RICCI V. DESTEFANO: EVEN WHITES ARE A PROTECTED CLASS IN THE ROBERTS COURT

by
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After preparing and administering written and oral tests for firefighters to determine eligibility for promotions, the City of New Haven, Connecticut, discarded the results when it appeared that no blacks, only non-blacks, had become eligible for immediate promotion. New Haven was then in the paradoxical position of being subject to a charge of race discrimination by non-black firefighters in violation of the Constitution and the "disparate treatment" provision of Title VII of the 1964 Civil Rights Act if it discarded the test results, as it did, or by black firefighters in violation of the "disparate impact" provision of Title VII if it did not. After first holding, dubiously, that the city was guilty of race discrimination in violation of the disparate treatment provision, the Court then held, even more dubiously, that the violation could be justified, as a matter of statutory interpretation, if the city could show—which the Court held it could not—"a strong basis in evidence" that its action was necessary to avoid a violation of the disparate impact provision. The Court thus attempted to "reconcile" the two provisions, which, importantly, it recognized for the first time as being in conflict. It also thus avoided, as Justice Scalia pointed out in a concurring opinion, the underlying question presented by the case: the constitutionality of the disparate impact provision if it is interpreted, as it often has been but need not be, as effectively requiring race discrimination by employers.

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I. INTRODUCTION

Ricci v. DeStefano,[1] the New Haven Firefighters case, was surely the most closely followed, widely discussed, and popularly approved decision—for the plaintiffs[2]—of the Supreme Court's October 2008 Term. The case involved a claim of race discrimination by mostly white firefighters who were denied promotions they had become eligible for by doing well on examinations when the City discarded the examination results because no black firefighters had become immediately eligible. The case thus presented, in unusually clear and dramatic form, the emotionally charged issue at the center of the nation's racial divide: color blindness and individualism on one side, versus race-based "affirmative action" and group rights on the other.

Once the results of the examinations came out, the City was in the unenviable and paradoxical position of being subject to suit for alleged race discrimination in employment in violation of Title VII of the 1964 Civil Rights Act,[3] regardless of what it did: by whites (and one Hispanic), if it discarded the results, as it did, and by blacks if it did not. The source of the paradox, one of many in American race discrimination law,[4] is that while one provision of Title VII ("disparate treatment"[5]) prohibits all race discrimination in employment, another provision ("disparate impact"[6]), the *Ricci* Court recognized for the first time, is in "conflict" by effectively requiring race discrimination, and thus raising the question of its constitutionality. The Court attempted to leave this question open by purporting to decide the case on statutory grounds. It first held, dubiously, that the City's cancellation of the exam results was express race discrimination in violation of the disparate treatment provision and then, even more dubiously, that this violation might be justified under the statute by "reconciling" the conflicting provisions.[7] The dissenters,

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

[2] "American voters . . . disagree 71 – 19 percent with Supreme Court nominee Sonia Sotomay[o]r's ruling [in favor of the city] in the New Haven firefighters' case." Press Release, Quinnipiac Univ., U.S. Voters Disagree 3-1 with Sotomayor on Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action (June 3, 2009), *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1307.

[3] Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 703, 78 Stat. 253, 255 (codified as amended at 42 U.S.C. § 2000e-2 (2006)). The act also prohibits employment discrimination on the basis of color, religion, sex, or national origin.

[4] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–21 (2007) (finding that a school district may be constitutionally required to take steps to increase school racial integration on one day and constitutionally prohibited from doing so on the next). *See also* Lino A. Graglia, *Solving the* Parents Involved *Paradox*, 31 SEATTLE U. L. REV. 911 (2008).

[5] 42 U.S.C. § 2000e-2(a)(1) (2006); *Ricci*, 129 S. Ct. at 2672.

[6] 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Ricci*, 129 S. Ct. at 2672–73.

[7] *Ricci*, 129 S. Ct. at 2673–76.

boldly predicting that the decision "will not have staying power,"[8] accused the majority, with some basis, of "demonstrably false pretension"[9] in finding race discrimination by the City. They then, however, engaged in the even greater pretense of purporting to see not "even a hint of 'conflict'"[10] between the two provisions.

The majority sought to leave the constitutional question open by deciding the case under the statute by resolving the conflict; the dissenters purported to see no conflict and, therefore, no constitutional question. The real difference between the two is that the majority saw its task as remedying the discrimination it found against the (non-black) plaintiffs before it, while the dissenters sought to resolve what they saw as the much wider social problem of "entrench[ed] preexisting racial hierarchies" and "entrenched inequality."[11]

The Court's recognition of the disparate impact provision of Title VII as not a prohibition, as it purports to be, but in practical effect a requirement of race discrimination (the doctrinally most significant aspect of the decision) should result in its either being held unconstitutional or, preferably, reinterpreted (as the Court in effect did) so as not to require race preference. Given the majority's reaffirmation of its opposition to all race discrimination, the decision may bode ill for "affirmative action" generally. Perhaps most important, the Court's recognition of the disparate impact doctrine as an example of a law imposing a requirement of discrimination in the name of enforcing a prohibition may be the beginning of a new era of candor in American race discrimination law.

II. BACKGROUND

In 2003, New Haven undertook to fill vacant lieutenant and captain positions in its fire department.[12] The city charter established a civil service merit system requiring that positions be filled on the basis of job-related examinations. The New Haven Civil Service Board (CSB) would then certify a list of applicants who passed the exams, and under the charter's "rule of three," vacancies would be filled by the top scorers, with the last vacancy filled by one of the remaining top three.[13] The City's contract with the New Haven firefighters' union stipulated conditions of eligibility for the positions, such as a high school diploma, and that the

[8] *Id.* at 2690 (Ginsburg, J., dissenting). That phrase was labeled "a dark prophecy or curse" by Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 CATO SUPREME CT. REV. 53, 70 (2009).

[9] *Ricci*, 129 S. Ct. at 2703.

[10] *Id.* at 2699.

[11] *Id.* at 2690–91.

[12] *Id.* at 2664–65 (majority opinion).

[13] *Id.* at 2665.

test was to have both a written and an oral part, with the written portion counting for 60% and the oral component for 40% of the total score.[14]

At a cost of $100,000 the City hired Industrial/Organizational Solutions, Inc. (IOS), a firm specializing in designing fire and police department examinations, to prepare the tests.[15] IOS engaged in extensive interviews of incumbent captains, lieutenants, and others, observed on-duty officers, and wrote job-analysis questionnaires that it administered to officers. At each stage, it deliberately oversampled non-white firefighters to ensure that the examinations would not unintentionally favor whites. On the basis of the job analysis data it obtained, IOS prepared written examinations to test the candidates' job-related knowledge. For each test, lieutenant and captain, IOS compiled a list of training manuals and other materials used as the source of the test questions. As required by CSB rules, it prepared a multiple-choice test of 100 questions for each position, written at or below the tenth grade reading level.[16] The City gave candidates a list of the source material for the questions and provided for a three-month study period. IOS also prepared oral examination materials based on hypothetical situations meant to test, *inter alia*, command, interpersonal, leadership, and management skills. Candidates responded to the hypotheticals before one of nine panels of three assessors, two of whom were non-white, drawn from a pool of 30 who were superior in rank to the candidates being tested. IOS trained the assessors and provided them with checklists of criteria so as to get consistent results.[17]

Seventy-seven candidates (43 whites, 19 blacks, and 15 Hispanics) took the lieutenant examination, and 34 passed (25 whites, 6 blacks, and 3 Hispanics). Under the rule of three, the top ten candidates (the top seven and the next three) were eligible for immediate promotion to one of the eight lieutenant positions that were then open. All were white. Forty-one candidates (25 whites, 8 blacks and 8 Hispanics) took the captain examination, and 22 passed (16 whites, 3 blacks, and 3 Hispanics). The top nine candidates were eligible for immediate promotion to the seven captain positions that were then open. Seven were white and two were Hispanic.[18]

When these results became public, "the mayor and other local politicians opened a public debate that turned rancorous."[19] Some firefighters threatened a discrimination lawsuit if the promotions were made, others if they were not.[20] There was evidence, the district judge found, that the mayor feared that certifying the results of the

[14] *Id.*
[15] *Id.*
[16] *Id.* at 2665–66.
[17] *Id.* at 2666.
[18] *Id.*
[19] *Id.* at 2664.
[20] *Id.*

examinations "would incur the wrath of [Rev. Boise] Kimber," a politically powerful clergyman, "and other influential leaders of New Haven's African-American community."[21]

When the city legal counsel advised the CSB that "a statistical demonstration of disparate impact . . . constitutes a sufficiently serious claim of racial discrimination,"[22] the CSB held a series of five meetings to hear arguments for and against certification of the results.[23] Some firefighters, without knowing whether they had passed, defended the examinations.[24] One, Frank Ricci, pointed out that he had studied for eight to thirteen hours a day over the three-month period allowed to prepare for the test, and because of learning disabilities, had spent more than $1,000 purchasing study materials and having them read to him and taped.[25] Other firefighters opposed certifying the test results, describing some of the questions as outdated or irrelevant to New Haven's firefighting practices. They criticized the test materials, a full set of which cost $500, as too expensive and too long. At another meeting, it was suggested that a validation study was needed to determine whether the tests were "job related," as required by Title VII to avoid "disparate impact" liability.[26] A representative of the International Association of Black Professional Firefighters suggested that the City "adjust" the test results so that "a certain amount of minorities get elevated to the rank of Lieutenant and Captain."[27] A representative of IOS defended the tests as job related and "facially neutral."[28]

Undoubtedly the most important witness was Christopher Hornick, the operator of a consulting business that competed with IOS, who testified by telephone. He stated that the test scores indicated a "relatively high adverse impact"[29] and that although "[n]ormally, whites outperform ethnic minorities"[30] on standardized tests, he was "a little surprised" by

[21] *Id.* at 2684 (Alito, J., concurring) (alteration in original).

[22] *Id.* at 2666 (majority opinion). "The pass rates of minorities . . . were approximately one-half the pass rates for white candidates." *Id.* at 2678. According to the Equal Employment Opportunity Commission, a "selection rate that is less than 80 percent 'of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.'" *Id.* (quoting 29 C.F.R. § 1607.4(D) (2008)).

[23] *Id.* at 2667–71.

[24] *Id.* at 2667.

[25] *Id.*

[26] *Id.*; *see* 42 U.S.C. § 2000e-2(k)(1)(A)(2006) ("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 . . . .").

[27] *Ricci*, 129 S. Ct. at 2667.

[28] *Id.* at 2668.

[29] *Id.*

[30] *Id.* (alteration in original).

the disparity in scores, though "[s]ome of it is fairly typical of what [is] seen in other areas."[31] The "adverse impact on the written exam was somewhat higher," he said, "but generally in the range that [he had] seen professionally."[32] He thought that the collective-bargaining agreement's requirement that examinations have a 60/40 ratio of written and oral components might account for the statistical disparity, because blacks generally do better on oral than on written tests. The fact that for security reasons no department personnel reviewed the tests meant, he said, that "you inevitably get things in there" that, though based on the source materials, are not relevant to New Haven.[33] He suggested it might have been better to use "assessment centers," where candidates have to respond to real-world situations just as they would in the field, rather than using written and oral examinations.[34] He concluded that the tests were "reasonably good," but that a better process might be used in the future, and he would be available to help.[35]

A "fire program specialist" testified that the test questions were relevant and covered material the candidates should know.[36] An expert on the effect of "race and culture" on test performance testified that the test questions might have favored whites because 67% of the respondents used in making up the questions were white, but that a white versus black and Hispanic disparity, especially on written tests, was unavoidable.[37]

At the final CSB meeting, the city counsel, the City's chief administrative officer, speaking on behalf of the mayor, and the human resources director, relying primarily on the Hornick testimony, urged the CSB to reject the test results, which the city counsel said were certain to be challenged.[38] The president of the New Haven firefighters union urged certification. Frank Ricci, testifying again for certification, argued that the assessment-center alternative was not presently available and would take several years to develop.[39] The CSB, with one member recused, split two to two, resulting in a decision against certification.[40]

Eighteen firefighters—17 whites, including Frank Ricci, and one Hispanic—who were denied promotion as a result of the decision sued the city, the mayor, and others, alleging unconstitutional race discrimination.[41] They also filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and, after obtaining

[31] *Id.* (first alteration in original).
[32] *Id.*
[33] *Id.* at 2668–69.
[34] *Id.* at 2669.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 2669–70.
[39] *Id.* at 2670–71.
[40] *Id.* at 2671.
[41] *Id.*

right-to-sue letters, amended their complaint to also allege a violation of Title VII. On cross-motions for summary judgment, the district court granted the City's motion, finding that its decision not to certify the test results was not done with "discriminatory animus," but "to avoid making promotions based on a test with a racially disparate impact."[42] The court held the decision was not discriminatory because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted."[43]

A three-judge panel of the Court of Appeals for the Second Circuit affirmed the district court decision in a one-paragraph unpublished summary order.[44] When other members of the court moved for a rehearing en banc, the panel withdrew the summary order and substituted a nearly identical one-paragraph per curiam opinion affirming the district court's decision for the reasons stated in its opinion.[45] While "not unsympathetic to the plaintiffs' expression of frustration," the panel found that they "simply" had not stated a "viable Title VII claim."[46] "To the contrary," instead of violating the statute, the CSB was "simply trying to fulfill its obligations under Title VII," given the disparate impact of the tests.[47] The motion for a rehearing en banc was then denied by a vote of seven to six.[48] The Supreme Court granted the firefighters' petition for certiorari and reversed.[49] Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[50] Justice Scalia also wrote a concurring opinion, as did Justice Alito, joined by Justices Scalia and Thomas.[51] Justice Ginsburg wrote a dissenting opinion joined by Justices Stevens, Souter, and Breyer.[52]

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[42] *Id.*

[43] *Id.* at 2672. The Second Circuit, in an opinion by Judge Calabresi, in a different case, characterized the city's action differently than the district judge in *Ricci*: "[W]hat [the city] did, in essence, was to give promotion—or at least another chance at promotion—to the individual black firefighters who had taken the test, at the expense of those firefighters who would have been eligible for promotion if the test results had been certified." United States v. Brennan, 650 F.3d 65, 102 (2d Cir. 2011).

[44] *Ricci*, 129 S. Ct. at 2672.

[45] *Id.*; Ricci v. DeStefano (*Ricci III*), 530 F.3d 88, 88 (2d Cir. 2008). The decision had an additional element of public interest because Justice, then Judge, Sonia Sotomayor, was a member of the panel. *See* Ricci v. DeStefano (*Ricci II*), 530 F.3d 87 (2d Cir. 2008) (per curiam).

[46] *Ricci II*, 530 F.3d at 87.

[47] *Id.*

[48] *Ricci III*, 530 F.3d at 88.

[49] *Ricci*, 129 S. Ct. at 2672.

[50] *Id.* at 2664.

[51] *Id.* at 2681 (Scalia, J., concurring); *id.* at 2683 (Alito, J., concurring).

[52] *Id.* at 2689 (Ginsburg, J., dissenting).

III. THE SUPREME COURT'S OPINION

Although plaintiffs challenged the City's action on both statutory and constitutional grounds,[53] Justice Kennedy, by finding that the case could be decided on statutory grounds, made consideration of the constitutional grounds unnecessary, but nonetheless explicitly stated that the Court was holding "the underlying constitutional question" aside.[54] Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991,[55] he began, prohibits "both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."[56] As originally enacted in 1964, Title VII's "principal non-discrimination provision" prohibited only disparate treatment, "the most easily understood type of discrimination," requiring a showing of "discriminatory intent or motive."[57] It "did not include an express prohibition on policies or practices that produce a disparate impact."[58]

In *Griggs v. Duke Power Co.*[59] in 1971, however, "the Court interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are 'discriminatory in operation,'" with the "'touchstone' for disparate-impact liability" being "the lack of 'business necessity.'"[60] The employer must show that a practice that "operates to exclude [minorities]" is "related to job performance."[61] Put another way, the "employer's burden [is] to demonstrate that [the] practice has a 'manifest relationship to the employment in question.'"[62] If an employer does this, a plaintiff can still prevail by showing a "legitimate alternative that would have resulted in less discrimination."[63]

Twenty years later, Congress, by the Civil Rights Act of 1991, amended Title VII to add "a provision codifying the prohibition on disparate-impact discrimination."[64] "[A] plaintiff establishes a prima facie violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.'"[65] The employer can defend "by

[53] *Id.* at 2672 (majority opinion).
[54] *Id.* at 2681.
[55] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
[56] *Ricci*, 129 S. Ct. at 2672.
[57] *Id.* (internal quotation marks omitted).
[58] *Id.*
[59] 401 U.S. 424 (1971).
[60] *Ricci*, 129 S. Ct. at 2672–73 (quoting *Griggs*, 401 U.S. at 431).
[61] *Id.* at 2673 (alteration in original) (quoting *Griggs*, 401 U.S. at 431).
[62] *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).
[63] *Id.*
[64] *Id.*
[65] *Id.* (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'"[66] If this is shown, a plaintiff can still succeed by showing "an available alternative employment practice that has less disparate impact."[67]

The lower courts dismissed the plaintiffs' complaint of alleged race discrimination by finding that the City's act of discarding the test results was not discriminatory.[68] It was a facially neutral act—making no mention of race—and was necessary for the City to avoid Title VII litigation.[69] Justice Kennedy, however, made the very important move of beginning his analysis of the case by treating the alleged race discrimination not as an issue, but as a given.[70] The evidence showed that "the City chose not to certify the examination results because of the statistical disparity based on race," i.e., "solely because the higher scoring candidates were white," making the action "express, race-based decisionmaking."[71] The question, therefore, was "not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action."[72]

By definition, however, an act does not constitute "express" race discrimination unless it mentions race, which the City's action did not. As the lower courts found, it was "facially neutral" and treated all the test takers the same.[73] The question therefore was not, as Justice Kennedy said, whether express race discrimination can be justified, but when, if ever, a facially race-neutral act should nonetheless be treated as racially discriminatory because of its racial effects. The Court's official answer—apparently supporting Justice Kennedy's conclusion—is that it depends on the actor's "intent."[74] This is advantageous for a court because it seems

[66] *Id.* (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

[67] *Id.*

[68] *Id.* at 2671–72 ("[T]he result was the same for all because . . . nobody was promoted." (quoting Ricci v. DeStefano (*Ricci I*), 554 F. Supp. 2d 142, 161 (D. Conn. 2006)).

[69] *Ricci II*, 530 F.3d 87, 87 (2d Cir. 2008) ("[T]he Board . . . was simply trying to fulfill its obligations under Title VII . . . .").

[70] *Ricci*, 129 S. Ct. at 2673.

[71] *Id.* at 2673–74. "As the District Court put it, the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'" *Id.* at 2673 (quoting *Ricci I*, 554 F. Supp. 2d at 152).

[72] *Id.* at 2674.

[73] *See Ricci I*, 554 F. Supp. 2d at 161.

[74] The standard citation is *Washington v. Davis*, 426 U.S. 229 (1976). In *Washington*, the Court held that the "legal standards applicable to Title VII cases" were not applicable in "resolving the constitutional issue," *id.* at 238, which should be reason enough to question the validity of those standards since Title VII and the Equal Protection Clause purport to do the same thing—prohibit discrimination. The Court, indeed, had "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory," *id.* at 245, which would seem to require finding the *Griggs* standard not merely inapplicable but invalid. If it is "untenable," as the Court held, "that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees [by requiring a passing grade on a standard reading test] rather than be satisfied with some

to make the issue one of fact rather than policy; perhaps involving a moral element of blame. It has the disadvantages, however, of raising issues as to how "intent" is to be defined, determined, and most important, why, in any event, a competent actor's mental state ("subjective intent") rather than the effects of his deliberate (non-accidental) act should determine the act's legal consequences. The law typically disposes of these problems with the sensible assumption that a competent actor intends the natural and foreseeable consequences of his deliberate acts,[75] which tends, however, to make the intent inquiry superfluous and misleading,[76] especially since good intent will not excuse an otherwise unlawful act.[77]

A more realistic, and less confusing, approach is ordinarily to omit the intent inquiry, look directly at effects, and hold a facially race neutral act racially discriminatory on the basis of its racial effects only if it lacks a sufficient non-racial justification. Redrawing the boundaries of a town with the effect of excluding nearly all blacks and very few whites with no apparent non-racial justification is a clear and classic example.[78] By this

lower level of competence," *id.* at 245–46, it should also be untenable that Title VII prevents private employers from doing the same thing.

[75] *Id.* at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.").

[76] *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) ("[If] the court [is] to 'infer' improper intent" from objective factors, "then, using Occam's razor, we can slice 'intent' away.") (opinion of Judge, later Justice, Breyer).

[77] *See, e.g.*, Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (noting that intent may be considered "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences").

[78] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960). An act, as in *Gomillion*, with racial effects "unexplainable on grounds other than race," is objectively discriminatory, not discriminatory, as the Court suggested in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, because of an improper intent. 429 U.S. 252, 266 (1977). It presumably would be considered discriminatory even if it could be shown that the city officials never considered race. When, however, the issue is the sufficiency of a non-racial justification, a court may accept evidence of the actor's evaluation of the justification as relevant or dispositive—evidence, for example, that "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* at 267.

Other cases purporting to rely on subjective intent almost always seem to turn on objective factors. In *Hunt v. Cromartie*, for example, the Court stated that "[a] facially neutral law . . . warrants strict scrutiny only if it can be proved that the law was 'motivated by a racial purpose or object,'" 526 U.S. 541, 546 (1999) (quoting Miller v. Johnson, 515 U.S. 900, 913 (1995)), but discrimination was found on the basis of objective "statistical and demographic evidence." *Id.* at 548. As Justice Stevens stated in his concurring opinion in *Washington v. Davis*, "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as [one] might assume." 426 U.S. at 254.

The difference between the *Griggs* and the *Washington* "standards" is a difference in the placement and weight of the burden of justification of employment requirements

test, New Haven's action was not discriminatory because it had the very substantial non-racial justification of being necessary to avoid Title VII disparate impact litigation, to say nothing of possible liability.

To say, as Justice Kennedy did, that the City rejected the test results "solely because the higher scoring candidates were white"[79] is correct in the sense that the City would not have rejected them otherwise, but the relevance of the fact that the higher scoring candidates were white is that it subjected the City to disparate impact litigation, which rejecting the test results served to avoid. Kennedy was correct, therefore, that race discrimination was involved in the City's action, but its source was not the action itself, but Title VII's disparate impact provision, which made the City subject to litigation and possible liability because the higher scoring candidates were white.

It is also not accurate to state, as Justice Kennedy did, that *Griggs*' creation of disparate impact liability under Title VII, codified by the 1991 Act, prohibited a new or additional type of discrimination.[80] The original Title VII had already prohibited all race discrimination in employment. The effect of disparate impact liability is not to prohibit but to require race discrimination, to convert a requirement that employment decisions be made without regard to race into a requirement that they not be made without taking race into account.[81] The simple magic of the misuse of language makes it possible to find "race discrimination" on the basis of legitimate, non-racial employment criteria, such as literacy or education. Thus, an employer can be found guilty of "race discrimination" if it prefers employees who are high school graduates to high school dropouts if, as is usually the case, a racial disproportion in the workforce results.[82] It is not enough that the requirement obviously serves the

with a disparate racial impact. Under *Griggs*, the defendant must show a more than rational justification; under *Washington*, the plaintiff must show the absence of a rational justification. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1150 (1989) (noting that intent "allocat[es] burdens of proof according to the balance of individual and public interests," and "submerges judicial discretion to the level where it becomes invisible to those outside the system").

The dubiousness of reliance on subjective intent is shown by Justice Alito's reliance on it in his concurring opinion. *See infra* Part VI.

[79] Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

[80] *Id.* at 2672–73.

[81] The Court made its conversion of Title VII's prohibition of race discrimination to permission for race discrimination explicit in *United Steelworkers v. Weber*, holding that an employer may admit employees to a training program according to a plan that "operates to discriminate against white employees solely because they are white." 443 U.S. 193, 201, 208 (1979).

[82] *See* THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 3 (1994). "Group occupational patterns, repeated in country after country, are only one of numerous cultural patterns that follow racial or ethnic groups around the world. Viewing such groups internationally frees us from prevailing 'social science' doctrines which presuppose that a given nation is causally—and hence morally—responsible for whatever occupational, economic, or other patterns, 'disparities,' or 'imbalances' are found among the various groups within its borders. Differences among groups, and

employer's need for the most competent, reliable, and promotable employees available; the employer can escape liability only by incurring the cost of attempting to "validate" the requirement to the satisfaction of an administrative agency or court.[83] The effect is to create an economic inducement for the employer to avoid the validation cost by hiring by race to avoid the disproportion. Disparate impact liability is simply a race-preference ("affirmative action") requirement, with the degree of preference required dependent on the cost of validation.[84]

The real question presented by *Ricci*, therefore, was not the legality or constitutionality of the City's alleged discrimination, but the constitutionality of amended Title VII to the extent that it is interpreted as an effective requirement of discrimination. Since Title VII's disparate impact provision is the result of a doctrine first created by the Court itself and then specifically endorsed by Congress, the Court was understandably eager to at least postpone facing that question by focusing, instead, on the City's action. After ignoring Title VII's disparate impact provision in finding the City guilty of race discrimination, the Court turned to it to decide the justifiability of that supposed discrimination. In doing so, the Court made the crucial move of recognizing that Title VII's disparate treatment and disparate impact

even among subgroups within a given people, are the rule rather than the exception, all over the planet . . . ." *Id.*

[83] *See generally* George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 87–88, 90–91.

[84] *See id.* at 83 ("This last Term, the Supreme Court revisited the issue of affirmative action, in the heavily cloaked guise of the technical rules governing claims of intentional discrimination and disparate adverse impact under Title VII.") The objective of the disparate impact doctrine, the then EEOC Director, Eleanor Holmes Norton, once candidly advised employers, was not to justify or "validate" employment requirements, but simply to hire more minorities and females: "It is clear that the employers around the country are increasingly sophisticated in the validation of tests. . . . We do not see, however, comparable evidence that validated tests have in fact gotten black and brown bodies, or for that matter, females into places as [a] result of the validation of those tests. . . . Therefore, I see some very positive advantages I must say in encouraging an employer to look at what the ultimate goal is. That is to say, did your work force have some minorities and females before the test was validated or does it have any appreciable number now that the test has been validated? And if you really don't want to go through that, but you are interested in getting excluded people in your work force, we would encourage you to do so." Barbara Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 40 n.62 (quoting Eleanor Homes Norton at an EEOC meeting on December 22, 1977). *But see* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489 (1996) ("[D]isparate impact liability may actually induce hiring discrimination against minorities (and other protected groups)" because of "disparate impact firing liability . . . ."); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 782 (2006) ("[D]isparate impact theory has produced limited meaningful change, and . . . a broader definition of intent could have served virtually the same purpose.").

provisions "point in different directions" and "could be in conflict,"[85] the one explicitly prohibiting and the other effectively requiring race discrimination.

Although Title VII's disparate impact provision did not prevent the City's action from being found to be race discrimination, it may, the Court found, authorize or require and therefore possibly justify that discrimination.[86] That, however, would seem not to avoid—but to raise—the question of the disparate impact provision's constitutionality and indeed, as a matter of logic at least, to answer it in the negative, for it cannot, it would seem, authorize or require unconstitutional ("express, race-based") discrimination without being unconstitutional itself.[87] Instead of answering that question, Justice Kennedy decided to leave it open[88] by deciding the case on purely statutory grounds. Title VII's two provisions may be "reconciled,"[89] he found, by holding that disparate impact's requirement of discrimination may, in limited circumstances not present in this case, trump disparate treatment's prohibition.

Justice Kennedy began his reconciliation process by rejecting plaintiffs' argument that "unintentional" disparate impact "discrimination" should never be allowed to trump "intentional" disparate treatment discrimination.[90] "Congress has expressly prohibited both types of discrimination,"[91] and it would not be proper to render part of the statute "a dead letter."[92] He next rejected plaintiffs' alternative argument that a violation of the disparate treatment provision should be trumped by an alleged need to comply with the disparate impact provision only if an actual violation of the disparate impact provision would otherwise have occurred. That rule, Kennedy pointed out, would deter employers from voluntary compliance with the disparate impact provision, lest it later be found that no actual violation would have occurred.[93]

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[85] *Ricci*, 129 S. Ct. at 2674.

[86] *Id.* at 2677.

[87] *See, e.g.*, Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1346 (2010) ("Title VII's prohibition on disparate treatment and the Fourteenth Amendment's guarantee of equal protection have the same content, so a rule that conflicts with one also conflicts with the other."); *The Supreme Court, 2008 Term — Leading Cases*, 123 HARV. L. REV. 153, 290 (2009) ("[I]f discriminatory actions would be unconstitutional were it not for a compelling interest in Title VII compliance, then how can Title VII mandate those actions and not be unconstitutional itself?").

[88] The constitutional question, Kennedy insisted, was left open: "Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard [applied to the statute] would satisfy the Equal Protection Clause in a future case." *Ricci*, 129 S. Ct. at 2676.

[89] *Id. at* 2672.

[90] *Id.* at 2674.

[91] *Id.*

[92] *Id.* (quoting United States v. Atl. Research Corp., 551 U.S. 128, 137 (2007)).

[93] *Id.*

Finally, Justice Kennedy rejected the defendants' proposal—"[a]t the opposite end of the spectrum"—that it should be enough to avoid disparate treatment liability that the employer had a good-faith belief that its action was necessary to avoid disparate-impact liability.[94] That, Kennedy objected, would encourage employers to take "race-based action at the slightest hint of disparate impact."[95] Since statistics alone showing racial disproportions can establish a prima facie disparate impact case, the proposal "would amount to a *de facto* quota system" and a requirement of "outright racial balancing."[96] Kennedy therefore sought a "more appropriate balance"[97] between making the disparate impact defense to a disparate treatment violation too easy or too difficult. It happened, helpfully, he found, that the Court had earlier dealt with the problem of reconciling a requirement with a prohibition of race discrimination, albeit in the different equal protection context. Kennedy therefore sought to solve the present problem of the conflicting requirements by applying the doctrine developed in those cases. That doctrine, unfortunately, is based on a "remedial theory" that is fictional and, in any event, inapplicable to the present case.

IV. THE "REMEDY" RATIONALE FOR RACE DISCRIMINATION

The "remedy" justification for a requirement of race discrimination has a somewhat convoluted history. In 1954, *Brown v. Board of Education*,[98] of course, prohibited school segregation and, it soon appeared, all official race discrimination.[99] In the great Civil Rights Act of 1964,[100] Congress in effect ratified, extended and made enforceable what it, like everyone else, understood to be the *Brown* principle, a prohibition of all official race discrimination. School segregation then quickly came to an end, but because of residential racial separation, a high degree of integration did not usually result. *Brown* therefore came to be seen by some not as a triumph but as something of a disappointment, and its prohibition of discrimination as an obstacle rather than an aid to racial

[94] *Id.* at 2674–75.

[95] *Id.* at 2675.

[96] *Id.*

[97] *Id.*

[98] 347 U.S. 483 (1954).

[99] This was made clear in the companion case of *Bolling v. Sharpe*, prohibiting school segregation in Washington, D.C. under the Due Process Clause of the Fifth Amendment ("Classifications based solely upon race must be scrutinized with particular care."), 347 U.S. 497, 499 (1954), and in a series of cases prohibiting segregation in non-education contexts by simply citing *Brown*, e.g., on public beaches, *see Dawson v. Mayor of Baltimore City*, 220 F.2d 386, 386–87 (4th Cir. 1955) (per curiam), *aff'd per curiam*, 350 U.S. 877 (1955), and golf courses, *see Holmes v. City of Atlanta*, 223 F.2d 93, 94 (5th Cir. 1955), *vacated per curiam*, 350 U.S. 879 (1955) (vacating in favor of petitioners in conformity with *Dawson v. Mayor of Baltimore City*).

[100] Civil Rights Act of 1964, Pub L. No, 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2006)).

equality.[101] In 1968, in *Green v. New Kent County, Va.*,[102] the Court essentially adopted this view by holding that a school district's ending all official race discrimination was not sufficient to put it in compliance with the Constitution when insufficient integration resulted.[103] Because it was not feasible, however, for the Court to openly announce a new constitutional requirement of integration, the Court insisted, instead, that the requirement was only "desegregation," the undoing or "remedying" of the segregation prohibited in *Brown*. Thus, instead of qualifying or making an exception to the *Brown* principle, the Court purported to be enforcing it: imposing a requirement of race discrimination in the name of a prohibition.[104] Each succeeding case made it more clear, however, that the rationale was fictional, that the Court was simply requiring integration for its own sake.[105]

Once *Green* thus established that official race discrimination was not nearly as absolutely prohibited as had been thought since *Brown*, but was actually permissible or even required as a "remedy" for past discrimination, proposals for its use in other, non-school contexts quickly arose. Just as Congress had followed *Brown* by prohibiting race discrimination in the 1964 Civil Rights Act, it followed *Green* by requiring it, for the first time, in the Public Works Employment Act of 1977, in the

[101] *See, e.g.*, Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 15 (1990) ("The basic principle of color-blindness may obstruct the goal of equal achievement."(footnote omitted)); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 504 n.41 (2003) ("[T]he colorblindness imagery now functions mostly to impede efforts to dismantle old racial hierarchies."). *See generally* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

[102] Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

[103] *Id.* at 440–42. For a full discussion of the case and the Court's move from prohibiting segregation to requiring integration, see LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

[104] The desegregation/remedy rationale had the further advantages for the Court of making it appear initially that the requirement would apply only to the South, where there had been segregation, and of obviating any need to justify a requirement of integration on its merits. The rationale had the disadvantages, however, that it was not only false as a matter of fact—compulsory integration was not limited to undoing segregation—but illogical as a matter of policy—if compulsory integration is sound policy, it should be so everywhere, not only in the South. The remedy rationale had the further disadvantage for proponents of compulsory integration that it could go from requiring to prohibiting compulsory integration and race discrimination by simply being taken seriously, by a court noting, as the Court did in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), that there was no longer any segregation to be remedied. *See* Lino A. Graglia, *supra* note 4, at 917–21 (2008).

[105] In *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Court required "desegregation" in a school district that had never had segregation and, indeed, found itself in court only because of its exceptional commitment to integration. *See* GRAGLIA, *supra* note 103, at 160–202.

distribution of federal funds to the states for public works projects.[106] In *Fullilove v. Klutznick* in 1980, the Court, following *Green* and its progeny, upheld explicit race discrimination "as a strictly remedial measure" within the "broad remedial powers of Congress" under Section 5 of the Fourteenth Amendment.[107] How discriminating in favor of a person not shown to be a victim of discrimination can be considered a "remedy" for discrimination against a different person was not explained.

In *Wygant v. Jackson Board of Education*[108] in 1986, however, the Court, in a plurality opinion by Justice Powell,[109] balked at approving a school district plan that gave preference to blacks over whites in laying off teachers in response to a budget crisis. Instead of simply returning to the *Brown* nondiscrimination principle, however, Powell—a frequent seeker of a "middle way"[110]—sought to accommodate the *Green* qualification of the principle by stating that such discrimination may be permissible if necessary for "remedial" purposes.[111] He then very much narrowed this permission, however, by stating that the remedy rationale was limited, first, to remedying the school district's own prior discrimination, not "societal discrimination,"[112] and second, by a requirement, which he found that the school district had failed to meet, of "a strong basis in evidence for its conclusion that remedial action was necessary."[113] Justice White, concurring, would have simply returned to the *Brown* principle by holding that "the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination," is a violation of the Equal Protection Clause.[114]

Finally, in *City of Richmond v. J.A. Croson Co.*[115] in 1989, involving race preferences in public contracting, a Court majority, for the first time, in an opinion by Justice O'Connor, adopted the position she had earlier

[106] Public Works Employment Act of 1977, Pub. L. No. 95-28, § 103, 91 Stat. 116, 116–17 (codified as amended at 42 U.S.C. § 6705 (2006)). The act required that at least 10%of the funds made available ordinarily go to "minority business enterprises," with "minority" defined in racial and ethnic terms. 42 U.S.C. § 6705(f)(2) (2006).

[107] Fullilove v. Klutznick, 448 U.S. 448, 472–73, 481–83 (1980).

[108] 476 U.S. 267 (1986).

[109] The opinion was joined by Chief Justice Burger and Justices Rehnquist and O'Connor. *Id.* at 269. Justice White concurred separately. *Id.* at 294. Justice Marshall dissented joined by Justices Brennan, Blackmun, and Stevens. *Id.* at 295.

[110] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (finding discrimination favoring blacks is subject to "strict scrutiny," but is nonetheless permissible in higher education to increase "diversity"); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 217–32 (1973) (Powell, J., concurring in part) (after correctly arguing that compulsory integration cannot be justified as desegregation, he in effect nonetheless justified a very limited form of it as desegregation). *See* GRAGLIA, *supra* note 103, at 160–202.

[111] *Wygant*, 476 U.S. at 277 (plurality opinion).

[112] *Id.* at 278.

[113] *Id.* at 277.

[114] *Id.* at 295 (White, J., concurring in the judgment).

[115] 488 U.S. 469 (1989).

taken concurring in *Wygant* that strict scrutiny is applicable to all official race discrimination, regardless of "the race of those burdened or benefited."[116] Following *Wygant*, the Court purported, nonetheless, to leave a narrow opening for "remedial" race discrimination by the City of Richmond, if Richmond could show a "strong basis in evidence for its conclusion that remedial action was necessary,"[117] which, the Court found, Richmond could not. Justice Scalia, concurring in the judgment, would have totally rejected the *Green* remedial theory, at least in a non-school context, and like Justice White in *Wygant*, confined remedies to persons shown to have been injured.[118]

V. "RECONCILING" DISPARATE IMPACT WITH DISPARATE TREATMENT

In *Ricci*, Justice Kennedy saw the *Wygant–Croson* attempt to reconcile *Green*'s requirement of "remedial" discrimination with *Brown*'s prohibition of all discrimination as the answer to the problem of reconciling the similarly conflicting provisions of Title VII. Adopting the *Wygant–Croson* standard, he held that violation of the disparate treatment provision's prohibition of race discrimination could be justified by a need to comply with the disparate impact provision's conflicting requirement only if there was a "strong basis in evidence" that a violation of the disparate impact provision would otherwise occur.[119] Whatever the (extremely dubious) merits of the *Wygant–Croson* standard in the context of those cases, it would seem to have no application to the present case.

When explicit race discrimination is supposedly justified as a remedy for other discrimination, it is logical to require a showing of that other discrimination. In *Ricci*, however, there was no issue of remedy. The City's alleged discrimination was not justified as a remedy for past discrimination, but as necessary to avoid litigation and possible liability under Title VII. By adopting the strong-basis-in-evidence rule, the Court in effect held that although the City's interest in avoiding litigation under Title VII could not prevent its rejection of the test results from being discriminatory, its interest in avoiding a likelihood of liability under Title VII could justify that discrimination, preventing it from being illegal.[120] The City was thus in the position of having to show that its tests were justifiable in order to avoid disparate impact liability and that they were not justifiable in order to avoid disparate treatment liability.

The result is that the disparate impact provision's requirement of race discrimination can, when sufficiently clear, trump the disparate treatment provision's prohibition. But that, of course, as already noted,

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[116] *Id.* at 494.

[117] *Id.* at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)).

[118] *Id.* at 525 (Scalia, J., concurring in the judgment).

[119] Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009).

[120] *Id.*

raises rather than leaves open the question of the disparate impact provision's constitutionality. Because, however, the City did not, Justice Kennedy later found, have a strong basis in evidence of a disparate impact violation—that the exams were discriminating—it did not escape disparate treatment liability. The question of the constitutionality of the disparate impact provision's permitting race discrimination that the disparate treatment provision would otherwise prohibit therefore did not arise. That it would be a serious question if and when it does arise, Kennedy took pains to make clear:

> We . . . 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.[121]

The Court thus held that an unconstitutional action (the City's rejection of the test results) may be excused by a legal requirement (Title VII's disparate impact provision) that may itself be unconstitutional. The difficulty began with the Court's mistaken finding that the City's action rather than the disparate impact provision of Title VII was the source of the discrimination. Instead of avoiding the question of the disparate impact provision's constitutionality, however, the Court merely postponed it to later in the opinion, where the Court then found it did not have to be decided because the case could be decided on statutory grounds.

Having newly and surprisingly announced the strong-basis-in-evidence standard as the way to reconcile Title VII's disparate treatment and disparate impact provisions, the Court, even more surprisingly, saw no need to remand the case to the lower courts to determine the standard's application. The Court dismissed as "incorrect" the City's argument that it could justify its rejection of the test results under the standard, because, the Court held, "the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate" and no "rational trier of fact" could find for the City.[122] There was, therefore, "no genuine issue as to any material fact" to preclude grant of summary judgment to plaintiffs.[123] Of the several dubious conclusions reached by the Court on its way to upholding the extremely appealing claim of the non-black firefighters—even the Supreme Court dissenters and the judges of the court of appeals recognized their claim to "sympathy"[124]—this was

[121] *Id.*

[122] *Id.* at 2677.

[123] *Id.*

[124] *See id.* at 2690 (Ginsburg, J., dissenting) ("The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's

perhaps the most dubious. There seems little doubt that the lower courts, given the opportunity and the interpretation of "business necessity" referred to by Justice Ginsburg,[125] would have had little difficulty in finding that the City met the standard. The result almost surely would have been the case's return to the Court with the constitutional question unavoidable.

Justice Kennedy conceded that the examinations' "racial adverse impact . . . was significant," falling well below the EEOC's 80% standard.[126] While statistical evidence of disparate impact establishes a prima facie case of a Title VII violation, it is, however, "far from a strong basis in evidence" of liability.[127] That requires a showing that the tests "were not job related and consistent with business necessity" or that "an equally valid, less-discriminatory alternative" was available.[128] "There is no genuine dispute," Kennedy stated, that the examinations met those requirements, and the City's assertions to the contrary were "blatantly contradicted by the record."[129] The exams were prepared only "after painstaking analyses of the captain and lieutenant positions—analyses in which IOS made sure that minorities were overrepresented"; the only witness who "had reviewed the examinations in any detail, and . . . the only one with any firefighting experience . . . stated that the questions were relevant for both exams"; and complaints about them, not all valid, were addressed by IOS.[130] Further, the City "turned a blind eye to evidence that supported the exams' validity."[131]

Justice Kennedy found that the City "also lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative."[132] The City argued, first, that weighting the exams on a 30/70 written/oral basis, instead of 60/40, would have made three blacks eligible for immediate promotion.[133] But there was no evidence, Kennedy responded, that the "60/40 weighting was indeed arbitrary"; it was presumably adopted for a "rational reason"; and it was not shown that a 30/70

sympathy."); *Ricci II*, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam) ("We are not unsympathetic to the plaintiffs' expression of frustration.").

[125] *Ricci*, 129 S. Ct. at 2697 (Ginsburg, J., dissenting) ("Practices discriminatory in effect, courts repeatedly emphasized, could be maintained only upon an employer's showing of 'an overriding and compelling business purpose.'" (quoting Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1261 n.9 (6th Cir. 1981))).

[126] *Id.* at 2677–78 ("The pass rates of minorities . . . were approximately one-half the pass rates for white candidates." A selection rate that is less that 80% of the rate of the highest scoring group "will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." (quoting 29 C.F.R. § 1607.4(D) (2008))).

[127] *Id.* at 2678.

[128] *Id.*

[129] *Id.* (internal quotation marks omitted).

[130] *Id.* at 2678–79.

[131] *Id.* at 2679.

[132] *Id.*

[133] *Id.*

weighting would be an equally valid way to test for the required "mix of job knowledge and situational skills."[134] The City next argued that "banding" the test scores—rounding scores to the nearest whole number and treating everyone with that number as equal—would have made four blacks and one Hispanic eligible for immediate promotion.[135] Banding, however, Kennedy found, would violate "Title VII's prohibition of adjusting test results on the basis of race."[136]

Finally, the City argued that, as Hornick had testified, use of an "assessment center process" to evaluate performance of "typical job tasks would have demonstrated less adverse impact."[137] "Hornick's brief mention of alternative testing methods," Justice Kennedy responded, did "not raise a genuine issue of material fact that assessment centers were available to the City at the time of the examinations and that they would have produced less adverse impact."[138] Hornick also testified, Kennedy noted, that adverse impact has existed "since the beginning of testing," and in the end he "suggested that the CSB should certify the list as it exists."[139] Further, his "primary concern . . . was marketing his services" to the City, which later hired him as a consultant.[140] "[T]he City," Kennedy concluded, "lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results"; plaintiffs were therefore entitled to summary judgment on their disparate treatment claim.[141]

It is difficult to disagree with Justice Ginsburg's objection that Justice Kennedy's response to the City's arguments ignores *Griggs* and treats "disparate impact [as] a mere afterthought."[142] That a business practice is "rational," not "arbitrary," and without an immediately available less-objectionable alternative should and would protect an employer from a disparate treatment (actual discrimination) challenge, but the whole point of *Griggs* is that good non-racial reasons for a business practice are not necessarily a defense to a disparate impact challenge. If Kennedy's approach is now the law, there is no longer distinctive disparate impact liability, and the disparate impact provision is no longer a de facto race-preference requirement. Justice Ginsburg is likely correct that "New Haven had ample cause to believe its selection process was flawed and not justified by business necessity"[143] or, more accurately, that a lower court might so find, and she is surely correct that "[t]he Court stack[ed]

[134] *Id.*
[135] *Id.* at 2679–80.
[136] *Id.* at 2680.
[137] *Id.* (internal quotation marks omitted).
[138] *Id.*
[139] *Id.* (internal quotation marks omitted).
[140] *Id.*
[141] *Id.* at 2681.
[142] *Id.* at 2696–97 (Ginsburg, J., dissenting).
[143] *Id.* at 2703.

the deck further by denying respondents any chance to satisfy the newly announced strong-basis-in-evidence standard."[144]

VI. JUSTICE ALITO'S CONCURRING OPINION

Justice Alito wrote a concurring opinion, joined by Justices Scalia and Thomas, arguing that the City's rejection of the test results would have constituted race discrimination in violation of Title VII's disparate treatment provision even if the City had met the Court's strong-basis-in-evidence requirement.[145] An employer's defense to an alleged disparate treatment violation that the challenged action "was based on a legitimate reason" raises, Alito said, "two questions—one objective and one subjective."[146] The objective question "is whether the reason . . . is legitimate under Title VII."[147] If it is not legitimate on its face, the employer is liable. The "subjective question concerns the employer's intent."[148] If the facially legitimate reason "turns out" to be "just a pretext for discrimination, the employer is again liable."[149] Even the dissent, he assumed, "would not countenance summary judgment for respondents if respondents' professed concern about disparate-impact litigation was simply a pretext."[150]

This illustrates the difficulty, noted above,[151] of relying on "intent" to find race discrimination on the basis of a racially neutral act. According to Justice Alito's reasoning, the City's cancellation of the test results, even if otherwise not racially discriminatory, because necessary to avoid disparate impact litigation, would become racially discriminatory if the city officials had an objectionable mental state. Even if, however, the city officials took the action only, as Alito said, "to placate a politically important racial constituency,"[152] the fact would remain that the action they took was, by hypothesis, objectively a legally permissible act. It is not clear how or why a mental state can or should negate that fact. There is no inconsistency between the City's action for the hypothetically legitimate reason of avoiding disparate impact litigation and the putative illegitimate reason of placating a racial constituency. A city official could reason: "What I am asked to do is, fortunately, legally permissible; surely it cannot become impermissible because it will please my constituents."

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[144] *Id.* at 2702. *See* Marcus, *supra* note 8, at 76 ("Indeed, Justice Kennedy is flatly wrong when he states . . . that New Haven's evidence of disparate-impact liability was 'nothing more' than a 'significant statistical disparity.'" (quoting *Ricci*, 129 S. Ct. at 2678)).

[145] *See Ricci*, 129 S. Ct. at 2683–89 (Alito, J., concurring).

[146] *Id.* at 2683.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* at 2684.

[151] *See supra* text accompanying notes 73–77.

[152] *Ricci*, 129 S. Ct. at 2684 (Alito, J., concurring).

The only authority Justice Alito offered for his "pretext" statement, *St. Mary's Honor Center v. Hicks*,[153] does not support it. In that case, the Court said that in order to refute a prima facie case of race discrimination, an employer "'must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action."[154] The case did not present the question whether an employer's otherwise lawful action becomes unlawful if taken for a supposedly improper reason. In *Hicks*, it was not conceded, as it was in Alito's hypothetical, that the employer had a legitimate reason for the challenged action, demoting and discharging a black employee. The reasons given for the discharge—alleged work deficiencies—were not legitimate if, as the district court found, they were never considered sufficient to discharge other employees.[155] It is clearly objectively—not merely "subjectively"—discriminatory for an employer to hold a black person to a higher standard than it applies to others, which was the issue in *Hicks*, but not in *Ricci*.[156]

VII. JUSTICE GINSBURG'S DISSENTING OPINION

Justice Ginsburg delivered a dissenting opinion, joined by Justices Stevens, Souter, and Breyer, longer than the majority opinion and taking

[153] 509 U.S. 502 (1993).

[154] *Id.* at 507 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

[155] The *Hicks* district court found that "respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's co-workers were either disregarded or treated more leniently." *Id.* at 508.

[156] Justice Alito's discussion of the city's intent in cancelling the test results had the perhaps not entirely coincidental effect of placing the case in its heated racial setting and thereby enhancing the appeal of the plaintiffs' claim. Mayor DeStefano knew, Alito pointed out, that certifying the exam results would "incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African-American community." *Ricci*, 129 S. Ct. at 2684 (Alito, J., concurring) (alteration in original). The Rev. Kimber, who, Alito noted, "was prosecuted and convicted for stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath," was "considered a valuable political supporter and vote-getter." *Id.* (internal quotation marks omitted). Mayor DeStefano appointed him the Chairman of the New Haven Board of Fire Commissioners despite his lack of any relevant experience, but he "stepped down" to become just a member after protests about his telling "firefighters that certain new recruits would not be hired because 'they just have too many vowels in their name[s].'" *Id.* at 2684–85 (alteration in original). He once "threatened a race riot during the murder trial of the black man arrested for killing [a] white Yalie," and "continues to call whites racist if they question his actions." *Id.* at 2684. At a CSB meeting, the chairman had "to shout him down and hold him out of order three times." *Id.* at 2685. Most of this information, whatever its relevance, apparently came from a statement of facts by the plaintiffs that the dissent questioned as "displaying an adversarial zeal." *Id.* at 2707 (Ginsburg, J., dissenting).

it to task at almost every point. The different attitudes reflected in the two opinions could hardly be clearer or greater. The majority's apparent determination to hold for plaintiffs, as victims of race discrimination, without having to face the question of the constitutionality of Title VII's requirement of discrimination was matched by the dissenters' apparent determination to hold for the City by simply closing their eyes to the fact of that requirement. The fundamental difference between the two can be seen as reflecting and deriving from the *Brown–Green* dichotomy. The majority, committed to *Brown's* apparent prohibition of all official race discrimination, was concerned to correct the race discrimination suffered by the non-black firefighters. The dissenters, following *Green*'s provision for (or requirement of) race discrimination to advance integration, were concerned to combat what they saw as "entrench[ed] preexisting racial hierarchies."[157]

"The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy," Justice Ginsburg conceded, "[b]ut they had no vested right to promotion," and cases involving "claims of race discrimination" must be considered in a "context" beyond the claims of the immediate parties.[158] Before Title VII was made applicable to public employment in 1972, "fire departments across the country, including New Haven's, pervasively discriminated against minorities. . . . Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow."[159] "African-Americans and Hispanics account for nearly 60 percent of the population" of New Haven, but "are rarely seen" in fire department command positions.[160] These "important parts of the story" were ignored by the majority.[161] They were ignored, however, because the majority did not agree with the implication of Justice Ginsburg's argument, that discrimination against non-whites in the past justifies discrimination against whites in the present.

Given Justice Ginsburg's insistence on considering the case in a context of what she saw as "entrench[ed] preexisting racial hierarchies" and a "backdrop of entrenched inequality," she had little difficulty in rejecting the non-black firefighters' claim of discrimination by finding that the City's promotion examinations might be discriminatory.[162] Both the lieutenant and the captain examinations produced the "stark disparities" that blacks and Hispanics "passed at about half the rate of their Caucasian counterparts."[163] This established a prima facie case of a disparate impact Title VII violation, which had not been refuted, she

[157] *Id.* at 2690 (Ginsburg, J., dissenting).
[158] *Id.* at 2689–90.
[159] *Id.* at 2690.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 2690–91.
[163] *Id.* at 2692.

argued, as required by Title VII, by a showing that the examinations were "job-related and consistent with business necessity"[164] or that no equally valid selection method with less disparate impact was available. The City, for example, simply followed its contract with the firefighters' union requiring examinations with the written and oral portions weighted on a 60/40 ratio that disadvantaged blacks without considering "whether the weighting was likely to identify the most qualified fire-officer candidates."[165] Perhaps most important, Ginsburg pointed out, Hornick had testified that he had developed tests, such as the use of "an assessment center process," that better "'identif[y] the best possible people' and 'demonstrate dramatically less adverse impacts.'"[166] Hornick also testified, as Justice Kennedy pointed out, that "adverse impact in standardized testing 'has been in existence since the beginning of testing,'" and he ultimately recommended that the City certify the test results,[167] but Ginsburg was nonetheless surely correct that the City had reason to believe that it was vulnerable to a charge of a disparate impact violation if it did not cancel the test results.

Justice Ginsburg was also correct that the City's cancellation of the test results was not "express"[168] discrimination and that the *Wygant–Croson* "strong-basis-in-evidence" test was not applicable to this case. It was not applicable, however, not because, as she said, those cases involved race preferences[169]—so does Title VII—but because, unlike *Ricci*, they involved a "remedy." She was perhaps most clearly correct in arguing that the majority opinion "stacks the deck . . . by denying respondents any chance to satisfy the newly announced" standard.[170]

It is not credible, however, that Justice Ginsburg was unable to see anything in Title VII or the Court's "Title VII precedents" that "offer[s] even a hint of 'conflict' between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions."[171] The proposed 1990 Civil Rights Act,[172] the predecessor of the 1991 Act, was vetoed by President George H.W. Bush on the ground that the disparate-

[164] *Id.*

[165] *Id.* at 2703. Justice Ginsburg noted that a representative of a black firefighter association testified that after Bridgeport, Connecticut revised its procedure "to give primacy to the oral exam . . . minorities [were] fairly represented in its exam results." *Id.* at 2693 (internal quotation marks omitted). This did not show, however, as Justice Ginsburg apparently assumed, that the change also "identif[ied] the most qualified" candidates. *Id.* at 2703.

[166] *Id.* at 2694 (alteration in original).

[167] *Id.* at 2680 (majority opinion).

[168] *See id.* at 2696 (Ginsburg, J., dissenting).

[169] *Id.* at 2701.

[170] *Id.* at 2702.

[171] *Id.* at 2699.

[172] Civil Rights Act of 1990, S. 2104, 101st Cong.

impact provision would require employers to use race preference,[173] and that was the central subject of debate in the legislative history of the 1991 Act.[174] As for the Court's precedents, Justice White's opinion for the Court in *Wards Cove Packing Co. v. Atonio* (1989),[175] like Justice O'Connor's earlier plurality opinion in *Watson v. Fort Worth Bank & Trust* (1988),[176] turned entirely on the need to avoid the obvious potential conflict between the two provisions, which they saw could be done only by accepting a showing of a legitimate business need as justification for a challenged practice.[177]

Far from being in conflict, Justice Ginsburg argued, the two provisions of Title VII "advance the same objectives: ending workplace

[173] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT APPROVAL S. 2104, THE CIVIL RIGHTS ACT OF 1990, S. DOC. NO. 101-35, at 2 (1990) ("S. 2104 creates powerful incentives for employers to adopt hiring and promotion quotas.").

[174] For a detailed review of the legislative history of the 1991 Act, see Kingsley R. Browne, *The Civil Rights Act of 1991*: *A "Quota Bill," a Codification of* Griggs*, a Partial Return to* Wards Cove*, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 305–06 (1993).

[175] 490 U.S. 642 (1989).

[176] 487 U.S. 977 (1988).

[177] Indeed, Justice Ginsburg cites and quotes from an article by Professor Richard Primus, one of her former law clerks, ASS'N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 1158 (2010–2011), recognizing and attempting to justify the conflict that Ginsburg claimed to be unable to see. Ricci v. DeStefano, 129 S. Ct. 2658, 2700 (2009) (quoting Primus, *supra* note 101, at 585). *See also* Primus, *supra* note 87, at 1353 ("Disparate-impact doctrine does require race-conscious decisionmaking, so it follows that there is a conflict between the two frameworks.").

Like Justice Ginsburg, Professor Primus rejects the application of strict scrutiny to discrimination meant to benefit members of a racial minority group. *See* Primus, *supra* note 101, at 502 ("*Adarand* was wrongly decided."). Indeed, he seems to question the importance of the distinction between prohibiting and requiring race discrimination. *See id.* at 525 ("[I]f one is confident that there could be no equal protection problem with a law prohibiting intentional discrimination, then perhaps racially allocative motive should not be a serious problem in disparate impact law or affirmative action either."). Also like Justice Ginsburg, he therefore sees the mission of Title VII as being less to prevent discrimination against a white person, such as Frank Ricci, a member (though he may not know it) of a "historically privileged class," *id.* at 527, than to combat the conditions of "racial hierarchy in the workplace." *Id.* at 516.

The criticism of *Ricci* by Cheryl I. Harris and Kimberly West-Faulcon is similarly based on rejection of the Court's insistence that all official discrimination must be subjected to strict scrutiny. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010). Thus, the fact that the City discarded the test results because "virtually all of the open promotional positions would have gone to whites" does not mean that "the white firefighters' rights had been abridged." *Id.* at 109. Chief Justice Roberts' statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is criticized as "reconstitut[ing] the very concept of discrimination as any antidiscrimination remedy that displaces the expectations of whites with regard to the racial status quo." *Id.* at 117 (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007)). In the tradition of *Green*, express discrimination meant to benefit non-whites is not discrimination at all, but "antidiscrimination," the "remedy" for discrimination. *Id.*

discrimination and promoting genuinely equal opportunity."[178] Only a strong commitment to a desired result, it would seem, could cause her to fail to see that the opposite, unfortunately, is the case. As the Court itself recognized in *Washington v. Davis*,[179] to effectively require an employer to abandon legitimate, non-racial employment requirements in order to avoid a disparate racial impact is not to prohibit race discrimination.[180] It does not promote—it denies —equal opportunity to better-qualified job applicants, whom an employer must reject in order to meet a racial quota or goal. These facts cannot be avoided by arguing, as Ginsburg did, that the Equal Protection Clause, the basis of *Washington*, prohibits one form of discrimination ("intentional"), while the disparate impact provision prohibits another ("unintentional").[181] The Equal Protection Clause and the disparate treatment provision both prohibit all race discrimination where they apply, leaving no additional discrimination for the disparate impact provision to prohibit. To say that an employer who prefers, say, more literate to less literate employees or employees without an arrest record or history of drug use engages in "unintentional" race discrimination if a racial "disproportion" in its workforce results is to ignore reality[182] and misuse language.

The reality, to repeat, is that the disparate impact provision is a race-preference requirement, with the amount of required preference dependent on the cost and difficulty of "validating" legitimate employment requirements, i.e., on how much more than a legitimate business need (obvious rationality) must be shown to justify a challenged requirement.[183] Because this fact cannot be defended, it must, in the tradition of *Green* and its progeny, be denied—never more incredibly than by Justice Ginsburg in *Ricci*—and the opposite asserted, that the provision actually prohibits race discrimination,[184] albeit of a different

[178] *Ricci*, 129 S. Ct. at 2699 (Ginsburg, J., dissenting).

[179] 426 U.S. 229 (1976).

[180] The Court had "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory." *Id.* at 245.

[181] *See Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

[182] *See* Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 623 (2011) (noting that disparate impact doctrine must be reconsidered in light of the fact that "[t]he combination of well-documented racial differences in cognitive ability and the consistent link between ability and job performance generates a pattern that experts term 'the validity-diversity tradeoff': the most effective job selection criteria consistently generate the smallest number of minority hires").

[183] *See id.* at 622. "[A] substantial body of research" since *Griggs* "has undermined two key elements of *Griggs*": First, "the implicit assumption that fair and valid staffing practices will result in workers from each race being hired or promoted in rough proportion to their numbers in the background population," and second, failure to recognize that screening criteria such as education level and aptitude tests are "related to subsequent performance" of even "service jobs." *Id.*

[184] In *Griggs*, itself, of course, the Court insisted that it was prohibiting, not requiring, race preference ("Discriminatory preference for any group . . . is precisely and only what Congress has proscribed. . . . Congress has not commanded that the less

"form." The source of Justice Ginsburg's disagreement with the majority is not, as she claimed, an inability to see that the disparate impact provision as she would interpret it is a requirement of race preference. Its source is that, as she had made clear in earlier cases, she does not necessarily oppose and would not apply the same standard of "strict scrutiny" to such a requirement.[185]

VIII. JUSTICE SCALIA'S CONCURRING OPINION

Justice Kennedy explicitly recognized that his heroic efforts to decide the case on statutory grounds did not dispose of the question of Title VII's constitutionality.[186] Although Justice Scalia joined Kennedy's opinion, he decided to address the question openly.[187] The Court's decision, he said in a concurring opinion, "merely postpones the evil day on which the Court will have to confront" the question.[188] If, as he said, "[t]he question is not an easy one,"[189] the difficulty would seem to have more to do with its exceptional nature and importance than its complexity or uncertainty. It would indeed be extraordinary for the Court to hold unconstitutional a four-decades-old doctrine that the Court itself created and Congress later ratified. On its merits, however, the issue would not seem difficult for a Court committed to ending all official race discrimination by insisting that the standard of review under the Equal Protection Clause is not dependent on "the race of those burdened or benefited" by a particular classification.[190] As Chief Justice Roberts' opinion decisively put it in the Court's most recent decision on race prior to *Ricci*: "The way to stop discrimination on the basis of race is

qualified be preferred over the better qualified simply because of minority origins."), even while holding that race discrimination can be found on the basis of preferring more intelligent or educated employees to employees who are less so. Griggs v. Duke Power Co., 401 U.S. 424, 431, 436 (1971).

The inability of the proponents of the 1991 Act to openly favor race discrimination led to their failing to oppose the only provision of the act that is actually a "civil rights" (anti-discrimination) measure, a prohibition of "race norming." *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(*l*) (2006)) (titled "Prohibition Against Discriminatory Use of Test Scores."). Under race norming, members of different racial groups are tested separately and the results are not compared, so that a person scoring at the top of one racial group can be reported to employers as equal to a person scoring at the top of a different racial group, even though their scores may be very different.

[185] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).

[186] "We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case." *Ricci*, 129 S. Ct. at 2676.

[187] "[T]he 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 (Scalia, J., concurring).

[188] *Id.* at 2682.

[189] *Id.*

[190] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

to stop discriminating on the basis on race."[191] Although Justice Kennedy did not join that section of the Court's opinion, he agreed that all government distribution of "burdens or benefits on the basis of individual racial classification . . . is reviewed under strict scrutiny."[192]

Justice Scalia went on to point out, however, that there may be a means of avoiding "the evil day," namely by interpreting Title VII's disparate impact provision as consistent, rather than potentially in conflict, with its disparate treatment provision: "It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment."[193] If so framed, a plaintiff will still be able to establish a prima facie case of discrimination by showing that an employment requirement has a racially disparate impact. It would not have to also show that the employer had an "illicit intent," as it supposedly must to establish a constitutional violation.[194] The employer would then be required to justify the requirement, but it cannot, Scalia continued, be precluded from "proving that its motives were pure and its actions reasonable."[195] The plaintiff would not have to prove that the challenged requirement served no legitimate business need (to show "illicit intent"), but the employer would not have to prove more than that it serves a legitimate business need, that is, more than ordinary business rationality.

The disparate impact provision of Title VII is an effective requirement of race preference only if and to the extent that challenged employment practices cannot be justified on the basis of legitimate business goals, effectively requiring employers to engage in racially preferential hiring and promotion to avoid the costs of "validating" challenged requirements by showing an elusive something more than a legitimate business need.[196] Justice Scalia's suggested interpretation of the disparate impact provision as a true anti-discrimination measure, not an effective requirement of race preference, thereby avoiding the constitutional question, is essentially the interpretation of *Griggs* and later cases adopted by the Court for the same purpose in *Wards Cove Packing*

[191] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[192] *Id.* at 720. Justice Kennedy joined Part III-A, quoted above. *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy has also stated that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *J.A. Croson Co.*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment).

[193] *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

[194] *Id.* at 2683.

[195] *Id.* "[A]rguably," Justice Scalia said, "the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion." *Id.* at 2682–83 (referring to Justice Ginsburg's description of the "demanding nature of the 'business necessity' defense"). It is also arguable, however, as noted below, that the decisions cited by Justice Ginsburg have made the defense more demanding than is required or justifiable.

[196] On the impact on employers of showing more than a legitimate business need, see Wax, *supra* note 182, at 623–26.

Co. v. Atonio (1989).[197] In *Wards Cove*, the Court stated that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[198] Congress, acting on the belief that *Wards Cove* weakened the justification requirement, responded by enacting the 1991 Civil Rights Act.[199]

The 1991 Act codified the *Griggs* disparate impact doctrine, but to the extent that it sought to enact a stricter justification requirement than in *Wards Cove*, it apparently did not succeed.[200] Instead of explicitly overruling *Wards Cove* (as the vetoed 1990 Act had done) and redefining the requirement, it simply reiterated the *Griggs* requirement that a challenged practice be "job related for the position in question and consistent with business necessity."[201] Instead of attempting to explicitly define those terms, Congress provided, perhaps uniquely, that they are to mean whatever they meant in a series of (not necessarily consistent) Supreme Court decisions. A purpose of the Act, it stated, is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*."[202]

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[197] 490 U.S. 642 (1989).

[198] *Id.* at 659.

[199] Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1160–62 (1993).

[200] This was the conclusion of several contemporary commentators. *See, e.g.*, Browne, *supra* note 174, at 290 ("At most, the *Wards Cove* opinion made only marginal adjustments to the disparate-impact doctrine, although . . . it arguably did not change the doctrine at all."); Carvin, *supra* note 199, at 1163 (arguing that the 1991 Act codifies *Wards Cove*); Lino A. Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1117, 1134 (1992) (*Griggs* stated "that the employer's burden is to show that the challenged employment standard has 'a manifest relationship to the employment in question.' This phrase was repeated and apparently treated as the definitive statement of the relevant test in every later case, including . . . *Watson* and both the majority and dissenting opinions in *Wards Cove* itself. This makes it extremely difficult, to say the least, to state what precisely is the difference, if any, in the meaning of 'business necessity' between *Wards Cove* and prior cases." (footnote omitted)); Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87, 116 n.149 (1997) ("[T]he *Wards Cove* approach appears to have been written into law."); Philip S. Runkel, *The Civil Rights Act of 1991: A Continuation of the* Wards Cove *Standard of Business Necessity?*, 35 WM. & MARY L. REV. 1177, 1208 (1994) ("[T]he Bush Administration may have been right after all: the *Wards Cove* standard of business necessity is here to stay.").

It was also the conclusion asserted by the Executive Branch. A Bush administration "Section-by-Section Analysis" of the act concluded that "the present bill has codified the 'business necessity' test employed in *Beazer* and reiterated in *Wards Cove*. The language in the bill is thus plainly not intended to make the test more onerous for employers to satisfy than it had been under current law." 137 CONG. REC. 29,038 (1991).

[201] Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

[202] *Id.* § 3(2), 105 Stat. at 1071 (citations omitted).

Wards Cove, however, purported to follow, not overrule or qualify, the *Griggs* justification standard, and in any event, the Court's decisions immediately prior to *Wards Cove* stated the standard in language not substantially different from *Wards Cove*. *Watson v. Fort Worth Bank & Trust* stated that the employer must produce "evidence that its employment practices are based on legitimate business reasons,"[203] and *New York City Transit Authority v. Beazer* stated that it is enough that "[legitimate employment] goals are significantly served by—even if they do not require—[the challenged practice]."[204]

Justice Ginsburg's statement that the Court in *Wards Cove* "significantly modified the *Griggs–Albemarle* delineation of Title VII's disparate-impact proscription" is therefore questionable.[205] Under *Griggs–Albemarle*, she said, "the challenged practice 'must have a manifest relationship to the employment in question,'"[206] while under *Wards Cove* "the practice would be permissible as long as it 'serve[d], in a significant way, the legitimate employment goals of the employer.'"[207] It is hardly clear, in the first place, that the two standards are substantially different: a practice that serves legitimate employment goals in a significant way would seem to have a manifest relationship to the employment in question. *Wards Cove* purported to be consistent with *Griggs* and *Albemarle*, which it quoted and cited. In any event, the 1991 Act does not limit the inquiry to the "the *Griggs–Albemarle* delineation." It refers, instead, to "*Griggs* . . . and . . . other Supreme Court decisions prior to *Wards Cove*," which include *Watson* and *Beazer*.[208]

It seems, therefore, that the effect of Congress's inability to define the employer's justification requirement other than by reference to Supreme Court decisions was to affirm rather than repudiate *Wards Cove*. The Act's requirement that employers show that challenged business practices are "job related . . . and consistent with business necessity" in order to avoid liability can and should be found to be met by a showing that the practices significantly serve legitimate employment goals.[209] This interpretation of the Act, indeed, has already in effect been adopted by the Court in *Ricci* by its holding that a challenged employment requirement is sufficiently justified by a showing that it is not "arbitrary" and was adopted for a "rational reason."[210] The result is to obviate the

[203] 487 U.S. 977, 998 (1988).

[204] 440 U.S. 568, 587 n.31 (1979).

[205] Ricci v. DeStefano, 129 S. Ct. 2658, 2698 (2009) (Ginsburg, J., dissenting).

[206] *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

[207] *Id.* (alteration in original) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989)).

[208] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (1991). The cases cited by Justice Ginsburg, *Ricci*, 129 S. Ct. at 2697 n.3 (Ginsburg, J., dissenting), as applying a stricter standard were all decided prior to *Watson* and *Wards Cove*, as well as the 1991 Act.

[209] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[210] *Ricci*, 129 S. Ct. at 2679.

constitutional question that the *Ricci* Court recognized, and unsuccessfully sought to avoid, and to make Title VII the anti-discrimination statute it purports to continue to be.

IX. CONCLUSION

Ricci presented in especially dramatic form the issue of race-based affirmative action that is at the center of the nation's so-called culture wars and racial divisions. Most Americans no doubt find it hard to believe that a person who qualified for a promotion by doing well on an apparently race-neutral examination could be denied the promotion because persons of another race did not do as well. That is nonetheless the result that New Haven reasonably considered to be required by Title VII's disparate impact theory of race discrimination as interpreted by some lower courts. The doctrinal significance of *Ricci* is its recognition that such an interpretation makes Title VII a requirement, not a prohibition, of race discrimination and therefore subject to serious constitutional challenge.

The Court strove mightily to avoid facing this challenge, but may have actually obviated it by holding that an employer may justify a challenged employment requirement by showing that it is "rational" and not "arbitrary." The effect is to make Title VII what—even as amended—it purports to be, a prohibition of race discrimination, not a race-based affirmative action measure. The result is to inject a much-needed element of candor into American race discrimination law, which should serve to reduce its tendency to produce paradoxes.