Ricci v. DeStefano: Does It Herald an "Evil Day," or Does It Lack "Staying Power"?

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OVERVIEW

The Supreme Court's recent decision in *Ricci v. DeStefano*[1] has already been the subject of widespread public attention and comment.[2] It became a major focus of the Senate confirmation hearing for Justice Sonia Sotomayor, who had been a member of the Second Circuit panel that the Supreme Court reversed. It has also been widely discussed as another chapter in the legal battle

1. 129 S. Ct. 2658 (2009).

2. The *Ricci* decision has its own Wikipedia article, see http://en.wikipedia.org/wiki/Ricci_v._DeStefano (last visited Mar. 28, 2010).

over affirmative action. However, the more significant consequences of the *Ricci* decision may lie elsewhere.

The lower courts in *Ricci* held that the City of New Haven acted lawfully when it decided, after administering and scoring promotional examinations for supervisory positions in the fire department, not to use the examination results because they had a severe adverse impact against African-Americans and Latinos and because the city believed their use could violate Title VII of the Civil Rights Act of 1964, as amended.[3] The Supreme Court reversed in a 5-4 decision, with the majority holding that an employer may decide not to use a selection procedure in such circumstances only where the employer has "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."[4] The majority's decision was a marked departure from Title VII precedent. Further, the majority determined the merits of the dispute instead of remanding for the lower courts to apply its newly-minted "strong-basis-in-evidence" standard. And Justice Scalia went so far as to question the constitutionality of Title VII's disparate-impact standard and predicted that the Court must face this issue on some "evil day."[5] While Justice Ginsburg and three other dissenting justices "anticipate[d]" that the opinion of the majority "will not have staying power,"[6] a broad reading of the majority's decision could foreshadow significant negative consequences for the effective enforcement of Title VII and other civil rights statutes.

Section I of this Article reviews the state of Title VII disparate-impact law before the *Ricci* decision. In what many regard as the most important decision interpreting Title VII, *Griggs v. Duke Power Co.*,[7] a unanimous Court found in 1971 that the purposes of Title VII were "plain" from the statutory language: "to achieve equality of employment opportunities"; to bar "not only overt discrimination but also practices that are fair in form, but discriminatory in operation"; and to direct the "thrust of the Act to the *consequences* of employment practices, not simply the motivation."[8] In decisions since *Griggs*, the Supreme Court explained the operation

3. 42 U.S.C. §§ 2000e to 2000e-17 (2006).
4. *Ricci*, 129 S. Ct. at 2677.
5. *Id.* at 2682 (Scalia, J., concurring).
6. *Id.* at 2690 (Ginsburg, J., dissenting).
7. 401 U.S. 424 (1971).
8. *Id.* at 429–32 (emphasis added).

of these statutory purposes. For example, in *Connecticut v. Teal*,[9] the Court stated that "Congress' primary purpose [in enacting Title VII] was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."[10] Moreover, in twice amending Title VII since *Griggs*, Congress expressly approved the disparate-impact standard endorsed by the Court in *Griggs*. In 1972, Congress amended Title VII to extend coverage to employment practices by local, state, and federal governments. In extending coverage, "Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*."[11] And in enacting the Civil Rights Act of 1991, Congress explicitly stated that a principal purpose of the legislation was to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs*."[12]

Section II of the Article examines the *Ricci* case, in which a bare majority of the Supreme Court departed from almost forty years of judicial interpretation of Title VII that had been endorsed by two statutory amendments. For the first time, the Court stated that, as "enacted in 1964, Title VII's *principal* nondiscrimination provision held employers liable only for disparate treatment."[13] Moreover, for the first time the Supreme Court found that there was a "conflict" between Title VII's prohibition against disparate treatment and its prohibition against disparate impact.[14]

By asserting that the prohibition of disparate-treatment discrimination is the "principal" purpose of Title VII and that the disparate-impact prohibition "conflicts" with this "principal" purpose, the Court set a possible foundation for limiting the application of the disparate-impact standard in the future. In addition, instead of following its normal procedure and remanding the case for lower court review under its new interpretation, the Supreme Court proceeded to decide the merits itself and ruled that New Haven acted unlawfully. The relevant inquiry, whether New Haven had a "strong basis in evidence" to believe that it would be subject to disparate-impact liability, should have been a factually intensive

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9. 457 U.S. 440 (1982) (quoting *Griggs*, 401 U.S. at 429–30).

10. *Id.* at 449 (citations omitted).

11. *Id.* at 447 n.8.

12. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071.

13. Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009) (emphasis added).

14. *Id.* at 2674.

question whose resolution likely would depend upon expert opinion and other evidence. Instead, the Supreme Court decided this question on a record that did not even contain a written study prepared by an expert showing that the city's proposed use of its tests would be "job related . . . and consistent with business necessity."[15] Nor did the record contain any evidence supporting the relative weighting of the tests' written and oral sections; rather, the Court "presume[d]" that sixty percent of the weight was assigned to the written section and forty percent to the oral section for "a rational reason" simply "because that formula was the result of a union-negotiated collective-bargaining agreement."[16]

In addition, the Court went beyond the bounds of the case before it to opine about the merits of a hypothetical *future* lawsuit. The Court stated that, if minorities were to challenge the legality of the selection procedures after the City of New Haven certifies its test results, "the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."[17] If black firefighters sue New Haven because the promotional tests have a disparate impact and are not job related and consistent with business necessity, then the black firefighters, according to the Court, would "clear[ly]" lose regardless of the evidence they would muster by expert testimony or otherwise.[18] The Court's willingness to "presume" rationality and to decide issues relating to the legality of the selection procedures on the basis of the conclusory summary-judgment record before it appears to be a significant departure from its prior decisions where, for example, the Court required the employer to demonstrate that the selection procedure had "a manifest relationship to the employment in question."[19]

In his concurring opinion, Justice Scalia expressed his view that the Court's "resolution of this dispute merely postpones the evil day on which the Court will have to confront the question:

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15. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

16. *Ricci*, 129 S. Ct. at 2679. As the dissent notes, "[N]either the Court nor the concurring opinions attempt to defend the [60/40 written/oral] ratio." *Id.* at 2699 n.5 (Ginsburg, J., dissenting).

17. *Id.* at 2681 (majority opinion).

18. *Id.*

19. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (internal quotation marks omitted) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[20] He added that "the war between disparate impact and equal protection will be waged sooner or later."[21] While it did not use the colorful language of Justice Scalia's concurring opinion, the majority referred to this constitutional question as well.[22] The Court has applied the disparate-impact standard for almost forty years and in numerous opinions, but no Justice has ever questioned the constitutionality of the standard until *Ricci*. Similarly, Congress twice amended Title VII, in 1972 and 1991, expressly approving the impact standard without raising any issue about its constitutionality.

Section III of the Article discusses the practical importance of Title VII's disparate-impact standard. Application of this standard since *Griggs* has curtailed the use of unnecessary barriers to the employment of minorities and women and has effectuated a core goal of Title VII by expanding equal employment opportunity. The *Ricci* decision, depending upon how it is interpreted and applied, may or may not interfere with continued progress toward that goal.

Section IV examines *Ricci*'s effect on employers' selection practices and Title VII challenges to those practices. *Ricci* holds that an employer, after administering and scoring a test and discovering that it has an adverse racial impact, may invalidate the test results where it can demonstrate "a strong basis in evidence to believe it will be subject to disparate-impact liability" if it fails to take such action.[23] This defense may be difficult but not impossible to establish.

Ricci recognizes that "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."[24] Thus, in developing selection procedures after *Ricci*, employers should avoid, in a manner consistent with business needs, practices that will likely lead to adverse impact. Moreover, employers should only use

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20. *Ricci*, 129 S. Ct. at 2681–82 (Scalia, J., concurring).
21. *Id.* at 2683.
22. *Id.* at 2676 (majority opinion).
23. *Id.* at 2677.
24. *Id.* (emphasis added).

selection procedures in a manner that is job related and consistent with business necessity and should not base decisions on assumptions or estimates (such as the seventy percent passing rate, the 60/40 written/oral weighting ratio, or the rank-ordering adopted by New Haven) that are likely to cause or increase adverse impact. Finally, as directed by the *Uniform Guidelines on Employee Selection Procedures*,[25] during the development of selection devices an employer should conduct a reasonable search for alternative practices that will meet its business needs while eliminating or reducing adverse impact.

Ricci was a "reverse" discrimination case brought by a predominantly white group of plaintiffs who alleged that New Haven's actions constituted intentional discrimination against them based on their race. It did not change the longstanding legal principles, explicitly endorsed by Congress, that apply to the typical Title VII disparate-impact cases brought by minorities or women.

Section V of the Article addresses some of the thorny practical issues that would arise if the Court were to take up Justice Scalia's call in *Ricci* for a constitutional "war between disparate impact and equal protection."[26] For instance, a constitutional determination may lead to a patchwork of results. Since the concept of disparate-impact discrimination is incorporated into the Age Discrimination in Employment Act[27] and the Americans with Disabilities Act,[28] as well as Title VII, disparate-impact claims may be made on the basis of age and disability as well as race, color, gender, religion, and national origin. The constitutional standard, however, varies significantly depending upon the basis of the classification. For example, the standard for a classification based upon race is "strict scrutiny,"[29] based upon gender is "intermediate scrutiny,"[30] and based upon age or disability is likely to be "rational basis."[31] Thus, the Court could find disparate impact to be unconstitutional with respect to race claims under the strict scrutiny standard but not with respect to gender, age, or disability claims under

25. 29 C.F.R. §§ 1607.1–.18 (2009).
26. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).
27. 29 U.S.C. §§ 621–634 (2006).
28. 42 U.S.C. §§ 12101–12213.
29. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
30. United States v. Virginia, 518 U.S. 515, 567 (1996).
31. Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (age); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (disability).

the intermediate scrutiny or rational basis standard. Moreover, a determination of the constitutionality of Title VII's disparate-impact prohibition would almost certainly affect other civil rights statutes, such as the Fair Housing Act and the Voting Rights Act, which also provide for disparate-impact claims.

This Article concludes that the *Ricci* decision, read in the light of its particular facts and in the full context of Title VII disparate-impact law, need not undermine Title VII's core goal of removing artificial and unnecessary barriers to equal employment opportunities that are unrelated to job performance. Properly understood, the Supreme Court's decision in *Ricci* may not be a harbinger of an "evil day," but may instead have the "staying power" to reinforce Title VII's disparate-impact standard and the objectives that standard is designed to achieve.

I. DISPARATE-IMPACT LAW BEFORE *RICCI*

Since its enactment in 1964, section 703(a) of Title VII has provided that it is unlawful for an employer

> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> 2. to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[32]

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32. 42 U.S.C. § 2000e-2(a)(1), (2). Section 703(a)(2) was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, to expressly prohibit discrimination against "applicants for employment," as well as discrimination against "employees." *See* H.R. REP. NO. 92-238, at 30 (1971); S. REP. NO. 92-415, at 43 (1971). Congress regarded this amendment as "declaratory of existing law." S. REP. NO. 92-415, at 43; s*ee also* SUBCOMMITTEE ON LABOR, HOUSE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY

Also since 1964, section 703(h) has stated in relevant part that it is not unlawful for an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."[33]

From the very beginning, civil rights enforcement agencies and courts—including the United States Supreme Court, prior to its decision in *Ricci*—recognized that sections 703(a)(2) and 703(h) provided the original statutory basis for the disparate-impact analysis that has been part of the fabric of Title VII since its inception.

A. EEOC Guidelines

In guidelines it first adopted in 1966[34] and then refined in 1970,[35] the Equal Employment Opportunity Commission ("EEOC")—the agency created by Congress to enforce Title VII[36]—reviewed the statutory language and legislative history and concluded that Title VII prohibited not only intentional discrimina-

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ACT OF 1972, at 1849 (1972) (containing a section-by-section analysis of H.R. 1746 as reported by the Conference Committee, which cites, *inter alia*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)). The language of section 703(a) otherwise remains the same today as when it was first enacted in 1964. 42 U.S.C. § 2000e-2(a).

33. 42 U.S.C. § 2000e-2(h); *see* Griggs v. Duke Power Co., 401 U.S. 424, 434–36 (1971) (explaining that the language of section 703(h) has not changed since 1964).

34. EEOC Guidelines on Employment Testing Procedures, *reprinted in* Empl. Prac. Guide (CCH) ¶ 16,904 (1967). These guidelines also endorsed the *Standards for Educational and Psychological Tests and Manuals* ("APA *Standards*"), which had been adopted earlier in 1966 by the American Psychological Association and other professional organizations concerned with testing standards and practices. *See* AMERICAN PSYCHOLOGICAL ASS'N, AMERICAN EDUCATIONAL RESEARCH ASS'N, AND NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS AND MANUALS (1966). Over the next several decades, the professional standards of psychologists—including subsequent versions of the APA *Standards*, as well as the *Principles for the Validation and Use of Personnel Selection Procedures* adopted by the APA's Division of Industrial-Organizational Psychology—have remained influential in shaping Title VII disparate-impact law and agency guidelines.

35. EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (Aug. 1, 1970) (codified at 29 C.F.R. §§ 1607.1–.13 (1970)).

36. *See* 42 U.S.C. §§ 2000e-4, -5.

tion (disparate treatment) but also facially neutral tests and other practices that had an adverse impact and were not shown to be sufficiently related to job performance (disparate impact). As the EEOC's 1970 *Guidelines on Employment Testing Procedures* ("1970 *Guidelines*") stated, the Commission determined that

> in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. . . . A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by Title VII may result in the rejection of many who have necessary qualifications for successful work performance.[37]

In keeping with these findings, the 1970 *Guidelines* adopted an expansive definition of the term "test"[38] and defined "discrimination" to include

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37. 29 C.F.R. § 1607.1(b) (1970). The 1970 *Guidelines* also noted that there had been

> a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, [or] promote . . . with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

Id.

38. According to the 1970 *Guidelines*, a test is

> any paper-and-pencil or performance measure used as a basis for any employment decision . . . . This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work his-

> [t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII . . . unless: (a) the test has been validated and evidences a high degree of utility . . . and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.[39]

Thus, in the earliest stages of its role as the principal agency responsible for the enforcement of Title VII, the EEOC understood that the statute prohibited both disparate-treatment and disparate-impact discrimination, and it recognized that disparate-impact analysis was a critical part of the statutory scheme.

B. Griggs v. Duke Power Co.

In its 1971 decision in *Griggs v. Duke Power Co.*,[40] the Supreme Court resoundingly endorsed the EEOC's understanding of Title VII. The employer in *Griggs* required applicants for all jobs in higher-paying departments to have a high school diploma and to receive satisfactory scores on two standardized aptitude tests—the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.[41] The Supreme Court accepted the lower court's finding that there was "no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike,"[42] but noted that the employer's use of the tests and high school diploma requirement had the effect of "render[ing] ineligible a markedly disproportionate number of Negroes"[43] and that neither standard was "shown to bear a demonstrable relationship to successful performance of the jobs for which

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> tory requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

29 C.F.R. § 1607.2.

39. *Id.*
40. 401 U.S. 424 (1971).
41. *Id.* at 427–28.
42. *Id.* at 429.
43. *Id.*

it was used."[44] Indeed, the record showed that these standards had been adopted "without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force."[45]

In an opinion authored by Chief Justice Burger, the Court in *Griggs* specifically relied on the language of section 703(a)(2)[46]—which the majority in *Ricci* failed to mention—in unanimously holding that Title VII prohibits disparate-impact as well as disparate-treatment discrimination:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[47]

The Court in *Griggs* also concluded that the EEOC's disparate-impact guidelines were "entitled to great deference" by the courts: "Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[48] Thus, the Court joined the EEOC in holding that, under Title VII, an employer may not use a test in a manner that has an adverse impact on a protected group unless the employer can prove that the test "bear[s] a de-

44. *Id.* at 431.
45. *Id.*
46. *Id.* at 426 n.1.
47. *Id.* at 431.
48. *Id.* at 434.

monstrable relationship to successful performance of the jobs for which it [is] used."[49]

Echoing the principles underlying the EEOC's 1970 *Guidelines*, the *Griggs* opinion repeatedly emphasized that Title VII, in seeking "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"[50] is not focused solely on the prohibition of disparate treatment:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . .
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> . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[51]

C. The Equal Employment Opportunity Act of 1972

The language and legislative history of the Equal Employment Opportunity Act of 1972 further underscored that Congress intended Title VII to prohibit disparate-impact discrimination as well as disparate-treatment discrimination.[52] The 1972 Act amended Title VII in a number of respects and extended its coverage to federal, state, and local government employment. The House and Senate committee reports on this legislation expressly recognized and approved the interpretation of Title VII that had been set forth by the EEOC in its 1970 *Guidelines* and endorsed by the Supreme Court in *Griggs*.

The report of the House Committee on Education and Labor stated the following:

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49. *Id.* at 431.

50. *Id.* at 429–30.

51. *Id.* at 432 (emphasis added).

52. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon [than previously believed]. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. . . . A recent striking example was provided by the U.S. Supreme Court in its decision in *Griggs*[,] . . . where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.[53]

The report of the Senate Committee on Labor and Public Welfare included similar language[54] and additionally directed the federal Civil Service Commission

> to develop more expertise in recognizing and isolating the various forms of discrimination which exist in the system it administers. . . . The Commission should not assume that employment discrimination in the Federal Government is solely a matter of malicious intent on the part of individuals. . . . Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on "paper" credentials. Similar requirements in the private sectors of business have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g. *Griggs v. Duke Power Co.*) The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or

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53. H.R. REP. NO. 92-238, at 8 (1971) (citations omitted) (footnote omitted).

54. S. REP. NO. 92-415, at 5 (1971).

> educationally disadvantaged suffer a very heavy burden in trying to meet such artificial qualifications.
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> It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required. For example, the Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.[55]

As the Supreme Court acknowledged in *Connecticut v. Teal*,[56] Congress in 1972 "recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*."[57] Given this unequivocal evidence of legislative intent as long ago as 1972, not to mention the Supreme Court's own 1971 opinion in *Griggs*, it is difficult to understand how a majority of the Court in *Ricci* could characterize disparate treatment as "the original, foundational prohibition of Title VII"[58] and disparate impact as a "new" prohibition that was not added to the statute until 1991.[59]

D. Albermarle Paper Co. v. Moody

For many years after the *Griggs* decision and the Equal Employment Opportunity Act of 1972, the Court continued to recognize disparate impact as part of the original, foundational prohibition of Title VII. In *Albemarle Paper Co. v. Moody*,[60] the Court

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55. *Id.* at 14–15 (citation omitted).

56. 457 U.S. 440 (1982).

57. *Id.* at 447 n.8. The Court in *Teal* also noted that both the Senate and House reports on the 1972 Act "cited *Griggs* with approval" and added that "the section-by-section analyses of the 1972 amendments submitted to both Houses explicitly stated that in any area not addressed by the amendments, present case law—which as Congress had already recognized included our then recent decision in *Griggs*—was intended to continue to govern." *Id.*

58. Ricci v. DeStefano, 129 S. Ct. 2658, 2675 (2009).

59. *Id.* As described below, in 1991 when Congress codified the disparate-impact standard, it was acting to restore "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs*." *See infra* notes 111–21 and accompanying text.

60. 422 U.S. 405 (1975).

reaffirmed its holding in *Griggs*: "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.'"[61] The Court noted that the employer's burden of justification arises only after the complaining party "has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."[62] The opinion went on to state that, even if the employer meets its burden of showing that its tests are job-related, plaintiffs may still prove a violation of Title VII by showing "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[63]

Like the employer in *Griggs*, the employer in *Albemarle* required applicants for jobs in higher-paying lines of progression in an industrial plant to obtain minimum scores on two standardized "general ability tests"—the Beta Examination and the Wonderlic Test.[64] There was little or no dispute that the use of these tests had an adverse impact on African-Americans.[65] The Court's opinion therefore focused primarily on the issue of job-relatedness. Restating the view expressed in *Griggs* that the EEOC's 1970 *Guidelines* were entitled to great deference, the Court in *Albemarle* concluded that

> [t]he message of these [1970] *Guidelines* is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the

61. *Id.* at 425 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

62. *Id.*

63. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

64. *Id.* at 427.

65. *See id.* at 429 & n.25.

> job or jobs for which candidates are being evaluated."[66]

Drawing upon the 1970 *Guidelines* and the 1966 and 1974 American Psychological Association's *Standards for Educational and Psychological Tests and Manuals* ("APA *Standards*"), and expressing its skepticism about a validation study conducted by a party to litigation on the eve of trial,[67] the Court in *Albemarle* undertook a detailed and technical critique of several aspects of the employer's validation evidence.[68]

First, the Court criticized the "odd patchwork of results" demonstrated by the employer's concurrent criterion-related validity study.[69] The study found significant correlations between test scores and job performance for some jobs but not for others. Since there was no analysis of the jobs involved, the Court found "no basis for concluding that 'no significant differences' exist among the lines of progression, or among distinct job groupings within the studied lines of progression. Indeed, the study's checkered results

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66. *Id.* at 431 (quoting 1970 EEOC *Guidelines*, 29 C.F.R. § 1607.4(c) (1970)).

67. *Id.* at 433 n.32.

68. *Id.* at 431–35. Chief Justice Burger dissented from this part of the Court's opinion on the ground that the majority's analysis was "based upon a wooden application of EEOC *Guidelines*." *Id.* at 451 (Burger, J., dissenting).

69. *Id.* at 431–32 (majority opinion). A criterion-related validity study examines empirical data to determine whether a selection procedure is predictive of or significantly correlated with important elements of job performance.

> Criterion-related validity . . . is established when comparative success on the challenged test has a statistically significant positive correlation with comparative success on some measure of job performance. . . . There are two types of criterion-related validation: predictive and concurrent. In a pure predictive study, sample group members are tested ***before*** they begin the job and are selected without regard to their test scores. Their subsequent job performance is evaluated and statistically correlated with their test scores to determine whether the test accurately predicted performance. By contrast, in a concurrent study the test is administered to incumbent employees, whose job performance is correlated with their test scores.

1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 188–89 (4th ed. 2007) (footnotes omitted).

appear[ed] to compel the opposite conclusion."[70] Second, noting the possibility of bias,[71] the Court disapproved the study's use of vague and subjective supervisory ratings as performance measures.[72] Third, the Court found fault with the study's focus on job groups near the top of the lines of progression, rather than on entry-level jobs.[73] The Court endorsed the view of the 1970 *Guidelines* that performance measures should be based on higher-level jobs only where the employer can show that "new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level."[74] Finally, the Court noted that the study "dealt only with job-experienced, white workers; but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite."[75] Relying on both the APA *Standards* and the 1970 *Guidelines*, the Court indicated that validation studies should focus on persons similar to those with whom the tests are used.[76] The Supreme Court's detailed analysis in *Albemarle* of the technical aspects of Title VII's job-relatedness requirement underscores the Court's recognition that the disparate-impact standard is a fundamental basis for Title VII liability.

E. Uniform Guidelines on Employee Selection Procedures

By the time Congress amended Title VII in 1972, the EEOC, the Department of Labor, and the Civil Service Commission (now the Office of Personnel Management) each had adopted its own separate set of employment testing guidelines.[77] In re-

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70. *Albemarle Paper Co.*, 422 U.S. at 432 (quoting 29 C.F.R. § 1607.4(c)(2)).

71. *Id.* at 433 n.30 (quoting 29 C.F.R. § 1607.5(b)(3), (4)).

72. *Id.* at 433. Supervisors were told to "determine which ones (employees) they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against." *Id.*

73. *Id.* at 433–34.

74. *Id.* at 434 (quoting 1970 *Guidelines*, 29 C.F.R. § 1607.4(c)(1)).

75. *Id.* at 435.

76. *Id.* (quoting APA *Standards*, ¶ C5.4; 1970 *Guidelines*, 29 C.F.R. § 1607.5B).

77. *See* 1970 *Guidelines*, 29 C.F.R. §§ 1607.1–.18; Department of Labor, Office of Federal Contract Compliance, *Guidelines*, 36 Fed. Reg. 19,307 (Oct. 2, 1971) (to be codified at 41 C.F.R. pt. 60-3); Civil Service Commission, *Guidelines*, 37 Fed. Reg. 12,984 (June 30, 1972).

sponse to concerns about the existence of potentially conflicting guidelines, Congress established the Equal Employment Opportunity Coordinating Council and charged it with the responsibility of developing and implementing uniform enforcement policies for all relevant agencies.[78] Through several years of sometimes contentious debate and negotiation designed to achieve this goal, the agencies continued to issue separate guidelines; but throughout this period of dispute, they all agreed with the basic principles that had been enunciated in the EEOC's 1970 *Guidelines*, approved by the Supreme Court in *Griggs* and *Albemarle*, and reaffirmed by Congress in the Equal Employment Opportunity Act of 1972.[79] Finally, in December 1977 the five agencies reached agreement and jointly published a proposed draft of the *Uniform Guidelines on Employee Selection Procedures* ("*Uniform Guidelines*").[80] After publishing a notice of proposed rulemaking, reviewing extensive written comments, and holding a public hearing,[81] the EEOC, Civil Service Commission, and the Departments of Justice, Labor, and Treasury revised the proposed draft and adopted the *Uniform Guidelines* in September 1978.[82]

While their interpretation and application have been affected by subsequent court decisions and the evolving standards

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78. *See* 42 U.S.C. § 2000e-14 (2006).

79. *See* Patrick O. Patterson, *Employment Testing and Title VII of the Civil Rights Act of 1964*, *in* TEST POLICY AND THE POLITICS OF OPPORTUNITY ALLOCATION: THE WORKPLACE AND THE LAW 97–98 (Bernard R. Gilford ed., Kluwer Academic 1989).

80. 42 Fed. Reg. 65,542 (Dec. 30, 1977) (to be codified at 5 C.F.R. pt. 300; 29 C.F.R. pt. 1607; 28 C.F.R. pt. 50; 41 C.F.R. pt. 60-3).

81. *See Uniform Guidelines*, Supplementary Information: Analysis of Comments, 43 Fed. Reg. 32,892, 32,893 (July 28, 1978).

82. *See* 43 Fed. Reg. 38,310 (Aug. 25, 1978) (Civil Service Commission [Office of Personnel Management]); 43 Fed. Reg. 38,311 (Aug. 25, 1978) (Department of Justice); 43 Fed. Reg. 38,312 (Aug. 25, 1978) (EEOC); 43 Fed. Reg. 38,314 (Aug. 25, 1978) (Department of Labor); 43 Fed. Reg. 38,309 (Aug. 25, 1978) (Department of the Treasury). The *Uniform Guidelines* are codified in 5 C.F.R. § 300.103(c) (2009) (Civil Service Commission [Office of Personnel Management]); 28 C.F.R. § 50.14 (2009) (Department of Justice); 29 C.F.R. § 1607 (2009) (EEOC); 41 C.F.R. § 60-3 (2009) (Department of Labor). This Article will use the EEOC codification in 29 C.F.R. § 1607 for citations to the *Uniform Guidelines*.

and practices of the psychological profession,[83] the *Uniform Guidelines* remain in effect today.[84] Section 3A restates the *Griggs-Albemarle* principle, which underlies all the remaining provisions: "The use of any selection procedure which has an adverse impact . . . will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated."[85] Section 3B states that a validity study should include "an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible."[86] Section 4 contains record-keeping provisions[87] and methods for determining whether a selection procedure has an adverse impact.[88] Section 6 provides employers with the choice of validating a selection procedure that has an adverse impact or using an alternative procedure that eliminates the impact.[89] An employer that elects to validate its procedures will find general standards for criterion-related, content, and construct validity studies in section 5[90] and more detailed technical standards for each of these validation strategies in section 15.[91]

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83. The *Uniform Guidelines* state that they are "built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession," and that they are "intended to be consistent with existing law." 29 C.F.R. § 1607.1(C). As discussed in this Article and elsewhere, the case law on disparate impact and testing has continued to develop in the years since 1978. The standards of the psychological profession have likewise continued to evolve. *See, e.g.*, SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, INC., PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (4th ed. 2003) [hereinafter PRINCIPLES]; AMERICAN EDUCATIONAL RESEARCH ASS'N, AMERICAL PSYCHOLOGICAL ASS'N, AND NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999).

84. Following issuance of the *Uniform Guidelines*, the enforcement agencies issued "Questions and Answers to Clarify and Provide a Common Interpretation of the *Uniform Guidelines on Employee Selection Procedures*." *See* 44 Fed. Reg. 11,996 (Mar. 2, 1979); 45 Fed. Reg. 29,530 (May 2, 1980).

85. 29 C.F.R. § 1607.3(A) (2009).

86. *Id.* § 1607.3(B).

87. *Id.* § 1607.4(A)–(B).

88. *Id.* § 1607.4(C)–(E).

89. *Id.* § 1607.6.

90. *Id.* § 1607.5.

91. *Id.* § 1607.15.

F. Watson *and* Wards Cove

Into the early 1980s, the Supreme Court reaffirmed, refined, and applied the basic principles of *Griggs* and *Albemarle* in a number of subsequent cases.[92] Then, in its 1987 decision in *Watson v. Forth Worth Bank & Trust*,[93] the Court unanimously[94] "reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent," and further noted that "[w]e have not limited

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92. *See* Connecticut v. Teal, 457 U.S. 440, 446–47 (1982) (The Court, relying on section 703(a)(2), stated, "*Griggs* and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." (footnote omitted) (citations omitted)); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) ("A prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities."); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory." (citations omitted)); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (The Court noted that *Griggs* and *Albemarle* "make clear that to establish a prima facie case of [disparate-impact] discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement (has) . . . a manifest relationship to the employment in question.' If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.'" (internal quotation marks omitted) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

93. 487 U.S. 977 (1987).

94. Justice Kennedy did not participate in the consideration or decision of *Watson*. *Id.*

this principle to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination."[95] The Court—again, as in *Griggs*, specifically relying upon the language of section 703(a)(2)[96]—went on to hold that Title VII's disparate-impact prohibition "is in principle no less applicable to subjective employment criteria than to objective or standardized tests."[97]

Four members of the Court in *Watson*,[98] however, signaled a radical departure from the Court's prior understanding of disparate-impact analysis in at least three respects. Justice O'Connor's plurality opinion first stated that, to establish a prima facie disparate-impact case, plaintiffs must not only prove the existence of disparities in the employer's work force but also isolate and identify the specific practices that caused the observed disparities.[99] Second, once a prima facie case has been established, the employer bears only the "burden of producing evidence that its employment practices are based on legitimate business reasons," and plaintiffs must then prove the *absence* of business necessity.[100] Third, "employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance,"[101] and employers will often find it even "easier than in the case of standardized tests to produce evidence of a 'manifest relationship to the employment in question.'"[102] Justice Blackmun, joined by Justices Brennan and Marshall,[103] found the plurality's discussion of the allocation and burdens of proof in Title VII disparate-impact claims to be "flatly contradicted by our cases."[104]

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95. *Id.* at 988.

96. *See id.* at 991.

97. *Id.* at 990.

98. Justice O'Connor's opinion on these points was joined by the Chief Justice and by Justices White and Scalia. *Id.* at 981.

99. *Id.* at 994.

100. *Id.* at 998.

101. *Id.*

102. *Id.* at 999.

103. Justice Stevens would have remanded the case for further fact finding. *Id.* at 1011 (Stevens, J., concurring).

104. *Id.* at 1000–01 (Blackman, J., concurring).

The next Term, in *Wards Cove Packing Co. v. Atonio*,[105] Justice Kennedy[106] joined the *Watson* plurality to hold that, as part of their prima facie case, plaintiffs must isolate and identify the specific elements of an employer's practices that had a disparate impact and must also prove that those elements caused the impact.[107] The *Wards Cove* majority also held that, once a prima facie case has been established, the employer bears only "the burden of producing evidence of a business justification,"[108] while plaintiffs bear the burden of proving that a challenged practice does not "serve[], in a significant way, the legitimate employment goals of the employer."[109] In his dissenting opinion, Justice Blackmun noted that a "bare majority" in *Wards Cove* had "reache[d] out to make last Term's plurality opinion in *Watson* . . . the law, thereby upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases."[110]

G. Civil Rights Act of 1991

In response to *Wards Cove* and "a number of [other] recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [Title VII and other civil rights] laws,"[111] Congress enacted the Civil Rights Act of 1991.[112] Congress found that *Wards Cove* in particular had "weakened the scope and effectiveness of Federal civil rights protections,"[113] and declared that an express purpose of the 1991 Act was to restore "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* and in the other Supreme Court

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105. 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

106. Justice Kennedy later wrote the majority opinion in *Ricci*.

107. *Wards Cove*, 490 U.S. at 656–58.

108. *Id.* at 659.

109. *Id.*; *see also id.* at 660.

110. *Id.* at 661 (Blackmun, J., dissenting).

111. H.R. REP. NO. 102-40, pt. 2, at 2 (1991). In addition to *Wards Cove*, those Supreme Court decisions included *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

112. Pub. L. No. 102-166, 105 Stat. 1071.

113. *Id.* § 2(2).

decisions prior to *Wards Cove*."[114] The 1991 Act's disparate-impact provisions are codified in section 703(k) of Title VII:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> >
> > (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
>
> (1)(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
>
> (1)(B)(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

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114. *Id.* § 3(2).

> (1)(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."
>
> (2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.[115]

Thus, as the combined result of legislative action, judicial construction, and administrative interpretation, it was clear—at least prior to the Supreme Court's decision in *Ricci*—that disparate-impact claims under sections 703(a)(2), (h), and (k) of Title VII[116] were subject to a three-stage analysis:[117]

1. *The Prima Facie Case*: Plaintiffs must demonstrate that a challenged selection practice has a substantial adverse impact on a protected group.[118] Plaintiffs bear the burdens of production and persuasion at this stage.

2. *Business Necessity*: If plaintiffs establish a prima facie case,[119] the burdens of production and persuasion shift to the employer to demonstrate that the

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115. 42 U.S.C. § 2000e-2(k) (2006).

116. Congress has also incorporated a disparate-impact standard into other fair employment laws, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act, as well as other civil rights statutes, including the Fair Housing Act and the Voting Rights Act, among others. *See infra* Part V.

117. *See* LINDEMANN & GROSSMAN, *supra* note 69, at 119.

118. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i) ("[T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.").

119. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(ii) ("If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.").

challenged practice is "job related for the position in question and consistent with business necessity."[120]

3. *Alternatives with a Lesser Impact*: Plaintiffs may rebut the employer's business-necessity defense by showing that the employer did not implement an effective alternative practice that would have less adverse impact.[121]

The Court's decision in *Ricci* should be read and understood against this legal and historical background.

II. THE *RICCI* DECISION

A. Facts and Procedural History

Although the courts in *Ricci* characterized the underlying facts of the case as "largely undisputed,"[122] those facts—and the conflicting inferences that may be drawn from them—are critically important to understanding the course of the *Ricci* litigation and the Supreme Court's ultimate decision in the case.[123] The City of New Haven had determined that it needed to fill vacant lieutenant and captain positions in its fire department. In devising and implementing a process to fill these positions, city officials sought to comply with (1) the city charter, which established a "merit system" requiring that vacancies be filled with "the most qualified individuals, as determined by job-related examinations" using the "rule of three," under which each vacancy must be filled by choosing one candidate among the top three on a ranked eligibility list certified by the Civil Service Board ("CSB");[124] (2) the city's collective bargaining agreement with the New Haven firefighters' union, which provided that a written examination would account for sixty percent and an oral examination would account for forty percent of an applicant's total score;[125] and (3) state and federal fair

120. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

121. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

122. Ricci v. DeStefano, 129 S. Ct. 2658, 2665 (2009) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006)).

123. Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 264 F. App'x 106 (2d Cir.), *withdrawn and aff'd per curiam*, 530 F.3d 87 (2d Cir.), *reh'g en banc denied*, 530 F.3d 88 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

124. *Ricci*, 129 S. Ct. at 2665.

125. *Id.*

employment laws, including Title VII, which prohibit discrimination in employment based on race or national origin.[126] The city's efforts to comply with these obligations took place in a historical context of prior litigation, both nationally and in New Haven, challenging discriminatory fire department "selection methods [that] served to entrench preexisting racial hierarchies."[127] Following the settlement of such litigation in New Haven, more African-American and Latino firefighters were hired into entry-level positions, but "significant disparities remain[ed]" in supervisory positions.[128]

In an effort to fill its vacant supervisory positions while complying with its legal obligations, the city hired Industrial/Organizational Solutions, Inc. ("IOS") to develop and administer its selection procedures.[129] IOS performed job analyses to identify the tasks performed by lieutenants and captains and to determine the "knowledge, skills, and abilities" necessary to perform those tasks.[130] "With the job-analysis information in hand," IOS developed multiple-choice written tests that were drawn from a list of training manuals, fire department procedures, and other materials and were intended "to measure the candidates' job-related knowledge."[131] As required by CSB rules, each written test had 100 questions. After IOS prepared the tests, the city opened a three-month study period and gave candidates a list of the source material for the test questions.[132] IOS developed oral examinations as well. Using the job-analysis information, IOS wrote hypothetical situations designed to test "incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things."[133] IOS assembled a pool of thirty assessors from out-of-state fire departments and trained them to administer and score the oral examinations. Two-thirds of the assessors were minorities, and each three-member assessment panel contained two minority members.[134] To sit for the examinations, can-

126. *See id.*
127. *Id.* at 2690 (Ginsburg, J., dissenting).
128. *Id.* at 2691.
129. *Id.* at 2665 (majority opinion).
130. *Id.*
131. *Id.*
132. *Id.* at 2666.
133. *Id.*
134. *Id.*

didates for lieutenant needed thirty months of experience in the fire department, a high school diploma, and certain vocational training courses.[135] Candidates for captain needed one year's service as a lieutenant, as well as a high school diploma and vocational training courses.[136]

The city administered and scored the written and oral examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination: forty-three whites, nineteen African-Americans, and fifteen Hispanics. Of those, thirty-four candidates passed: twenty-five whites, six African-Americans, and three Hispanics. Under the city's rule of three, the top ten scorers on the ranked eligibility list would have been eligible for immediate promotion to one of the eight available lieutenant vacancies. All ten of the top scorers were white.[137]

Forty-one candidates completed the captain examination: twenty-five whites, eight African-Americans, and eight Hispanics. Of those, twenty-two candidates passed: sixteen whites, three African-Americans, and three Hispanics. Under the rule of three, the top nine scorers would have been eligible for immediate promotion to captain: seven whites and two Hispanics.[138]

In January 2004, city officials met with IOS Vice President Chad Legel and "expressed concern that the tests had discriminated against minority candidates."[139] "Legel defended the examinations' validity" and stated that the racial disparity in examination results was likely due to "external factors" and was in line with the results of previous fire department promotional examinations.[140] Several days after this meeting, the city's counsel, Thomas Ude, sent a letter to the CSB stating that "under federal law, 'a statistical demonstration of disparate impact,' standing alone, 'constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies—even . . . race-conscious remedies.'"[141]

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135. *Id.* at 2665.
136. *Id.*
137. *Id.* at 2666.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 2666–67 (quoting Petition for Writ of Certiorari at 443a, *Ricci*, 129 S. Ct. 2658 (No. 07-1428)).

Beginning with a meeting on January 22, 2004, and concluding with a meeting on March 18, 2004, the CSB held five public meetings to consider whether it should certify the examination results.[142] At these meetings, the CSB heard testimony from city managers and officials, firefighters, Chad Legel for IOS, and witnesses from outside New Haven, including another test developer and persons with experience in other fire departments. Among other matters, the CSB considered the disparate impact of the examinations, their job-relatedness, the likelihood of a lawsuit by minorities if the examination results were certified, and the availability (or unavailability) of selection procedures that would have less discriminatory results while still serving the operational needs of the department.[143] At the close of testimony, with one member recused, the CSB deadlocked two to two, resulting in a decision not to certify the examination results.[144]

Seventeen white firefighters and one Hispanic firefighter who had passed the examinations and ranked high on the city's eligibility lists filed suit against the city, various city and CSB officials, and a private citizen who had strongly opposed certification. The plaintiffs alleged that the CSB's failure to certify the examination results violated their rights under Title VII and the Equal Protection Clause of the Fourteenth Amendment.[145]

The plaintiffs alleged that the CSB's decision not to certify the examination results was an act of intentional discrimination. In a detailed forty-eight page opinion ruling on the parties' cross-motions for summary judgment, the district court reviewed the facts of the case at length and discussed and applied nearly forty years' worth of congressional enactments, administrative guidelines, and judicial precedents from the Supreme Court and the Second Circuit. Applying well established principles of Title VII law, the court analyzed the evidence under the "familiar *McDonnell Douglas* three-prong burden-shifting test."[146] The court found,

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142. *Id.* at 2667–71.

143. *Id.*

144. *Id.* at 2671.

145. *Id.* The plaintiffs also alleged violations of the First Amendment and 42 U.S.C. § 1985 (2006), as well as a tort claim for intentional infliction of emotional distress. Ricci v. DeStefano, 554 F. Supp. 2d 142, 144 (D. Conn. 2006). Only the Title VII and equal protection claims were presented for review by the Supreme Court.

146. *Ricci*, 554 F. Supp. 2d at 151. Under this test:

first, that the plaintiffs had established a prima facie case of intentional discrimination: a jury could infer that the city was motivated "by a concern that too many whites and not enough minorities would be promoted."[147] Second, the court found that the city had presented evidence that it had a legitimate, nondiscriminatory reason for deciding not to certify the examination results—i.e., that it "desired to comply with the letter and spirit of Title VII" by avoiding a potential violation of the disparate-impact prohibition of the statute.[148] Finally, the plaintiffs countered that this asserted reason was merely a pretext for advancing the interests of nonwhite firefighters.[149] Relying on Second Circuit precedent,[150] the district court held that the city's "motivation to avoid making promotions based on a test with a racially disparate impact" was not a pretext for intentional discrimination against the plaintiffs and that the city, therefore, had not violated Title VII.[151]

The district court further held that the plaintiffs' equal protection claim lacked merit because they had not established either that the city had used a racial classification or that the city had acted with discriminatory intent. The city's "desire to design an . . . exam which would diminish the adverse impact on black applicants . . . does not constitute a 'racial classification.'"[152] The court noted that "[n]othing in the record . . . suggests that the City

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> (1) the plaintiff first must establish a prima facie case of discrimination; (2) the employer must respond with a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must establish that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination.

LINDEMANN & GROSSMAN, *supra* note 69, at 12; *see* Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

147. *Ricci*, 554 F. Supp. 2d at 152.

148. *Id.* at 152–53.

149. *Id.* at 153.

150. *See* Hayden v. County of Nassau, 180 F.3d 42, 48–50 (2d Cir. 1999); Bushey v. N.Y. State Civil Serv. Comm'n, 733 F.2d 220, 226 n.7, 228 (2d Cir. 1984); Kirkland v. N.Y. State Dep't of Corr. Servs., 771 F.2d 1117, 1130 (2d Cir. 1983).

151. *Ricci*, 554 F. Supp. 2d at 160.

152. *Id.* at 161 (quoting *Hayden*, 180 F.3d at 48).

defendants or CSB acted 'because of' discriminatory animus toward plaintiffs."[153] Rather, they acted on the basis of their concerns that the examinations had an adverse impact on nonwhite candidates; that promotions based on the exam scores would undermine their goal of diversity in the fire department; and that use of the exam results would subject the city to public criticism and to the likelihood of Title VII lawsuits by nonwhite candidates.[154] Relying again on Second Circuit precedent, the district court found that "'[t]he intent to remedy the disparate impact of [the examinations] is not equivalent to an intent to discriminate against non-minority applicants.'"[155] Accordingly, the district court granted the defendants' motion for summary judgment.[156]

A Second Circuit panel—which famously included then-Judge Sonia Sotomayor[157]—initially issued an unpublished summary order affirming the district court's decision.[158] The panel subsequently withdrew its summary affirmance and issued instead a short *per curiam* published opinion affirming the district court "for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below."[159] A majority of all active judges on the Second Circuit subsequently declined, by a vote of 7-6, to rehear the case, thus leaving the panel's decision in place.[160] Three published opinions explained the Second Circuit majority's reasons for concluding that rehearing before the full court was unnecessary[161]—including the fact that two of their prior decisions "clearly establish[ed] for the circuit that a public employer, faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such

153. *Id.* at 162.

154. *Id.*

155. *Id.* (quoting *Hayden*, 180 F.3d at 51).

156. *Id.*

157. *See* Adam Liptak, *Sotomayor Case Draws Scrutiny*, N.Y. TIMES, June 6, 2009, at A1.

158. Ricci v. DeStefano, 264 F. App'x 106 (2d Cir. 2008).

159. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

160. *Id.* at 88.

161. *See id.* at 88–89 (Calabresi, J., concurring); *id.* 89–90 (Katzmann, J., concurring); *id.* at 90–92 (Parker, J., concurring).

liability."[162] The dissenters issued two published opinions of their own, arguing not that the panel's decision was wrong on the merits, but rather that the issues in the case warranted review by the full Second Circuit.[163]

By a 5-4 vote, a majority of the Supreme Court—in an opinion by Justice Kennedy that was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito—held that "race-based action like the City's in this case is impermissible under Title VII unless 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" provisions of Title VII.[164] The Court further held that, on the record in this case, the city could not satisfy the majority's new "strong basis in evidence" standard and, therefore, concluded that the plaintiffs were entitled to summary judgment.[165] In light of its resolution of the statutory issue, the majority found it unnecessary to reach the question whether the city's actions violated the Equal Protection Clause.[166] In dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, criticized the majority's "strong-basis-in-evidence standard" and articulated an alternative standard requiring an employer to have "good cause to believe that the [selection] method screens out qualified applicants and would be difficult to justify as grounded in business necessi-

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162. *Id*. at 90 (Parker, J., concurring) (citing Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999); Bushey v. N.Y. State Civil Serv. Comm'n, 733 F.2d 220 (2d Cir. 1984)).

163. *See id*. at 92–93 (Jacobs, C.J., dissenting); *id.* at 93–101 (Cabranes, J., dissenting).

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

165. *Id*. In a separate opinion, Justice Alito, joined by Justices Scalia and Thomas, argued that the Court could not affirm summary judgment for the city because a reasonable jury could easily find that the city's asserted reason for not certifying the exam results was pretextual—i.e., "that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency" led by an African-American minister who was named as a defendant in the case. *Id.* at 2688 (Alito, J., concurring).

166. *Id*. at 2664–65 (majority opinion). In Justice Scalia's view, the Court's avoidance of the constitutional issue "merely postpone[d] the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" *Id.* at 2682 (Scalia, J., concurring).

ty."[167] The dissent also argued that, even under the majority's new standard, the plaintiffs were not entitled to summary judgment because evidence of the "multiple deficiencies" of the examinations created at least a triable issue of fact.[168]

B. Analysis of the Supreme Court's Decision

1. Title VII's "Original, Foundational" Prohibitions

Characterizing Title VII's prohibition of disparate treatment in section 703(a)(1)[169] as the statute's "principal nondiscrimination provision"[170] and its "original, foundational prohibition,"[171] the majority in *Ricci* asserted that the Civil Rights Act of 1964 "did not include an express prohibition on policies or practices that produce a disparate impact,"[172] and that no such provision existed until Congress enacted the Civil Rights Act of 1991.[173] In fact, however, as discussed above,[174] and as the dissent in *Ricci* noted,[175] the original 1964 text of Title VII contained not only section 703(a)(1)'s prohibition of disparate treatment but also section 703(a)(2)'s broad prohibition of conduct that "limit[s], segregate[s], or classif[ies]" persons "in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[176] For decades, enforcement agencies and courts— including the United States Supreme Court[177]—have recognized this latter provision, in conjunction with the exception provided by section 703(h) for "professionally developed ability tests" that are not "designed, intended, or used to

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167. *Id*. at 2702 (Ginsburg, J., dissenting).
168. *Id*. at 2707.
169. 42 U.S.C. § 2000e-2(a)(1) (2006).
170. *Ricci*, 129 S. Ct. at 2672.
171. *Id*. at 2675.
172. *Id*. at 2672.
173. *Id*. at 2673.
174. *See supra* Part I.
175. *See Ricci*, 129 S. Ct. at 2696–97 & n.2 (Ginsburg, J., dissenting).
176. 42 U.S.C. § 2000e-2(a)(2) (2006).
177. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988); Connecticut v. Teal, 457 U.S. 440, 446–47 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 426 & n.1 (1971).

discriminate,"[178] as the original statutory basis for the disparate-impact analysis that has been an integral part of Title VII since its inception.[179]

In 1971 the Court in *Griggs v. Duke Power Co.*, citing sections 703(a)(2) and 703(h), found that it was "plain from the language of the statute"[180] that Congress intended to prohibit disparate-impact discrimination as well as disparate-treatment discrimination.[181] It is curious, then, that the majority in *Ricci* was unable to locate any statutory prohibition of such discrimination predating the enactment of section 703(k) as part of the Civil Rights Act of 1991.[182] It is even more curious that the majority in *Ricci* failed to mention three critical events that occurred during the twenty years between the decision in *Griggs* and the enactment of the 1991 Act.

First, in 1972, one year after the *Griggs* decision, Congress amended Title VII to include state and local governments as covered employers and to authorize Title VII lawsuits by the EEOC against private employers and by the Department of Justice against public employers.[183] In thus extending the reach of Title VII, "Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*."[184]

Second, in 1978, after several years of debate and negotiation among the federal civil rights enforcement agencies, the *Uniform Guidelines* were adopted by the EEOC, the Civil Service Commission (now the Office of Personnel Management), and the Departments of Justice, Labor, and the Treasury.[185] These guidelines, which "represent 'the administrative interpretation of the Act by the enforcing agenc[ies]' and are thus 'entitled to great defe-

178. 42 U.S.C. § 2000e-2(h).

179. *See supra* Part I.B.

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

181. *Id.* at 431.

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

183. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The 1972 Act also amended section 703(a)(2) to protect "applicants for employment" as well as "employees." *Id.* § 8(a), 86 Stat. at 109.

184. Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982); *see also supra* Part II.B.6 and note 177.

185. *See supra* Part I.E.

rence,'"[186] reaffirmed Title VII's prohibition of disparate-impact discrimination. As the *Uniform Guidelines* state, "The use of any selection procedure which has an adverse impact . . . will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated."[187]

Third, the Civil Rights Act of 1991 was enacted, in significant part, for the stated purpose of overturning the Supreme Court's interpretation of Title VII's disparate-impact provisions in *Wards Cove Packing Co. v. Atonio*.[188] The majority in *Wards Cove*, disregarding *Griggs* and its progeny and relying instead on disparate-treatment precedents, had held that once a prima facie disparate-impact case has been established, the employer bears only "the burden of producing evidence of a business justification,"[189] while plaintiffs bear the burden of proving that a challenged practice does not "serve[], in a significant way, the legitimate employment goals of the employer."[190] Although *Griggs* and subsequent cases had held that the employer bears "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question,"[191] the majority in *Wards Cove* reallocated this burden onto the plaintiffs' shoulders in order to "conform[] to the rule in disparate-treatment cases."[192] The *Wards Cove* majority also abandoned *Griggs*' holding that "[t]he touchstone is business necessity";[193] instead, "[t]he touchstone of this inquiry" in *Wards Cove* was "a reasoned review of the employer's justification."[194] The Court in *Griggs* concluded that, "[i]f an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited."[195] The majority in *Wards Cove*, by contrast, deter-

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186. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 383–84 (2d Cir. 2006) (quoting *Griggs*, 401 U.S. at 433–34); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

187. 29 C.F.R. § 1607.3A (2009); *see supra* Part I.E.

188. 490 U.S. 642, 656–58 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

189. *Id.* at 659.

190. *Id.*; *see also id.* at 660.

191. *Griggs*, 401 U.S. at 432; *see also Albemarle*, 422 U.S. at 425.

192. *Wards Cove*, 490 U.S. at 660.

193. *Griggs*, 401 U.S. at 431.

194. *Wards Cove*, 490 U.S. at 659.

195. *Griggs*, 401 U.S. at 431.

mined that a practice that had a disparate impact on a protected group would be deemed lawful unless the plaintiffs could prove that it did *not* "serve[], in a significant way, the legitimate employment goals of the employer."[196]

The *Ricci* majority,[197] while noting that the Civil Rights Act of 1991 was enacted twenty years after *Griggs*,[198] failed to acknowledge that the 1991 Act was based in large part on a congressional finding that "the decision of the Supreme Court in *Wards Cove* . . . has weakened the scope and effectiveness of federal civil rights protections."[199] The majority in *Ricci* also neglected to note that an express purpose of the 1991 Act was to restore "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* . . . and in the other Supreme Court decisions prior to *Wards Cove*."[200] As other courts have recognized, the Civil Rights Act of 1991 "effectively overruled the Supreme Court's narrow construction of Title VII as set forth in *Wards Cove*."[201]

2. The "Conflict" Between Disparate Impact and Disparate Treatment

Having determined—erroneously—that the prohibition of disparate-impact discrimination was not an "original, foundation-

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196. *Wards Cove*, 490 U.S. at 659.

197. The *Ricci* majority was composed of Justice Kennedy, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. The *Wards Cove* majority was composed of Justice White, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy.

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

199. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071.

200. *Id.* § 3(2).

201. Allen v. Highlands Hosp. Corp., 545 F.3d 387, 403 (6th Cir. 2008); *see supra* Part I.G.; *see also* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 241 (3d Cir. 2007) (noting that Congress recognized that *Wards Cove* was "a departure from *Griggs*" and responded by "abrogating" the *Wards Cove* business justification standard and "restoring" the *Griggs* business necessity standard); Theodore McMillian, *The Civil Rights Act of 1991—One Step Forward on a Long Road*, 22 STETSON L. REV. 69, 71–74 (1992) (containing a discussion by Judge Theodore McMillian, then serving on the United States Court of Appeals for the Eighth Circuit, on congressional rejection of the *Wards Cove* standards and restoration of the *Griggs* standards for application of disparate-impact law).

al" provision of Title VII, the majority in *Ricci* nonetheless recognized that an "important purpose" of the statute is to ensure "that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[202] The *Ricci* majority, however, described this purpose and the means for achieving it far more narrowly than the Court had in the past. In *Teamsters v. United States*, for example, the Court stated:

> The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. To achieve this purpose, Congress proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.[203]

The majority in *Ricci* did not acknowledge that the purpose of Congress in enacting Title VII in 1964 was to achieve equality of opportunity not only through the prohibition of intentional discrimination but also through the removal of unnecessary barriers that disproportionately exclude minorities and women regardless of the employer's intent. As the Court recognized long ago in *Griggs*, "Congress directed the thrust of the Act to the ***consequences*** of employment practices, not simply the motivation."[204]

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202. *Ricci*, 129 S. Ct. at 2674.

203. 431 U.S. 324, 348–49 (1977) (citations omitted) (internal quotation marks omitted); ***see also*** Connecticut v. Teal, 457 U.S. 440, 448–49 (1982) ("Congress' primary purpose was the prophylactic one of achieving equality of employment 'opportunities' ***and*** removing 'barriers' to such equality.") (emphasis added) (citations omitted).

204. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis added); ***see also Teal***, 457 U.S. at 451 ("Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary, and unnecessary' employer-created barriers to professional development that have a discriminatory impact upon individuals.").

Based upon its narrow description of Congress' purpose, the *Ricci* majority perceived a "conflict" between Title VII's disparate-impact and disparate-treatment provisions: absent a "lawful justification," the city's effort to comply with the disparate-impact prohibition constituted "discriminatory . . . race-based action" in violation of the disparate-treatment prohibition.[205] As the dissent recognized, however, these "twin pillars of Title VII" are not in conflict; on the contrary, they "advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity."[206] Title VII—as originally enacted, as subsequently amended, and as understood by the Supreme Court prior to *Ricci*—prohibits employers from intentionally discriminating ***and*** from using unjustified practices that have a discriminatory impact.

3. Adoption of the "Strong-Basis-in-Evidence" Standard

The majority in *Ricci* "reconciled" the conflict it discovered within Title VII[207] by "searching for a standard that strikes . . . [an] appropriate balance" between the purportedly conflicting provisions.[208] Implicitly equating action designed to eliminate unjustified disparate impact in current selection procedures with race-conscious affirmative action designed to remedy past discrimination,[209] the majority found the standard it was seeking in cases holding that race-conscious, remedial affirmative action violates the Equal Protection Clause of the Fourteenth Amendment unless there is "'a strong basis in evidence' that the remedial actions were necessary."[210] Even though no party in *Ricci* advocated appropriat-

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205. *Ricci*, 129 S. Ct. at 2674.

206. *Id.* at 2699 (Ginsburg, J., dissenting). "Neither Congress' enactments nor this Court's Title VII precedents (including the now-discredited decision in *Wards Cove*) offer even a hint of 'conflict' between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions." *Id.*

207. "Our task is to provide guidance to employers and courts for situations when these two prohibitions could be in conflict absent a rule to reconcile them." *Id.* at 2674 (majority opinion); *see also id.* at 2676 (adopting a strong-basis-in-evidence standard "to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII").

208. *Id.* at 2675.

209. *See id.* at 2700 (Ginsburg, J., dissenting) ("The Court's standard [is] drawn from inapposite equal protection precedents . . . .").

210. *Id.* at 2675 (majority opinion) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

ing this standard from the constitutional cases,[211] the majority "adopt[ed] the strong-basis-in-evidence standard as a matter of statutory construction" and held 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.[212]

The strong-basis-in-evidence standard, according to the *Ricci* majority, "leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination,"[213] while it also "appropriately constrains employers' discretion in making race-based decisions."[214] The majority's standard would not interfere with "an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotional] process," nor would it 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."[215] After the test-design stage, however, "once [the] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's

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211. The plaintiffs in *Ricci* argued that an employer may never take race-conscious actions in order to avoid disparate-impact liability under any circumstances or, in the alternative, that an employer may do so only if it knows with certainty that its practice violates Title VII's disparate-impact prohibition. *Id.* at 2674. The city and the Government, on the other hand, argued that race-conscious actions could be justified by an employer's good-faith belief that such actions were necessary to comply with Title VII's disparate-impact provisions. *Id.* at 2674–75. The majority rejected all of these proposed standards and instead "search[ed] for a standard that strikes a more appropriate balance." *Id.* at 2675.

212. *Id.* at 2677.

213. *Id.* at 2676 (citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986)).

214. *Id.*

215. *Id.* at 2677.

legitimate expectation not to be judged on the basis of race . . . absent a strong basis in evidence of an impermissible disparate impact."[216]

Criticizing the majority's standard as "enigmatic," the dissent in *Ricci* found the Court's equal protection cases to be of "limited utility" because they concern "the constitutionality of absolute racial preferences," whereas Title VII's disparate-impact prohibition "calls for no racial preference, absolute or otherwise."[217] According to the dissent, the majority's strong-basis-in-evidence standard makes voluntary compliance—Congress' preferred means of achieving Title VII's objectives[218]—a "hazardous venture," virtually demanding that an employer "establish 'a provable, actual violation' *against itself*."[219] The dissent would hold instead that "an employer who jettisons a selection device when its disproportional racial impact becomes apparent does not violate Title VII's disparate-treatment" prohibition if it has "good cause to believe the device would not withstand examination for business necessity."[220]

4. Application of the "Strong-Basis-in-Evidence" Standard

When the Supreme Court adopts a new rule of law,[221] it ordinarily remands and allows the lower courts to apply the rule in the first instance.[222] This general principle should be particularly applicable where, as in *Ricci*, the questions to be resolved under the Court's new rule are technical in nature and involve experts whose opinions have never been subjected to cross-examination. Moreover, the lower courts in *Ricci* decided the case on the basis of longstanding precedents at a time when they had no way of

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216. *Id.*

217. *Id.* at 2700–01 (Ginsburg, J., dissenting).

218. *Id.* at 2701 (quoting *Int'l Ass'n of Firefighters*, 478 U.S. at 515).

219. *Id.* (quoting *Ricci*, 129 S. Ct. at 2676 (majority opinion)).

220. *Id.* at 2699.

221. The majority in *Ricci* acknowledged that it was adopting "a rule to reconcile" what it perceived as a "conflict" between Title VII's disparate-treatment and disparate-impact provisions. *Id.* at 2674 (majority opinion).

222. *See id.* at 2702–03 (Ginsburg, J., dissenting) (citing Johnson v. California, 543 U.S. 499, 515 (2005); Pullman-Standard v. Swint, 456 U.S. 273 (1982)). Justice Ginsburg noted in dissent that she "would not oppose a remand for further proceedings fair to both sides" but that the majority had "chosen to short-circuit this litigation based on its pretension that the City has shown, and can show, nothing more than a statistical disparity." *Id.* at 2707.

knowing that the Supreme Court would adopt a new rule.[223] Nonetheless, the *Ricci* majority chose to "short-circuit [the] litigation"[224] by applying its new rule to the summary-judgment record before it. The Court then reached its own conclusion that the city lacked a strong basis in evidence to believe it would have incurred disparate-impact liability if it had certified the examination results.[225]

In applying its new standard, the *Ricci* majority initially followed the Court's precedents in determining that the city's proposed use of the examinations would have a "significant" adverse racial impact and that the city was therefore "faced with a prima facie case of disparate-impact liability."[226] But the majority arguably departed from established case law and undermined the intent of Congress in concluding that there was "no genuine dispute that the examinations were job-related and consistent with business necessity" and that the certification of the examination results could not expose New Haven to disparate-impact liability.[227]

a. Job-Relatedness

In reaching the conclusion that there was no genuine dispute that the examinations were job-related, the majority noted that

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223. 554 F. Supp. 2d 142, 151, 161 (D. Conn. 2006). The district court applied the "familiar *McDonnell Douglas* three-prong burden-shifting test" and followed clear Second Circuit precedent. *Id.* at 151. The Second Circuit denied en banc rehearing at least in part because two of its prior decisions "clearly establish[ed] for the circuit that a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability." Ricci v. DeStefano, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring) (citing Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999); Bushey v. N.Y. State Civil Serv. Comm'n, 733 F.2d 220 (2d Cir. 1984)).

224. *Ricci*, 129 S. Ct. at 2707 (Ginsburg, J., dissenting).

225. *Id.* at 2681 (majority opinion).

226. *Id.* at 2677. The pass rates for minorities were approximately one-half the pass rates for whites and "[fell] well below the 80-percent standard set by the EEOC." *Id.* at 2678 (citing *Uniform Guidelines*, 29 C.F.R. § 1607.4(D) (2009)). As a result of ranking and application of the "rule of three," the City would not have considered African-American candidates for any of the then-vacant lieutenant or captain positions. *Id.*

227. *Id.*

the test developer had conducted job analyses[228] and had drawn test questions from source material approved by the fire department; a retired fire captain from another department thought the "questions were relevant for both exams"; and another test developer had said the exams "appea[r] to be . . . reasonably good."[229] Such "casual reports of [test] validity," however, are not acceptable substitutes for the scientific evidence required by the *Uniform Guidelines*,[230] nor do they satisfy the validation standards adopted by the Court in prior cases.[231] Although such testimony might have satisfied an employer's reduced burden of producing evidence of a business justification under the Court's holding in *Wards Cove*,[232] Congress specifically rejected that holding when it enacted the Civil Rights Act of 1991.[233] Thus, with respect to reviewing an employer's de-

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228. The job analyses relied primarily on information obtained from non-minority fire officers. *See id.* at 2706 (Ginsburg, J., dissenting).

229. *Id.* at 2678 (majority opinion).

230. *See* 29 C.F.R. § 1607.9(A) ("Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of its validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.").

231. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) ("[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" (quoting 29 C.F.R. § 1607.4(C) (1970))); *id*. at 431–35 (outlining a detailed technical analysis of validation requirements); *see also supra* Part I.D.

232. 490 U.S. 642, 659–60 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074. Even under *Wards Cove*, however, such testimony might well have failed to meet the standards for admissibility of expert opinion testimony. *See* FED. R. EVID. 701–703; Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

233. *Ricci*, 129 S. Ct. at 2705–06 (Ginsburg, J., dissenting) ("Perhaps such reasoning would have sufficed under *Wards Cove*, which permitted exclusionary practices as long as they advanced an employer's 'legitimate' goals. But Congress repudiated *Wards Cove* and reinstated the 'business necessity' rule attended by a 'manifest relationship' requirement." (citations omitted)); *see supra* Part I.G.

cision not to use a procedure with an adverse impact, one may argue that the majority in *Ricci* judicially resurrected the discredited *Wards Cove* standard that Congress explicitly overruled.[234]

Under pre-*Wards Cove* case law, which now applies pursuant to the 1991 Act,[235] and under the *Uniform Guidelines*, it appears that—at least on the summary-judgment record in the Supreme Court—the city did in fact have a strong basis in evidence for its concern that its selection procedures were not job related or consistent with business necessity. There was no evidence in the record of any justification for the 60/40 written/oral weighting mandated by the collective bargaining agreement,[236] and many courts have recognized that heavy reliance on written multiple-choice tests of "cognitive ability" to select fire officers is questionable because such tests often do not effectively measure the complex set of behaviors, skills, and abilities needed to perform the job.[237] Under the *Uniform Guidelines*, as measures of "'interpersonal relations' or 'ability to function under danger (e.g., firefighters),' '[p]encil-and-paper tests . . . generally are not close enough approximations of work behaviors to show content validity.'"[238] There was also no evidence in the record that the examinations' cutoff scores accurately differentiated between qualified and unqualified candidates, nor was there any evidence justifying the use of

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234. *Cf.* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 612 (2009) (Thomas, J., concurring) (stating that the Supreme Court should not, "with a sweep of the Court's pen, subordinate[] what the . . . statute says to what the Court thinks is a good idea").

235. An express purpose of the Civil Rights Act of 1991 was to restore "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in [*Griggs*] . . . and in the other Supreme Court decisions prior to [*Wards Cove*]." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071; *see supra* Part I.G.

236. As the dissent noted, "[n]either the Court nor the concurring opinions attempt to defend th[is] ratio." *Ricci*, 129 S. Ct. at 2699 n.5 (Ginsburg, J., dissenting); *see also id.* at 2703 n.11 ("This alone would have posed a substantial problem for New Haven in a disparate-impact suit . . . .").

237. *Id.* at 2704 (citing, *inter alia*, Firefighters Inst. for Racial Equal. v. St. Louis, 616 F.2d 350, 359 (8th Cir. 1980); Vulcan Pioneers, Inc. v. N.J. Dep't of Civil Serv., 625 F. Supp. 527, 539 (D.N.J. 1985)).

238. *Id.* (quoting Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,007 (1979); citing *Uniform Guidelines*, 29 C.F.R. § 1607.15(C)(4) (2009)).

the examinations as rank-ordering devices.[239] The *Uniform Guidelines* call for such evidence:[240] "Many courts have taken the position that sufficient proof of job relatedness must support the use of a cutoff score that increases adverse impact."[241] Also, "[c]ourts generally require employers to present specific and well-documented justification for . . . rank-order selection and, accordingly, frequently reject rank-ordering selection practices as inadequately validated or unjustifiably adverse."[242]

The *Ricci* majority seems to assume that a "technical report" that was never provided by the test developer would have filled these evidentiary holes, and it faults the city for failing to press for the report and thereby "turn[ing] a blind eye to evidence that supported the exams' validity."[243] Such assumptions of validity, however, are no substitute for evidence.[244] To the extent that there was any validation evidence in *Ricci*, it fell far short of the standards previously required by the Court[245] and by the *Uniform Guidelines*.[246] The record in *Ricci*, in any event, suggests that the missing technical report would merely have summarized the steps taken by the test developer and would not have satisfied the relevant standards.[247]

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239. *Id.* at 2706 n.16.

240. Cut-off scores "should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." *See* 29 C.F.R. § 1607.5(H). Furthermore, where ranking results in effectively higher cut-off scores, "the degree of adverse impact should be considered." *Id.*; s*ee also* 29 C.F.R. § 1607.5(G) ("[I]f a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis . . . the user should have sufficient evidence of validity and utility to support the use on a ranking basis.").

241. LINDEMANN & GROSSMAN, *supra* note 69, at 218 (footnote omitted); *see infra* Part IV.B.

242. LINDEMANN & GROSSMAN, *supra* note 69, at 213 (footnote omitted); *see infra* Part IV.B.

243. *Ricci*, 129 S. Ct. at 2679.

244. *Uniform Guidelines*, 29 C.F.R. § 1607.9(A) ("Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's [sic] validity be accepted in lieu of evidence of validity.").

245. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431–35 (1975).

246. 29 C.F.R. § 1607.14 (listing technical standards for validity studies).

247. *See Ricci*, 129 S. Ct. at 2707 (Ginsburg, J., dissenting).

b. Less Discriminatory Alternatives

The *Ricci* majority also held that there was no genuine dispute as to the availability of other equally valid and less discriminatory alternatives to the city's use of its promotional examinations. In reaching this conclusion, the majority rejected proposed changes in the 60/40 written/oral weighting formula and in the city's interpretation of the "rule of three." The majority found "no evidence to show that the 60/40 weighting was indeed arbitrary" and "presume[d] the parties negotiated that weighting [in the collective bargaining agreement] for a rational reason,"[248] thus apparently turning Title VII law on its head by assuming job-relatedness without requiring any evidence.[249] The majority also speculated that changing the weighting formula might violate section 703(*l*) of Title VII, which prohibits the alteration of test scores on the basis of race.[250] With respect to a proposal to round examination scores to the nearest whole number and "band" all candidates with the same whole-number score together for purposes of the "rule of three,"[251] the majority found this was not an available alternative "as a matter of law" because it would have violated section 703(*l*).[252] The majority did not address whether, without regard to race, the city could have chosen to change the weighting formula or to band statistically identical scores together in order to make its selection procedures less arbitrary and more rational.[253] Moreover, because the majority decided the factual questions on its own,

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248. *Id.* at 2679 (majority opinion).

249. *See, e.g.*, *Uniform Guidelines*, 29 C.F.R. § 1607.9(A) (stating that assumptions of validity are unacceptable substitutes for evidence of validity).

250. *Ricci*, 129 S. Ct. at 2679 (citing 42 U.S.C. § 2000e-2(l) (2006) (stating that it is unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race")).

251. The majority recognized that a state court decision interpreting the city charter as prohibiting banding "may not eliminate banding as a valid alternative under Title VII." *Id.* at 2680 (exempting the city from liability under any state or municipal law which "purports to require . . . the doing of any act which would be an unlawful employment practice under [Title VII]" (citing 42 U.S.C. § 2000e-7)).

252. *Id.*

253. The dissent in *Ricci* noted that "[n]o one is arguing . . . that the results of the exams given should have been altered. Rather, the argument is that the City could have availed itself of a better option when it initially decided what selection process to use." *Id.* at 2705 n.15 (Ginsburg, J., dissenting).

without remanding, it did so without the benefit of potentially important expert testimony on these issues.

The majority in *Ricci*—without the benefit of a remand for relevant expert testimony or fact-finding—also rejected the use of "assessment centers" as an equally valid, less discriminatory method of selecting fire officers, asserting that this proposed alternative was supported by only "a few stray (and contradictory) statements in the record."[254] The dissent, however, cited a study finding that, as far back as 1996, nearly two-thirds of surveyed municipalities used assessment centers ("simulations of the real world of work") as part of their fire officer promotion process and that, among municipalities still relying on written tests, the median weight assigned to them was thirty percent—half the weight assigned to New Haven's written tests.[255] Testimony before the CSB indicated that these alternative methods were "both more reliable and notably less discriminatory in operation" than the city's examinations.[256] In the dissent's view, "[g]iven the large number of municipalities that regularly use assessment centers, it is impossible to fathom why the City, with proper planning, could not have done so as well."[257] The majority nonetheless concluded that there was "no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City."[258]

5. Advisory Opinion on Potential Future Lawsuit

The majority in *Ricci* recognized that, as a result of its decision, the city would be required to certify the examination results and to fill virtually all lieutenant and captain vacancies with white candidates. Hypothesizing that African-American and Latino firefighters would be likely to challenge those actions as a violation of Title VII's disparate-impact provisions, the majority executed a

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254. *Id.* at 2680 (majority opinion).

255. *Id.* at 2705 (Ginsburg, J., dissenting) (citing Phillip E. Lowry, *A Survey of the Assessment Center Process in the Public Sector*, 25 PUB. PERSONNEL MGMT. 307, 309, 315 (1996)).

256. *Id.*

257. *Id.* at 2705 n.15.

258. *Id.* at 2681 (majority opinion).

preemptive strike and ruled in advance on the merits of their hypothetical lawsuit:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.[259]

Ordinarily, the Supreme Court takes the position that, under Article III of the Constitution, it has "no business offering an advisory opinion" on a question that is not before it.[260] In *Ricci*, however, the majority took the extraordinary step of ruling—in advance of the filing of any lawsuit and without regard to what expert testimony and other evidence in such a lawsuit might show as to disparate impact, job-relatedness, business necessity, or less discriminatory alternatives—that the African-American and Latino plaintiffs would "clear[ly]" lose.[261] The majority's willingness—indeed, eagerness—to issue this advisory opinion is particularly surprising in view of the fact that four justices, even on the truncated summary-judgment record before the Court in *Ricci*, found that the city had "good cause to fear disparate-impact liability" in such a future suit, and that there was "at least a triable issue under a strong-basis-in-evidence standard."[262]

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259. *Id.*

260. Alabama v. Shelton, 535 U.S. 654, 676 (2002) (Scalia, J., dissenting); s*ee also* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 139 (2007) (Thomas, J., dissenting) (opining that the Court may not render "'an advisory opinion as to the validity of a defense . . . in a controversy which has not arisen'" (quoting Coffman v. Breeze Corps., 323 U.S. 316, 324 (1945))); Hudson v. United States, 522 U.S. 93, 112 (1997) (Stevens, J., concurring) ("[A] desire to reshape the law does not provide a legitimate basis for issuing what amounts to little more than an advisory opinion that, at best, will have the precedential value of pure dictum . . . .").

261. *See Ricci*, 129 S. Ct. at 2681.

262. *Id.* at 2707 (Ginsburg, J., dissenting).

6. Constitutionality of Title VII's Disparate-Impact Prohibition

As the majority noted, the plaintiffs in ***Ricci*** argued that the city's decision not to certify the examination results violated not only Title VII but also the Equal Protection Clause of the Fourteenth Amendment.[263] Although the majority alluded to this constitutional question at various points in its opinion,[264] it concluded that its resolution of the Title VII issue made it unnecessary for the Court to reach the equal protection issue.[265]

Justice Scalia, in a concurring opinion joined by none of the other justices, was far more direct.[266] In his view, the majority's resolution of the ***Ricci*** case "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[267] While stating that this question "is not an easy one,"[268] Justice Scalia's opinion nonetheless makes clear that he has serious constitutional doubts:

> As the facts of [***Ricci***] illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.[269]

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263. *Id.* at 2664 (majority opinion).

264. *See, e.g.*, *id.* at 2676 (noting that the Court "do[es] not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case," and it "need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution").

265. *Id.* at 2664–65, 2681.

266. *Id.* at 2681–83 (Scalia, J., concurring). Justice Alito's concurring opinion, which was joined by Justices Scalia and Thomas, does not discuss the constitutional issue. *See id.* at 2683–90 (Alito, J., concurring).

267. *Id.* at 2682 (Scalia, J., concurring).

268. *Id.* (citing Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003)).

269. *Id.* (citations omitted).

His opinion concludes with a dark warning that "the war between disparate impact and equal protection will be waged sooner or later."[270]

While Justice Scalia perceives a "war" between disparate impact and equal protection, the dissent in *Ricci* views these two sources of law as complementary. The Equal Protection Clause "prohibits only intentional discrimination," whereas "Title VII, in contrast, aims to eliminate all forms of employment discrimination, unintentional as well as deliberate."[271] The dissent notes that the Court has never before questioned the constitutionality of Title VII's disparate-impact component, which, "[b]y instructing employers to avoid needlessly exclusionary selection processes, . . . calls for a 'race-neutral means to increase minority . . . participation'—something this Court's equal protection precedents also encourage."[272] The dissent concludes that "'[t]he very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection . . . suggests that only a very uncompromising court would issue such a decision.'"[273]

III. THE IMPORTANCE OF THE DISPARATE-IMPACT STANDARD

As noted above, depending on how it is read, the majority's decision in *Ricci* could weaken the effectiveness of the disparate-impact standard, and Justice Scalia's dissent raises the spectre that the standard could even be declared unconstitutional. The disparate-impact standard has been an essential tool in achieving equal opportunity for racial and ethnic minorities, women, and other disadvantaged groups. Its restriction or outright elimination could substantially impede continued progress toward this goal.

Since the endorsement of the disparate-impact standard by the Supreme Court in 1971, there has been a profound expansion in the number of women and people of color in the workforce, particularly in law enforcement and firefighting occupations. While there as yet is no comprehensive study of the effects of the disparate-impact standard on the United States workforce, there is a

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270. *Id.* at 2683.

271. *Id.* at 2700 (Ginsburg, J., dissenting).

272. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238 (1995)).

273. *Id.* at 2700–01 (quoting Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003)).

general consensus among social scientists that the standard has played a significant role in expanding equal employment opportunities. Moreover, practical steps taken by employers to avoid disparate-impact liability—and thereby increase diversity in the workplace—underscore the importance of the standard. Congress has recognized its importance by explicitly approving the disparate-impact standard in the 1972 and 1991 amendments to Title VII and by mandating its continued use.[274]

A. Expansion of Equal Employment Opportunity

Police and fire jobs provide good illustrations of occupations that were previously held almost entirely by white men but have, over the past forty years, undergone significant change in racial and gender composition. Police and fire departments were also the most common defendants in disparate-impact suits brought on behalf of people of color and women challenging testing procedures.[275] Police departments, for instance, have seen a significant increase in the number of African-American officers employed during this period. According to one source, between 1970 and 1980—a period roughly correlated with the early implementation of the disparate-impact standard—the number of African-American police officers nearly doubled, increasing from 24,000 to

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274. *See supra* Part I.E, G. In her dissenting opinion in *Ricci*, Justice Ginsburg described that in amending Title VII in 1972 to extend to state and local governments, Congress "took note of a U.S. Commission on Civil Rights (USCCR) report finding racial discrimination in municipal employment even 'more pervasive than in the private sector.'" *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting) (citing H.R. REP. NO. 92-238, at 17 (1971)). In particular, Congress recognized that "flawed selection methods served to entrench preexisting racial hierarchies" and that the "USCCR report singled out police and fire departments for having '[b]arriers to equal employment . . . greater . . . than in any other area of State or local government.'" *Id.* at 2690–91 (citing 118 CONG. REC. 1817 (1972)).

Justice Ginsburg summarized the history of minority employment in fire departments since the Equal Employment Opportunity Act of 1972. "At that time, municipal fire departments across the country, including New Haven's, pervasively discriminated against minorities. . . . It took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities." *Id.* at 2690.

275. Paul Burstein & Susan Pitchford, *Social-Scientific and Legal Challenges to Education and Test Requirements in Employment*, 37 SOC. PROBS. 243, 250–51 (1990).

43,500.[276] This growth continued in more recent years. Between 1987 and 2003, the percentage of minority police officers increased from 14.6% to 23.6%.[277] One measure of increased opportunities for African-American officers in specific municipalities is the "index of black representation," which is calculated by dividing the percentage of African-American police officers in a department by the percentage of African-Americans in the local population.[278] Between 1983 and 1992, the Los Angeles index of black representation increased from .55 to 1.00 and the Detroit index increased from .49 to .70; other cities also saw their index rise to a level closer to parity.[279] There has also been a significant increase in the number of African-American firefighters. By 2008, an approximate total of 24,000 African-American firefighters accounted for 8.2% of all career firefighters in the U.S.[280]

In 1970, only 2% of police officers in the United States were women, but by 1991, women comprised 9% of all police officers in the country,[281] and by 2003, 11.3% of police officers were women.[282] In fire departments, the number and percentage of full-time, career firefighters who are women have significantly in-

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276. William L. Taylor, Essay, Brown*, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1713 (1986) (discussing increases in the number of African-American employees in the steel industry and other professions in the early 1970s following the entry of Title VII consent decrees); *see also* J. Le Vonne Chambers & Barry Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 258–59 (1985) (citing census data showing that African-American police officers increased from 23,796 in 1970, or 6.34% of all police officers, to approximately 47,000, or 9.3% of all police officers, in 1982).

277. MATTHEW J. HICKMAN & BRIAN A. REAVES, LOCAL POLICE DEPARTMENTS, 2003 iii (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd03.pdf.

278. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1162 n.60 (1998).

279. *Id.*

280. NATIONAL FIRE PROTECTION ASS'N, FIREFIGHTING OCCUPATIONS (ONLY) BY WOMEN AND RACE, http://www.nfpa.org/itemDetail.asp?categoryID=955&itemID=23601&URL=Research/Fire%20statistics/The%20U.S.%20fire%20service#only (last visited Apr. 11, 2010).

281. Barbara R. Price, *Female Police Officers in the United States*, *in* POLICING IN CENTRAL AND EASTERN EUROPE: COMPARING FIRSTHAND KNOWLEDGE WITH EXPERIENCE FROM THE WEST (Milan Pagon ed., 1996), *available at* http://www.ncjrs.gov/policing/fem635.htm.

282. Hickman & Reaves, *supra* note 277.

creased since the mid-1970s, although the proportion of female firefighters remains small. The first two known women who were paid to fight fires in an urban setting were hired in 1973 and 1974.[283] By the year 2000, these two firefighters were joined by as many as 11,000 other career women firefighters, according to the U.S. Census, comprising 3.7% of all firefighters in the country.[284]

B. Role of the Impact Standard in Expanding Equal Opportunity

From the outset, we caution that social science literature has not produced a precise measure of the influence of the disparate-impact standard that teases out the effects of disparate-treatment law, increased educational opportunities, political or social pressures on employers, or any number of other possible factors that play into the progress that women, African-Americans, and Latinos have made in the workplace over the past forty years. As sociologist Robin Stryker explains, "sorting out how equal employment law has affected labor market outcomes is like detective work. The sociologist has to play Sherlock Holmes even ***before*** trying to isolate the effect of disparate impact from other aspects of EEO [equal employment opportunity] enforcement."[285] As a result, the academic literature in this area is sparse, and the literature that has been produced has focused on a variety of indicators in an effort to capture the role of disparate impact in expanding equal employment opportunities.

Some scholars have hypothesized that the disparate-impact standard had little effect on employment practices, particularly after 1977, when the Supreme Court issued three decisions that limited the availability of broad Title VII class actions, eliminated seniority systems from the reach of the disparate-impact standard, and increased the complexity and difficulty of proving statistical

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283. Terese M. Floren, *History of Women in Firefighting*, INT'L ASS'N OF WOMEN IN FIRE & EMERGENCY SERVICES, 2007, http://www.i-women.org/history_women_firefighting.php?osCsid=ff6f5180c7cc0b2a67dc350.7eaa78e60.

284. Denise M. Hulett et al., *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. DIVERSITY ORGS., COMMUNITIES & NATIONS 189, 191 (2008). Other sources have estimated more than 6500 career firefighters in 2007. *See* Floren, *supra* note 283.

285. Robin Stryker, *Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies*, 42 SOC. Q. 13, 24 (2001).

disparities.[286] Even according to Professor Stryker, a proponent of the importance of disparate impact, much of the momentum around Title VII following the Supreme Court's endorsement of the standard in *Griggs* was in decline by the 1980s.[287] This view of the reduced importance of disparate impact finds some support in the declining numbers of disparate-impact suits being filed. Such suits accounted for nine percent of all employment discrimination cases filed in 1972 and 1973, in the immediate aftermath of *Griggs*, but less than five percent of the cases filed by the late 1980s.[288]

Others have argued that political pressure and an increase in African-American mayors, not the disparate-impact standard or the enforcement of Title VII, are responsible for the public-employment gains of African-Americans, or that these political changes would have achieved the same results in the absence of disparate-impact suits.[289] One study found that the presence of black mayors was the most significant variable associated with the number of African-American police officers.[290] Yet even some who argue that the political landscape was responsible for public-employment gains acknowledge that disparate-impact challenges to testing procedures may have helped black mayors overcome "strict civil service rules that otherwise may have frustrated affir-

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286. *See* George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1476 (1992) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)) (citing E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977)); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499 (2003) ("As a practical matter, disparate impact litigation now plays a much smaller role than it once did in increasing employment opportunities for large numbers of nonwhite workers.").

287. Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOC. 709, 743 (2004).

288. Stryker, *supra* note 285, at 23.

289. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 764–65 (2006) ("In most metropolitan areas, the substantial political pressure to diversify the police force, and to a lesser extent, fire departments, would likely have achieved much of the changes the testing challenges produced.").

290. William G. Lewis, *Toward Representative Bureaucracy: Blacks in City Police Organizations, 1975–1985*, 49 PUB. ADMIN. REV. 257, 262 (1989).

mative action measures" as well as union opposition to integration.[291]

Despite the decline in the number of disparate-impact suits in recent years, "disparate impact is widely credited with promoting wholesale change in employment practices, especially in large manufacturing firms."[292] Stryker points to three reasons why the disparate-impact standard deserves credit for changing the composition of the workforce. First, despite the small number of disparate-impact cases filed, they "tended to be targeted to large, industry-leading firms, precisely to have maximum impact."[293] Second, disparate-impact cases—often filed by the government or as class actions—"substantially increase the plaintiffs' odds of victory" as well as "the likely costs of these victories to employers."[294] Finally, Stryker points to the EEOC's decision to target major companies and the "innovativeness" of the disparate-impact standard, both of which heightened the visibility of disparate-impact suits:[295] "Business press coverage of 1970s government enforcement strategies highlighted the innovativeness of disparate impact and promoted the perception that [the] cases were highly successful, creating enormous financial costs to employers."[296] Furthermore, scholars have conducted comparative analyses of voting rights, school desegregation, and employment discrimination law and concluded that "orientation to effects instead of to individual motivation is the single most important quality legal rules can have for 'maximizing [their] aggregate impact' and 'effectiveness.'"[297]

C. Employer Response to the Impact Standard

Perhaps the best way to measure the success of the disparate-impact standard is to examine the way employers responded to the possibility of disparate-impact litigation in the aftermath of *Griggs* and Congress' repeated reaffirmation of the *Griggs* standard. This approach accounts not only for the effects of actual me-

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291. Selmi, *supra* note 289, at 765.

292. Stryker, *supra* note 285, at 24 (citing academic literature).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. Pedriana & Stryker, *supra* note 287, at 739 (citing RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE, 390–91 (1986)).

rits decisions and the number of suits filed but also for employers' perceptions about the threat posed by these disparate-impact lawsuits and knowledge in the business community of settlements that may not have made it into the empirical studies discussed above. That is, "[e]mployers' perception of litigation threat, rather than litigation itself, may be the major mechanism through which Title VII enforcement improves the relative employment and earnings of minorities."[298]

Stryker argues that the

> Supreme Court endorsement of disparate impact and EEOC guidelines in *Griggs*—and consolidated in *Albermarle Paper*—expanded both the legal scope of discriminatory conduct and the legal capacities of the EEOC to interpret that conduct in ways that likely influenced how employers, managers, human resource professionals, and in-house counsel understood the law and constructed the meaning of compliance.[299]

This conclusion is supported by business and personnel publications released shortly after *Griggs*, which show that "employers were indeed taking seriously the aggressive legal climate."[300] A 1973 publication by the Conference Board—a prominent nonprofit business organization[301]—noted that following *Griggs*, "'leading companies have reported that the central thrust of the court decisions dealing with nondiscrimination has become sufficiently clear to serve them as [a] reliable guide to action.'"[302] The report also warned employers that courts were imposing "'broad penalties and

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298. Stryker, *supra* note 285, at 24.

299. Pedriana & Stryker, *supra* note 287, at 746.

300. *Id.* at 745.

301. The Conference Board, composed of approximately 2000 member companies worldwide, describes its mission as the creation and dissemination of "knowledge about management and the marketplace to help businesses strengthen their performance and better serve society." The Conference Board, http://www.conference-board.org/aboutus/mission.cfm (last visited Apr. 11, 2010).

302. Pedriana & Stryker, *supra* note 287, at 745 (quoting RUTH G. SHAEFFER, NONDISCRIMINATION IN EMPLOYMENT: CHANGING PERSPECTIVES, 1963–1972 iii (1973)).

stringent controls'" on employers and "'are saying that it is the *results* of an employer's actions, and not his intentions, that determine whether he is discriminating.'"[303] In other words, courts were applying the disparate-impact standard, and companies knew that they needed to make "'[r]apid changes . . . if they were to avoid serious legal problems.'"[304]

Two years later, in a 1975 publication, the Conference Board again warned employers that "safeguards and precautions need to be built into the performance-appraisal system" because if the appraisals have an adverse effect they "may well be considered by the courts as 'tests' needing validation."[305] Business and personnel publications also responded to the burden-shifting rule discussed in *Griggs*, in which the burden shifted to employers to prove that there was a "manifest relationship" between a selection device that had a disparate impact and successful job performance.[306] As noted by Stryker, "[t]he same business press coverage that publicized disparate impact as an aggressive, effective enforcement strategy also highlighted the role of burden shifting in promoting this success."[307] For example, one major human resources publication noted that "'[t]he shifting of the burden made it easy for the EEOC and private plaintiffs to win class action Title VII suits.'"[308] This led the same publication to quote a company attorney as saying that it is "'not a question of whether you're going to win or lose your Title VII suit, the question is how badly you're going to lose.'"[309]

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303. *Id.* (quoting SHAEFFER, *supra* note 302, at 1).

304. *Id.* (quoting SHAEFFER, *supra* note 302, at 20).

305. *Id.* at 746 (quoting RUTH G. SHAEFFER, NONDISCRIMINATION IN EMPLOYMENT, 1973–1975: A BROADENING AND DEEPENING NATIONAL EFFORT 26–27 (1975)).

306. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

307. Stryker, *supra* note 285, at 26.

308. *Id.* (quoting Michael Farrell, *Proposed EEOC Regulations*, 23 THE PERSONNEL ADMIN. 51, 56 (1978)).

309. *Id.* (quoting Farrell, *supra* note 308, at 51, 56). While many plaintiffs' lawyers who were active at that time (including the authors of the present Article) would not agree that litigating Title VII class actions was ever "easy" or that employers always lost, these perceptions nonetheless played a role in making the disparate-impact standard an effective tool for removing unnecessary barriers and advancing equal employment opportunity.

The employer response to the disparate-impact standard can also be observed in the development and use of alternative hiring and promotion procedures that were designed to select qualified employees and result in reduced adverse impact. Dr. Nancy Tippens, who has worked as a consultant for numerous Fortune 100 companies, including Exxon, Bell Atlantic, and GTE, in the development and validation of selection and assessment tools, states that "[m]ost employers" strive to minimize adverse impact in their testing programs for many reasons, including the "reduction of the likelihood of legal challenges" under the adverse impact standard.[310] Most psychologists actively investigate alternative selection practices, as directed by the ***Uniform Guidelines***, in order to "replace procedures with high adverse impact and low validity with those that have lower adverse impact and equal or greater validity."[311] Dr. Tippens observes that there are "no easy answers to the questions of adverse impact,"[312] but she lists a substantial number of approaches that have resulted in reductions of adverse impact without a significant consequence to the validity of the selection procedure.[313]

Similarly, three psychologists who have worked on large-scale, public-sector testing programs for three decades describe the extensive efforts and research undertaken to reduce adverse impact without reducing the validity of selection procedures.[314] According to these psychologists, the "good news is that [there is] some progress in creating valid tests that result in a diverse workforce."[315] In general, those psychologists show that there were both "improvements in validity and reductions in adverse impact" as selection procedures for police officers moved away from sole or primary reliance upon written multiple choice tests that focused on verbal abilities and towards a broader understanding of the job that

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310. Nancy T. Tippens, *Adverse Impact in Employee Selection Procedures from the Perspective of an Organizational Consultant*, *in* ADVERSE IMPACT 212, 212 (James L. Outtz ed., 2009).

311. *Id.* at 213–14.

312. *Id.* at 222.

313. *Id.* at 214–22.

314. Wayne Cascio, Rick Jacobs & Jay Silva, *Validity, Utility, and Adverse Impact: Practical Implications from 30 Years of Data*, *in* ADVERSE IMPACT 271, 271–88 (James L. Outtz ed., 2009).

315. *Id.* at 272.

included other abilities, experiences, and personal characteristics that are important to job success.[316]

One such selection method, much discussed in the *Ricci* opinions and in the amicus brief filed by a group of expert industrial-organizational psychologists,[317] is the assessment center. An assessment center tests multiple dimensions of job qualification through observation of job-related exercises and other assessment techniques such as job simulations. Assessment centers are known to reduce adverse impact[318] and are viewed by many police chiefs as "accurate simulation[s] of the job and its duties, [which] have proven highly defensible as a selection strategy."[319] As the expert psychologists explained in their amicus brief in *Ricci*, employers—prompted at least in part by Title VII, the *Griggs* decision, and the development of the EEOC's *Uniform Guidelines*—increasingly began using assessment centers in the 1970s.[320] Assessment centers gained particular prominence in promotion decisions made by fire departments. Indeed, by 1986, four percent of fire departments

316. *Id.* at 273.

317. Brief of Industrial-Organizational Psychologists as Amici Curiae Supporting Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328). This brief was filed on behalf of experts in the field of industrial-organizational psychology who have "extensive experience in the design and validation of promotional tests for emergency services departments, including fire and police departments across the country," and who are "elected fellows of the Society for Industrial and Organization Psychology, . . . the division of the American Psychological Association that is responsible for the establishment of scientific findings and generally accepted professional practices in the field of personnel selection." *Id.*

318. *Id.* at 32 (citing GEORGE C. THORNTON & DEBORAH E. RUPP, ASSESSMENT CENTERS IN HUMAN RESOURCE MANAGEMENT 231 (2006); WAYNE F. CASCIO & HERMAN AGUINIS, APPLIED PSYCHOLOGY IN HUMAN RESOURCE MANAGEMENT 372–73 (6th ed. 2006)).

319. David L. Kurz, *A Promotional Process for the Smaller Police Agency*, THE POLICE CHIEF, Oct. 2006, *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1019&issue_id=102006; *see also* Frank Hughes, *Does the Benefit Outweigh the Cost? Using Assessment Centers in Selecting Middle Managers*, THE POLICE CHIEF, Aug. 2006, *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=973&issue_id=82006.

320. Brief of Industrial-Organizational Psychologists, *supra* note 317, at 29.

surveyed used assessment centers.[321] By 2000, estimates are that between sixty percent and seventy percent of fire departments used assessment centers.[322]

The disparate-impact standard has also spurred employers to use existing selection methods in ways that eliminate or reduce the adverse racial and gender impact traditionally associated with those methods. For instance, an alternative to the rank-ordering used by the test administrators in *Ricci* is "banding," in which a "statistical analysis of the amount of error in the test scores" is used to create bands or swaths of scores, "the lowest of which is considered to be sufficiently similar to the highest to warrant equal consideration within that band."[323] Judge Posner has recognized banding as "a universal and normally an unquestioned method of simplifying scoring by eliminating meaningless gradations," much as letter grades on a student's report card represent groupings of number grades within a certain range.[324] Employers have also reduced the disparate impact of written selection exams by weighting exam results in proportion to their job importance.[325] One survey has found that the median weight given to the written portion of police and fire department tests was thirty percent, far less than the sixty percent weighting assigned to the written test given by the New Haven Fire Department.[326]

D. Additional Considerations

The importance of the disparate-impact standard can also be seen in the role that it has played in challenging discriminatory selection practices that might not otherwise be captured by Title VII's ban on intentional discrimination. As the Supreme Court has noted, "even if one assumed that . . . [intentional] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would re-

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321. *Id.* at 30.

322. *Id.*

323. *Id.* at 27.

324. Chi. Firefighters Local 2 v. City of Chi., 249 F.3d 649, 656 (7th Cir. 2001).

325. Brief of Industrial-Organizational Psychologists, *supra* note 317, at 13.

326. *Id.* at 15–16 (citing Phillip E. Lowry, *A Survey of the Assessment Center Process in the Public Sector*, 25 PUB. PERSONNEL MGMT. 307, 309 (1996)).

main."[327] Today, one of the most common forms of discrimination is found in the use of selection systems that rely on subjective judgments without proper guidance or training to anchor those judgments in objective criteria.[328] Over twenty years ago, the Supreme Court endorsed the use of the disparate-impact standard as a specific means of challenging excessively subjective selection systems.[329]

Excessively subjective systems may have a disparate impact on employees or applicants for a number of reasons. For instance, a supervisor may have an unconscious bias against women or people of color.[330] In addition, as the Fifth Circuit recognized in *Rowe v. General Motors Corp.*,[331] a subjective decision-making process that relies "almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman" may reflect and aggravate historical segregation.[332] The Fifth Circuit explained that such a selection process is "a ready mechanism for discrimination," in part because "under the social structure of the times and place, Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups."[333]

As Professor Primus notes, the disparate-impact standard also serves as a "reminder[] within the law that historical discrimination continues to affect the status of racial groups."[334] As Justice

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327. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

328. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005) ("[D]iscrimination is still pervasive, now more often in the form of stereotyping or unconscious bias."); Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 417 (2000) ("[A]llegations of employers' excessively subjective decisionmaking frequently form the basis of these class actions.").

329. *See Watson*, 487 U.S. at 990–91; Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

330. *See, e.g.*, Hart, *supra* note 328, at 745–49; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

331. 457 F.2d 348 (5th Cir. 1972).

332. *Id.* at 359.

333. *Id.*

334. Primus, *supra* note 286, at 499.

O'Connor stated in *Smith v. City of Jackson*,[335] "disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination."[336] Abolishing or severely weakening the disparate-impact standard would result in a failure to understand and provide a remedy for the "historically embedded hierarchies" that continue to operate as barriers to equal opportunity for women and people of color.[337]

IV. *RICCI*'S EFFECT ON EMPLOYERS' SELECTION PRACTICES

Leading up to the *Ricci* litigation, New Haven officials found themselves in the unfortunate position of having to decide whether to make promotional decisions based on selection procedures that apparently had been designed and administered with the best of intentions but which turned out to have an adverse racial impact. After *Ricci*, employers should make every effort to avoid being placed in this position; but if that is where they find themselves, they may nonetheless be able to satisfy the Court's "strong-basis-in-evidence" standard. Employers may also look to *Ricci* for guidance in designing and developing new selection procedures before they are implemented and in defending selection procedures against disparate-impact challenges brought by minorities or women. In all of these contexts, *Ricci* should be read against the backdrop of its particular facts and care should be taken to avoid extending it beyond those facts.

A. Deciding Not to Use a Procedure with an Adverse Impact

Under *Ricci*, once an employer has administered a test and announced the selection criteria it intends to use, it

> may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e-2(j), and is antithetical to the notion of a workplace where indi-

335. 544 U.S. 228 (2005).
336. *Id.* at 262 (O'Connor, J., concurring).
337. Primus, *supra* note 286, at 499.

> viduals are guaranteed equal opportunity regardless of race.[338]

Moreover, an employer who decides, *after* administering and scoring a test, to alter the use of the test results in order to reduce adverse impact "could well" violate section 703(*l*) of Title VII,[339] which makes it unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."[340] An employer seeking to protect against disparate-treatment liability to white or male employees should avoid placing itself in New Haven's position by carefully designing job-related selection procedures that limit unnecessary adverse impact from the outset.[341]

Even where tests have already been administered and scored, however, *Ricci*'s strong-basis-in-evidence standard may provide employers with substantial protection against "reverse discrimination" suits.[342] According to the Court in *Ricci*, this standard

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338. Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

339. 42 U.S.C. § 2000e-2(*l*) (2006).

340. *Ricci*, 129 S. Ct. at 2679–80. In making the distinction between acts that an employer may properly undertake before or after the "tests" were completed, the Court was concerned about the "injury [that] arises in part from the high, and justified, expectations of the candidates who had participated in the testing process." *Id.* at 2681.

341. *See* Oakley v. City of Memphis, No. 07-6274, 2008 WL 4144820 (6th Cir. Sept. 8, 2008), *vacated and remanded*, 129 S. Ct. 2860 (2009). Like New Haven, Memphis decided not to use the results of a promotional examination for its police department because the test produced an adverse impact. The Sixth Circuit affirmed summary judgment for the city, dismissing a challenge to the city's failure to use the examination results. The Supreme Court vacated and remanded in light of *Ricci*.

342. In an article submitted for publication, two industrial-organizational psychologists describe in detail the manner by which an employer may use a "*Croson* study" to meet the strong-basis-in-evidence standard established by *Ricci*. D. A. Biddle & R.E. Biddle, Ricci v. DeStefano*: New Opportunities for Employers to Correct Disparate Impact-Using Croson Studies* (pts. 1 & 2), LAB. L.J. (forthcoming 2010). In *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505 (1989), the Supreme Court invalidated a plan to "set aside" a certain proportion of contracts for minority businesses. The Court held that the City of Richmond had failed to demonstrate a compelling governmental interest supporting its racial classifications: The factual predicate for the set-aside plan did not identify sufficient past discrimination in the city's construction industry to justify race-based relief under the Equal Protection Clause. *Id.* at 505–06. Similar-

is intended to leave "ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination."[343] In order to satisfy the *Ricci* standard, an employer would need to establish that the proposed selection procedure had an adverse impact and was unlikely to be valid or that there was an alternative procedure that would have produced substantially equally qualified candidates with less adverse impact. New Haven's failure to present sufficient evidence to satisfy this standard in *Ricci* does not preclude other employers from doing so in the future.

While the Court in *Ricci* did not explicitly state the amount of evidence necessary to meet the strong-basis-in-evidence test,[344] the Court made clear that an employer is not required to *prove* that it had committed or was about to commit a Title VII disparate-impact violation before it could lawfully refuse to implement a selection procedure because that procedure had an adverse impact.[345] The Court recognized that "[f]orbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill."[346] Furthermore, the Court observed that even in those limited situations where such a "restricted standard could be met, employers likely would hesitate before taking [such] voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment."[347]

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ly, New Haven, according to the Biddle article, failed to establish an adequate evidentiary foundation for its actions; for example, New Haven did not require its test developer to complete a validity report examining the justification or lack of justification for the use of its promotional procedures. The Biddle article explains that an employer could use appropriate expert analysis to demonstrate that, for example, a scoring system was not job-related and, if it resulted in adverse impact, would violate Title VII. Such a fact-based review, supported by expert testimony, would adhere to the type of analysis required by *Croson* and, according to the argument set forth in the article, would satisfy *Ricci*'s strong-basis-in-evidence test.

343. *Ricci*, 129 S. Ct. at 2676.

344. The Court was not required to do so because, in its view, there was "no evidence . . . that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City." *Id.* at 2681.

345. *Id.* at 2674.

346. *Id.*

347. *Id.*

Since the majority in *Ricci* borrowed its strong-basis-in-evidence standard from Fourteenth Amendment affirmative action cases,[348] it is reasonable for employers to borrow the approach other employers have used to successfully defend affirmative action plans in those cases. The City of Detroit, for example, implemented an affirmative action plan for the promotion of police officers that was challenged by the police officers' union and by individual white police officers. In defense of that plan, Detroit introduced evidence and expert testimony that its promotional examinations violated the *Uniform Guidelines* and Title VII.[349] Detroit presented expert testimony that there was no basis to conclude that the promotional tests were valid.[350] In defense of its affirmative action plan, Detroit introduced evidence comparable to the evidence that a minority plaintiff would introduce challenging the legality of the promotional system.[351] Given the substantial evidence of past discrimination introduced by the City of Detroit itself, the court upheld the plan because it "looks to the future as a means of remedying a sorry past."[352]

In *Ricci*, by contrast, the City of New Haven did not produce evidence comparable to that which a minority plaintiff would introduce in a challenge to the job-relatedness of its promotional examinations but rather relied principally on the adverse impact of its proposed selection procedures. New Haven did not undertake a careful evaluation of the evidence concerning whether the procedures were job-related or whether there were alternative procedures that would have comparable validity and less adverse impact; rather, New Haven considered input from numerous sources and "opened a public debate that turned rancorous."[353] In reviewing that debate, the majority in *Ricci* concluded that there was "no evidence—let alone the required strong basis in evidence—that the tests were flawed,"[354] while the dissent concluded that there was "ample cause to believe [that the] selection process was flawed and

348. *See id.* at 2675; *see also supra* Part II.B.3.

349. Baker v. City of Detroit, 483 F. Supp. 930, 992–94 (E.D. Mich.), *aff'd*, 704 F.2d 878 (6th Cir.), *modified*, 712 F.2d 222 (6th Cir. 1983).

350. *Id.* at 972–74.

351. *Id.*

352. *Id.* at 1003.

353. *Ricci*, 129 S. Ct. at 2664; *see supra* Part II.A.

354. *Ricci*, 129 S. Ct. at 2681.

not justified by business necessity."[355] The majority discounted the general opinions about "flaws" in the examinations that the city had culled from the public debate; the city had failed to request a report on test validity that was contemplated in its contract with the test developer, and, therefore, had "turned a blind eye to evidence that supported the exams' validity."[356]

Furthermore, the city did not produce evidence that the weighting of the test, sixty percent for the written section and forty percent for the oral section, was "arbitrary" or that a different weighting, such as the suggested 30/70 weighting, would have been valid and had less adverse impact.[357] Moreover, the "brief mention of alternative testing methods," such as assessment centers, by an industrial-organizational psychologist who had not "stud[ied] the test at length or in detail,"[358] was insufficient to raise a genuine issue as to whether there was available to New Haven an alternative selection practice that would have been substantially

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355. *Id.* at 2703 (Ginsberg, J., dissenting). In his concurring opinion, Justice Alito—joined by Justices Scalia and Thomas—argued that New Haven's decision regarding the use of its promotional tests was influenced by an attempt to satisfy the asserted demands of a "politically powerful" African-American pastor and "self-professed 'kingmaker.'" *Id.* at 2684 (Alito, J., concurring). Justice Alito did not conclude that the evidence submitted, largely by unchallenged affidavits, would have been sufficient to establish that New Haven's decision was racially motivated and that summary judgment for the plaintiffs could have been granted on the basis of that evidence; rather, he contended that the evidence presented a factual question that would have prevented the grant of summary judgment to New Haven even if the city had met the strong-basis-in evidence test. *Id.* at 2687–89.

Regardless of one's view of Justice Alito's racial-motivation analysis, his concurring opinion does raise an additional reason for a public employer to take great care in deciding whether to use a selection procedure with a significant adverse impact. A public employer that takes a position advantageous to a political constituency with a significant minority composition could become, as Justice Alito describes, the target of allegations of racial favoritism and disparate treatment. A well-developed and factually supported explanation of the decision could demonstrate that the decision was instead made for legitimate reasons, including an effort to select the most qualified employees using a procedure with the least adverse impact.

356. *Id.* at 2679 (majority opinion).

357. *Id.*

358. *Id.* at 2668.

equally valid while having less adverse impact.[359] The city could have presented substantial evidence—including expert testimony—that its selection procedures were not valid; that the weighting and rank-ordering specified by the union contract and civil service rules were arbitrary and unjustified; and that equally or more valid alternative procedures were available that would have little or no adverse racial impact. New Haven, however, chose not to introduce such evidence and instead relied largely on cursory and sometimes not fully informed remarks made during the public debate.

After *Ricci*, if an employer seeks to justify a decision not to use a selection procedure because it has an adverse impact and does not meet the "business necessity" standard, the employer will need to present evidence focused on that selection procedure. The *Uniform Guidelines* reject any reliance on "casual reports" to show that a selection procedure is job related.[360] Similarly, in *Ricci* the Supreme Court held, in effect, that where a selection procedure has been administered and scored, an employer may not use "casual reports" to assert that the procedure may *not* be job-related and thereby successfully justify its decision not to use the procedure because it has an adverse impact. Unlike New Haven, an employer should study the selection procedure by carefully reviewing technical reports and evidence concerning the development and intended use of the procedure.

The *Uniform Guidelines* and professional standards require a rigorous analysis of the development and intended use of selection procedures that have an adverse impact.[361] Without such an analysis it is impossible, as a practical matter, to present pertinent evidence, including expert opinion, demonstrating the flaws in the development of the procedure and its intended use. It is also impossible to point towards alternative testing procedures that would equally serve business purposes and result in less or no adverse impact.

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359. *Id.* at 2680. The dissent determined that the psychologist's "commonsense observation[s]" about New Haven's reliance on the weighting established by the collective bargaining agreement and the failure to consider alternative tests, as well as other facts, supported the conclusion that New Haven had "good cause" to believe that its promotional tests would have been invalid under the business-necessity test. *Id.* at 2703–06 (Ginsburg, J., dissenting).

360. 29 C.F.R. § 1607.9 (2009).

361. *See* PRINCIPLES, *supra* note 83, at 4–5; *Uniform Guidelines*, 29 C.F.R. § 1607.14(B)–(D).

Once such an analysis has been performed, an employer should have an expert industrial-organizational psychologist review the test, its development, and its intended use in detail. Also, the expert should determine whether, as required by the ***Uniform Guidelines***,[362] there has been an adequate search for alternatives with less adverse impact and whether such alternatives are likely to exist. If New Haven had followed this approach, it likely could have met the strong-basis-in-evidence standard.[363]

B. Devising and Developing New Selection Procedures

The majority opinion in ***Ricci*** draws a sharp distinction between actions that an employer may take before, and those it may take after, administering a selection procedure. As discussed above, once an employer has administered and scored a test that turns out to have an adverse racial impact, it may not decide to ignore the test results absent a strong basis in evidence for believing that it would otherwise be subject to disparate-impact liability.[364] However, the ***Ricci*** Court recognized that "Title VII does not prohibit an employer from considering, before administering a test

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362. 29 C.F.R. § 1607.3(B).

363. For example, Charles Legel, who developed the test, admitted that he gave no consideration to the weighting of the oral and written parts of the test; that various important KSAOs such as "command presence" were not evaluated; and that he did not review whether alternatives—such as assessment centers, which had been used successfully by other public safety departments for many years and generally produced less adverse impact—could have been implemented by New Haven. ***See supra*** Part I. If Legel had produced the technical report called for by his contract, and if New Haven had retained an expert to review that report in detail and provide analysis and opinion as to whether New Haven's promotional tests were "job related and consistent with business necessity" as required by Title VII, the city might well have been able to meet the Court's strong-basis-in-evidence standard.

In light of this analysis, it is fair to ask why the Court did not remand the action in order to permit New Haven to attempt to meet this standard. In her dissent, Justice Ginsburg states that the majority "stacks the deck further by denying [New Haven] any chance to satisfy the newly announced strong-basis-in-evidence standard." *Ricci*, 129 S. Ct. at 2702 (Ginsburg, J., dissenting). While the majority does not respond directly to this point, we may infer that the majority concluded that New Haven had its opportunity and turned a "blind eye" to the evidence and that delaying further the "justified expectations" of the plaintiffs was not appropriate on the facts of this case. ***See id.*** at 2681 (majority opinion).

364. ***See supra*** Part IV.A.

or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."[365] And the Court did not "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made."[366] As the dissent noted, the *Ricci* case presented "an unfortunate situation, one New Haven might well have avoided had it utilized a better selection practice in the first place."[367] The areas where New Haven fell short in *Ricci* can provide guidance for employers who want to avoid this "unfortunate situation" in the future.

Ricci underscores the need for an employer to carefully design and develop any selection and scoring procedure—including the consideration of alternative procedures—before it is administered and scored, rather than evaluating the procedure only *after* the fact and then deciding whether to use the procedure based upon the degree of adverse impact it has. This approach is consistent with the guidelines and professional standards that federal agencies have long followed.[368] Critically, an employer should design and develop its selection procedures based upon analysis and factual investigation of the requirements of the job.

As set forth in detail in the applicable professional standards and the *Uniform Guidelines*,[369] the development of job requirements and their use based on a job analysis, rather than on unverified assumptions and predetermined requirements imposed by civil service regulations or union contracts, is likely to produce more qualified candidates. Such an approach, even apart from the standards set forth in *Ricci*, has clear advantages for an employer. However, due to cost, convenience, compliance with civil service rules, union contracts, or some other reason, an employer might forgo basing the design, development, and use of its selection procedure upon thorough research.

Title VII does not require employers to follow professional standards designed to produce the most qualified candidates or to "validate" selection procedures *before* implementation. The legal

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365. *Ricci*, 129 S. Ct. at 2677.
366. *Id.*
367. *Ricci*, 129 S. Ct. at 2710 (Ginsburg, J., dissenting).
368. *See supra* Part I.E.
369. *See id.*

requirement that an employer must "validate" its selection procedure applies only if the procedure has an adverse impact.[370] Moreover, under Title VII an employer may perform a job analysis and seek to develop evidence of validity even *after* a selection procedure has been implemented and *after* members of a protected group have challenged the procedure because it has an unjustified adverse impact. While a study conducted or controlled by "an interested party in litigation must be examined with great care," an employer may nonetheless rely on such a post-litigation study in defense of its selection procedures.[371]

Even though Title VII has never mandated pre-litigation job analyses or validation studies, prior to *Ricci* there were at least two important reasons for an employer to base its selection procedures upon professional standards and the *Uniform Guidelines*: (1) to identify more qualified candidates, and (2) to develop evidence to defend against possible Title VII litigation brought by, or on behalf of, minorities or women.[372] After *Ricci*, there is a third compelling reason: to permit the greatest leeway for the employer to develop a procedure that results in the selection of qualified candidates with no adverse impact or with as little adverse impact as possible.

The development of a selection procedure should begin with a job analysis, which is a "detailed statement of work behaviors and other information relevant to the job."[373] Without a job analysis, an employer may not be able to measure the important knowledge, skills, abilities, and other personal characteristics ("KSAOs") required to successfully perform the job.[374] Furthermore, a thorough job analysis is required in order to evaluate the appropriate method for evaluating the KSAOs and to determine the

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370. *See* EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979); Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975); 29 C.F.R. § 1607.3(A) (2009).

371. Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 n.32 (1975).

372. These two reasons are interrelated. The use of validated selection procedures promotes equal opportunity by ensuring that any adverse impact on a group results from job requirements rather than bias, contamination, or irrelevant factors in the selection process.

373. *Uniform Guidelines*, 29 C.F.R. § 1607.16(K).

374. *See* 29 C.F.R. §§ 1607.14(B)(2), (3), 1607.14(C)(2), (4); *see also Albemarle*, 422 U.S. at 431–33; United States v. County of Fairfax, 629 F.2d 932, 943 (4th Cir. 1980) ("Usually the starting point in proof of validity is evidence of a thorough job analysis.").

type of selection procedure or procedures to employ. Finally, the job analysis is required to assess the proper use of the selection procedure—for example, whether the procedure should be used on a pass-fail basis, as a rank-ordering device, both, or neither.[375] Before an employer develops an appropriate selection procedure or decides upon the best use of that procedure, the employer must identify the important personal characteristics required for a job and the level at which those characteristics must be manifested. If an employer does not understand the job duties and the KSAOs necessary to do the job, then the employer has no rational foundation for designing a selection procedure.

In determining that there was insufficient evidence to demonstrate that New Haven's promotional system was not job-related, the Court in *Ricci* referenced the "painstaking analyses of the captain and lieutenant positions" that were performed by the city's test developer.[376] The Court described the detailed process for completing the job analysis[377] and the testimony of the test developer about that analysis.[378] However, even the best possible job analysis can contribute to the validity of a selection procedure only to the extent that it is actually taken into account in the development of that procedure. In *Ricci*, critical aspects of the selection procedure—including the form and weighting of the tests and the use of rank order—were established by New Haven prior to any "painstaking analysis" of the jobs; in effect, New Haven followed the path of the Queen in *Alice in Wonderland*: "sentence first-verdict afterwards."[379]

To be fair, New Haven adopted critical parts of its selection process because of civil service rules, the City Charter, and its collective bargaining agreement with the firefighters' union.[380] The

375. *See infra* notes 397–404.

376. Ricci v. DeStefano, 129 S. Ct. 2658, 2678 (2009).

377. *Id.* at 2665–66.

378. *Id.* at 2668.

379. LEWIS CARROLL, ALICE IN WONDERLAND 96 (Donald J. Gray ed., W. W. Norton & Co. 1971) (1865).

380. The City Charter required that the City select employees according to a "rule of three," that is the City was required to select a person for promotions from among the top three scorers on a rank-order list. *Ricci*, 129 S. Ct. at 2665. The City's collective bargaining agreement with the firefighters' union specified that applicants "for lieutenant and captain positions were to be screened using written and oral examinations, with the written exam accounting for 60 percent

civil service rules, City Charter, and collective bargaining agreement, however, were adopted years before the city devised its selection procedures for promotions in the fire department, without any job analyses, and without any concern for adherence to professional standards for the development of procedures designed to select qualified candidates for particular jobs. Also, state or local law does not shield an employer from liability under Title VII.[381] In *Ricci*, the Supreme Court recognized that a state court's prohibition of banding pursuant to municipal law could "not eliminate banding as a valid alternative under Title VII."[382] Similarly, the fact that an employer and union have incorporated a selection practice in a collective bargaining agreement does not insulate the employer or union from Title VII liability.[383]

As a consequence of *Ricci*, it is important for employers not to pre-judge selection procedures, as New Haven did, even where those selection procedures are mandated by local law or a collective bargaining agreement. An employer should not hamstring the developer of its selection procedures by precluding the developer from examining the type of test to use or the method the developer should use. For example, Charles Legel was directed by New Haven to develop a test that was weighted sixty percent for

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and the oral exam 40 percent of an applicant's total score." *Id.* As stated in the dissenting opinion, the "City simply adhered to the testing regime outlined in its two-decades old" collective bargaining agreement. *Id.* at 2691 (Ginsburg, J., dissenting). The City only solicited proposals for the creation of a selection process that followed the collective bargaining agreement. *Id.* Similarly, the developer did not consider alternatives because he "was under contract . . . only to create the oral interview and written exam." *Id.*

381. 42 U.S.C. § 2000e-7 (2006); *see* Dothard v. Rawlinson, 433 U.S. 321, 332 (1977).

382. *Ricci*, 129 S. Ct. at 2680.

383. In *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980), the Court recognized that seniority systems incorporated in collective bargaining agreements are entitled to protection under section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). However, the Court added that this ruling "does not mean that [the protection for seniority provisions in] § 703(h) is to be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, or tests' that disproportionately affect members of those groups that the Act protects." *Bryant*, 444 U.S. at 608; *see also* Donnell v. General Motors Corp., 576 F.2d 1292, 1297–98 (8th Cir. 1978) (finding union and employer jointly liable for high school diploma requirement for entrance into apprentice program).

the written and forty percent for the oral interview components because New Haven had entered into a two-decades old collective bargaining agreement specifying such weighting.[384] Similarly, Legel was directed to use the "rule of three"[385] and not to examine alternatives to the weighting of the components, any different use of the selection procedure (such as banding instead of rank-ordering), or any different types of procedures (such as an assessment center).[386] An employer looking to develop procedures to select the most competent employees with as little adverse impact as possible should not, as New Haven did, limit the choices that the developer of its selection procedures might explore.

Unlike New Haven, an employer should request that a test developer consider developments in industrial-organizational psychology that have led to the creation of selection procedures that are less dependent on written multiple-choice examinations and that evaluate a broad range of job-related KSAOs beyond cognitive abilities. Industrial-organizational psychologists have long recognized that multiple-choice "test scores that [are] predominantly the result of assessing cognitive abilities [will] certainly lead to adverse impact."[387] The shift in public-sector selection procedures

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384. The Supreme Court in *Ricci* "presume[d] the parties negotiated that weighting for a rational reason" since it was "the result of a union-negotiated collective bargaining agreement." *Ricci*, 129 S. Ct. at 2679. Assuming that this "presumption" is valid, there is no evidence or basis to believe that, consistent with professional standards or disparate-impact law developed since *Griggs*, the parties adopted this form of selection procedure based upon an analysis designed to select the most qualified workforce with the least adverse impact.

385. As discussed above, New Haven's "rule of three" required that each vacancy be filled by choosing one candidate among the top three on a ranked eligibility list. *See supra* Part II.A. New Haven's civil service rules also imposed a passing score of seventy percent. Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006). The record is devoid of any justification for this cut-off score other than its location in the civil service rules. We have not focused upon this cut-off score since the operative selection standard was the rank-ordered list. However, an employer developing a selection procedure needs to examine closely the establishment of a cut-off score. *See Uniform Guidelines*, 29 C.F.R. § 1607.5(H) (2009).

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

387. Cascio, Jacobs & Silva, *supra* note 314, at 273. For a description of some of the possible causes for this disparity, see Outtz & Newman, *A Theory of Adverse Impact*, *in* ADVERSE IMPACT 53–94 (James L. Outtz ed., 2009). While cognitive tests can be useful for predicting job performance on "certain aspects"

over the years, from reliance on "written, multiple choice tests" that focus on verbal ability to reliance on procedures that emphasize other "abilities, experiences, and personal characteristics [that] are important to job success," increased the ability of the procedures to predict job performance while at the same time decreasing adverse impact.[388]

An examination of possible approaches to the selection of firefighters for promotion provides a good example of the reasons why broadening the abilities that are evaluated would both improve the employer's ability to predict future job performance and reduce adverse impact. In a series of questions and answers designed to clarify and interpret the *Uniform Guidelines*, the EEOC states as follows:

> Paper-and-pencil tests . . . are most likely to be appropriate where work behaviors are performed in paper and pencil form . . . . Paper-and-pencil tests of effectiveness in interpersonal relations (*e.g.*, . . . supervision) . . . or ability to function properly under danger (*e.g.*, firefighter) generally are not close enough approximations of work behaviors to show content validity.[389]

As the Eighth Circuit summarized, a fire captain's job "involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities none of which is easily measured by a written, multiple choice test."[390] Moreover, there is a significant amount of professional literature supporting the conclusion of the EEOC and the Eighth Circuit that paper-and-pencil tests are not well-suited to predict the "command presence" and other characteristics that are

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of a job, the racial group differences that are "unrelated to job performance" are substantial. *Id.* at 55.

388. Casico, Jacobs & Silva, *supra* note 314, at 273, 275.

389. Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,007 (Mar. 2, 1979).

390. Firefighters Inst. for Racial Equal. v. City of St. Louis, 616 F.2d 350, 359 (8th Cir. 1980); *see also* Nash v. City of Jacksonville, 837 F.2d 1534, 1538 (11th Cir. 1988), *vacated* and *remanded*, 490 U.S. 1103 (1989), *op. reinstated on remand*, 905 F.2d 355 (11th Cir. 1990).

so important for supervisors in fire departments.[391] Given the limits placed on the development of New Haven's selection procedures, Charles Legel, who created the city's promotional examinations, asserted that he did not even attempt to assess the extent of "command presence" among the applicants.[392] If Legel had been permitted to assess command presence and other relevant characteristics, and to broaden the type of selection procedure used by New Haven, the department might well have ended up with a better tool for predicting job performance and reducing adverse impact at the same time.

Good professional practice as well as fair employment law should lead employers to consider alternative selection practices in order to maximize the predictability of job performance while minimizing adverse impact.[393] By failing to examine one obvious alternative, assessment centers, New Haven provides a counterexample for what employers should do. We have previously described the operation of assessment centers, the use of such centers by almost half of all fire departments, and the ability they give employers to evaluate critical KSAOs that are not easily assessed by written tests or oral interviews and to do so with less adverse impact than usually results from written multiple-choice tests.[394] New Haven's test developer testified that assessment centers would "probably be better" than the procedures used by New Haven in assessing "command presence," but he did not consider using an assessment-center approach because he was "not asked" to do so.[395] Even plaintiff Frank Ricci opined that "assessment centers in some cases show less adverse impact," but he asserted that New Haven could not use centers for the pertinent round of promotions because it "would take several years" to develop the centers.[396] Of course,

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391. Brief of Industrial-Organizational Psychologists, *supra* note 317, at 10–11.

392. Ricci v. DeStefano, 129 S. Ct. 2658, 2706 (2009) (Ginsburg, J., dissenting).

393. *Uniform Guidelines*, 29 C.F.R. § 1607.3(B) (2009); *see also supra* Part III.C.

394. *See supra* Part III.D.

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

396. *Id.* at 2670 (majority opinion). The Court relied on Frank Ricci's opinion regarding the length of time that it would take New Haven to develop an assessment center, *id.* at 2680, although it is unlikely that Mr. Ricci had the

if New Haven had considered alternative procedures such as assessment centers from the beginning of the development process, then, even according to plaintiff Ricci, New Haven would have had time to develop assessment centers that may have selected better fire lieutenants and captains while causing less adverse impact.

Finally, employers should carefully consider the way in which they use selection procedures. No matter how well a selection procedure is constructed, it is the use of that procedure that ultimately determines which candidates will be selected and whether the selection process will be fair and valid. An employer who wishes to select the best employees should pay attention to whether the way it ***uses*** a test—e.g., on a pass-fail basis[397] or to rank-order candidates[398]—is related to job performance. As courts have noted, "[r]ank-ordering satisfies a felt need for objectivity, but it does not necessarily select better job performers."[399]

Furthermore, the setting of a selection point on an examination will, as it did for New Haven, affect the degree of adverse im-

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professional expertise or credentials to render an opinion about the development of selection procedures.

397. Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 105 (2d Cir. 1980), *quoted in Ricci*, 129 S. Ct. at 2706 n.16 (Ginsburg, J., dissenting) ("When a cutoff score unrelated to job performance produces disparate racial results, Title VII is violated."); *see also* Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 489 (3d Cir. 1999); Contreras v. City of L.A., 656 F.2d 1267, 1287 (9th Cir. 1981); United States v. New York City, 637 F. Supp. 2d 77, 123–25 (E.D.N.Y. 2009); *Uniform Guidelines*, 29 C.F.R. § 1607.5(H) (explaining that cut-off scores "should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force").

398. *Guardians Ass'n*, 630 F.2d at 100–01 ("Permissible use of rank-ordering requires a demonstration of such substantial test validity that it is reasonable to expect one- or two-point differentials in scores to reflect difference in job performance."); Ensley Branch, NAACP v. Seibels, 616 F.2d 812, 822 (5th Cir. 1980) (discussing that even though the test could be used to screen out applicants lacking minimum skills, it was unlawful to use the test to rank applicants without evidence that candidates with higher scores would perform the job better); *Uniform Guidelines*, 29 C.F.R. § 1607.5(G) ("[I]f a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis, . . . the user should have sufficient evidence of validity and utility to support the use on a ranking basis.").

399. *New York City*, 637 F. Supp. 2d at 128 (quoting *Guardians Ass'n*, 630 F.2d at 100).

pact if there is a difference in the scores between groups on the examination. As a general matter, the higher the cut-off score is set on a "cognitive ability" test, the greater the racial adverse impact will be.[400] This does not mean that an employer should never set a higher cut score or use rank order, but rather that the employer should have evidence that the higher score or rank-ordering is "job related and consistent with business necessity." Again, the procedure followed by New Haven provides a counter-example to good practice. New Haven applied a cut score of seventy percent and rank-ordered candidates merely because those requirements were contained in the civil service rules.[401] As a result, New Haven developed a selection procedure that had significant adverse impact without any evidence that the cut score or rank-order process selected better candidates than other uses of the examinations would have selected.[402]

It is especially important to consider the use and scoring system for a selection procedure during its development. If the scoring system is altered after the employer reviews the results, then it may be argued—as the *Ricci* majority concluded with respect to the proposed use of "banding" by New Haven—that the alteration was done "to make the minority scores appear higher" and would, therefore, violate "Title VII's prohibition of adjusting test results on the basis of race."[403] If, during the development of the examinations, New Haven had focused upon the establishment of a scoring system related to predicting job performance and li-

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400. *See* Jerard F. Kehoe, *Cut Score and Adverse Impact*, *in* ADVERSE IMPACT 294–99 (James L. Outtz ed., 2009). Dr. Kehoe provides an analysis of the various technical methods for establishing cut scores and the way that these cut score-setting tactics may affect adverse impact. *Id.* at 299–321.

401. *See supra* Part II.A.

402. There are different approaches that an employer may undertake to setting selection points. For example, an employer may use "banding" in order to group candidates whose scores differ by less than the degree of measurement error. Chi. Firefighters Local 2 v. City of Chi., 249 F.3d 649, 656 (7th Cir. 2001); *see supra* Part III.C. An employer might also use a combination of selection procedures, such as a written test with a low cut-off score followed by an assessment center for evaluating those who pass the written test. Moreover, an employer may select carefully from among the various methods used to set cut-off scores, as suggested by Dr. Kehoe in order to select candidates likely to perform better while minimizing adverse impact. *See* Kehoe, *supra* note 400.

403. Ricci v. DeStefano, 129 S. Ct. 2658, 2680 (2009); *see supra* Part II.B.4.b.

miting unnecessary adverse impact, then Title VII's prohibition regarding the adjustment of scores based on race would not apply.[404] The *Ricci* decision thus provides yet another reason why employers, even in the earliest stages of designing and developing selection devices and scoring systems, should pay close attention to the creation of job-related procedures that reduce or eliminate adverse impact.

C. Defending Disparate-Impact Litigation Brought by Minorities or Women

The *Ricci* litigation occurred in a factual context very different from the more typical situation in which a member of a protected group challenges a selection procedure as illegal under Title VII because it has an adverse impact and the employer has not demonstrated that the procedure is "job related and consistent with business necessity." In such litigation the plaintiffs will introduce expert testimony and analysis that the procedures violate Title VII's prohibition of disparate-impact discrimination because they fail to meet professional standards, the *Uniform Guidelines*, and the case law developed through almost forty years of court decisions since *Griggs*.[405] The "basic rule has always been that 'discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being eva-

404. In reaching its conclusion in *Ricci*, the majority cited Judge Posner's statement that "if banding were adopted in order to make lower black scores seem higher, it would indeed be . . . forbidden." *Ricci*, 129 S. Ct. at 2680 (quoting *Chi. Firefighters Local 2*, 249 F.3d at 656). However, Judge Posner continued by stating that banding "is not race norming [and unlawful] per se." *Chi. Firefighters Local 2*, 249 F.3d at 656. Judge Posner approved the use of banding where it was applied as a "normally an unquestioned method of simplifying scoring by eliminating meaningless gradations." *Id.* If those "meaningless gradations" increase adverse impact—as will often be the case where the actual selection point is raised—then an employer must use banding or risk disparate-impact liability under Title VII.

405. There are two primary sources to which courts look when evaluating whether selection procedures are valid or job-related: testimony of experts and the *Uniform Guidelines*, including the professional standards to which they refer. Gulino v. N.Y. State Educ. Dep't., 460 F.3d 361, 382 (2d Cir. 2006); *see supra* Part II.B.4.a.

luated.'"[406] Congress reasserted and codified this basic rule in the Civil Rights Act of 1991.[407] *Ricci* did not change this basic statutory rule nor could the Supreme Court conceivably do so unless it were to declare the statute unconstitutional, a step that only Justice Scalia has publicly considered.

In *Ricci*, the Court relied on the fact that, unlike the plaintiffs challenging a selection procedure, the city in defending its decision not to use the procedure did not produce expert testimony that the test was not "job related" or that it had not followed acceptable professional standards.[408] As the Court emphasized on several occasions, New Haven thwarted the test developer's offer to prepare and present a validation report that would set forth the factual and analytical basis for evaluating whether the procedure was job-related.[409] In an action brought by a protected group challenging the legality of a selection procedure with an adverse impact, the employer would need to present such a validity report, since the burden of proof of job-relatedness would be on the employer.[410]

In *Ricci*, where a predominantly white group of plaintiffs challenged the city's decision not to use examinations that would have an adverse racial impact against nonwhites, the Supreme Court emphasized the "painstaking process" that New Haven's test developer had followed in developing the examinations and stated that, on the basis of the record presented, there was "no genuine dispute that the examinations were job-related and consistent with business necessity."[411] By contrast, in *United States v. City of New York*, a challenge by African-American and Latino candidates to the legality of a test given by New York City for selecting firefighters, the district court ruled that *Ricci* did not control the out-

406. *Gulino*, 460 F.3d at 383 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (2009)).

407. *See supra* Part I.G.

408. *See Ricci*, 129 S. Ct. at 2681. The city solicited general opinions from an expert, but those opinions were not based on any detailed study of the examinations. *See supra* Part II.B.4.a. While the burden rests on the employer to prove that an examination is job related, a plaintiff challenging a selection procedure will often rely on an expert to contest the employer's job-relatedness defense. *Gulino*, 460 F.3d at 382–83.

409. *See, e.g.*, *Ricci*, 129 S. Ct. at 2679.

410. *See supra* Part I.G.

411. *Ricci*, 129 S. Ct. at 2678.

come since the city had not established that it had undertaken a careful job analysis and had not demonstrated that the test was job-related.[412] The court in *City of New York* emphasized that in *Ricci* the Supreme Court "confronted the narrow issue of whether New Haven could defend" against a claim of intentional discrimination because its selection test had an adverse impact.[413] The Court reasoned that the "relevant teaching of *Ricci*, in this regard, is that the process of designing employment examinations is complex, requiring consultation with experts and careful consideration of accepted testing standards."[414] The court applied those standards, which it had read *Ricci* to endorse, by considering the testimony of experts, the *Uniform Guidelines*, and applicable decisional law.[415]

The litigation concerning the test used by New York City for hiring firefighters serves as a critical counterpoint to the litigation challenging New Haven's decision not to use a selection procedure that resulted in adverse impact. Unlike New Haven, New York City, under the direction of Mayor Bloomberg, made a decision to proceed with a selection process for firefighters that had an adverse impact on minorities. Mayor Bloomberg explained this decision on July 15, 2009, in testimony to the Senate Judiciary Committee during Justice Sotomayor's confirmation hearing:

> I disagreed with what the City of New Haven did. . . . [Y]ou should know that our city is a defendant in a case . . . where the challenge is to two entry-level tests for our fire department . . . .

412. 637 F. Supp. 2d 77, 83 (E.D.N.Y. 2009).

413. *Id.*

414. *Id.*

415. The district court applied the principle enunciated by the Second Circuit almost three decades earlier in *Guardians Ass'n v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980), as well as other Second Circuit authority. *New York City*, 637 F. Supp. 2d at 108–10. At no point does the district court indicate that *Ricci* modified either the standard or analysis that it should apply to the evaluation of claims made by minority candidates challenging the disparate impact of a selection procedure.

> I've chosen to fight this. I think that in fact the tests were job-related and consistent with business necessity.[416]

Approximately one week after this testimony, the district court ruled that New York City had violated Title VII because, contrary to Mayor Bloomberg's testimony before the Senate, the tests were not job-related and consistent with business necessity.[417]

A comparison of the *Ricci* litigation with the *City of New York* litigation underscores the importance of developing selection procedures carefully with the twin goals of selecting qualified candidates and limiting or eliminating adverse impact. Where this is done before tests are administered and scored, employers can minimize their potential exposure to challenges from either minorities or white males. Even after a test has been administered and scored, however, an employer who decides not to use the test results in order to avoid adverse impact will prevail in litigation if it can satisfy *Ricci*'s strong-basis-in-evidence standard.

V. REFLECTIONS ON THE CONSTITUTIONALITY OF THE DISPARATE-IMPACT STANDARD

The *Ricci* decision raises, but does not answer, questions about the continued viability of the disparate-impact standard. Notably, Justice Scalia warned that the majority's disposition of *Ricci* "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[418]

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416. United States v. New York City, No. 07-CV-2067 (NGG)(RLM), 2009 WL 2423307, at *2 (E.D.N.Y. Aug. 5, 2009).

417. *New York City*, 637 F. Supp. 2d at 132. Subsequently, the court found that New York City's use of these examinations, which "unfairly excluded hundreds of qualified black applicants from the opportunity to serve" as firefighters, also "constitutes a pattern and practice of intentional discrimination against blacks, in violation of the Fourteenth Amendment . . . [and] Title VII." United States v. New York City, No. 07-CV-2067 (NGG)(RLM), 2010 WL 234768, at *1 (E.D.N.Y. Jan. 13, 2010).

418. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring). He also predicted that a "war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them." *Id.* at 2683.

Justice Scalia's intriguing opener suggests questions—apparently difficult in his mind—about whether Title VII's disparate-impact prohibition and the Equal Protection Clause of the Fourteenth Amendment stand at cross-purposes and about exactly how "evil" the day may be when and if the Court confronts this question.

The majority opinion, while stating that its holding was purely statutory and did not address any constitutional issues,[419] emphasized that

> [w]e also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. . . . [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.[420]

This reference to the constitutional issues mirrors the majority's view of Title VII's disparate-impact prohibition as a direct extension of its worst fears about affirmative action and racial quotas.[421] Justice Scalia's concurring opinion expands on this theme:

> As the facts of [*Ricci*] illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory. To be sure, the disparate-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 estab-

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419. *Id.* at 2676 (majority opinion).

420. *Id.*

421. *See id.* at 2675 (citation omitted). The Court also noted that a "minimal standard" allowing employers to "violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact" and could amount to "a *de facto* quota system . . . with the intent of obtaining the employer's preferred racial balance." *Id.*

> lishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. . . . Government compulsion of such design would therefore seemingly violate equal protection principles.[422]

In the context of the Court's underlying failure to distinguish between disparate impact and affirmative action, the majority liberally borrowed from the Court's constitutional affirmative-action cases in which the intersection and conflict between equal protection and antidiscrimination measures have been addressed.[423] The apparent hostility with which at least some members of the Court approach the disparate-impact standard stands in stark contrast with, and perhaps in defiance of, the two occasions on which Congress has specifically reaffirmed the disparate-impact standard.[424] In light of Congress' repeated endorsement of disparate impact, the Court's hostility toward it may ultimately find no relief but through a constitutional challenge to the disparate-impact standard.

Resolution of the constitutionality of Title VII's disparate-impact standard, however, may affect laws other than Title VII and that is perhaps where Justice Scalia's warning of the "evil day" lies. If the Supreme Court finds that the disparate-impact standard violates the Equal Protection Clause, such a holding would potentially undermine a panoply of other federal and state laws that use an impact standard.[425]

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422. *Id.* at 2682 (Scalia, J., concurring).

423. *Id.* at 2675 (majority opinion) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

424. *See supra* Part II.B.6.

425. Professor Primus observes that the "recognition that disparate impact standards are constitutionally problematic would destabilize a range of federal laws besides Title VII." Primus, *supra* note 286, at 496 n.15. In a forthcoming article, Professor Primus discusses the *Ricci* decision. *See* Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. (forthcoming 2010). In the latter article, Professor Primus observes that "[u]ntil recently . . . the idea that a statutory disparate impact standard could violate equal protection was all but unthinkable." *Id*. Professor Primus analyzes the different ways the Supreme Court may approach this constitutional question in the future. *Id.* In this section of the present Article, we discuss the practical consequences for various civil rights laws of a determination that an impact standard violates the Constitution

Under the Americans with Disabilities Act ("ADA"), the definition of discrimination includes actions causing an unjustified adverse impact on disabled persons.[426] Like Title VII, the ADA provides employers with a business necessity defense against adverse impact claims; the employer may show that the challenged practice is job-related and consistent with business necessity and that such job-related performance cannot be accomplished by reasonable accommodation.[427] The disparate-impact standard could arguably be even more important in the context of disability rights where, as the Supreme Court has observed, "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[428] Thus, invalidation of the ADA's disparate-impact prohibition could substantially undercut the statutory protections accorded disabled persons, which Congress recently found it necessary to reinforce in response to unduly restrictive Supreme Court decisions.[429]

The Supreme Court has held that disparate-impact claims may also be made under the Age Discrimination in Employment Act ("ADEA").[430] Several justices have already expressed their

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rather than, as Professor Primus does, consider whether the Court may rule that the impact standard is unconstitutional.

426. 42 U.S.C. § 12112(b)(1), (b)(3)(A) (2006); *see* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) ("Both disparate treatment and disparate impact claims are cognizable under the ADA."); *see also* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 989–93 (9th Cir. 2007) (en banc).

427. 42 U.S.C. § 12113(a); *Bates*, 511 F.3d at 989.

428. Alexander v. Choate, 469 U.S. 287, 295 (1985) (interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 794). A decision on the constitutionality of disparate-impact claims under Title VII would presumably also affect the viability of disparate-impact claims under the Rehabilitation Act as well as the ADA.

429. The Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, "expressly overturned several Supreme Court decisions," including *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Air Lines*, Inc., 527 U.S. 471 (1999). LINDEMANN & GROSSMAN, *supra* note 69, at 13-27.

430. *See* Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2403 (2008); Smith v. City of Jackson, 544 U.S. 228, 232 (2005). There are several important differences between Title VII's disparate-impact standard and the ADEA's disparate-impact standard. In each instance, the ADEA standard is more favorable to defendants than the Title VII standard. First, for the ADEA, the plaintiff must show the particular step in the challenged practice that is re-

belief that the disparate-impact prohibition is arguably less important, and its victims are perhaps less deserving of protection, in the ADEA age-discrimination context than in the Title VII race-discrimination context.[431] Thus, if Title VII were to fall under the weight of an equal protection challenge, it is reasonable to assume that the disparate-impact provisions of the ADEA would, at the very least, be called into question as well.

Section 2 of the Voting Rights Act also contains a disparate-impact provision,[432] analogous to the provision in Title VII, allowing "that a violation of § 2 could be established by proof of discriminatory results alone."[433] The Act was amended to change the result of the plurality opinion in *City of Mobile v. Bolden*, in which the Supreme Court found that discriminatory intent was required in order to challenge facially neutral practices that abridge or deny voting rights.[434] Congress amended section 2 in 1982 to clarify its intent, "mak[ing] clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge."[435] Thus, there are obvious parallels between Title VII and the Voting Rights Act in the way in which the judicial and legislative branches have interacted; the Supreme Court rejected disparate-impact claims under

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sponsible for the alleged disparity. *Smith*, 544 U.S. at 241. Second, the ADEA's statutory "reasonable-factor-other-than-age" defense supplants Title VII's "business necessity" defense. *Id.* at 239–41. Third, an ADEA plaintiff cannot argue that there is a less discriminatory alternative to the challenged practice. *Id.* at 243. Fourth, the *Uniform Guidelines* do not apply to ADEA cases. *See* 29 C.F.R. § 1607.2(A), (D) (2009).

431. *See Smith*, 544 U.S. at 262 (O'Connor, J., concurring) ("[D]isparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination. However, that rationale finds no parallel in the ADEA context, . . . and it therefore should not control our decision here.").

432. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a)–(b) (2006).

433. Chisom v. Roemer, 501 U.S. 380, 404 (1991); s*ee also* Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) ("To establish a Section 2 violation, plaintiffs need only demonstrate 'a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997))).

434. 446 U.S. 55 (1980).

435. *Chisom*, 501 U.S. at 383–84.

the Voting Rights Act in *City of Mobile* and severely restricted them under Title VII in *Wards Cove*, only to have Congress overturn both decisions and clarify its intent that such claims be actionable.

Compared with Title VII, however, section 2 of the Voting Rights Act could potentially trigger even greater equal protection concerns given its reliance on racial and ethnic group characteristics, including the assumption that "members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth."[436] To the extent that the Supreme Court is increasingly concerned with the equal protection implications of ostensibly benign racial classifications, section 2 would likely serve as an easy target.[437]

Section 4 of the Voting Rights Act has its own disparate-impact subsection, which provides that a state or subdivision, in order to reinstate a suspended voting practice, must show that the practice has not been used "for the purpose *or with the effect* of denying or abridging the right to vote on account of race or color."[438] Because the Supreme Court has sought to interpret the disparate-impact provisions of section 4 and Title VII consistently—even relying on a seminal Voting Rights Act case[439] in first explaining Title VII's disparate-impact prohibition[440]—section 4's disparate-impact provision could easily come under increased constitutional scrutiny if the Court were to find Title VII's disparate-impact standard unconstitutional.

Section 5 of the Voting Rights Act also contains a disparate-impact provision, requiring preclearance of all changes in state election procedures in certain states.[441] Such preclearance is

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436. Thornburg v. Gingles, 478 U.S. 30, 64 (1986).

437. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race . . . because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

438. 42 U.S.C. § 1973b(a)(1)(A) (2006) (emphasis added).

439. Gaston County v. United States, 395 U.S. 285 (1969).

440. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

441. 42 U.S.C. § 1973(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State

granted only if the change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."[442] Thus, section 5,[443] like other sections of the Voting Rights Act, may be affected by a finding that Title VII's disparate-impact standard is unconstitutional. Additionally, if the Supreme Court were to find a conflict between the Equal Protection Clause and the Voting Rights Act, it might also find that the Act conflicts with other constitutional provisions as well.[444]

The Fair Housing Act, which makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin,"[445] authorizes disparate-impact claims where an unjustified policy disproportionately affects a protected class.[446] Under the Fair Housing Amendments Act ("FHAA"), disparate-impact claims are also available where a challenged policy or practice disparately impacts persons with disabilities.[447] "When examining disparate impact claims under the FHAA and ADA, [courts] use Title VII as a starting point."[448] It is thus reasonable to assume that any constitutional infirmity found in Title VII's disparate-impact provision would apply in the fair housing context as

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or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .").

442. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2509 (2009); *see also* Primus, *supra* note 286, at 497 n.16 (citing Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681–89 (2001); Lani Guinier, *Eracing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 111 (1994)).

443. In *Northwest Austin* the Supreme Court declined to decide whether section 5's preclearance requirement is unconstitutional, holding that the case could be resolved on statutory grounds. *See Nw. Austin*, 129 S. Ct. at 2513.

444. *Cf.* City of Rome v. United States, 446 U.S. 156, 177 (1980) (holding that section 5's "ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment").

445. 42 U.S.C. § 3604(a).

446. *See* Reinhart v. Lincoln County, 482 F.3d 1225, 1229 (10th Cir. 2007); 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 681 (D.C. Cir. 2006).

447. 42 U.S.C. § 3604(f)(1); *see* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003).

448. *Tsombanidis*, 352 F.3d at 575; *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

well. Such a holding would be particularly disastrous for fair housing because the Fair Housing Act's "stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation."[449]

Regulations promulgated by the Department of Justice pursuant to Title VI of the Civil Rights Act of 1964[450] endorse a disparate-impact interpretation of that statute, requiring that federally funded programs "may not . . . utilize criteria or methods of administration which have the ***effect*** of subjecting individuals to discrimination because of their race, color, or national origin, or have the ***effect*** of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."[451] A decision holding Title VII's disparate-impact prohibition unconstitutional would likely apply to Title VI as well.[452]

A finding that the Title VII disparate-impact standard violates the Equal Protection Clause would also have the possible effect of invalidating analogous state laws that recognize disparate-impact discrimination claims. For instance, the California Fair Employment and Housing Act recognizes disparate-impact discrimination claims.[453] Ohio's antidiscrimination law prohibits practices that have an unjustified disparate impact based on "race, color, religion, sex, military status, national origin, disability, age,

449. *Huntingdon Branch*, 844 F.2d at 934.

450. 42 U.S.C. § 2000d.

451. 28 C.F.R. § 42.104(b)(2) (2009) (emphasis added).

452. *See, e.g.*, N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) ("Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance."). Note, however, that the practical impact of a finding that the disparate-impact standard violates the Equal Protection Clause may be limited in the Title VI context because there is no private right of action to enforce Title VI's disparate-impact regulations. *See* Alexander v. Sandoval, 532 U.S. 275, 289–90 (2001). Thus, such a finding would only affect the federal government's ability to enforce disparate-impact regulations to the extent that the federal government is inclined to do so.

453. *See* Harris v. Civil Serv. Comm'n, 65 Cal. App. 4th 1356, 1365 (Cal. Ct. App. 1998).

or ancestry."[454] New York's human rights laws also support discrimination claims based on the disparate-impact theory.[455]

Perhaps most significantly, a decision or decisions regarding the constitutionality of the disparate-impact standard may lead to a patchwork of results, given the different levels of equal protection scrutiny applicable to different classifications. For instance, the Court might find the impact standard under Title VII unconstitutional as applied to race discrimination but *not* as to sex discrimination, since "strict scrutiny" applies to race discrimination but only "intermediate" scrutiny applies to sex discrimination.[456] Claims of disparate impact based on national origin would similarly be subject to strict scrutiny under the Equal Protection Clause,[457] thus increasing the likelihood that national origin disparate-impact claims would be found unconstitutional. Thus, were the Court to apply equal protection analysis to statutory disparate-impact provisions, perverse results might follow in which the groups that have historically been recognized as needing the most protection—racial minorities—would receive the least protection as a result of the interplay between the Equal Protection Clause, Title VII, and other civil rights statutes.[458]

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454. OHIO REV. CODE ANN. § 4112.02(A) (LexisNexis 2010); *see* Little Forest Med. Ctr. v. Ohio Civil Rights Comm'n, 575 N.E.2d 1164, 1167 (Ohio 1991).

455. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661, 669 (N.Y. 1995).

456. *See* Primus, *supra* note 286, at 496 n.15 ("It seems likely, however, that a line could be drawn between race and sex on the grounds that sex discrimination, unlike race discrimination, is not subject to strict scrutiny under the Equal Protection Clause" (citing Clark v. Jeter, 486 U.S. 456, 461 (1988))).

457. *See* Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 204–05 (2d Cir. 2006) (holding that classifications based on national origin trigger strict scrutiny).

458. *See* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579 (11th Cir. 1994) ("While it may seem odd that it is now easier to uphold affirmative action programs for women than for racial minorities, Supreme Court precedent compels that result."); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir. 1991) ("The Supreme Court does not consider discrimination against women to be as invidious—as harmful and as difficult to justify—as discrimination against blacks and other racial minorities; nor, to come to the point, does it consider discrimination against men to be as invidious as racial discrimination.").

Similarly, the ADEA's disparate-impact prohibition may withstand constitutional scrutiny even if Title VII's does not because strict scrutiny equal protection review does not apply to age classifications.[459] In any event, the ADEA's impact standard is already weaker than Title VII's because the ADEA gives employers a "reasonable-factor-other-than-age" defense that is markedly easier to prove than Title VII's "business necessity" defense.[460] The constitutional issue may be further complicated by the extent to which it might depend on the strength of the supporting evidence on which Congress or a state legislature relied in enacting a statute containing a disparate-impact provision.[461]

In sum, if and when the Court confronts the constitutional question raised by Justice Scalia's concurrence in *Ricci*, his "evil day" may open a Pandora's box of unintended consequences. A judicial determination that Title VII's disparate-impact standard violates the Equal Protection Clause could reach far beyond Title VII and into other federal and state antidiscrimination statutes, including the Voting Rights Act, the Fair Housing Act, and the Americans with Disabilities Act. Finally, examining statutory disparate-impact provisions under the various applicable levels of equal protection review may lead to a bizarre world in which the use of a disparate-impact standard is permissible for groups that receive lower levels of scrutiny under the Equal Protection Clause but not for those that receive the highest level of scrutiny and therefore are in theory entitled to the most protection—those who

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459. Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1059 n.8 (9th Cir. 2009) (noting that age discrimination challenges under equal protection receive deferential rational basis scrutiny); Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1367–69 (4th Cir. 1989) (finding similarly).

460. *See* Smith v. City of Jackson, 544 U.S. 228, 243 (2005) ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry [of the ADEA] includes no such requirement.").

461. *Compare* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 739–40 (2003) (holding that the Family and Medical Leave Act could be constitutionally applied to the states), ***with*** Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (holding that the ADEA could not constitutionally be applied to the states).

are discriminated against based on race, national origin, or religion.[462]

VI. CONCLUSION

It may not be determined for years whether the *Ricci* decision heralds an "evil day" or lacks "staying power." What is clear now, however, is that through its decades of existence Title VII's disparate-impact standard has served Congress' goal of removing artificial and unnecessary barriers to equal employment opportunity that are unrelated to job performance. This standard, and its application by courts and enforcement agencies, has led employers to make their selection procedures more job-related, to reduce or eliminate adverse impact, and to develop less discriminatory alternatives to historically entrenched hiring and promotion practices.

The majority's decision in *Ricci*—unless it is understood in the context of Title VII's text, legislative history, statutory purpose, administrative interpretation, and decades of the Court's own precedents—has the potential to undermine the disparate-impact standard and the positive results that have been achieved under that standard. If the Court in future cases decides that an expansive reading of *Ricci* has "staying power," we may well see an "evil day" for equal opportunity and rational employment practices in the United States. Yet nothing in the *Ricci* decision compels such a reading. To the contrary, *Ricci* counsels that, before tests are administered or scored, employers may take steps to ensure that their selection procedures will be job-related and will minimize unnecessary adverse impact against minorities and women. Employers who take such steps should enjoy substantial protection from liability in both conventional and "reverse" discrimination suits. Moreover, *Ricci* creates a strong-basis-in-evidence defense for employers who decide, even after administering and scoring tests, to discard test results that have an unjustified adverse impact. And, despite Justice Scalia's constitutional concerns, *Ricci* does not purport to overturn the decades of case law and two congressional amendments that establish the disparate-impact standard and

462. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.").

the manner in which it applies to Title VII cases brought by minorities or women.

If the Court in the future confines its decision in *Ricci* to the unique facts of that case—including "the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established"[463]—and adheres to its original understanding of Title VII, there may yet be many good days to come when the disparate-impact standard can serve its congressionally mandated purpose.

463. Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009); *see also id.* at 2689 (Alito, J., concurring) ("In order to qualify for promotion, [the plaintiffs in *Ricci*] made personal sacrifices."); *id.* at 2690 (Ginsburg, J., dissenting) ("The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy.").