⁵³

Another necessary element of disparate treatment was that the bias had to cause the complained of harm.⁵⁴ Whether it has to be the "but for" cause or just a contributing cause (the "mixed motive" test) has been, and still is, a matter of controversy.⁵⁵ We may start with *Price Waterhouse v. Hopkins*,⁵⁶ where Justice Brennan's plurality of four ruled that the plaintiff need only show the prohibited intention (there, gender) was a "motivating factor" in the decision.⁵⁷ Justice O'Connor's concurring opinion, however, stated that the plaintiff must prove a "substantial" rather than just a "motivating factor."⁵⁸ The Civil Rights Act of 1991 § 703(m) adopted the Brennan test, stating that discrimination need only be a "motivating factor."⁵⁹

The Court revisited the issue in *Gross v. FBL Financial Services, Inc.*,⁶⁰ which held that under the Age Discrimination in Employment Act (ADEA), the discrimination must be the "but for" cause of the adverse employment decision.⁶¹ The Court rejected the plaintiff's argument that

⁴⁸ Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 731 (2006).

⁴⁹ 426 U.S. 229 (1976).

⁵⁰ *See id.* at 239.

⁵¹ *See id.* at 246.

⁵² *See id.*

⁵³ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006).

⁵⁴ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion).

⁵⁵ *See id.* at 262–63 (O'Connor, J., concurring).

⁵⁶ 490 U.S. 228 (1989).

⁵⁷ *Id.* at 258.

⁵⁸ *Id.* at 265 (O'Connor, J., concurring).

⁵⁹ 42 U.S.C. § 2000e-3(m) (2006); *see also* Sullivan, *supra* note 46, at 932–33 (discussing the adoption of the Brennan test by Congress).

⁶⁰ 129 S. Ct. 2343 (2009).

⁶¹ *Id.* at 2352.

the case was controlled by *Price Waterhouse*, which held that the discrimination must only be a “motivating factor,” not the “but for” cause.⁶² In a footnote, the Court pointed out that Congress amended Title VII to allow the discrimination to be only a “motivating factor” but did *not* amend the ADEA.⁶³

We are then left with at least two standards of causation: a “motivating factor” for Title VII and “but for” in ADEA cases. Both tests assume there has to be some discriminatory intent that to some extent influences the discriminatory action.⁶⁴ If, however, knowledge of a discriminatory racial result—a result that classifies by race—is sufficient to be discriminatory treatment, there would be no need to deal with whether a prohibited intent or motive would be a “motivating factor” or a “but for” cause. This may well be true for § 1983 suits as well.

B. Ricci Redefines Disparate Treatment

We now come to what disparate treatment means post-*Ricci*. Although Justice Kennedy’s opinion spends pages describing the efforts expended by the firefighters who passed the test, the many efforts and resources expended by the City of New Haven in trying to create a fair test, and the long process that ended in the tests not being certified; the case’s ruling is simple: the rejection of the test was race-based, and this violated Title VII.⁶⁵ “We conclude that race-based action like the City’s in this case is impermissible under Title VII.”⁶⁶

The sentence concludes with a proviso, “[U]nless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute.”⁶⁷ But how did “disparate impact” become an issue? It became an issue because the City’s first reaction to the results of the test was that the results were suspect due to the test’s disparate impact on minorities.⁶⁸ The City’s corporate counsel convened a meeting with the testing company’s vice-president where “City officials expressed concern that the tests had discriminated against

⁶² *Id.* at 2348–49.

⁶³ *Id.* at 2349 (emphasis added).

⁶⁴ *See id.* at 2349–50, 2352 (discussing the precedent supporting the need for discriminatory intent in both Title VII and ADEA cases).

⁶⁵ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664–71 (2009).

⁶⁶ *Id.* at 2666.

⁶⁷ *Id.*

⁶⁸ *Id.*

minority candidates.”⁶⁹ It was this concern for minority candidates that demonstrates—as a matter of law—that the City violated Title VII:

Our analysis begins with this premise: The City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because “too many whites and not enough minorities would be promoted were the lists to be certified.” (respondents’ “own arguments . . . show that the City’s reasons for advocating non-certification were related to the racial distribution of the results.”) Without some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.⁷⁰

The district court in *Ricci* had ruled the contrary—having a racial motive did *not* equal discrimination.⁷¹ It relied on a Second Circuit case that noted, “Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflects a concern with race. That does not make such enactments or actions unlawful or automatically suspect.”⁷² To the contrary, the Supreme Court’s opinion changed this prior law to the extent of providing a racial preference to the plaintiffs.⁷³

⁶⁹ *Id.*

⁷⁰ *Id.* at 2673 (internal citations omitted) (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006)); *see also* 42 U.S.C. § 2000e-2(a)(1).

⁷¹ *Ricci*, 554 F. Supp. 2d at 160.

⁷² *Id.* at 157 (quoting *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48–49 (2d Cir.1999)). Both Professor Norton and I find it hard to believe that the Court’s majority and dissenting opinions in *Ricci* are describing the same case. Norton, *supra* note 26, at 221–22.

⁷³ *See Harris & West-Faulcon*, *supra* note 2, at 32–33. Harris and West-Faulcon argue that:

Ricci’s doctrinal innovations produce racial asymmetry in the burdens and presumptions that operate under Title VII law in several respects. First, by imputing race-specific harm to a race-neutral

(continued)

Thus, the City or any employer who wants to change a selection procedure is in a Catch-22 situation. If the reason for change is that the procedure has a disparate impact, then the reason, being race-based, is a per se violation of Title VII.⁷⁴ All race-based classifications are bad, per se.⁷⁵ Justice Kennedy does give the employer an out—it can and must “demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”⁷⁶ Changing employment practices based on disparate impact, then, is high-risk for the employer because if the change is based on disparate impact, it automatically violates Title VII,⁷⁷ and the only defense is the hard one of showing, not just some evidence or a preponderance of evidence, but a “strong basis” in evidence that a disparate impact suit would win.⁷⁸ The defendant must pretend it is a disparate impact plaintiff suing itself and assess its chances. If it is wrong, it will lose in a disparate treatment suit. And, if it does or does not change, it may be sued under disparate impact. This is exactly what happened to the City of New Haven, which was sued by a firefighter who was not promoted.⁷⁹

decision, the *Ricci* plaintiffs were provided a racial preference: Unlike ordinary Title VII plaintiffs, they were relieved of any requirement of demonstrating pretext or of proving an impermissible racial motive. . . . Under Title VII a determination of this issue would be a factual inquiry into motive. However, this evidentiary inquiry has been supplanted by a kind of *ipsi dixit* logic that equates all inquiries regarding racial effects or racial dynamics with an illegitimate discriminatory motive. Prior to *Ricci*, Second Circuit precedent as well as established case law in other jurisdictions had flatly rejected this characterization. *Id.*

⁷⁴ See 42 U.S.C. § 2000e-2(a) (2006).

⁷⁵ *Id.*

⁷⁶ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

⁷⁷ See 42 U.S.C. § 2000e-2(a)(1)–(2).

⁷⁸ *Ricci*, 129 S. Ct. at 2664.

⁷⁹ *Briscoe v. City of New Haven*, No. 3:09-CV-1642 (CSH), 2010 WL 2794212, at *1 (D. Conn. July 12, 2010). The court in *Briscoe* ruled in favor of the City of New Haven and dismissed the case. *Id.* at *12. The district court in *Ricci* noted that the prior New Haven promotion tests may well have had a disparate impact. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 153–54 (D. Conn. 2006) (discussing the differences in pass-fail rates for minorities and whites).

Note here that the situation is seen as a zero-sum game: changing the system for the benefit of minorities necessarily constitutes discrimination against non-minorities.⁸⁰

This finding of an automatic violation changes a principle of the prior law in which a preference for one group was not seen as necessarily being discrimination against the other.⁸¹ In *Equal Employment Opportunity Commission v. Consolidated Service Systems*,⁸² Judge Richard Posner ruled in favor of an employer who relied on word-of-mouth recruitment and wound up with a work force of almost all Korean ethnicity.⁸³ The court held that preferring those of Korean descent was not discrimination against non-Koreans.⁸⁴ Another instance is the “paramour” cases.⁸⁵ The boss promotes a female employee he has been sleeping with.⁸⁶ A male employee, who has not been promoted, then sues for gender discrimination.⁸⁷ The courts have held that there is no discrimination, just a preference for certain women.⁸⁸ The same result occurs in “cronyism,” where the boss hires and promotes his male buddies.⁸⁹

Nor does the City’s benign motivation, to avoid using a test with a disparate impact, obviate discriminatory intent:

Whatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that

⁸⁰ See Norton, *supra* note 26, at 233.

⁸¹ *Id.* at 229, 234–35.

⁸² 989 F.2d 233 (7th Cir. 1993).

⁸³ *Id.* at 234–35.

⁸⁴ *Id.* at 237.

⁸⁵ Allen R. Kamp, *Anti-Preference in Employment Law: A Preliminary Analysis*, 18 CHICANO-LATINO L. REV. 59, 63 (1996); see also Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 549 (1994).

⁸⁶ See Phillips, *supra* note 85, at 549.

⁸⁷ See *id.* at 549–50.

⁸⁸ See Kamp, *supra* note 85, at 63.

⁸⁹ B. Stephanie Siegmann, *Hire Your Friends: First Circuit Accepts “Cronyism” as Valid Counterargument to Title VII Disparate Treatment Action—Foster v. Dalton*, 71 F.3d 52 (1st Cir. 1995), 30 SUFFOLK U. L. REV. 991, 992 (1997).

conduct was discriminatory but whether the City had a lawful justification for its race-based action.⁹⁰

In rejecting the City's argument that an "alternative" selection procedure could be used, the Court again limits disparate impact and expands disparate treatment.⁹¹ Under the codification of the disparate impact theory in the Civil Rights Act of 1991, once the defendant has demonstrated "business necessity," the plaintiff may show that another selection procedure—a valid alternative—would have less disparate impact.⁹² The City argued that changing the weighting of the written and oral scores from 60/40 to 30/70 would allow it to consider three black candidates for promotion.⁹³ The City also argued it could have modified the "rule of three," which required that any promotions be made only from the three highest scores on the exam.⁹⁴ (Note here that the City is arguing against itself: that it did violate Title VII because it could have used a "valid alternative.") The Court ruled that would have violated Title VII's prohibition on adjusting test results based on race.⁹⁵ Thus, once a test has been given, it cannot be changed—even if there is evidence that the test had a disparate impact—because the change would also be based on race.⁹⁶ This holding both limits disparate impact and expands disparate treatment in showing that any race-conscious act violates Title VII.

⁹⁰ Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

⁹¹ *Id.* at 2679–81.

⁹² See 42 U.S.C. § 2000e–2(k)(1)(A)(ii),–2(k)(1)(C) (2006); see also Ricci, 129 S. Ct. at 2673 ("Even if the employer meets [the burden of showing a business necessity], a plaintiff may still succeed by showing that the employer refuses to adopt an available employment practice that has less disparate impact . . .").

⁹³ Ricci, 129 S. Ct. at 2679.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2676 (citing 42 U.S.C. § 2000e–2(l) (2006)).

⁹⁶ See Harris & West-Faulcon, *supra* note 2, at 2. Harris and West-Faulcon point out that this freezes the status quo:

From this vantage point, instead of identifying the most qualified candidates, New Haven's exams unfairly and unnecessarily reproduced the fire department's racially (and gender) skewed status quo. Nevertheless, in Ricci, the City's efforts to ameliorate this racial imbalance were themselves treated as racially rigging the results, exemplifying how the pursuit of fair testing was race-d. *Id.*

C. *Limitations on the Scope of Ricci*

1. *Vested Rights*

Two factors in the majority opinion limit the scope of the opinion.⁹⁷ One is that the Court found the plaintiffs had a vested right in their promotions.⁹⁸ In employment discrimination law, this is called an “adverse employment action,” that is some significant term or condition of employment must have been adversely affected for there to be a cause of action for employment discrimination.⁹⁹ In *Jones v. Clinton*,¹⁰⁰ for example, Jones lost her suit against President Clinton because the adverse action against her (for allegedly refusing to perform sexual acts with the then Governor) was only a job reassignment and not getting flowers for Secretary’s Day.¹⁰¹

Ricci’s first paragraphs describe the importance of the promotion to firefighters and their effort to pass the test:

In the fire department of New Haven, Connecticut—as in emergency-service agencies throughout the Nation—firefighters prize their promotion to and within the officer ranks. An agency’s officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates.

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many

⁹⁷ See *Ricci*, 129 S. Ct. at 2676.

⁹⁸ See *id.*

⁹⁹ See, e.g., *Crady v. Liberty Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (dismissing an age discrimination suit because the employer’s action had no adverse effect on the plaintiff’s salary, benefits, or responsibilities).

¹⁰⁰ 990 F. Supp. 657 (E.D. Ark. 1998).

¹⁰¹ *Id.* at 671.

firefighters studied for months, at considerable personal and financial cost.¹⁰²

The majority opinion goes on to describe how hard Ricci studied for the test. Ricci suffered from dyslexia, along with other learning disabilities. Every day, he studied eight to thirteen hours. He spent over \$1,000 on study materials and payments to his neighbor to record them on tape so “he could ‘give it [his] best shot.’”¹⁰³ Once the selection criteria have been made clear, employers “may not then invalidate the test results, thus upsetting an employee’s legitimate expectations not to be judged on the basis of race.”¹⁰⁴

Under the majority opinion, there was a vested right. The question then, of course becomes “What is a vested right?” One can now indulge in the law professors’ favorite sport of coming up with hypotheticals: let’s say that a state law school has admitted students on the basis of LSAT scores and undergraduate grade point averages. Noticing that minorities do worse on the LSAT, the school decides not to require the LSAT score but to instead look at such factors as community service, job experience, and extra-curricular activities. A prospective student in preparation for the LSAT invested money in taking LSAT prep courses, such as Kaplan’s, and spent hours doing practice LSAT tests. He then took the test and did very well. Did the prospective student have a vested right? Has the law school violated § 1983?

2. *Changing the Past or Changing the Future?*

The majority opinion’s second limitation is that the race-consciousness only invalidated a decision made after the test was applied, not before.¹⁰⁵ Kennedy makes clear that the majority opinion applies only to changing the results retrospectively, not prospectively in designing the test.¹⁰⁶

¹⁰² *Ricci*, 129 S. Ct. at 2664.

¹⁰³ *Id.* at 2667.

¹⁰⁴ *Id.* at 2677.

¹⁰⁵ *See id.* at 2676 (stating that an employer may neither rescore nor discard a test to achieve a more desirable racial distribution).

¹⁰⁶ *Id.* at 2677. Justice Kennedy states:

Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common

(continued)

Professor Zimmer, reading Justice Kennedy's opinions in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*¹⁰⁷ and *Ricci* together, concludes that an employer may act prospectively with race-consciousness, but not retroactively, as in *Ricci*.¹⁰⁸

Justice Scalia, however, indicates that Equal Protection would invalidate prospective race-conscious decisions:

[D]isparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles.¹⁰⁹

Scalia's approach would both grandfather in past practices that have a disparate impact and cause changes made in order to have a diverse work force to be illegal.¹¹⁰ Here I came up with a hypothetical—say an employer years ago instituted a policy that hired only natural blondes. There is no evidence that it was racially motivated—the employer just liked blondes. After someone points out to him that he is not hiring many southern Europeans, Hispanics, or Asians, he contemplates changing his system. If he does not change, would he be liable under a disparate impact theory? If he does change, is he liable under disparate treatment for establishing a quota?

ground for open discussions toward that end. We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. *Id.*

¹⁰⁷ 551 U.S. 701 (2007).

¹⁰⁸ Zimmer, *supra* note 3, at 32.

¹⁰⁹ *Ricci*, 129 S. Ct. at 2682.

¹¹⁰ *See id.*

D. The Concurring Opinions

The concurring opinions of Justices Scalia and Alito (joined by Justices Scalia and Thomas) go even further in expanding the definition of disparate treatment.

Scalia writes in terms of disparate impact that are equally applicable to defining disparate treatment:

As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is, as the Court explains, discriminatory.¹¹¹

Thus, disparate impact requires classification by race, which the Fourteenth Amendment prohibits.¹¹²

Justice Alito's concurring opinion argues that the City's concern with disparate impact was pretextual because "the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency."¹¹³

In support of his position, Alito refers to Reverend Boise Kimber as "a politically powerful New Haven pastor and a self-professed 'king maker.'"¹¹⁴ To Alito, the Rev. Kimber's racism is shown by threatening a race riot during the trial of a black man accused of murdering a white man and calling whites who questioned his actions racist.¹¹⁵ Justice Alito notes the following: Rev. Kimber had personal ties with New Haven Mayor John DeStefano, opposed the test certification, informed the Mayor of his opposition, protested to the test certification body, and along with others, lobbied the Board not to certify the results.¹¹⁶

To Alito, Kimber's lobbying and the decision of the Mayor to reject the test results could lead a jury to "easily" find that the City was really motivated by "a simple desire to please a politically important racial constituency."¹¹⁷ Thus, although the City may have engaged in intentional

¹¹¹ *Id.*

¹¹² U.S. CONST. amend. XIV, § 1.

¹¹³ *Ricci*, 129 S. Ct. at 2684.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2684–85.

¹¹⁷ *Id.* at 2688.

racial discrimination, “there are some things that a public official cannot do, and one of those is engaging in intentional racial discrimination when making employment decisions.”¹¹⁸ Proving intentional discrimination by considering the actions of those outside of the government is a powerful tool to find racial discrimination. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹¹⁹ which laid down a multi-part test to judge whether a governmental body has engaged in intentional discrimination, spoke in terms of the statements by governmental officials, not lay citizens.¹²⁰ The Court downplayed the influence of those outside the government.¹²¹

Professors Harris and West-Faulcon point out that the Court ignored racial statements¹²² in *Palmer v. Thompson*,¹²³ where the Court found no constitutional violation when the City of Jackson, Mississippi closed its swimming pools rather than desegregate them.¹²⁴ The Mayor was reported as saying:

‘We will do all right this year at the swimming pools . . . but if these agitators keep up their pressure, we

¹¹⁸ *Id.*

¹¹⁹ 429 U.S. 252 (1977).

¹²⁰ *See id.* at 268. The Court placed special significance on legislative action by writing:

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or report. In some extraordinary instances, the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. *Id.*

¹²¹ *See id.* at 269. To minimize the importance of lay opinion in applying the test, the Court wrote:

In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence “does not warrant the conclusion that this motivated the defendants.”

Id. (citation omitted).

¹²² Harris & West-Faulcon, *supra* note 2, at 35.

¹²³ 403 U.S. 217 (1971).

¹²⁴ *Id.* at 227.

would have five colored swimming pools because we are not going to have any intermingling.’ . . . He said the City now has legislative authority to sell the pools or close them down if they can’t be sold.¹²⁵

The district court in *Ricci* ruled that a decision made with a racial and political motivation is not discrimination: “Defendants’ motivation to avoid making promotions based on a test with racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent.”¹²⁶

Alito makes it a lot easier to find a racial motive, and again, such a motive is bad per se. He makes it too easy—Rev. Kimber was just exercising his right to express his views to his government.¹²⁷ To Alito, this is impermissible racism.¹²⁸

All in all, the majority and concurring opinions re-conceptualize discrimination law:

Thus, through framing the City’s conduct as affirmative action, *Ricci* doctrinally and conceptually “whitens” discrimination and “races” test fairness: It positions whites as the disempowered race vis a vis city officials who are beholden to politically powerful minorities seeking unearned preferences for members of their race. Next, it casts whites as meritorious, hard-working victims of the racially preferential rigging of test results as against nonwhites whose test scores presumptively demonstrate they are not deserving or at least are less so.¹²⁹

¹²⁵ *Id.* at 250 (internal citations omitted).

¹²⁶ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006).

¹²⁷ See U.S. CONST. amend. I.

¹²⁸ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2684–85 (2009) (Alito, J., concurring) (describing actions taken by Rev. Kimber and city officials and concluding that a reasonable jury could “easily” find intentional racial discrimination on the part of the city).

¹²⁹ *Harris & West-Faulcon*, *supra* note 2, at 13.

E. Ricci's Application to Equal Protection

The majority opinion in *Ricci* specifically stated it was decided under Title VII only, not the Equal Protection Clause.¹³⁰ However, it cannot be so limited. As stated by Professor Primus:

It would be a mistake, however, to think of the *Ricci* premise as merely statutory. Despite the Court's professed intention to avoid equal protection issues, the *Ricci* premise is properly understood as a constitutional proposition as well as a statutory one. The reason is that constitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII's prohibition on disparate treatment. Obviously the two doctrinal frameworks diverge in some respects. They cover different though overlapping sets of parties, and they have different procedural requirements for plaintiffs filing causes of action. That said, the conceptual content of the two frameworks is the same. The conduct prohibited under one is virtually coextensive with the conduct prohibited under the other.¹³¹

Ricci uses an analytical model appropriate to the Equal Protection Clause, not Title VII.¹³² The Court ignored the usual methods of deciding Title VII claims.¹³³ It did not deal with Title VII's requirement of "adverse employment action."¹³⁴ (Note that the plaintiffs in *Ricci* had not yet been promoted or passed a certified test—the test was to be effective only upon certification.)¹³⁵

¹³⁰ See *Ricci*, 129 S. Ct. at 2676 ("[B]ecause respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.").

¹³¹ Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354–55 (2010).

¹³² See *id.* at 1357–58 (arguing that the plaintiff's in *Ricci* alleged a kind of injury that is typically analyzed as an equal protection problem, not as disparate treatment under Title VII).

¹³³ See *id.* at 1357 (pointing out that the *Ricci* Court failed to identify an adverse employment action that is necessary under Title VII).

¹³⁴ See *id.*

¹³⁵ *Id.*

The district court in *Ricci* ruled that there was no adverse action.¹³⁶ This court used the *McDonnell Douglas Corp. v. Green*¹³⁷ analysis, standard in disparate treatment cases, to decide the case, but the Supreme Court ignored it.¹³⁸ Under *McDonnell Douglas*, if the plaintiff presents a prima facie case, then the defendant must articulate a “legitimate non-discriminatory reason” for the disparate treatment, and then the plaintiff must show that the explanation was pretextual and the adverse action was the result of discrimination.¹³⁹

The Court lastly ignored the tests for motive under Title VII and instead substituted the Equal Protection test of “predominant motive.”¹⁴⁰ Justice Kennedy imported the “strong basis in evidence” rule for the disparate impact defense from earlier court decisions under the Equal Protection Clause,¹⁴¹ such as *City of Richmond v. J.A. Croson Co.*¹⁴² and *Wygant v. Jackson Board of Education.*¹⁴³

Ricci is then ultimately an equal protection case and an important one. Professor Zimmer concludes that it takes us closer to an interpretation of the Fourteenth Amendment, which imposes a “color-blind” standard.¹⁴⁴

¹³⁶ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006).

¹³⁷ 411 U.S. 792 (1973).

¹³⁸ Primus, *supra* note 131, at 1358.

¹³⁹ *McDonnell Douglas*, 411 U.S. at 802–05.

¹⁴⁰ Primus, *supra* note 131, at 1360–61.

¹⁴¹ See *Harris & West-Faulcon*, *supra* note 2, at 26 (“Kennedy borrowed the ‘strong basis in evidence’ standard the Court set forth previously as applicable to public entities that voluntar[il]ly adopt race-based affirmative action policies.”).

¹⁴² 488 U.S. 469, 493–98 (1989).

¹⁴³ 476 U.S. 267, 277–78 (1986).

¹⁴⁴ See Michael Zimmer, *Ricci: The Equal Protection Implications*, CONCURRING OPINIONS.COM (Nov. 28, 2009, 11:40 AM). Professor Zimmer concludes:

In sum, the *Ricci* Court took one step closer to a statutory and constitutional “color blind” standard. On one hand, it did not appear to change the equal protection standard applicable to express racial classifications that was established in *Adarand Constructors*: “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” On the other hand, it likely expanded the scope of application of strict scrutiny to some, but not all situations, where a governmental actor (or a private actor acting under compulsion of law) takes action, knowing the racial consequences of that action. Strict scrutiny does not apply if that action is taken before expectations have

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IV. WHAT COMMENTATORS THINK *RICCI* MEANS

Turning to some early commentary on *Ricci*, the consensus is that *Ricci* does equate race-conscious decision making with prohibited disparate treatment.¹⁴⁵ Moreover, such race-conscious decision making is prohibited under both the Equal Protection Clause and Title VII.¹⁴⁶ Professor Richard Primus succinctly describes the holding of *Ricci*:

If Title VII's prohibition on disparate treatment is understood as a general requirement of color-blindness in employment, then it is easy to see any race-conscious decisionmaking as disparate treatment. Disparate impact doctrine does require race-conscious decisionmaking, so it follows that there is a conflict between the two frameworks. It's as simple as that. No court ever took this view before, but many people now and in the future will regard the proposition as obvious.¹⁴⁷

Professor Primus describes how *Ricci*'s promise is a radical departure from prior law. "No court ever took this view before"¹⁴⁸:

. . . Disparate treatment doctrine prohibits race-conscious decisionmaking, and disparate impact remedies are always race-conscious. There is accordingly a tension between the two frameworks. That said, no prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment. That is why the *Ricci* Court had to state the premise in its own voice and without citation. From the traditional perspective of antidiscrimination law, the idea that disparate impact remedies are as a conceptual matter disparate treatment problems is a radical departure.¹⁴⁹

been established or reliance interests created in individuals. But strict scrutiny does apply once those expectations have been established.

Id. (quoting in part *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

¹⁴⁵ See Harris & West-Faulcon, *supra* note 2, at 41; see also Primus, *supra* note 131, at 1349–50.

¹⁴⁶ See Primus, *supra* 131, at 1349–50.

¹⁴⁷ *Id.* at 1353.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1350.

Historically, disparate treatment under Title VII covered two different things: one “is about employers applying different rules to employees of different races (or sexes, etc.).”¹⁵⁰ Title VII also bans wrongful employer motive:

Consider a case in which a business located in a heavily white suburb of a heavily black city has a policy of hiring only people who live in the suburb. Formally, such a policy does not treat individual applicants disparately on the basis of their race. But if the policy is motivated by the desire to exclude black applicants from the city next door, it is actionable under the heading “disparate treatment,” despite the absence of disparate treatment by race in the ordinary-language sense. The discrimination is intentional, and intentional discrimination is *called* “disparate treatment.”¹⁵¹

Courts and commentators did not see changes to avoid disparate impact as involving disparate treatment based on explicit bias,¹⁵² nor did courts see such action as stemming from an impermissible racial motive.¹⁵³

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1351.

¹⁵² *Id.* If a written test has a racially disparate impact and the employer throws out the results—as happened in *Ricci*—the test results are thrown out for all applicants, regardless of race. *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009) (observing that all of the examinations were thrown out). Any black applicants who did very well on the test are disadvantaged by the disparate impact remedy along with white applicants who did very well. White applicants who did poorly may stand to gain along with black applicants who did poorly. Obviously the decision to throw out the test is race-conscious. But throwing out the test results does not involve “disparate treatment” in the ordinary-language sense of sorting employees into groups and conferring a benefit on members of one group that was withheld from members of the other group. *See Primus, supra* note 131, at 1350–51. No two employees are given different tests, nor are separate criteria used to evaluate different employees, and no job is given to a Mr. Black but denied to a similarly situated Mr. White. *Id.* at 1351.

¹⁵³ *See Primus, supra* note 131, at 1351. The remaining question, then, is whether throwing out the test results proceeds from a motive that is prohibited under Title VII. During the early decades of disparate impact doctrine, the easy answer to that question was no. *Id.* Disparate impact doctrine was broadly understood as a means of redressing unjust but persistent racial disadvantage in the workplace, and antidiscrimination law was broadly tolerant of deliberate measures intended to improve the position of disadvantaged minority groups. *Id.* at 1353.

Professor Michael Zimmer concludes that what the Court found illegal was acting with the knowledge of racial consequences: “The defendant was liable to these plaintiffs who were adversely affected by the decision even though the decision was made in spite of their race, not because of it.”¹⁵⁴

This represents a break from prior law.¹⁵⁵ Disparate treatment dealt with intentional discrimination proven by either direct or indirect evidence.¹⁵⁶ Direct evidence cases, such as *L.A. Department of Water & Power v. Manhart*¹⁵⁷ and *International Union v. Johnson Controls*,¹⁵⁸ involved expressly discriminatory classifications, which divided employees into two non-overlapping groups.¹⁵⁹ The statistics were overwhelming.¹⁶⁰

Traditionally, one could not draw an inference of discrimination from the decision maker’s consciousness of the race or gender of the subject employee. As stated by Justice O’Connor in *Price Waterhouse v. Hopkins*,¹⁶¹

¹⁵⁴ Zimmer, *supra* note 3, at 4.

¹⁵⁵ See Primus, *supra* note 131, at 1353 (“No court ever took this view before . . .”).

¹⁵⁶ See *id.* at 1342.

¹⁵⁷ 435 U.S. 702 (1978).

¹⁵⁸ 499 U.S. 187 (1991).

¹⁵⁹ See *Manhart*, 435 U.S. at 704 (dividing workers into groups based on sex for the purpose of allocating pension fund contributions); see also *Johnson Controls*, 499 U.S. at 190 (excluding females from certain jobs to further a “fetal-protection policy”). In indirect evidence, the reason given, say, for not hiring blacks was shown to be pretextual because of, for example, overwhelming statistics of racial hiring. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 303 (1988) (describing a school district in which 15.4% of the population was African-American but only 5.7% of the teachers were black).

¹⁶⁰ Michael Zimmer, *Color-Blind Standards in a Race Conscious Society*, CONCURRING OPINIONS.COM (Nov. 20, 2009, 8:49 AM EST), <http://www.concurringopinions.com/archives/2009/11/ricci-color-blind-standards-in-a-race-conscious-society.html>. Prof. Zimmer states that in *Ricci*:

[T]he white plaintiffs were only 25% of all whites who took the test. Looking at the statistics alone, it would seem to be unlikely to support drawing an inference of intentional race discrimination against the members of any of the six groups without drawing the same inference as to the members of each of the six groups. That would not be disparate treatment discrimination. *Id.*

¹⁶¹ 490 U.S. 228 (1988).

Race and gender always “play a role” in . . . a benign sense that these are human characteristics of which decisionmakers are aware and may comment on in a perfectly neutral fashion. For example, . . . mere reference to “a lady candidate” might show that gender “played a role” in the decision, but by no means could support a rational factfinder’s inference that the decision was made “because of” sex.”¹⁶²

The most glaring example is *Personnel Administrator of Massachusetts v. Feeney*,¹⁶³ which found that a preference for veterans where 98% of the veterans were men, did *not* show a discriminatory purpose against women.¹⁶⁴

Professor Zimmer concludes:

The Court appeared to take a giant leap from the fact that the City knew the racial distribution of the testtakers and the racial consequences of using the test to conclude, as a matter of law, that the decision not to use the scores was “because of” the race of the six different groups.¹⁶⁵

Professor Primus’s article, *The Future of Disparate Impact*, lays out three interpretations of *Ricci*: the General, the Institutional, and the Visible Victims.¹⁶⁶

The “General” would represent a fundamental change in antidiscrimination law, but its logic is simple: it is “color-blindness, understood as the rejection of race-conscious governmental action, as the guiding value of equal protection.”¹⁶⁷ Under this reading, disparate impact could only serve as a defense if it “were found to be narrowly tailored to a compelling governmental interest But compelling interest defenses are always longshots.”¹⁶⁸

¹⁶² *Id.* at 277.

¹⁶³ 442 U.S. 256 (1979).

¹⁶⁴ *Id.* at 270.

¹⁶⁵ Michael Zimmer, *Ricci: Color-Blind Standards in a Race Conscious Society*, CONCURRING OPINIONS.COM (Sept. 26, 2010, 8:49 PM), <http://www.concurringopinions.com/archives/2009/11/ricci-color-blind-standards-in-a-race-conscious-society.html>.

¹⁶⁶ Primus, *supra* note 131, at 1362.

¹⁶⁷ *Id.* at 1363.

¹⁶⁸ *Id.*

The “Institutional” reading is that public employers may not institute a remedy that is race-conscious, but that courts may.¹⁶⁹ A court adjudicating a suit by a black man must notice the race of the plaintiff. “On that institutional reading, Title VII’s disparate impact doctrine is still constitutional, so long as it is implemented by courts. *Ricci* means only that employers cannot implement race-conscious remedies by themselves.”¹⁷⁰

The “Visible Victims” reading requires specific innocent parties to trigger liability. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁷¹ Justice Kennedy recommended using facially race-neutral means such as redistricting to further race integration.¹⁷² Another example is then-Governor George W. Bush’s Ten Percent Plan, which admitted all Texas high school graduates in the top ten percent of their high school class to the University of Texas.¹⁷³ President Bush’s Justice Department later considered the Plan as a model.¹⁷⁴ Because there were no visible victims, the plan would not violate equal protection, although it was chosen with race-consciousness.¹⁷⁵ Professor Primus concludes by stating that the way the Court will choose between the three readings may well depend on the facts of the case that will present the issue.¹⁷⁶

Note that Scalia and Alito (plus Thomas) would come down on the side of the “General” reading—any race consciousness by anybody is always bad.¹⁷⁷ Bruce Willoughby, a Nevada employment lawyer, shows how this may work in practice, noting that “[t]he court did not provide any guidelines to educate attorneys and employers on how employers can determine what qualifies as a ‘strong basis in evidence.’”¹⁷⁸ He counsels

¹⁶⁹ *Id.* at 1344.

¹⁷⁰ *Id.* at 1369.

¹⁷¹ 551 U.S. 701 (2007).

¹⁷² *See id.* at 789.

¹⁷³ Primus, *supra* note 131, at 1369.

¹⁷⁴ *Id.* at 1370.

¹⁷⁵ *Id.*

¹⁷⁶ *See id.* at 1385–86.

¹⁷⁷ *See* Michael Subit, *A Plaintiff’s Employment Lawyer’s Perspective on Ricci v. DeStefano*, 25 AM. B. ASS’N J. LAB. & EMP. 199, 208 (2010).

¹⁷⁸ Willoughby, *supra* note 2, at 31.

that the safest course for an employer is to continue using whatever criteria is in place, ignoring any disparate impact.¹⁷⁹

V. THE CONSERVATIVE INTERPRETATION

Ricci's result did not come from nowhere; it is a product of long-standing conservative opposition to equal protection and civil rights.¹⁸⁰ Kenneth L. Marcus's *The War Between Disparate Impact and Equal Protection* may serve as the conservative reading of *Ricci*.¹⁸¹ It concludes that state actors "may take narrowly tailored race-conscious actions" to avoid creating intentional and unconscious discrimination that cannot be proven through other means.¹⁸² The Equal Protection Clause, however, would prevent Title VII from being used to "level racial disparities that do not arise from intentional or unconscious discrimination."¹⁸³ There is scope, however, to voluntarily avoid "systematic racial biases that do not arise from an institution's present or prior discriminatory actions."¹⁸⁴

Marcus equates changing the selection criteria to avoid any disparate impact on minorities to "rigid quotas based on demographic racial balancing."¹⁸⁵ He states, "Allocation of public benefits must be made on an individual basis, rather than on the basis of racial group membership."¹⁸⁶ The bottom line "is that facially neutral employment decisions will trigger [strict scrutiny] when they are motivated by a predominantly race-conscious intent."¹⁸⁷ Marcus predicts that *Ricci's* "strong basis in evidence" defense will fall as violative of the Equal

¹⁷⁹ *Id.* Willoughby's conclusion has the support of Professor Norton: "Indeed, *Ricci* now gives employers pause before choosing practices that lessen disparate impact [claims]." Norton, *supra* note 26, at 231.

¹⁸⁰ See Subit, *supra* note 177, at 200. Throughout this article, I use the term "conservative" as meaning organizations, commentators, justices, and judges who are generally considered to be or regard themselves as conservatives. I do not mean the term in any precise or philosophical sense.

¹⁸¹ Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 CATO SUP. CT. REV. 53 (2009). It should be noted that the Cato Review is not an academic publication but that of the Cato Institute, a right-wing lobbying institution.

¹⁸² *Id.* at 55.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 65.

¹⁸⁶ *Id.* at 69.

¹⁸⁷ *Id.* at 71.

Protection Clause.¹⁸⁸ Congress cannot require that employers act to dismantle cultural obstacles to equal opportunity, such as “height and weight requirements for prison guards that may exclude most women, rather than directly measuring strength or other job relevant variables.”¹⁸⁹

We have here an example of how a practice can be valid under the no racial classification test, even though it furthers racial subordination by freezing in place current racial hierarchies.¹⁹⁰ Any present subordination is even constitutionally protected by the Equal Protection Clause.¹⁹¹ We should pause here in wonder at how the conservatives have managed to take a Reconstruction amendment, passed after the Civil War,¹⁹² and turned it into a mechanism to preserve white privilege.

In 1990, a conservative thinker, Charles Bolick, complained that conservatives had made “the plight of the white firefighters victimized by

¹⁸⁸ See *id.* at 83. Marcus concludes that Title VII’s disparate impact provision, as currently drafted, will fall to an Equal Protection claim. *Id.* Overruling Title VII’s disparate impact provision generally would also eliminate any defense based on an employer’s argument that there is a strong basis in evidence that their policy violated the provision.

¹⁸⁹ *Id.* at 82.

¹⁹⁰ See Harris & Faulcon-West, *supra* note 2, at 7–8. Harris and Faulcon-West point out that the present racial and gender make-up of fire departments is the result of discrimination:

Many times before Ricci spoke to the Senate, such women and nonwhite men testified before Congress. Even after overt exclusion ended when fire departments became subject to antidiscrimination laws, officials, often encouraged by white male dominated unions, used formally neutral selection criteria, including job irrelevant tests, to preserve the racially and gender skewed status quo previously achieved by blatant discrimination and nepotism. Time and time again the courts have been called upon to assess whether the criteria utilized really assessed job performance or were in fact discrimination by other means. Courts frequently have found departmental processes unnecessarily exclusionary, especially for minorities and women. *Id.*

¹⁹¹ See Marcus, *supra* note 181, at 83.

¹⁹² See 15 Stat. 706 (1868) (codified as amended at U.S. CONST. amend. XIV) (announcing, on July 20, 1868, that Secretary of State William Seward certified that three-fourths of the states had ratified the Fourteenth Amendment).

reverse discrimination” into “the major civil rights issue of our era.”¹⁹³ Bolick argued, “Given limited resources, public interest litigators should represent the most disadvantaged individuals and should try whenever possible to find a plaintiff whose plight outrages people.”¹⁹⁴ So, several years later, we get Frank Ricci, the dyslexic white firefighter, whose understandable and commendable ambitions for promotion and status were taken from him by a racial decision.¹⁹⁵ The *Ricci* plaintiffs used a publicity campaign to exploit their public appeal, even to the extent of creating a website.¹⁹⁶

Russell Kirk’s *The Conservative Mind: From Burke to Eliot* shows the conservative antipathy to equal protection.¹⁹⁷ He saw the abolitionists and slavery as morally equivalent:

[T]hat magnificent, simple cavalryman General Nathan Bedford Forrest listened to a series of highflying speeches from his old comrades in arms, by way of apologia for the lost cause; but slavery was scarcely mentioned. Then Forrest rose up, disgruntled, and announced that if he hadn’t thought he was fighting to keep his niggers, and other folks’ niggers, he never would have gone to war in the first place. Human slavery is bad ground for conservatives to make a stand upon; yet it needs to be remembered that the wild demands and expectations of the abolitionists were quite as slippery a foundation for political decency.¹⁹⁸

Conservatives generally approved of the antebellum political system.¹⁹⁹ The Civil War and Reconstruction “constituted one of the two great crises

¹⁹³ STEVEN MICHAEL TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 86 (2008) (quoting CLINT BOLICK, *UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA’S THIRD CENTURY* 137 (1990)).

¹⁹⁴ TELES, *supra* note 193, at 86; BOLICK, *supra* note 193, at 141.

¹⁹⁵ See Michael Doyle & David Lightman, *Sotomayor Backers Urge Reporters to Probe New Haven Firefighter*, *McCLATCHY NEWSPAPERS* (July 10, 2009), <http://www.mcclatchydc.com/2009/07/10/71660/sotomayor-backers-urge-reporters.html>.

¹⁹⁶ Harris & West-Faulcon, *supra* note 2, at 24.

¹⁹⁷ RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* 150 (7th ed. 1985).

¹⁹⁸ *Id.* at 151.

¹⁹⁹ See *id.* at 150; see also GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at 326 (ISI Books 30th Anniversary ed. 2006) (1976).

in the decline of the Republic.”²⁰⁰ Two conservative writers, Felix Morley and James J. Kilpatrick, thought that the Fourteenth Amendment was passed “in a ‘scandalous’ fashion.”²⁰¹

The conservative reaction to the Second Reconstruction, epitomized by *Brown v. Board of Education*, was much the same. Their reaction to *Brown* was hardly one of rejoicing that we had established a “color-blind constitution.”²⁰² *Ricci’s* premise of anti-discrimination being a zero-sum game harkens back to Herbert Wechsler’s *Toward Neutral Principles*, in which he could not find a justification for *Brown*.²⁰³ The only neutral principle he could find in *Brown* was freedom of association, but that principle did not dictate *Brown’s* result because “the freedom of association is denied by segregation, [but] integration forces an association upon those for whom it is . . . repugnant.”²⁰⁴ And thus, there is no reason to prefer one over another: “Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it,” there is no reason to pick one over the other.²⁰⁵

George H. Nash writes in *The Conservative Intellectual Movement in America Since 1945* that L. Brent Bozell, a conservative lawyer, criticized *Brown’s* “very reasoning.”²⁰⁶ Bozell argued that *Brown* was wrong because the same Congress that drafted the Fourteenth Amendment established segregated schools in the District of Columbia.²⁰⁷ William F. Buckley’s *National Review* generally criticized *Brown*.²⁰⁸ In 1957, an editorial declared:

The central question that emerges . . . is whether the White community in the South is entitled to take such measures as one necessary to prevail, politically and

²⁰⁰ Nash, *supra* note 199, at 327.

²⁰¹ *Id.*

²⁰² See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 92 (2001) (discussing widespread white supremacy in the wake of the Supreme Court’s decisions in *Brown* and *Brown II*).

²⁰³ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) (arguing that equal protection principles did not justify *Brown*).

²⁰⁴ *Id.* at 34.

²⁰⁵ *Id.*

²⁰⁶ See NASH, *supra* note 199, at 334.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 307.

culturally, in areas where it does not predominate numerically? The sobering answer is *Yes*—the White community is so entitled because, for the time being, it is the advanced race. . . .²⁰⁹

By 1967, the National Review had evolved to advocate black separatism.²¹⁰ “Why not experiment with black administration of black schools, for example, if that was what a majority of black parents really wanted? Why be shackled by clichés about integration?”²¹¹

Professors Harris and West-Faulcon point that *Ricci* is a product of the conservative campaign aimed at disparate impact: “[I]n truth they seek to bury disparate impact doctrine not to praise it.”²¹² The attack on affirmative action is part of a greater conservative project to extend “the claim of reverse discrimination to cover voting rights, school desegregation, and now, disparate impact theory in *Ricci*.”²¹³ They conclude that *Ricci* may “operationalize” Roberts’ mantra—“[t]he way to stop discrimination [on the basis of race] is to stop discriminating [on the basis of race].”²¹⁴

Even though the first conservative reaction to such cases as *Brown* was based on an “originalist” interpretation—that there was no historical basis for desegregation—Justice Scalia (and Justices Thomas, Alito, and Roberts) have switched to a “color-blind” constitution.²¹⁵ Under this view, equality is a zero-sum game, in which relief for one group is harm to another.²¹⁶ This conservative view recently surfaced in the Sotomayor

²⁰⁹ *Id.* at 308.

²¹⁰ *Id.* at 437–38.

²¹¹ *Id.* William F. Buckley later recanted and came to be in favor of racial equality. *Q & A on William F. Buckley*, N.Y. TIMES (Feb. 27, 2008, 12:52 PM), <http://papercuts.blogs.nytimes.com/2008/02/27/qa-with-sam-tanenhaus-on-william-f-buckley/> (recounting that Buckley “said it was a mistake for National Review not to have supported the civil rights legislation of 1964–65, and later supported a national holiday honoring Dr. Martin Luther King Jr., whom he grew to admire a good deal, above all for combining spiritual and political values.”).

²¹² Harris & West-Faulcon, *supra* note 2, at 39.

²¹³ *Id.* at 41.

²¹⁴ *Id.* at 41–42 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007)).

²¹⁵ See Weiner, *supra* note 2, at 69. Weiner argues that what Justice Harlan meant by “color blind” was that there should be no governmental racial subordination, not that there should be no racial classification. *Id.* at 61–63; see also Siegel, *supra* note 5, at 1519 n.168.

²¹⁶ Norton, *supra* note 26, at 202.

confirmation hearings, in which Senator Jeff Sessions of Alabama applied the zero-sum principle to empathy: “It seems to me that in *Ricci*, Judge Sotomayor’s empathy for one group of firefighters turned out to be prejudice against the others. That is, of course, the logical flaw in the “empathy standard.” Empathy for one party is always prejudice against others.”²¹⁷ As to the “color-blind” position, one wonders whether only the rhetoric has changed and these self-proclaimed conservatives are still motivated by an animus against the Fourteenth Amendment’s being at all effective.

VI. HOW *RICCI* MAKES TITLE VII AND THE EQUAL PROTECTION CLAUSE UNWORKABLE

There is a paradox in *Ricci*: it may destroy Title VII and the Equal Protection Clause by both not allowing any relief under them and by preventing employers and government officials from changing any practices, while at the same time making it easy for plaintiffs to win against state government and employers under Title VII and Equal Protection.

A. *The Impossibility of Relief*

Ricci works against providing relief for race discrimination because it sees providing such relief as a zero-sum game: relief for the victims of discrimination will necessarily harm those benefited by the discriminatory practice.²¹⁸ In *Ricci*, throwing out the test to benefit minorities harmed those who passed the test.²¹⁹ Moreover, it was invalid because it necessitated racial classification.²²⁰ Using an alternative testing method was also illegal: “Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations.”²²¹ Marcus’s article argues that choosing any selection criteria in order to promote racial diversity is subject to strict scrutiny:

This should have significant ramifications for policies like the University of Texas’s former “Ten Percent Plan,”

²¹⁷ *Id.* at 202 (citation omitted).

²¹⁸ *Id.* at 203.

²¹⁹ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (2009).

²²⁰ *Id.*

²²¹ *Id.*

under which UT guaranteed admissions to students graduating within the top 10 percent of their high school class. There is considerable evidence . . . which suggest[s] that Texas policymakers adopted this plan in order to diversify the racial composition of UT's student body. . . . As in *Ricci*, the government used a facially neutral policy to pursue a racially conscious agenda. Under *Ricci* and *Parents Involved*, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas's racial motivations predominated in the institution of the plan.²²²

Moreover, Congress cannot require changes in selection criteria that work against minorities, even if these criteria have nothing to do with "merit"—that is the actual ability to do the job:

The requirement that employers use less-disparity-producing alternatives can break down practices that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." One example is the use of height and weight requirements for prison guards that may exclude most women, rather than directly measuring strength or other job-relevant variables Congress cannot statutorily disassemble such cultural obstacles to equal opportunity. Investigating and responding to the racial impacts of institutional culture are, after all, race conscious activities that require some degree

²²² Marcus, *supra* note 181, at 73. Professors Harris and West-Faulcon believe that applying strict scrutiny to all practices designed to achieve racial diversity will virtually eliminate all such practices:

Finally, the Court's conflation of all racially-attentive processes with race-negative consequences for whites not only flattens out and obscures the complex relationship between racial attentiveness and particular decisions; it does so in ways that skew anti-discrimination law in favor of whites as a group. Because all remedial measures on behalf of racial minorities can at some level be characterized as racially attentive, treating racial attentiveness—attending to the racial consequences of one's actions—as a form of discriminatory motivation destabilizes virtually all remedial options, even those expressly authorized by settled doctrine and federal statutory law.

Harris & West-Faulcon, *supra* note 2, at 33.

of racial categorization. Strict judicial scrutiny, which applies in this situation, cannot be satisfied by a government interest in disassembling employment obstacles—unless they result from conscious or unconscious discriminatory animus.²²³

Can state actors and private employers voluntarily eliminate or minimize the disparate impact of selection criteria? Probably not, if the charge is race-conscious.²²⁴

To Marcus, employers may voluntarily change employment benefits that are now not supported by business necessity, but they cannot—due to the Constitution’s ban on race-conscious action—be required to do so.²²⁵ Professor Bielby points out that such an argument ignores the reality of business, which often operates according to closed social systems.²²⁶

The only way then to allow employers—and government—to change practices that have a real discriminatory effect could be to repeal the Equal Protection Clause of the Fourteenth Amendment and Title VII.

Of course, as I will discuss below, *Ricci* may not, and in my opinion, certainly will not be extended this far. But Willoughby’s advice to

²²³ Marcus, *supra* note 181, at 82.

²²⁴ *See id.* at 78. Marcus argues that under Equal Protection, Congress cannot require employers to avoid disparate impact:

Would the *Ricci* standard apply to a large private employer that contemplated race-conscious action to address potential disparate-impact liability? Probably not. After all, Congress cannot require employers to engage in conduct that, if federally conducted, would violate the Equal Protection Clause. If the equal protection bars state actors from engaging in race-conscious activity in order to avoid a disparate impact, then it also bars Congress from requiring private employers to do so. For this reason, further deliberations on the issue underlying *Ricci* will likely doom the *Ricci* standard, whether the reviewing Court is sympathetic to *Ricci*’s premises or not. *Id.*

²²⁵ *See id.* at 78–79.

²²⁶ William T. Bielby, *Accentuate the Positive: Are Good Intentions an Effective Way to Minimize Systemic Workplace Bias?*, 95 VA. L. REV. 117, 123 (2010) (“That definition ignores the fact that systemic discrimination sometimes is sustained by processes of ‘social closure’ through which high status employees consciously or unconsciously isolate or exclude outsiders, monopolize access to the most desirable jobs via closed social networks, and develop trust and a sense of mutual obligation (‘relatedness’) based on social similarity.”).

employers is sound—until the law becomes clear, employers have to be careful about changing their employment practices.²²⁷

Like a law chilling free speech, the ban on race-consciousness chills employer attempts not to discriminate. This approach directly contradicts Title VII, which is based in large part on voluntary compliance, mediation, conciliation, and settlement.²²⁸

B. Empowering Disparate Treatment Plaintiffs

Although the commentary has focused on how *Ricci* almost terminated disparate impact as a viable theory of liability, it must be remembered it did that only after finding disparate treatment. “Our analysis begins with this premise: The City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.”²²⁹

We may see the radical change the Supreme Court decision made in anti-discrimination law by comparing its opinion with that of the district court. The district court used the traditional *McDonnell Douglas* analysis:

Under that framework, plaintiffs must establish a prima facie case of discrimination on account of race. To do so, they must prove: (1) membership in a protected class; (2) qualification for the deposition; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class.²³⁰

The court went on to analyze the defendants’ proffered “legitimate non-discriminatory reason” that they desired to comply with the “letter and spirit of title VII,” avoiding a disparate impact.²³¹ The court then analyzed the plaintiffs’ claim that the legitimate non-discriminatory reason was pretextual.²³² The court concluded that any racial motive the defendants

²²⁷ Willoughby, *supra* note 2, at 31.

²²⁸ 42 U.S.C. § 2000e-5(b) (2006) (noting Title VII requires conciliation before the E.E.O.C. can file a suit).

²²⁹ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

²³⁰ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151–52 (D. Conn. 2006) (internal citation omitted).

²³¹ *Id.* at 152–53. Note that the city’s fears were realized as they were sued under that theory in *Briscoe v. City of New Haven*, No. 3:09-CV-1642 (CSH), 2010 WL 2794212, at *1 (D. Conn. July 12, 2010).

²³² *See id.* at 153–60.

had was not discrimination.²³³ It found that the plaintiffs had not suffered an adverse employment action, and the political motivations were not enough to establish discrimination.²³⁴ As for the Equal Protection claim, the court held that all the test takers were treated the same—all the results were discarded.²³⁵ Moreover, “[t]he intent to remedy the disparate impact of [the tests] is not equivalent to intent to discriminate against non-minority applicants.”²³⁶

The Supreme Court simply did not use this traditional analysis at all, but instead concluded: “Without some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.”²³⁷

There are two current lawsuits where the plaintiffs rely on the principle that any express race-based decision making is illegal. In *United States v. City of New York*,²³⁸ the court found that the City was liable for disparate treatment against minorities in its hiring of firefighters.²³⁹ *City of New York*, although it does not explicitly rely on *Ricci*,²⁴⁰ neatly demonstrates how to turn disparate impact into proof of disparate treatment. The plaintiffs presented a prima facie case by showing that four of the City’s employment practices (the use of two exams on pass-fail basis and the rank-order selection of applicants based on these two exams) had an adverse effect on black applicants.²⁴¹ As a defense, the City argued that there was no direct evidence of intent to discriminate, but the court ruled that there was no need for a smoking gun.²⁴² The City alleged that the designers of the exams attempted to design valid exams and were not racially motivated, but the court held that this was irrelevant.²⁴³ “On the other hand, a showing that the Exams were *constructed properly*—that is that they test for relevant job skills and properly differentiate between

²³³ *Id.* at 160.

²³⁴ *Id.*

²³⁵ *Id.* at 161.

²³⁶ *Id.* at 162 (quoting *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)).

²³⁷ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

²³⁸ 683 F. Supp. 2d 225 (E.D.N.Y. 2010), *later remedial proceedings*, 681 F. Supp. 2d 274 (E.D.N.Y. 2010).

²³⁹ *Id.* at 233.

²⁴⁰ *See id.* at 249–51.

²⁴¹ *Id.*

²⁴² *Id.* at 251–53.

²⁴³ *Id.* at 254–55.

better and worse candidates—would be highly relevant to the City’s defense”²⁴⁴ The City’s knowledge of the disparate impact of its employment practice led to a strong inference of disparate treatment:

The fact that the city’s top officials exhibited an attitude of deliberate indifference to the discriminatory effects of the hiring policies that they were charged with overseeing raises a strong inference that intentional discrimination was the city’s “standard operating procedure.”²⁴⁵

A case attacking how transportation is funded in the Chicago area, *Munguia v. State of Illinois*,²⁴⁶ attempts to use *Ricci* to overrule *Washington v. Davis*. Public transportation in the Chicago area is run by three entities: Metra, which consists of trains that primarily serve the suburbs; Pace, the suburban bus line; and the Chicago Transit Authority (CTA), which serves the City.²⁴⁷ The complaint alleges a great disparity between the Metra, which primarily serves whites, and the CTA, which primarily serves minorities.²⁴⁸ For example, paragraph seven alleges that the Metra received an operating subsidy of \$4.42 a trip whereas the CTA received \$.87.²⁴⁹ For capital funding, the figures are \$4.41 and \$0.95.²⁵⁰ The taxes are disproportionately heavier on Chicago residents.²⁵¹ The complaint maintains that funding suburban riders (who are mostly white) at a higher level than city riders (who are mostly minority) constitutes intentional discrimination.²⁵²

The complaint uses two approaches, both seemingly derived from *Ricci*, to demonstrate purposeful discrimination.²⁵³ The first parallels Alito’s concurrence in describing the political history of the Chicago area’s transportation funding.²⁵⁴ The current system stems from what is known in

²⁴⁴ *Id.* at 254.

²⁴⁵ *Id.* at 266 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

²⁴⁶ See Complaint at 1, *Munguia v. State of Ill.*, 2010 WL 3172740 (N.D. Ill. Aug. 11, 2010) (No. 10 CV 00055).

²⁴⁷ *Id.* at 10.

²⁴⁸ *Id.* at 1–2.

²⁴⁹ *Id.* at 2.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 18.

²⁵² *Id.* at 40.

²⁵³ *Id.* at 52–53.

²⁵⁴ *Id.* at 31–38.

Chicago as the “Council Wars,” when the election of a black mayor, Harold Washington, led to a group of white alderman taking control of the City Council and fighting the mayor on everything.²⁵⁵ The Illinois legislature also joined in to fight Mayor Washington.²⁵⁶ The complaint cites racially charged statements, as did Justice Alito, to support the claim of intentional discrimination.²⁵⁷

The second approach resembles *United States v. City of New York*, in which proof of discriminatory impact demonstrated intentional discrimination.²⁵⁸ The complaint alleges that the CTA was warned that reenacting the funding scheme would violate Title VI of the Federal Civil Rights Act.²⁵⁹ The reenactment then showed discriminatory intent.²⁶⁰ Section H of the complaint is headed “CTA and Metra Budget Reports Demonstrate That Defendants Knew of These Disparities for Years.”²⁶¹ Thus, again, knowledge of disparities shows intent. Such an approach would effectively overrule *Washington v. Davis*, which held that disparate impact was not enough to establish a constitutional violation.²⁶² Under *Ricci*, it may well be.

In the first part of this section, I argued that *Ricci* makes illegal an employer seeking to change a practice that has a disparate impact. In this part, I argue that *Ricci* makes an employer liable for not doing so. *Briscoe* demonstrates that this double bind is not just a theoretical concern of importance only to law professors. Which argument is right? Only time will tell. In the meantime, the conservative goal of making civil rights law unworkable seems to have been achieved.

VII. NOT AS BAD AS IT LOOKS

In reality, *Ricci* probably will not be extended as far as its logical implications. Legal doctrines rarely are. For example, at one time it was predicted by many contracts scholars that promissory estoppel would

²⁵⁵ *Id.* at 12–13.

²⁵⁶ *Id.* at 13–17.

²⁵⁷ *Id.* at 15.

²⁵⁸ Compare *City of N.Y. v. U.S.*, 683 F. Supp. 2d 225, 266 (E.D.N.Y. 2010) (finding that knowledge of disparate impact gives rise to an inference of intentional discrimination), with Complaint, *supra* note 246, at 40–46 (alleging that the defendants’ long standing knowledge of disparate impact amounts to intentional discrimination).

²⁵⁹ Complaint, *supra* note 246, at 19.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 21.

²⁶² *Washington v. Davis*, 426 U.S. 229, 244–45 (1976).

totally displace the role of consideration in contract law.²⁶³ Grant Gilmore, in his *Death of Contract*, predicted this.²⁶⁴ It never happened.²⁶⁵ The Court will probably find some way to limit its opinion. Furthermore, because *Ricci* was a 5–4 opinion,²⁶⁶ just one Justice has to change his or her mind or be replaced.

The scholarly commentators offer a few limitations. The Harvard commentary goes back to Justice Kennedy’s decision in *Parents Involved* to conclude that general rules that do not target individuals would be valid.²⁶⁷ This interpretation, thus, would permit the Texas Ten Percent Plan.²⁶⁸

The Harvard commentary also agrees with Professor Primus’ “*Visible Victims Reading*,” under which there has to be a specific harm to identified innocent parties.²⁶⁹ Let’s say that an employer changes its selection criteria

²⁶³ See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); see also GRANT GILMORE, *THE DEATH OF CONTRACT* 1 (Ronald K. L. Collins ed., 2d ed. 1995) (suggesting that law students should, perhaps, stop studying the theory of consideration).

²⁶⁴ See GILMORE, *supra* note 263, at 1.

²⁶⁵ See Robert A. Hillman, *The Triumph of Gilmore’s the Death of Contract*, 90 NW. U. L. REV. 32, 39–40 (1995); see also Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 950 (1997).

²⁶⁶ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2658 (2009).

²⁶⁷ *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 289 (2009). Commentators at the Harvard Law Review believe that:

[Justice Kennedy] would allow facially neutral but race-conscious behavior so long as its goals are not invidious and the problem is addressed in a general way, without subjecting individuals to different treatment “solely on the basis of a systematic, individual typing by race.” Thus, in the educational context, Justice Kennedy would allow schools to pursue student body diversity by 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.” *Id.*

²⁶⁸ See discussion *supra* Part VI.A.

²⁶⁹ See *The Supreme Court, 2008 Term*, *supra* note 267; see also Primus, *supra* note 131, at 1369–75.

for the future but does not take any action against those employees already in place. Is the employer's action illegal?²⁷⁰

To Primus, invisible victims will not get relief:

The concern that a practice marks a group as inferior is a concern about social meaning, as is the concern that the government sees people as members of racial groups rather than as individuals. These have been core matters of equal protection, and appropriately so. Equal protection aims to reduce the public salience of race. When considering the constitutionality of a race-conscious intervention, it is therefore useful to ask whether the measure will reduce or exacerbate the racial divides within the American public. . . . Reducing racial divides therefore calls for sensitivity not just to what is done or what is intended but what is publicly understood.²⁷¹

As Primus points out, the standard remedies for disparate impact do not harm third parties. The court can provide disparate impact plaintiffs with monetary relief and injunctions; however, the court does not ordinarily fire or demote those employees who were wrongly favored in hiring or promotion.²⁷² The City of New Haven should have gone ahead with the promotions and announced that the written/oral ratios would be changed to allow for more minority promotions, thus, avoiding the double litigation disaster that it is now faced with. There is a problem with the

²⁷⁰ Professor Primus argues probably not:

Obviously, if the Ten Percent Plan increases the proportion of African-Americans who are admitted to the University of Texas, it also decreases the proportion of admittees from other racial groups. There are, in the end, losers Successful norm-entrepreneurs could, in principle, persuade the public that there is no moral difference between the two kinds of programs. But as a general matter, it has not worked out that way. At least at this point in history, many people who oppose classificatory affirmative action are comfortable with alternative measures that do not exclude identifiable innocent third parties, even though as a logical matter those alternatives must be excluding someone.

Primus, *supra* note 131, at 1370.

²⁷¹ *Id.* at 1371-72.

²⁷² *Id.* at 1374.

respective seniority rights of the disparate impact plaintiffs, and that of the favored employers, but that is a far cry from having promotions rescinded.²⁷³

Even though *Ricci* ignored the requirement of adverse employment action,²⁷⁴ future courts may rediscover it. Let's say that under in-place promotion standards, whites are promoted more than blacks. The employer changes the process for future promotions, but the new process is not to be put in place for some time. Although the employees had an expectation of certain standards being applied, they did not do any studying or preparation for the new standards. For example, assume that academics who expected to be promoted for excellence in teaching were told that in the future publication would be required, with all present professors having a chance to publish. Even if the change were made due to racial reasons, it is hard to see the affected employees getting any relief.

There is an even less appealing group of plaintiffs. Hannah L. Weiner has written an excellent student note (under the direction of the above-cited Professor Primus) pointing out that the academic practice of legacy admits has (surprise!) a disparate impact against minorities.²⁷⁵ Let's say that an admissions office takes this to heart and abolishes legacies. Now a group of sons, daughters, grandsons, and granddaughters of alumni sue. Their argument is that they could have studied hard and taken SAT prep courses, but instead, relying on the legacy admits policy of old State U., spent their high school years partying, dating, vacationing, and generally goofing off. Could they win a lawsuit?

The "Visible Victim" principle also fits with human psychology, which does see possession as nine-tenths of the law.²⁷⁶ In experiments, people are asked to bid on a coffee mug.²⁷⁷ One is now given the mug.²⁷⁸ The amount of money the mug holder will sell the mug for is usually more

²⁷³ See *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 757 (1976).

²⁷⁴ See *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (omitting discussion of adverse employment action from the majority opinion).

²⁷⁵ See Weiner, *supra* note 2, at 48.

²⁷⁶ William N. Eskridge, Jr. & John Ferejohn, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 S. CAL. L. REV. 1545, 1560 (1995).

²⁷⁷ Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1803 (1996).

²⁷⁸ *Id.*

than he had bid for it.²⁷⁹ People usually regard those in possession of something as having a right to it.²⁸⁰

Ultimately, the majority decision in *Ricci* rests on the gripping narrative of the dedicated white working class dyslexic male who has been injured by liberals engaged in racist social engineering.²⁸¹ It worked for Jesse Helms, and it worked in *Ricci*.²⁸² Other less-appealing plaintiffs, even if subject to race-conscious decision making, will likely have less success. Their stories will just have less traction and resonance.

The main reason why *Ricci* will be limited is that it will have to be. If disparate treatment would apply to such issues as transportation funding in the Chicago metropolitan area, the courts will have to take over the tax and spending decisions of municipal corporations. This would overrule *Washington v. Davis*, but more importantly would negate the policy behind that decision. Courts do not want to and cannot take over a government every time that government engages in racially conscious decision making or knows the consequences of its actions.²⁸³

Another way for employers to retain some freedom of action—and avoid the double bind the City of New Haven put itself in—would be to be disingenuous or just lie. Police officers have used this technique effectively to circumvent the search and seizure rules.²⁸⁴ Employers can do the same. Let's posit our employer who only employs natural blondes. There is nothing in the record that this is due to racism, only that the boss likes blondes. He, then realizing that his practice discriminates against employees of Southern European, African, and Asian ancestry, wants to change. Instead of making a record that he wants to hire more Southern Europeans, Blacks, Asians, and Hispanics (that would be racist!), he

²⁷⁹ *Id.*

²⁸⁰ Eskridge, *supra* note 276, at 1560.

²⁸¹ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

²⁸² See Advertisement, *Jesse Helms "Hands" Ad*, YOUTUBE (Oct. 16, 2006), <http://www.youtube.com/watch?v=KIyewCdXMzk> (stating support for a racial quota laws emphasizes that the color of your skin is more important than your qualifications).

²⁸³ See Reshma M. Saujani, "The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 399 (2003) (stating that the United States Supreme Court ceases to defer to legislatures and administrative agency only when those bodies' actions are motivated by purposeful discrimination).

²⁸⁴ Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 53 (1994) (arguing that police officers will sometimes lie to avoid the exclusionary rule).

expresses the desire to broaden his hiring criteria for the purpose of obtaining a more qualified (*not a more racially diverse*) workforce. Many employers may take this route.

VIII. CONCLUSION

A. *What Planet Are They On?*

Ricci adopts a “post-racial” view, in which “it is not only wrong but also irrelevant and counter-productive to consider race because race *doesn’t* matter anymore in significant ways.”²⁸⁵ But, as Stanley Fish writes in his *New York Times* blog, “Think Again,” *Ricci’s* view of the law is impossible:

New Haven’s act of abandoning a test adopted in a good-faith, non-discriminatory spirit is itself discriminatory in operation, and not even “fair in form” to the white firefighters who studied and took their chances like everyone else. “This express, race-based decision-making violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.”

These words (of Justice Kennedy’s) imply that there was some action New Haven might have taken that would not have fallen under the description “because of an individual’s race.” But any action the city might take would be taken under the shadow of the law’s concern for race and would therefore have been a “race-based” action. Without a concern for race there would be no Civil Rights Act, no Title VII, no categories of disparate treatment and disparate impact.

Acting on the basis of race is not an option; it is an inevitability, even though all parties claim to be neutral with respect to race and reject any suggestion that race consciousness informs their positions. . . . “Because of race” is the name of the game and no one can escape it.

. . . Not only is there no escape from race; there is no possibility that those who are obsessed by it—everyone in

²⁸⁵ Norton, *supra* note 26, at 209. I consider “post-racialism” to be a form of psychological denial of reality—if we just ignore race, it will go away.

this case—can ever find the peace Scalia imagines in some nebulous future or the complementariness Ginsburg incorrectly assumes in the present.²⁸⁶

Reading the concurring opinions of Alito and Scalia and some of the commentary makes one wonder what planet the authors are living on. The title of Professor Zimmer's forthcoming article puts it very well: *Ricci's Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*²⁸⁷

It is very hard to come up with a selection criterion that does not have a racial disparate impact.²⁸⁸ All selection—on the basis of zip codes, the Ten Percent Plan, legacies, SAT and LSAT scores, written tests, oral tests, attractiveness—will produce differing results, all of which correlate with race.²⁸⁹ *Ricci* makes it harder to bring a disparate impact suit,²⁹⁰ but a plaintiff can easily convert disparate impact into disparate treatment. If the racial result of the selection criterion is known in advance, then the decision to use that criterion is race-conscious and illegal. If a criterion once used produces a racial disparity, then using it again is disparate treatment. The latter is the exact theory that has won summary judgment for blacks in *United States v. New York City*.²⁹¹

Thus, disparate impact has devolved into the common-law first bite rule for dogs²⁹²—one can give one test that has a disparate impact, but after that, it is disparate treatment.

²⁸⁶ Stanley Eugene Fish, *Because of Race: Ricci v. DeStefano*, THE NEW YORK TIMES OPINIONATOR (July 13, 2009, 10:00 PM), <http://opinionator.blogs.nytimes.com/2009/07/13/because-of-race-ricci-v-destefano/>.

²⁸⁷ Zimmer, *supra* note 3.

²⁸⁸ See discussion *supra* Parts III.C.1, VI.A.

²⁸⁹ See, e.g., Complaint at 2–3, E.E.O.C. v. Abercrombie & Fitch Stores, Inc., No. 09-CV-602-GKF-FHM (N.D. Okla. Sept. 17, 2009) (showing the E.E.O.C. sued Abercrombie for hiring on the basis of attractiveness, which meant young, white, buffed, not disabled, and sexy).

²⁹⁰ See *supra* Part VI.

²⁹¹ See *United States v. City of N.Y.*, 683 F. Supp. 2d 225, 249 (E.D.N.Y. 2010).

²⁹² 3B C.J.S. *Animals* § 346 (2006) (“A person, although not the owner of a vicious dog, may make himself liable to others by knowingly keeping or harboring the dog upon his premises, after knowledge of his vicious propensities . . .”). Professor Joseph Seiner and Benjamin Gutman point out, however, that a properly performed validation study provides a limited safe harbor from disparate impact liability and immunizes the employer from after-the-fact second-guessing by a fact-finder in court. Joseph A. Seiner & Benjamin Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B.U. L. REV. (forthcoming 2010)

(continued)

Ricci effectively overrules *Washington v. Davis*. We may see this in *Munguia v. State of Illinois*, where plaintiffs are challenging the transportation funding for the Chicago area.²⁹³ The plaintiffs claim that the current allocation of revenues for transportation funding in the area favors whites over minorities.²⁹⁴ The plaintiffs' tactic is to circumvent *Washington v. Davis* and *Arlington Heights* by pleading evidence of racial bias in the initial allocation of funds and the subsequent knowledge that the white areas are better funded than the minority areas.²⁹⁵ This knowledge, plaintiffs maintain, constitutes intent.²⁹⁶

Even more importantly, decision makers cannot act behind a veil of ignorance in our society. Employers generally know the racial consequences of their actions.²⁹⁷ Federal contractors have to keep statistics on the racial breakdown of their personnel.²⁹⁸ For faculty hiring, the race and gender of the faculty candidate interviewing at the annual American Association of Law Schools hiring conference is given in the upper right-hand corner of the candidate's one-page summary.²⁹⁹

My views may be influenced by living in Chicago, where racial groups and ethnic groups, even those whose ancestors immigrated in the Nineteenth Century, call themselves such things as Irish, Norwegian, or Swedish.³⁰⁰ And groups are defined narrowly; the Irish are West or South

(manuscript at 34), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564244&http://www.google.com/search?source=ig&hl=en&rlz=1G1TSNACENUS379&=&q=Does+Ricci+herald+a+new+disparate+impact%3F+pdf&aq=f&aql=&aql=&oq=&gs_rfa_i=Cryag0UayTKKCGoqINtznyB8AAACqBAVP0Gp8og.

²⁹³ *Munguia v. Illinois*, No. 10-CV-0055, 2010 WL 3172740, at *1 (N.D. Ill. Aug. 11, 2010).

²⁹⁴ See *id.* at *1, *9.

²⁹⁵ See *supra* text accompanying notes 246–51.

²⁹⁶ See *supra* text accompanying note 252.

²⁹⁷ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (stating that Title VII requires employers to evaluate the racial outcomes of their employment practices, which implies that they must be aware of those outcomes).

²⁹⁸ 41 C.F.R. § 60.12(c) (2006).

²⁹⁹ See Pati Abdullina, *Association of American Law Schools Statistical Report on Law Faculty 2007-2008*, AM. ASS'N L. SCH. 15 (last visited Dec. 12, 2010), <http://www.aals.org/statistics/report-07-08.pdf> (showing that race is a self-identified item on faculty candidate summaries).

³⁰⁰ See David Roediger, *Racism, Ethnicity and White Identity*, THE ELECTRONIC ENCYCLOPEDIA OF CHICAGO (Sept. 27, 2010), <http://encyclopedia.chicagohistory.org/pages/1033.html>; see also Ellen Skerrett, *Irish*, THE ELECTRONIC ENCYCLOPEDIA OF CHICAGO (Sept. 27, 2010), <http://encyclopedia.chicagohistory.org/pages/652.html>.

Side Irish, the Hispanics are Mexican, Puerto Rican, or Cuban.³⁰¹ One student this semester told me that although her name ended in “ski,” she was Ukrainian, not Polish. Students at John Marshall can join Black, Hispanic, Jewish, Muslim, Irish, Italian, Arabic, Greek, Asian, and Middle-Eastern student organizations (among others) and then list these organizations on their resumes.³⁰² Because people frequently proclaim their racial and ethnic identities by putting ethnic insignia (such as national flags) on their cars and clothing,³⁰³ it would be impossible for a decision maker to be “color-blind.” In a factory, all the boss would have to do is walk onto the shop floor. Under *Ricci*, the intent to discriminate and the “because of race elements” are established by a party’s knowledge of the racial consequences:

The intent to discriminate element, which traditionally has been the hardest to prove, becomes simply a question of the defendant’s knowledge of the racial consequences without more. Not only is plaintiff’s burden of proving intent vastly simplified, the Court’s approach seems to knock out the linkage, the “because of” race element, that supposedly joins a defendant’s intent to discriminate to an adverse employment action suffered by the plaintiff “because of” the victim’s race.³⁰⁴

Justice Alito’s use of the presence of the black activists to prove New Haven’s desire to placate a racial minority is even more bizarre, given the realities of American politics. A large portion of the actions of the city of Chicago are done to placate a racial minority.³⁰⁵ Dividing up the pie on

³⁰¹ See Roediger, *supra* note 300.

³⁰² See *Student Organizations*, THE JOHN MARSHALL LAW SCHOOL (Sept. 27, 2010), <http://www.jmls.edu/students/organizations/index.shtml>.

³⁰³ See KATHLEEN STASSEN BERGER, *THE DEVELOPING PERSON THROUGH CHILDHOOD AND ADOLESCENCE* 16 (Jessica Bayne et al. eds., 6th ed. 2003) (identifying flags, bumperstickers, and other insignia as ways of broadcasting ethnic identity).

³⁰⁴ Zimmer, *supra* note 165. Professor Zimmer proposes that employers use the election process of symphony orchestras, using a blind between the evaluators and the performers. *Id.* (Professor Zimmer has told me he was being facetious.).

³⁰⁵ See, e.g., Stefanie Chambers, *Urban Education Reform and Minority Political Empowerment*, 117 POL. SCI. Q. 643, 643–44 (2002) (describing increased government responsiveness to minority community needs in Chicago and other urban areas); *Community Tensions and Hate Crimes*, THE CITY OF CHICAGO’S OFFICIAL SITE (Sept. 27, 2010), http://www.cityofchicago.org/city/en/depts/cchr/provdrs/hate_crimes.html.
(continued)

racial and ethnic lines has been an operative principle of American politics for centuries.³⁰⁶ All that Rev. Kimber did was use the political process to represent his constituency,³⁰⁷ which one would think he had a constitutional right to do. Almost all cities in the United States have black, Hispanic, white, or whatever activists.³⁰⁸ Title VII was passed in large part due to the actions of a black activist, Dr. Martin Luther King, Jr.³⁰⁹ Under Alito, Thomas, and Scalia's view, perhaps the majority of governmental action is unconstitutional, including their appointment to the Supreme Court. Do Justices Scalia, Alito, and Thomas think that their appointments were not to a large part related to their race or ethnicity?

So if Title VII and the Fourteenth Amendment require that we use criteria that are "color blind," we can use few meaningful criteria (a restaurant maître d'hôtel told me that he only hired Virgos—this would be a race neutral criterion). Almost any meaningful selection criterion will have some disparate impact, and once that impact is known—and it almost always will be—the decision to continue or stop using it will be a race-conscious decision.

www.cityofchicago.org/city/en/depts/cdph/provdrs/pol_plan_access/svcs/toward_a_healthyfuturetoolkit.html (describing the services of Chicago's Intergroup Relations Unit, an agency tasked with resolving conflicts between different races and ethnicities); *Boards and Commissions Directory*, THE CITY OF CHICAGO'S OFFICIAL SITE (Sept. 27, 2010), <http://webapps.cityofchicago.org/moboco/org/cityofchicago/moboc/controller/view/start.do> (featuring six Chicago advisory councils specific to racial and ethnic minorities).

³⁰⁶ See, e.g., *Brown v. Bd. of Ed.*, 347 U.S. 483, 486–96 (1954) (evaluating a state policy of dividing the right to attend public schools along racial lines); *Plessy v. Ferguson*, 163 U.S. 537, 537 (1896) (evaluating a state policy of dividing the right to use mass transit along racial lines); *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1856) (evaluating the right to sue in federal court along racial lines).

³⁰⁷ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2685–86 (2009) (describing Rev. Kimber's telephone calls and attendance at public meetings to oppose certification of the promotion exam).

³⁰⁸ See, e.g., *About Us*, PRESENTE.ORG (Sept. 27, 2010), <http://prsente.org/about> (describing the presence of the Latino activist group in over one hundred U.S. cities); *Community Partners*, ASIAN AMERICAN JUSTICE CENTER (Sept. 27, 2010), http://www.advancingequality.org/community_partners/ (describing the presence of the Asian activist group in forty-eight U.S. cities); *Find Your Local Unit*, NAACP (Sept. 27, 2010), http://www.naacp.org/pages/find_your_local_unit/ (describing the presence of the African-American activist group in over 2,000 local units throughout the United States).

³⁰⁹ See NICK KOTZ, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA* 333 (2005); ADAM FAIRCLOUGH, *BETTER DAY COMING: BLACKS AND EQUALITY 1890–2000*, at 292–93 (2001).

B. *Self-Consuming Artifacts*

Here we refer to another work by Stanley Fish, *Self-Consuming Artifacts*. There, Fish argues that certain seventeenth century poems are dialectic, and that the way they proceed is to use art to convey the reader to a point where he transcends art:

[A] dialectical presentation succeeds at its own expense; for by conveying those who experience it to a point where they are beyond the aid that discursive or rational forms can offer, it becomes the vehicle of its own abandonment. Hence, the title of this study, *Self-Consuming Artifacts*³¹⁰

Similarly, Equal Protection and Title VII should, in the conservative view, work only towards destroying their reason for existence—to achieve racial equality—because their success will make it impossible to consider race.³¹¹ “A self-consuming artifact signifies most successfully when it fails”³¹²

Ricci’s adoption of the no “racial classification” reading of equal protection may mean that the only way to move towards greater racial equality would be to repeal the Equal Protection Clause and Title VII. The amendment and the statute both require the race-consciousness, which both the amendment and the statute then make unconstitutional and illegal.³¹³ Here we consider again the Second Circuit opinion quoted by the district court in *Ricci*: “[E]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute,

³¹⁰ STANLEY EUGENE FISH, *SELF-CONSUMING ARTIFACTS: THE EXPERIENCE OF SEVENTEENTH-CENTURY LITERATURE* 3 (1972).

³¹¹ See Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 269–70 (2005) (discussing how the views of conservative judges have allowed African Americans virtually no redress yet racial inequality lingers).

³¹² FISH, *supra* note 310, at 4.

³¹³ Compare Mary C. Daly, *Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark from Weber to Johnson*, 30 B.C. L. REV. 1, 9–11 (1988) (describing a public sector employer’s ability to adopt race-conscious hiring policies based on equal protection and Title VII), with *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (stating that similar interests are at play under both the Equal Protection Clause and Title VII and holding that New Haven’s race-conscious remedy violated Title VII).

reflects a concern with race. That does not make such enactments or actions unlawful or automatically suspect”³¹⁴

So, under the majority opinion in *Ricci*, the Fourteenth Amendment—passed after the Civil War, which was fought to a large extent “because of race”³¹⁵—and The Civil Rights Act of 1964—passed primarily to end long standing and pervasive discrimination against African-Americans—prohibit acts done to redress discriminatory racial practices.³¹⁶ The Amendment and Act destroy themselves.

C. Ricci’s Dilemmas

Ricci poses a multitude of dilemmas for the lawyers, their clients, and the courts. “Dilemma” is defined in the *Oxford English Dictionary* as “[a] form of argument involving an adversary in the choice of two (or, *loosely*, more) alternatives, either of which is (or appears) equally unfavorable to him.”³¹⁷ I have posed in this paper several dilemmas, which the courts will have to resolve. These include:

1. Whether an employer can choose a particular selection criterion to promote racial diversity?³¹⁸

2. Can an employer change a present selection procedure that adversely affects minorities, even if the practice is not justified by business necessity?³¹⁹

3. Will disparate impact have a future? Or, more broadly, can Congress invalidate a selection criterion that adversely affects minorities, even if it has nothing to do with merit?³²⁰

4. Is the *McDonnell Douglas* analysis no longer good law?³²¹

5. Can one convert a disparate impact claim to disparate treatment if the employer knows that a particular selection criterion used in the past has a disparate impact? In other words, is the theory of liability in *U.S. v. City of New York* viable?³²²

³¹⁴ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 157 (D. Conn. 2006) (quoting *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48–49 (2d Cir. 1999)).

³¹⁵ See *Ricci*, 554 F. Supp. 2d at 161–62.

³¹⁶ See *Ricci*, 129 S. Ct. at 2673.

³¹⁷ CLARENDON PRESS, *OXFORD ENGLISH DICTIONARY* 664 (2d ed. 1989).

³¹⁸ See discussion *supra* Part III.B.

³¹⁹ See discussion *supra* Part VI.A.

³²⁰ See discussion *supra* Part III.B.

³²¹ See discussion *supra* Part III.E.

³²² See discussion *supra* Part VI.B.

6. Has *Washington v. Davis* been overruled or, in other words, will *Munguia* succeed in changing the transportation funding of the Chicago area?³²³

7. Will *Ricci* be applied prospectively or only retroactively, that is, can any future selection criteria be changed?³²⁴

8. Will Primus's "Visible Victims" limitation principle be adopted?³²⁵

9. Does *Ricci* lower the standards for finding a test's validity or, more broadly, business necessity?³²⁶

The ultimate question is whether Title VII will have to be repealed to save it.

³²³ See discussion *supra* Part VI.B.

³²⁴ See discussion *supra* Part III.C.2.

³²⁵ See discussion *supra* Part IV.

³²⁶ See discussion *supra* Parts III.B, III.C.1.