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DISPARATE IMPACT AND EQUAL PROTECTION AFTER *RICCI V. DESTEFANO*

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INTRODUCTION

This country has a long history of embracing expansive values and tolerating abuses of those values at the same time. These contradictory attitudes are evident in our approach to equality. We talk of equality as a core American value but tolerate significant levels of subordination of particular groups, often even groups that have historically been subordinated. We struggle with reconciling conflicts created by the pursuit of equality, pluralism, and liberty,

and strike the balance among them differently at different times. In the current attempts to balance these interests, the Supreme Court is marking an increasingly formalist approach to the question of discrimination, an approach that poses a danger to legislation with a more substantive approach to equality. In this context, the Court is using the Constitution to limit Congress' power to prohibit discrimination. While the bulk of this trend has focused on limiting the kinds of race conscious actions state and local governments or the federal executive branch can take and the power Congress has to stop discrimination by states, the latest trend suggests that the Court may be focused on limiting the power of Congress to prohibit discrimination in private workplaces.

The prohibitions against discrimination in the United States are found in multiple sources of law. The most well-known is the Equal Protection Clause of the Fourteenth Amendment, a principle that has been embodied in the Fifth Amendment's Due Process Clause, as well. Additionally, several federal statutes prohibit discrimination in employment,[1] housing,[2] public accommodations,[3] and education.[4] Most states have constitutional and statutory prohibitions, as well. Over time, the content of the antidiscrimination norm has been fleshed out in court decisions, legislative debates, and in the media somewhat sporadically. The commitment to equality is very present in the public consciousness[5] and yet still contested enough that there are gaps in consensus on the content of the norm.

Part of the reason for this lack of consensus is that the issue of discrimination in employment has not been in the forefront of public debate the way it had been in earlier years. Employment discrimination was one of the main focuses of the Civil Rights Movement in the 1960s, which led to passage of the Civil Rights Act of 1964, the employment title of which is popularly known as Title VII. Early cases in the 1970s concerning that statute focused on what practices constituted discrimination on the basis of race.[6] Likewise, employment discrimination was part of the central focus of the second wave of the feminist movement. Interspersed with the wave of cases concerning race

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1. *See e.g.*, 29 U.S.C. §§ 621-34 (2006); 42 U.S.C. §§ 2000e to 2000e-17 (2006); 42 U.S.C. §§ 12101-12213 (2006).

2. 42 U.S.C. §§ 3601-19 (2006).

3. 42 U.S.C. §§ 2000a to 2000a-6 (2006).

4. 20 U.S.C. §§ 1681-88 (2006); 42 U.S.C. §§ 2000c to 2000c-9 (2006).

5. As a proxy for the level of public interest surrounding this issue, I used a search of the case name, *Ricci v. DeStefano*, the subject of this article, in print news sources held in the LexisNexis database over 2008 and 2009. That search revealed 1174 stories. The search for the term "employment discrimination" yielded about 1000 stories in each month of 2008, and over 1500 stories for each month in the early part of 2009. In the last three months of 2009, the news stories were back down to about 900 per month.

6. *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

discrimination in the 1970s were a number of cases dealing with discrimination on the basis of sex.[7] In a wave following those cases, litigation under the Equal Protection Clause in the 1980s addressed the use of affirmative action to benefit black people and whether that was permissible or itself discrimination against white people.[8] During that same time, sex discrimination under Title VII continued to be litigated.[9] Since then, most cases and legislation involving employment discrimination have concerned the more technical and procedural aspects of litigating the issue.[10]

And while there had been significant litigation concerning race and sex in the education context,[11] the content of the norm prohibiting discrimination in employment had not been addressed by the Supreme Court in many years. At the end of its 2008 term, the United States Supreme Court issued its first decision in decades addressing the content of the norm against race discrimination in employment in *Ricci v. DeStefano*.[12] The Court took a decidedly formalist turn, instituting a color-blind standard to define discrimination under Title VII at least in some circumstances.[13] In a similar move in the 2010 term, the Court considered a case ostensibly about the requirements for class actions that may have far-reaching effects on the content of the norm against sex discrimination in *Wal-Mart Stores, Inc. v. Dukes*.[14]

At issue in *Ricci* was whether a city government's rejection of promotional test results that caused a disparate impact on firefighters of color

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7. *See e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that classifications on the basis of sex warranted intermediate scrutiny); Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down laws that kept women off of juries on the basis of sex); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking down a law requiring mandatory unpaid maternity leave as a violation of the Due Process Clause); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (rejecting pay disparities on the basis of sex which were based on the history of paying women less than their male counterparts); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (stating that sex should be considered a suspect class); Reed v. Reed, 404 U.S. 71 (1971) (striking down a state law that gave men automatic preference to be executors of estates as a violation of the Equal Protection Clause).

8. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

9. *See* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (ruling that victims of sexual harassment could bring claims even where they did not suffer physical or serious psychological injury); Johnson v. Santa Clara Cnty., 480 U.S. 616 (1987) (approving affirmative action for women); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (recognizing that hostile work environment sex discrimination violated Title VII); Hishon v. King & Spaulding, 467 U.S. 69 (1984) (ruling that law firms may not discriminate on the basis of sex in promoting lawyers to partnership positions).

10. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Soc'y v. Hicks, 509 U.S. 502 (1993); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

11. *See e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

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

13. *See id.* at 2673-74.

14. *See generally* Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011).

was disparate treatment, and if so, whether the city could defend its actions on the grounds that it was avoiding liability for the disparate impact.[15] The majority, dissent, and one concurring opinion debated those issues, but in the mix was a concurrence by Justice Scalia, focused on a separate issue. Because the employer was a government, the constitution applied to its actions, and the plaintiffs had alleged that the city's decision violated the Equal Protection clause.[16] The majority held that the decision violated Title VII and so did not address the equal protection claim. Justice Scalia, however, would have.[17]

Justice Scalia posited that Title VII's disparate impact provisions might violate the equal protection guarantee that is part of the Fifth Amendment.[18] His logic was this: by prohibiting disparate impact discrimination, Congress required private employers to take race, and presumably the other statuses protected, into account in order to be motivated to act in a particular way because of that status; taking an action because of someone's race would likely be a violation of equal protection if done by Congress directly; because Congress could not discriminate this way, the Fifth Amendment bars it from passing a statute that requires discrimination by private parties.[19] In *Wal-Mart*, the Court might have had to confront the constitutionality of the disparate impact theory in the context of sex discrimination because the employer action in that case was alleged to have been either disparate treatment or disparate impact.[20] Justice Scalia even wrote the opinion. However, the Court ignored the disparate impact issue entirely, and thus the constitutional issue, instead focusing only on whether the conduct alleged would be disparate treatment.[21]

As Professor Richard Primus noted in his article, *Equal Protection and Disparate Impact: Round Three*, the constitutional issues surrounding the disparate impact theory of discrimination have evolved significantly over time.[22] First the question was whether the Constitution's equal protection guarantee embodied disparate impact. Most people assumed yes, but the Supreme Court said no in 1976 in *Washington v. Davis*.[23] Second, the source of Congress' power to prohibit disparate impact discrimination was called into question with the so-called federalism revolution.[24] Only if it was within Congress' power under Section 5 of the Fourteenth Amendment could disparate

15. *Ricci*, 129 S. Ct. at 2673-74.
16. *See id.* at 2664, 2672, 2681.
17. *Id.* at 2682 (Scalia, J., concurring)
18. *Id.* at 2.
19. *Id.* at 2682-83.
20. *Wal-Mart Stores*, 131 S. Ct. at 2548
21. *See id.* at 2552-57.
22. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 494-95 (2003).
23. Washington v. Davis, 426 U.S. 229 (1976).
24. *See* Primus, *supra* note 22, at 494; *see also* Marcia L. McCormick, *Solving the Mystery of How* Ex Parte Young *Escaped the Federalism Revolution*, 40 U. TOL. L. REV. 909 (2009) (describing the so-called federalism revolution and its impact on both civil rights legislation and Eleventh Amendment jurisprudence).

impact legislation be applied to the states consistent with the Eleventh Amendment.[25] The question in *Ricci* goes one step further: to the extent that the prohibition on disparate impact discrimination requires employers to take race conscious action, can Congress enact it consistent with the Fifth Amendment's guarantee of due process?

This paper argues that the answer is "yes" after the cases of the federalism revolution and that Congress' power comes from the Fourteenth and Thirteenth Amendments. However the greatest dangers to disparate impact are the passage of time since the civil rights movement, the lack of consensus that disparate impact *is* discrimination, and the worldview by several of the Justices that discrimination against people of color and women is a thing of the past. In Part I, this paper will describe the Ricci case with particular focus on Justice Scalia's concurrence. Part II lays out the Court's jurisprudence on the federalism revolution and explains how that jurisprudence may apply to this question. Finally, Part III briefly explores the dangers to disparate impact that nonetheless remain.

I. THE *RICCI* DECISION

A. Background

The City of New Haven, Connecticut used a set of tests to promote firefighters to the ranks of lieutenant and captain.[26] The full process was this: the city would create a list of qualified applicants, ranked in order; when lieutenant or captain positions became available, promotions would be granted based on that list; the City was required to pick the person to be promoted from the top three on that list; and the list would be valid for two years, after which time a new eligibility list would have to be created.[27] The list was created through an examination process, which included both a written and an oral examination, designed by a professional testing company.[28] Sixty percent of the final score was determined by the written test score and forty percent by the oral test score.[29] The applicants who scored a certain passing minimum were put on the list in rank order from highest to lowest score.[30]

After the tests were administered and the applicants for promotion ranked, City leaders noticed that the highest scores were held by white applicants and the lowest held by black and Latino applicants at a rate disproportionate to their numbers in the applicant pool.[31] Sixty-four percent of the white applicants who

25. *See* Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 37 IND. L. REV. 354, 354-69 (2004).

26. Ricci v. DeStefano, 129 S. Ct. 2658, 2665 (2009).

27. *Id.*

28. *Id.* at 2665-66.

29. *Id.* at 2665.

30. *Id.*

31. *Id.* at 2666.

took the test for promotion to captain passed, while just under thirty-eight percent of black and Hispanic applicants passed.[32]

The City could have asked the testing company for a technical report to analyze the validity of the test – how well it predicted performance in the jobs it was required for – but did not and instead simply interviewed the test's designer and then held several days of hearings to determine whether the list should be used.[33] At those hearings, a number of witnesses testified, some in favor of using the list,[34] some taking no position on using it,[35] and some against using it.[36] Several witnesses, including the test's designer, testified that they believed the test was fair overall,[37] some testified about racial disparities in written tests generally,[38] and some testified about alternative ways to measure qualifications, from weighing the portions of the test differently to entirely different processes.[39] At the end of the hearings, the members of the City's Civil Service Board, the body that had to approve the list, split on whether to use the test results, and because there was not a majority in favor of using those results – the vote was tied – the list was discarded.[40]

Several white and one Hispanic firefighter sued the City in federal court, arguing that discarding the test results discriminated against them on the basis

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32. *Id.*.

33. *Id.* at 2666-71.

34. The test's designer told the City leaders that the test was valid, that any disparity was caused by external factors, and that the result was not significantly different from the City's prior promotional examinations. *Id.* at 2666, 2668. Several promotional candidates testified that the test was fair and that they had worked very hard. *Id.* at 2667. Counsel for the applicants who became plaintiffs in the eventual suit argued that the City should certify the results. *Id.* A retired fire captain from another state testified that the material tested was relevant to the jobs and that the study materials were less extensive than for other departments. *Id.* at 2669.

35. One of the testing experts stated that the test was "reasonably good" and that the City ought to certify the test but change the process in the future. *Ricci*, 129 S. Ct. at 2669. Neither the retired fire captain nor the testing expert called by the City gave any opinion on whether the test should be certified. *Id.*

36. Some firefighters testified that the test was not fair: questions were outdated or irrelevant to the job and the materials too extensive and expensive. *Id.* at 2667. One firefighter from a neighboring town called the test inherently unfair, and another suggested a validation study was necessary. *Id.*

37. *Id.* at 2667 (firefighters testifying that the test was fair); *id.* at 2668 (test creator stating that the test was neutral but expressing surprise at the level of disparity). *But see Ricci*, 129 S. Ct. at 2667 (firefighters testifying that the questions were outdated or not relevant to the City, and that the study materials were too expensive and long; that the test was "inherently unfair"; that the results should be adjusted).

38. *Id.* at 2667 (testifying about a neighboring city's practices); *id.* at 2669 (three experts testifying that written tests often have some level of disparity based on race).

39. A competitor to the company that designed the test used testified that the City could have used "assessment centers" in which applicants face realistic scenarios to which they must respond just as they would in the field. *Id.* at 2669. A firefighter from a neighboring town suggested adjusting the ratios or otherwise adjusting the final scores in some way to negate the effects of the disparity. *Id.* at 2667.

40. *Id.* at 2671.

of race in violation of the Equal Protection Clause of the United States Constitution and Title VII of the Civil Rights Act of 1964.[41] In the proceedings before the district court, the City's main defense was that City leaders had not discarded the results because of the race of the plaintiffs, but had instead discarded the results to avoid liability for discriminating against black and Hispanic applicants, upon whom the test had had a disparate impact.[42] The firefighters and the City filed motions for summary judgment, both asserting that the material facts were not in dispute and that each respectively was entitled to judgment as a matter of law.[43]

The district court granted the City's motion.[44] The district court held that as a matter of law, the "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not . . . constitute discriminatory intent,"[45] which meant that the City had not violated Title VII. The court further held that such a decision was not based on race within the meaning of the Equal Protection Clause because all of the test results were discarded and all races were treated the same – members of all races had to start the process over.[46] The firefighters appealed, and the intermediate appellate court affirmed the decision of the trial court.[47] The firefighters sought review of the decision by the Supreme Court, which agreed to consider the case[48] and issued its decision at the end of the term.[49]

B. The Decision

The Supreme Court, in a five to four opinion written by Justice Kennedy, reversed the lower court's entry of summary judgment for the city, holding that the decision to discard the test results was based on the race of the successful candidates, and this was intentional discrimination that would violate Title VII unless the City had a substantial basis in evidence to believe that the promotional process created a disparate impact on the black and Hispanic firefighters that would violate Title VII.[50] The Court further held that the City

41. *Ricci*, 129 S. Ct. at 2671.

42. *Id.*

43. *Id.*

44. Ricci v. DeStefano, 554 F. Supp. 2d 142, 163 (D. Conn. 2006), *rev.d*, 129 S. Ct. 2658 (2009).

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

46. *Id.* at 161.

47. Ricci v. DeStefano, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam). The court of appeals considered sua sponte whether to rehear the case en banc, and voted seven to six to deny that rehearing. Judges Calabresi, Katzmann, and B.D. Parker filed opinions concurring in the denial of rehearing. Chief Judge Jacobs and Judge Cabranes dissented from that decision. Ricci v. DeStefano, 530 F.3d 88, 88 (2d Cir. 2008) (Calabresi, J., concurring); *id.* at 89 (Katzmann, J., concurring); *id.* at 90 (Parker, J., concurring); *id.* at 92 (Jacobs, J., dissenting); *id.* at 93 (Cabranes, J., dissenting).

48. *Ricci*, 129 S. Ct. 2658, 2672 (2009).

49. *Id.* at 2658.

50. *Id.* at 2673-76.

lacked this substantial basis in evidence.[51] Because it had reversed the lower court on statutory grounds, the Court declined to analyze the equal protection issue.[52] Justices Scalia[53] and Alito[54] wrote separate concurrences, and Justice Ginsburg wrote a dissenting opinion.[55]

Before analyzing the Supreme Court's decision in depth, it is necessary to lay out the analytical framework for Title VII in a little bit more detail. Title VII provides in part that

> It shall be an unlawful employment practice for an employer
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;[56]

This provision is generally thought to prohibit disparate treatment, also called intentional discrimination.[57] To prove disparate treatment, a plaintiff must show that an employer has treated that plaintiff less favorably than it otherwise would have because of the plaintiff's protected status, in a case like *Ricci*, because of the plaintiff's race.[58]

Title VII also prohibits disparate impact discrimination, or discrimination in effects.[59] When a plaintiff proves that an employer's neutral practice has a disproportionate negative effect on the plaintiff's protected group, an employer

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51. *Id.* at 2678-81.

52. *Id.* at 2672, 2681.

53. *Id.* at 2681 (Scalia, J., concurring).

54. *Ricci*, 129 S. Ct. at 2683 (Alito, J., concurring).

55. *Id.* at 2689 (Ginsburg, J., dissenting).

56. 42 U.S.C. § 2000e-2(a)(1) (2006). Remedies for disparate treatment include reinstatement, back pay, other equitable relief, compensatory and punitive damages, and attorneys' fees. 42 U.S.C. §§ 1981a, 1988, 2000e-5(g) (2006).

57. *Ricci*, 129 S. Ct. at 2672.

58. *Id.*; *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989-91 (1988) (holding that discriminatory intent can be inferred from, in part, an overly subjective promotions process); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135-36 (1976) (holding that discriminating against pregnancy was not discrimination "based upon gender as such").

59. *See* 42 U.S.C. §§ 2000e-(2)(a)(2), (k) (2006); Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971). The text of Title VII as it was originally enacted embodies disparate impact, although the Court in *Griggs* did not rely on that language for its opinion, and the majority in *Ricci* did not analyze that language. The operative language is:
"It shall be an unlawful employment practice for an employer . . ."

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-(2)(a)(2). Remedies for disparate impact include reinstatement, back pay, other equitable relief, and attorneys' fees, but not compensatory and punitive damages. 42 U.S.C. §§ 1981a, 1988, 2000e-5(g) (2006).

can defend that neutral practice by demonstrating that the practice is "job related for the position in question and consistent with business necessity."[60] The employer will nonetheless be liable if the plaintiff shows that the employer refuses to adopt an available alternative practice that has less impact and still serves the employer's legitimate needs.[61]

i. The Majority Opinion: Avoiding Disparate Impact *is* Disparate Treatment

The Court in *Ricci* held that these two separate prohibitions conflicted in this situation, essentially finding that a decision to act because a practice may cause a racially disparate impact is a decision made on the basis of race.[62] In the Court's words, "[t]he City rejected the test results because the higher scoring candidates were white."[63] Considering the race-based effects of the testing and rejecting the test on that ground was taking an adverse action because of an individual's race.

The second step in the Court's analysis attempted to harmonize the conflict this premise set up. The Court held that good faith fear of a disparate impact lawsuit cannot be enough to justify acting because of an individual's race.[64] That would allow employers to avoid liability for racially motivated actions "at the slightest hint" of a disparate impact and to maintain some sort of racial quota or balance.[65]

To avoid this result, the Court looked to affirmative action cases under the Equal Protection Clause for an analogy, reasoning that affirmative action created the same kind of conflict in equal protection doctrine that this collision of disparate impact and disparate treatment created.[66] Under the Equal Protection Clause, a government employer can engage in race-based decisions like minority set-asides where there is a strong basis in evidence that such a decision is warranted to remedy past discrimination by that government employer.[67] The Court stated that such a standard was appropriate to balance the competing interests at stake.[68] That standard

> gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts

60. *Id.* § 2000e-2(k)(1)(A)(i).
61. *Id.* § 2000e-2(k)(1)(A)(ii).
62. *Ricci*, 129 S. Ct. at 2674 (2009).
63. *Id.*
64. *Id.* at 2675.
65. *Id.*
66. *Id.*
67. *Id.* (citing Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
68. *Ricci*, 129 S. Ct. at 2675-76.

> to eradicate workplace discrimination. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.[69]

The Court limited the applicability of its holding to a situation like the one in *Ricci*, stating that it would apply only after a promotional or hiring process has been established and employers have told applicants the selection criteria.[70] At that point, the employer "may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."[71] By implication then, a race conscious decision related to a hiring or promotional practice is only discrimination when it has been applied to specific people who have a contrary expectation interest in that process. While the process is being developed, no specific people have any particular expectations about that process, and no actual person is being judged on his or her race.

Having set forth the test, the Court applied it to the evidence submitted to the district court. The Court found that the City had demonstrated that the racial disparate impact caused by the test was significant. The pass rates for the applicants of color were about half the pass rate for the white applicants.[72] This rate differential fell well below the level the Equal Employment Opportunity Commission (EEOC) has said will demonstrate a disparate impact.[73] The EEOC has developed regulations to define what kinds of evidence can show that the negative impact of a practice on a protected group is severe enough to meet the plaintiff's burden. The regulations state that

> a selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty 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.[74]

Even if the pass rates alone had not demonstrated a significant disparate impact, the ranking and selection process would have. For example, if the list were used, the City would not have been able to consider any black applicant for a then-vacant lieutenant or captain position.[75]

Given the severity of this negative impact on applicants of color, the Court acknowledged that the City was required to look closely at its examination

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69. *Id.* at 2676.

70. *Id.* at 2677.

71. *Id.*

72. *Id.* at 2678.

73. *Id.* (citing 29 C.F.R. § 1607.4(D) (2008) and Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995-96 n.3 (1988) (plurality opinion)).

74. 29 C.F.R. § 1607.4(D) (2011).

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

process.[76] However that hard look, in the Court's view, did not provide enough evidence that the City would be unable to successfully defend the test because the test was not job related, or that the plaintiffs would be able to show that there were alternative processes that would cause less impact and still meet the City's legitimate goals.[77] The Court found that there was "no genuine dispute that the examinations were job-related and consistent with business necessity," citing the care the test's designer had taken to design the tests and the statements of various witnesses to the hearings that the tests were generally good.[78] Additionally, the fact that the City had not requested the validation study suggested to the Court that the City was not actually concerned that the tests were not job related and consistent with business necessity.[79] On the issue of other alternative processes, the Court rejected them as not viable either because they were not really available or proven to meet the City's legitimate business needs.[80]

As its last step, the Court considered what action to take on the district court's decision. It decided to not just reverse the grant of judgment in favor of the City, but to enter summary judgment in favor of the firefighters.[81] The Court's reasoning in a nutshell is this:

> The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair.
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> The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results – and threats of a lawsuit either way – the City was required to make a difficult inquiry. But its

76. *Id.*
77. *Id.*
78. *Id.* at 2678-79.
79. *Id.* at 2679.
80. *See id.* at 2679-81.
81. *Ricci*, 129 S. Ct. at 2681.

> hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.[82]

In addition to the majority opinion, there was a dissenting opinion and two concurring opinions. Because the dissent responds to the majority, and one of the concurrences responds to issues raised only by the dissent, I will describe the dissent first, and then the responding concurrence. I will end this section with a description of Justice Scalia's concurrence.

ii. Justice Ginsburg's Dissent

Justice Ginsburg's dissent approached the problem from a longer view, providing greater context for the City's action. She traced the history of discrimination by the City in its fire department and the way that current practices seemed to freeze that prior discrimination. The population of the City is nearly sixty percent black and Hispanic, and yet the leadership of its fire department is primarily white.[83] This country, and the City of New Haven, have a long history of discrimination in firefighting in particular, caused by a combination of racism and a failure by departments to use merit-based employment practices.[84] The City of New Haven had, in fact, been sued for race discrimination within the fire department.[85] And while at the time of the list's generation people of color were much better represented in the lower ranks of firefighter than they historically had been, in the senior ranks, only nine percent of officers were black and nine percent Hispanic.[86] Furthermore, the City was not limited to using a written test under civil service rules, but could have chosen from a variety of testing methods, including practical examinations like the assessment center model.[87] The City used the written and oral test only because that is what it had been doing for two decades under its contract with the firefighters' union and asked the testing company only to create that kind of test.[88]

Justice Ginsburg's dissent viewed additional facts from the City's hearings as relevant. She noted that the city's counsel emphasized that the statistical disparity alone did not create disparate impact liability for the City.[89] Testimony indicated that firefighters of color had significantly greater obstacles in getting copies of the study materials than had the white firefighters.[90]

82. *Id.*

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

84. *Id.* at 2690-91 (citing House of Representatives report supporting the amendment to Title VII that extended liability to state and local governments).

85. *Id.* at 2691; *see also* Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs, 66 F.R.D. 457, 459 (D. Conn. 1975).

86. *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting).

87. *Id.*

88. *Id.* at 2691-92.

89. *Id.* at 2692.

90. *Id.* at 2693.

Additionally, a firefighter from a nearby city testified that his city had changed the weights given the oral and written portions of the exam because the oral portion was more job related: it was able to address realistic scenarios that officers encounter.[91] This change also increased the representation of firefighters of color in leadership positions significantly.[92] Furthermore, the testimony from the testing experts casts doubt on the validity of a written exam to test performance-type positions.[93] And finally, Justice Ginsburg emphasized that the decision not to use the list was made by the Civil Service Board and that the two members who voted not to use the list stated that they were concerned that the process used to create it was flawed.[94] All of these facts demonstrated significant evidence that the process used would not satisfy the business necessity test and that there were alternatives which would serve the City's needs at least as well if not better that would not have the same impact.[95]

As a legal matter, the dissent focused on the importance of the disparate impact theory of discrimination to Title VII, faulting the majority for suggesting that the theory, and Congress' focus on the consequences of employers' conduct, not simply motivation for that conduct, was not part of that statute's original, foundational prohibition.[96] The dissent further noted that the disparate impact theory is present in the original statutory language, which prohibits any system that limits or classifies employees or applicants in a way that would tend to deprive those people of employment opportunities or other otherwise adversely affect their status.[97] Additional language in the statute prohibited the use of professionally developed ability tests if those tests' results were used to discriminate.[98] Disparate impact is designed to ensure that employers demonstrate that hiring and promotional processes bear a "manifest relationship" to the job they are used for.[99]

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91. *Id.*

92. *Ricci*, 129 S. Ct. at 2691.

93. *Id.* at 2693-95.

94. *Id.* at 2695. Even one of the board members who voted in favor of using the list seemed to agree that the process had discriminated. He simply was not sure the test was not job related or that the alternatives identified would be less discriminatory. *Id.* In fact both of the board members who voted to use the list urged the city to reform the process. *Id*. Justice Ginsburg also discussed at length the assertions of Justice Alito's concurrence regarding the facts and inferences the record supported, pointing to several allegations by petitioners unsupported by evidence admissible at trial. *Id.* at 2707-10.

95. *See Ricci*, 129 S. Ct. at 2703-07 (Ginsburg, J., dissenting).

96. *Id.* at 2696-97 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)). The *Griggs* case was a unanimous decision, showing that the Court at the time Title VII was enacted had a uniform view that disparate impact was central to Congress' goal. *See id.* at 2697.

97. *Id.* at 2696 n.2; 42 U.S.C. § 2000e-2(a)(2) (2006).

98. *Id.*; 42 U.S.C. § 2000e-2(h) (2006).

99. *Id.* at 2697-98 (explaining the stringency of the business necessity test). It was not until the late 1980s that the Court began to depart from this standard, holding by a bare majority that promotional and hiring processes need only serve the legitimate employment goals of the employer. *Id.* at 2698; Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989). Congress restored the test to its prior incarnation in 1991. *Ricci*, 129 S. Ct. 2698

Additionally, the dissent disagreed that acting to avoid a disparate impact could be viewed as disparate treatment consistent with Congress' design of Title VII.[100]

> Observance of Title VII's disparate-impact provision, in contrast [to the cases the Court draws the strong basis in evidence test from], calls for no racial preference, absolute or otherwise. The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.[101]

In fact, such a view was inconsistent with the Court's equal protection jurisprudence. While the Equal Protection Clause does not prohibit disparate impact discrimination, that prohibition in Title VII helps to promote the use of race-neutral means to increase workforce participation by people of color, a goal that the Court's equal protection precedents encourage.[102]

The test that Justice Ginsburg would have adopted would have been that an employer who discards a promotional or hiring process when the disproportionate racial impact of that process becomes evident violates Title VII only if the employer lacks good cause to believe the process would not withstand scrutiny for business necessity.[103] As Justice Ginsburg pointed out, there was no evidence to justify the sixty/forty percent ratio for the test scores as at all predictive of performance in the job.[104]

Justice Ginsburg faulted the majority for not considering the definition of disparate treatment as it has been developed through Title VII's affirmative action cases. The Court had previously held that voluntary consideration of the protected status of a person benefitted by such a plan simply was not discrimination against those not benefitted.[105] In fact, voluntary affirmative action plans that consider a protected status as one factor among others help "'eliminate[e] the vestiges of discrimination in the workplace,'" which is the ultimate goal of Title VII.[106]

(Ginsburg, J., dissenting); *see also* Civil Rights Act of 1991, 131 Pub. L. No. 102-166, 105 Stat. 1071.

100. *Ricci*, 129 S. Ct. at 2699.

101. *Id.* at 2701 (referring to Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), which invalidated a plan to lay off nonminority teachers with greater seniority that the minority teachers retained, and Richmond v. J.A. Croson, 488 U.S. 469 (1989), which rejected a set-aside program that operated as a quota for minority contractors).

102. *Id.* at 2700 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)). It does so, presumably, by prohibiting race neutral means that allow for unequal participation.

103. *Id.* at 2699.

104. *Id.* at 2699 n.5 (Ginsburg, J., dissenting).

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

106. *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting) (quoting Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616 (1987)).

Justice Ginsburg also warned that the majority's holding would seriously frustrate employer efforts to voluntarily comply with Title VII. The strong basis in evidence test, at least in the stringent form used by the majority, seemed indistinguishable from requiring an employer to prove an actual disparate impact violation against itself before it could act to prevent a disparate impact.[107] And related to that, she criticized the majority for entering judgment for the plaintiffs, not allowing the City the chance to provide evidence to meet this newly defined standard.[108] In fact, because the Equal Employment Opportunity Commission had regulations that allow employers even to take affirmative action, not simply refrain from acting, when faced with facts suggesting an actual or potential adverse impact, the City might have been able to avail itself of an affirmative defense in Title VII that provides a safe harbor to employers who have complied with EEOC regulations.[109]

iii. Justice Alito's Concurrence: A Response to Justice Ginsburg

Justice Alito's concurrence focused primarily on the factual record developed before the district court. In disparate treatment cases, when an employer offers a nondiscriminatory reason for its actions, the evaluating court must decide first whether that reason was really nondiscriminatory – which the majority in this case analyzed – and if it was, must then decide whether that reason was the real reason or instead a pretext for discrimination. Justice Alito's concurrence made that analysis.

In Justice Alito's view, a reasonable jury could find that the City was motivated by a desire to placate a politically motivated racial constituency.[110] One of the most outspoken people at the City's meetings was an African American minister, who was a leader in the community and a political supporter of the mayor.[111] Justice Alito catalogued evidence of this minister's exhortations at the meeting and influence on the mayor and the mayor's staff.[112] Justice Alito also listed facts that could suggest the mayor's staff and city attorney tailored the information presented to the City's Civil Service Board to persuade the members to discard the test results, and that the mayor made known that he would reject the Board's findings if they certified the list.[113]

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107. *Id.* at 2701-02 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring), and noting two equal protection cases— City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) and *Bush v. Vera*, 517 U.S. 952, 978 (1996)—in which the standard required only a prima facie case of a violation, something that was present here).

108. *Id.* at 2702-03.

109. *Id.* at 2703; *see also* 42 U.S.C. § 2000e-12(b) (2006); 29 C.F.R. §§ 1608.3, 1608.4 (2009).

110. *Id.* at 2683-84 (Alito, J., concurring).

111. *See id*. at 2684-85.

112. *Id.* at 2684-86.

113. *Id.* at 2686-87.

> In short, almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation. To achieve that end, the City administration concealed its internal decision but worked – as things turned out, successfully – to persuade the CSB that acceptance of the test results would be illegal and would expose the City to disparate-impact liability. But in the event that the CSB was not persuaded, the Mayor, wielding ultimate decision-making authority, was prepared to overrule the CSB immediately. Taking this view of the evidence, a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.[114]

This desire to please a politically important racial constituency played out in the form of a motive to discard the results because of the race of the successful candidates, concluded Justice Alito.[115]

iv. Justice Scalia's Concurrence: The Problem with Disparate Impact

Justice Scalia concurred in the result, but cautioned that he believed the Court would have to decide one day whether the disparate impact provisions of Title VII violate equal protection.[116] He agreed with the majority that an employer engages in disparate treatment when it evaluates the racial results of a promotional or hiring process and makes decisions based on those outcomes, and stated further that Congress cannot require employers to do this consistent with the equal protection principles embodied in the Fifth Amendment.[117] In other words, Congress cannot require employers to discriminate, and avoiding a disparate impact is discrimination.

And Justice Scalia seemed to find no difference caused by the timing of the employer's action. To him, the design of a system that avoids a disparate impact on a protected group is discrimination whether or not anyone has expectations in the use of the process yet.[118] He opined that disparate impact liability might be constitutional if the disparate impact theory was conceived of only as a means to get at intentional discrimination that is simply too hard to prove using the usual models.[119] However, in order to make the theory serve even that very limited purpose, Justice Scalia thought that employers would

114. *Id.* at 2687-88.
115. *Id.* at 2688.
116. *Id.* at 2681-82 (Scalia, J., concurring).
117. *Id.* at 2682.
118. *Id.*.
119. *Id.*.

need some kind of affirmative defense of good faith or good faith plus hiring standards that are reasonable.[120]

Justice Scalia's view is narrower than the Court's jurisprudence in other areas would suggest. The next section of this paper explores some of that in the context of the Court's recent federalism jurisprudence. The Court has suggested in the past that disparate impact is a reasonable prophylactic rule to enforce the prohibition on intentional race discrimination. It should find the same thing to be true for sex discrimination, although there are dangers to the viability of the disparate impact theory for both groups.

II. THE FEDERALISM REVOLUTION AND THE RECONSTRUCTION AMENDMENTS

Immediately after the Civil Rights Act of 1964 was enacted, the statute was challenged on the grounds that Congress could not require private parties to stop discriminating. The challengers focused on the public accommodations provisions and claimed that the statute exceeded Congress's commerce clause power and deprived it of liberty and property without due process.[121]

In *Heart of Atlanta Motel, Inc. v. United States*, the Court held that Congress could prohibit private race discrimination at least by businesses that affect interstate commerce under the Commerce Clause.[122] The Court also rejected Fifth Amendment and Thirteenth Amendment challenges. The Fifth Amendment argument was that the hotel was deprived of property without due process of law or suffered a taking because it could not refuse the customers it wished to.[123] The Thirteenth Amendment challenge was that the law forced the hotel into involuntary servitude by forcing it to serve customers it didn't wish to.[124] The Court found the latter argument particularly frivolous since the law was designed to remove the badges and incidents of slavery.[125]

After *Heart of Atlanta Motel*, Congress's power to enact Title VII was mostly settled. The bigger question was whether state action that was not intended to be discriminatory but which had discriminatory effects was prohibited by the Equal Protection clause. For a number of years, it was fairly widely believed that disparate impact was prohibited by the Equal Protection Clause.[126] The Supreme Court rejected that proposition in *Washington v. Davis*

120. *Id.*.

121. Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964).

122. *Id.* at 257-258, 261 (considering a challenge to the public accommodations provision of the Civil Rights Act of 1964).

123. *Id.* at 244.

124. *Id.*

125. *Id.* at 261.

126. *See* Washington v. Davis, 426 U.S. 229, 243-45 (1976) (detailing Supreme Court cases that seemed to recognize that and the extent of agreement among the courts of appeals); Primus, *supra* note 22, at 496. In a concurrence Justice Stevens, in fact, suggested that proof of discriminatory impact might sometimes show a violation of equal protection, not because it clearly showed a subjective motivation, but because people are presumed to intend the natural consequences of their actions. *Davis*, 426 U.S. at 253 (Stevens, J.,

in 1976.[127] There was no hint at that time that prohibiting discriminatory effects would pose a constitutional problem, and in fact, the Court seemingly approved of such a rule, but thought Congress should be the body to create it: "[E]xtension of the [disparate impact] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription."[128]

Then the focus of litigation shifted during the late 1980s and 1990s to affirmative action, and the Court's decisions in that area, taking equal protection doctrine into new formalist territory, created the tension that Richard Primus highlighted in his 2003 article, *Equal Protection and Disparate Impact: Round Three*, and Justice Scalia latched onto in his concurrence in *Ricci*. In *Wygant v. Jackson Board of Education*, a plurality of the Court stated that any consideration of race, even for benign reasons to benefit groups historically discriminated against, was subject to the same level of strict scrutiny as considerations that would harm groups historically discriminated against.[129] In *City of Richmond v. J.A. Croson Co.*, the Court struck down an affirmative action plan the city was requiring its contractors to agree to, a plan that involved minority set-asides for subcontractors, and a majority of justices finally agreed that strict scrutiny should apply.[130] In *Adarand Constructors, Inc. v. Pena*, the Court held that the Fifth Amendment's equal protection guarantee should be made identical to the Fourteenth Amendment's.[131]

Thus began the shift to impose limits on Congress' power to prohibit or remedy discrimination, a shift that gained new life when the Eleventh Amendment was reinvigorated in 1996 in *Seminole Tribe v. Florida*.[132] The story of the Eleventh amendment begins with *Chisholm v. Georgia*,[133] in which the Supreme Court allowed a citizen of South Carolina to sue the State of Georgia for money damages in federal court.[134] The Court found federal jurisdiction over the action under the plain language of Article III, which gives the federal courts jurisdiction over "[c]ontroversies . . . between a State and Citizens of another State . . . ."[135] Almost immediately, the Eleventh

concurring). He viewed the issue of intent to be a more objective assessment, like tort law recklessness or criminal law general intent. *Id.* (Stevens, J., concurring).

127. *Davis*, 426 U.S. at 245-46.

128. *Id.* at 248.

129. 476 U.S. 267, 273-74 (1986) (plurality op.); *Id.* at 285 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 295 (White, J., concurring in the judgment only).

130. 488 U.S. 469, 493, 508 (1989); *id.* at 520 (Scalia, J., concurring). The plurality rested its decision in part on the fact that a city council lacked the powers expressly given to Congress in the Fourteenth Amendment to enforce the equal protection guarantees. *Id.* at 488, 490.

131. 515 U.S. 200, 227 (1995) (overruling Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)).

132. 517 U.S. 44 (1996).

133. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

134. *Id.* at 420.

135. U.S. CONST. art. III, § 2.

Amendment was adopted.[136] The plain language of the Eleventh Amendment prohibits suits "in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or . . . of any Foreign State."[137] In *Hans v. Louisiana*, the Court read more into that language, holding that it prohibited suits in federal courts not only by citizens of foreign states but also by a citizen against his or her own state.[138] Thus interpreted, the Eleventh Amendment prohibited all actions by private parties brought in federal court both against states as parties of record and state officials in their official capacities where the state would be the real party in interest unless the states have consented to those suits or Congress has validly abrogated their immunity.

In 1972, Congress amended Title VII to apply to state and local government employers,[139] and shortly after that amendment, states challenged that as exceeding Congress' power. In *Fitzpatrick v. Bitzer*, the Court held that Congress could validly abrogate state immunity from suit under the Fourteenth Amendment and the other reconstruction amendments because they shifted power from the states to Congress.[140] The Court also concluded that Congress had exercised its power under the Fourteenth Amendment in enacting Title VII, but it did not analyze whether Title VII was valid Fourteenth Amendment legislation because the parties did not dispute it.[141]

In *Seminole Tribe*, the Court added new import to the question of Congress' power under the Fourteenth Amendment when it held that Congress could not abrogate state Eleventh Amendment immunity under the Commerce Clause, but instead could only do so under its Fourteenth Amendment powers.[142] The Court's reasoning went like this. Using a historical analysis, the Court found that state immunity from suit in federal court was part of the constitutional design and that states did not give up this immunity by ratifying the Constitution.[143] The Fourteenth Amendment altered that arrangement, however, shifting power from the states to the federal government, and thus

136. Erwin Chemerinsky described the reaction to Chisholm by state legislators and governors as outraged. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 414 (5th ed. 2007). Georgia enacted a statute making it a felony to attempt to enforce the Supreme Court's order, punishable by "death, without the benefit of clergy by being hanged." *Id.* (citing PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 810 (4th ed. 1998)). Congress passed the Eleventh Amendment within three weeks, and every state had ratified it within a year. *Id.*; *see also* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 20-21 (1987) (discussing the ratification process of the Eleventh Amendment following the Court's decision in *Chisholm*).

137. U.S. CONST. amend XI.

138. 134 U.S. 1, 20 (1890).

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

140. 427 U.S. 445, 453-56 (1976).

141. *Id.* at 452-53.

142. 517 U.S. 44, 59-66 (1996).

143. *Id.* at 64-65, 67-71.

amending both Article III and the Eleventh Amendment to the extent they were inconsistent.[144]

Thus, Congress' power under the Fourteenth Amendment became more vital, and the scope of Congress's enforcement power was fleshed out in a string of cases challenging laws that purported to abrogate state immunity. The line of cases limiting Congress' power under the Fourteenth Amendment began the year after the *Seminole Tribe* decision with *City of Boerne v. Flores*,[145] which assessed whether Congress could statutorily expand rights founded in the Constitution.[146] In *City of Boerne*, the statute at issue was the Religious Freedom Restoration Act (RFRA),[147] a congressional attempt to change the law on the First Amendment's Free Exercise clause, enacted after an unpopular Supreme Court decision, *Employment Division v. Smith*.[148] In *Smith*, the Court had held that state statutes of general applicability that did not purposefully discriminate against religious observance but only incidentally affected religious practices would be subject to rational basis scrutiny.[149] Public reaction to the seeming change in the law was strong; Congress passed the RFRA in direct response.[150] The RFRA provided that any substantial burden on religion by a neutral law would be suspect, and it required legislators to show that the statute was the least restrictive means to advance a compelling governmental interest.[151] Congress clearly stated that the RFRA was an attempt to "restore" the pre-*Smith* law on the Free Exercise Clause; thus, it was a direct challenge to the Court's interpretation of the Constitution.[152] In *City of Boerne*,

144. *Id.* at 59.

145. City of Boerne v. Flores, 521 U.S. 507 (1997).

146. *Id.* at 517.

147. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb to bb-4 (1994)).

148. Employment Div. v. Smith, 494 U.S. 872 (1990).

149. *Id.* at 878-79.

150. Maureen E. Markey, *The Price of the Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699, 728, 735-39 (1994-95).

151. *City of Boerne*, 521 U.S. at 515 (citing 42 U.S.C. § 2000bb(a), (b)).

152. In RFRA (42 U.S.C. §§ 2000bb), Congress stated:

> (1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

the Court held that Congress could not use the Fourteenth Amendment to expand rights beyond what the Court had declared them to be, nor could it create remedies out of proportion to a demonstrated record of Fourteenth Amendment violations.[153]

After *City of Boerne*, the Court continued its trend of invalidating legislation enacted under the Fourteenth Amendment. For instance, in *Florida Prepaid Postsecondary Education and Expense Board v. College Savings Bank*[154] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[155] the Court held that the Patent and Plant Variety Protection Remedy Clarification Act[156] and the Trademark Remedy Clarification Act[157] were not valid enactments under the Fourteenth Amendment.[158] It also held that two civil rights laws exceeded Congress' power under Section 5: In *Kimel v. Florida Board of Regents*,[159] the Court held that the Age Discrimination in Employment Act[160] was not congruent and proportional to any documented pattern of constitutional violations by states;[161] the Court held the same thing for Title I of the Americans with Disabilities Act[162] in *Board of Trustees v. Garrett*.[163]

In both of the civil rights cases, the Court began its analyses by looking to what the constitutional test was for discrimination on the basis of the statutes'

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42 U.S.C. § 2000bb(a). RFRA's purposes were:

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.
>
> Id. § 2000bb(b). Thus, Congress directly challenged the Court's interpretation of the Constitution.

153. *See City of Boerne*, 521 U.S. at 519–20, 536 (holding that, while Congress has broad authority under the Constitution to adopt legislation to protect Fourteenth Amendment rights, the Court retains the right to determine whether such legislation amounts to an abuse of authority under the Constitution).

154. 527 U.S. 627 (1999).

155. 527 U.S. 666 (1999).

156. Pub. L. No. 102-560, 106 Stat. 4230 (1992).

157. Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified at 15 U.S.C. §§ 1051, 1114, 1122, 1125, 1127 (1994)).

158. Fla. Prepaid Postsecondary Educ. and Expense Bd. v. Coll. Sav. Bank, 527 U.S. at 647 (involving the Patent and Plant Variety Protection Remedy Clarification Act). Coll. Sav. Bank v. Fla Prepaid Postsecondary Educ.n Expense Bd., 527 U.S. at 690-91 (involving the Trademark Remedy Clarification Act).

159. Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

160. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-34 (2006)).

161. *Kimel*, 528 U.S. at 63.

162. Pub. L. No. 101-336, Title I, 104 Stat. 327, 330-37 (1990) (codified at 42 U.S.C. §§ 12111-117 (2006)).

163. Board of Trustees v. Garrett, 531 U.S. 356, 374 (2001).

protected statuses.[164] Because both age and disability classifications received rational-basis review,[165] that is, decisions based on age and disability were presumptively valid, the statutes, which arguably made such decisions presumptively invalid, were not congruent to the Fourteenth Amendment.[166] Without a record of constitutional violations by the states, any remedy for those decisions was out of proportion to any constitutional harm.[167]

The significance of the Court's use of the constitutional test as the starting point and the importance of characterizing the statute's function became clear in *Nevada Department of Human Services v. Hibbs*.[168] In *Hibbs*, the Court found the Family Medical Leave Act (FMLA)[169] to be within Congress' Section 5 powers.[170] The FMLA requires, among other things, that employers allow employees of either sex up to twelve weeks of unpaid leave at the birth or adoption of a child or to care for a seriously ill family member.[171] Rather than characterize this as an entitlement program, which is subject to only rational-basis review, the Court characterized the family care leave provision of the FMLA as remedying discrimination on the basis of sex.[172] Allegations of sex discrimination receive heightened scrutiny under the Fourteenth Amendment.[173] Because widespread discrimination on the basis of sex had been recognized by the Court in so many cases and the remedy Congress chose to enforce the leave provisions was fairly close to what the Fourteenth Amendment would require for voluntary employer-leave policies, the Court upheld the FMLA as valid under the Fourteenth Amendment.[174]

The Court shifted its tactics a little by using an as-applied analysis in *Tennessee v. Lane*.[175] In that case, the Court upheld Title II of the ADA, which requires government bodies to provide access to government buildings and services to those with disabilities.[176] The Court found the legislation validly abrogated state sovereign immunity, at least as far as it mandated access to

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164. *Garrett*, 531 U.S. at 365; *see also Kimel*, 528 U.S. at 83-84, 86-88.

165. *Garrett*, 531 U.S. at 366; *Kimel*, 528 U.S. at 86.

166. *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91.

167. *See Garrett*, 531 U.S. at 372-73; *see also Kimel*, 528 U.S. at 88-91.

168. Nevada Dep't of Human Servs. v. Hibbs, 538 U.S. 721, 722-24 (2003).

169. Pub. L. No. 103-3, § 2, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-54 (2006)).

170. *Hibbs*, 538 U.S. at 726.

171. 29 U.S.C. §§ 2612(1) (2006).

172. *Hibbs*, 538 U.S. at 728.

173. *See id.*

174. *Id.* at 722-23. The Supreme Court will decide in its current term whether Congress had the power under the Fourteenth Amendment to allow for damages actions against states who fail to provide leave for or retaliate against employees who take leave because of their own serious health needs. Coleman v. Ct. App. Md., 131 S. Ct. 3059 (2011) (granting petition for writ of certiorari); Coleman v. Ct. App. Md., 626 F.3d 187, 193 (4th Cir. 2010) (holding that Congress did not validly abrogate state sovereign immunity in the FMLA's self-care provisions).

175. 541 U.S. 509 (2004).

176. 42 U.S.C. §§ 12131-65 (2006).

courthouses and other functions of government, which is protected under the First Amendment right to petition the government for redress of grievances and to participate in the political process.[177] Then in two bankruptcy cases, *Tennessee Student Assistance Corp. v. Hood*, and *Central Virginia Community College v. Katz*, the Court held that Congress could subject the state to suit in bankruptcy proceedings under its Article I bankruptcy powers.[178]

The Court's as-applied approach cut the other way in the Court's most recent Eleventh Amendment case, *Coleman v. Court of Appeals of Maryland*.[179] *Coleman* involved a state employee whose employment was essentially terminated after he requested leave to care for his own serious health condition.[180] He alleged a violation of the FMLA and sued the state for damages.[181] Although the Court had held in *Hibbs* that the FMLA was valid under Congress' section 5 power,[182] that case had involved an employee fired for taking leave to care for a family member.[183] The self care provision of the FMLA was not at issue in *Hibbs*.[184] Looking only at the self care provision, the Court in *Coleman* held that there was insufficient evidence that the self care provision was tied to sex discrimination or any other constitutional violations by states, and so it was not within Congress' section 5 power.[185] Notably, Justice Scalia, in a concurrence, would have held that outside of race, Congress' enforcement power is limited to regulating conduct that itself violates the Fourteenth Amendment.[186] Only Justices Ginsburg and Breyer would hold that Congress may validly abrogate state immunity from suit under its Commerce Clause powers.[187]

The Court has also taken a restrictive view of federal power in other civil rights contexts: habeas corpus jurisdiction[188] and voting rights cases.[189] And in

177. *Lane*, 541 U.S. at 509-10, 515, 523.

178. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373-79 (2006). Tn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446-51 (2004).

179. 132 S. Ct. 1327, 1333-34 (2012).

180. *See id*. at 1332-33.

181. *Id.* at 1333.

182. Nevada Dep't of Human Servs. v. Hibbs, 538 U.S. 721, 728 (2003).

183. *Id.* at 730-32.

184. *Coleman*, 132 S. Ct. at 1332.

185. *Id.* at 1334-37.

186. *Id.* at 1338 (Scalia, J., concurring).

187. *Id.* at 1339 & n.1 (Ginsburg, J., dissenting).

188. *E.g.*, Schlup v. Delo, 513 U.S. 298, 318 (1995) (expressing concern that habeas filings threatened the finality of state court judgments, implicating comity and federalism); *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244, 2255 (2006).

189. *E.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 476–85 (1996) (holding that preclearance under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1994), cannot be denied simply because a jurisdiction's voting procedures violate section 2 of the Act, *id.* § 1973); Growe v. Emison, 507 U.S. 25, 32 (1993) (recognizing that, even though federal and state courts may have concurrent jurisdiction over particular subject matter, there are circumstances in which federalism and comity concerns dictate federal abstention). *But see* Bush v. Vera, 517 U.S. 952, 1069 (1996) (5–4 decision) (Souter, J., dissenting)

a move similar to the one in *Ricci*, the Court avoided deciding whether the Voting Rights Act exceeded Congress' power in *Northwest Austin Municipal Utility District Number One. v. Holder*, issued just a week before *Ricci*.[190] Justice Thomas would have held that the statute exceeded Congress' power.[191]

While the Court has not yet analyzed whether disparate impact liability or other provisions of Title VII and related laws are consistent with Congress's powers under the Fifth Amendment, the lower courts have generally held that they are within Congress' power, usually under the Fourteenth Amendment, but sometimes under other amendments, as well. For example, in *Alaska v. EEOC*, the Ninth Circuit, en banc, upheld damages actions against state employers brought by policymaking employees for discrimination and retaliation because the state action would have violated the Fourteenth and First Amendments.[192] The Seventh Circuit held that at least for cases that would violate the Fourteenth Amendment, Congress acted validly under its Fourteenth Amendment power in extending Title VII liability to the states, in *Nanda v. Board of Trustees*,[193] and in enacting the Equal Pay Act, in *Varner v. Illinois State University*.[194] Similarly, the Eighth Circuit, in *Warren v. Prejean*,[195] upheld the retaliation provisions of Title VII as valid under the Fourteenth Amendment, in *Maitland v. University of Minnesota*,[196] held that the sex discrimination provisions of Title VII were valid, and in *Okruhlik v. University of Arkansas*,[197] held that the prohibitions on disparate treatment and disparate impact on the basis of race and sex were valid. Finally, in *In re Employment Discrimination Litigation*,[198] The Eleventh Circuit held that providing for damages for disparate impact discrimination is within Congress' powers Under the Fourteenth Amendment.[199]

Not every provision has been upheld, however. The Seventh Circuit, in *Holmes v. Marion County Office of Family and Children*,[200] held that religious accommodation provisions of Title VII were not valid under the Fourteenth Amendment because the accommodation requirement was more onerous than that imposed by the First Amendment, and the legislative history of Title VII did not reveal widespread discrimination by states on the basis of religion.[201]

(criticizing the plurality opinion for going too far in limiting state discretion under the Voting Rights Act).

190. Nw. Austin Mun. Util. Dist. No. One. v. Holder, 129 S. Ct. 2504, 2511-14 (2009). The amendment at issue was the Fifteenth, which concerns voting specifically.

191. *Id.* at 2519-27 (Thomas, J., concurring in part and dissenting in part).

192. Alaska v. EEOC, 564 F.3d 1062, 1068-71 (9th Cir. 2009).

193. 303 F.3d 817 (7th Cir. 2002)

194. 226 F.3d 927 (7th Cir. 2000)

195. 301 F.3d 893 (8th Cir. 2002)

196. 260 F.3d 959, 964 (8th Cir. 2001).

197. 255 F.3d 615 (8th Cir. 2001).

198. 198 F.3d 1305 (11th Cir. 1999).

199. *Id.* at 1318-24.

200. 349 F.3d 914 (7th Cir. 2003).

201. *Id.* at 919-22.

Were the Court to take up the validity of Title VII's disparate impact provision, the outcome may well depend on the case. The Court has been approaching these issues in the last few cases in a very narrow way, looking only to the statute's validity as applied to the particular case before the Court. Thus, where the disparate impact theory is used to get at cases where intent is too difficult to prove, but which are really disparate treatment kinds of cases, Justice Scalia suggested that disparate impact would be a theory that could shift the burden to an employer to disprove that protected class played a role in the decision. It would seem that situations in which employment decisions are left to the wholly subjective discretion of a supervisor might be the kind of case that this would apply to, but Justice Scalia's outright refusal to even consider the issue in *Wal-Mart v. Dukes* suggests that he is thinking of some other type of situation.[202] The prohibition on disparate treatment does not appear to be in constitutional danger. The government acts consistently when it refrains from or prohibits classification on the basis of race and sex, at least, and so Congress likely has the power to order private parties to refrain from classifying on the basis of race and sex. Moreover, the commerce clause still forms a basis to support that prohibition, and unless the Court holds that refraining from discrimination is also discrimination, there does not seem to be a way to create a conflict with the equal protection guarantees of the Fifth Amendment.

As for the form of disparate impact recognized in *Griggs*, and further codified by the Civil Rights Act of 1991, the analysis should be similar to the analysis of Congress's powers under the Fourteenth Amendment in the Eleventh Amendment cases. There are a couple of differences, though. On the one hand, federalism concerns, which would limit Congress's power would not be present because the focus of the law is on private parties, although it applies to states as well. On the other hand, the special grant of power to Congress and away from the states is not relevant, or at least not relevant in the same way that it was in the Eleventh Amendment context. And finally, the Thirteenth Amendment would be an additional source of power over private parties. In short, Congress would seem to have *more* power to create rules to govern the conduct of private parties than it has to govern the conduct of states.

The content of the equal protection norm contained in the Fifth Amendment must be informed by the content of that norm in the Reconstruction Amendments. Whatever the original content of the Fifth, when the Reconstruction Amendments were adopted, they amended the Fifth, just as they amended article III and the Eleventh Amendment. Moreover, Congress should have considerably more power to provide for judicial remedies against private parties because private parties have fewer constitutional protections

202. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (recognizing that discrimination that resulted from wholly subjective decision-making unbound by guidance could be actionable under a disparate impact theory of discrimination despite the fact that we usually think of decisions as being subject to disparate treatment analysis). These cases may be nearly impossible to bring, though, after the Court's decision in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). In that case, Justice Scalia expressed skepticism that supervisors would exercise that discretion to discriminate.

from litigation than do states. There is no constitutional immunity from suit that private parties have comparable to the immunity from suit that states have.

Congress should be able to create individual rights or rights to judicial remedies under any of its enumerated powers so long as those rights are necessary and proper to carry out its enumerated powers. It is true that Congress's power is limited by the Fifth Amendment's guarantees of due process, which include now an equal protection component, but that amendment cannot limit Congress's power to enforce the substantive guarantees of the Reconstruction Amendments. To the extent those might conflict, the later adopted amendments must control.[203] Additionally, Congress gets some leeway to decide how best to enforce the guarantees of those constitutional provisions. As long as the remedy provided is congruent and proportional to a record of injuries, Congress can provide for prophylactic rules that exceed the remedies the Court has provided directly under the constitution.[204]

This legislative record is full of testimony about private employers refusing to hire people who were not white, limiting them to the hardest and least prestigious work, paying them less, and segregating their workforces.[205] More was noted in the legislative record leading to the Equal Employment Opportunity Act of 1972, which gave the EEOC the power to enforce Title VII.[206] This record also detailed discrimination on the basis of sex, which was mostly missing from the legislative history of Title VII.[207] Certainly the kind of exploitation of workers that these practices represent and the resulting dependency that a permanent racial underclass or a permanent sexual underclass would lead to would be the kinds of things the Thirteenth Amendment would reach.[208]

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203. *See* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

204. *See* S. Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

205. *See generally* H.R. REP. NO. 88-914, *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2147-51 (1968) [hereinafter LEGISLATIVE HISTORY OF TITLE VII]; H.R. REP. NO. 87-1370, *reprinted in* LEGISLATIVE HISTORY OF TITLE VII, *supra* at 2155-61.

206. *E.g.* H.R.REP. NO. 92-238, at 3-5, 22-25 *reprinted in* SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 63-65, 83-85 (1972) [hereinafter 1972 AMENDMENTS HISTORY]; 117 CONG. REC. 8457-85 (1971), *reprinted in* 1972 AMENDMENTS HISTORY, *supra* at 240-41; 117 CONG. REC. 8517-42 (1971), *reprinted in* 1972 AMENDMENTS HISTORY, *supra* at 258-61, 269-70, 275, 290-93, 295, 297; S. REP. NO. 92-415, at 6-8, 10-17, *reprinted in* 1972 AMENDMENTS HISTORY, *supra* at 415-17, 419-26; 117 CONG. REC. 79-102 (1972), *reprinted in* 1972 AMENDMENTS HISTORY, *supra* at 585-86.

207. *E.g.* 117 CONG. REC. 8517-42 (1971), *reprinted in* 1972 AMENDMENTS HISTORY, *supra* note 206, at 274-76, 293, 295, 297, 299; S. REP. NO. 92-415, *reprinted in* 1972 AMENDMENTS HISTORY, *supra* note 206, at 415-17, 419-26; 117 CONG. REC. 79-102 (1972), *reprinted in* 1972 AMENDMENTS HISTORY, *supra* note 206, at 586.

208. *See, e.g.*, Alexander Tsesis, *Furthering American Freedom: Civil Rights and the Thirteenth Amendment*, 45 B.C. L. REV. 307 (2004) (arguing that the Thirteenth Amendment should be viewed as a source of authority for civil rights legislation); Rebecca E. Zietlow,

Given the anti-subordination goals of the Thirteenth Amendment, it may actually prohibit disparate impact discrimination by itself.[209] But at the least, that Amendment, which gives Congress specific powers of enforcement just like section 5 of the Fourteenth Amendment, in combination with the extensive record of subordination of women and people of color in employment, would allow Congress to prohibit disparate impact discrimination in employment as a means to put a greater burden on employers to insure against discrimination in its employment practices whether carried out by actors fully self-aware of their discriminatory purposes or practices that were not necessary for job-related reasons that inadvertently burdened members of groups historically subordinated.

III. THE DANGERS TO DISPARATE IMPACT THAT NONETHELESS REMAIN

Thus, in line with the Court's analyses of other statutes and Congress's power under the Fourteenth Amendment, the disparate impact provision seems to be within Congress's power under it, under the Fifth Amendment as modified by the Fourteenth, and under the Thirteenth Amendment. Even so, there is still some risk that the Court might not accept this analysis.

Where the Court has upheld statutes that create rights beyond what the Constitution would require, it has generally done so at times relatively close to that of the legislation's adoption.[210] And time may matter.[211] In *South Carolina v. Katzenbach*, for example, the Court found that Congress could, in the Voting Rights Act, prohibit conduct the Constitution would permit, in part because the Act was limited in time, that provision was limited in geography, and the remedy was limited to the most egregious practices.[212] Decades have passed since Congress made a legislative record documenting widespread

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Free at Last! Anti-Subordination and the Thirteenth Amendment, 90 B.U. L. REV. 255 (2010) [hereinafter Zietlow, *Free at Last*] (arguing that the Thirteenth Amendment embodies an anti-subordination principle that gets beyond formal equality and protects workers); Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. PA. J. CON. L. 1269, 1282-83, 1286-88 (2009) (arguing that the Thirteenth Amendment embodied citizenship rights that were thought to embody all human rights including the right to make and enforce contracts without regard to race).

209. *See* Zietlow, *Free at Last*, *supra* note 208, at 311-12.

210. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), was decided in 1976, just over a decade after Title VII was originally enacted and only a few years after the 1972 amendments which documented more continuing discrimination. Nevada Dep't of Human Res. v. Hibbs was decided in 2003, just a decade after the Family and Medical Leave Act was enacted.

211. *See* Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 37 IND. L. REV. 345, 347, 363-69 (2004) (suggesting that legislation's validity under the Fourteenth Amendment may expire over time).

212. S. Carolina v. Katzenbach, 383 U.S. at 328-29; *see also* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 782-83 (1998) (using *Katzenbach* to argue that time must matter).

discrimination. It is possible the Court would not see a continuing need for more prophylactic remedies.

And continuing the theme of change with the passage of time since the civil rights era, there are a number of additional tensions in the employment discrimination context that only seem to grow. It is not clear, for example, how this view of disparate impact as discrimination can be reconciled with prior Supreme Court opinions upholding voluntary affirmative action by employers as not discrimination.

In the end, much in this area seems to be about framing the issues – a task that is harder for supporters of Title VII with the passage of time because even if at one time we had consensus, we no longer do on fundamental issues like what discrimination is and what form of equality is embodied by the concept of equal protection; whether disparate impact is actually discrimination – or at least discrimination that should be illegal; whether disparate impact is a form of affirmative action or a guard against disparate treatment; whether affirmative action is insurance against discrimination, a remedy for past discrimination, or a remedy for social discrimination; and whether there is a tension between group-based harms and individual harms and if so, how to balance that tension.

When the Court first issued its decision, the reaction of scholars and practitioners in the area was somewhat unusual. Often, people in this area divide along client-focused lines into a labor side and a management side. The *Ricci* case presented an unusual convergence of interests because the employer here sided with the usually disadvantaged group of employees. So most of those who are usually labor side advocates had aligned with management side advocates in urging the Court to affirm the lower court's decision. When the decision was issued, both labor and management advocates bemoaned the result.[213] The split in opinion on this case was along a different fault line: strict legal formalists and everybody else.

Based on the Court's recent decisions in the context of higher education, particularly Justice Roberts' statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" in a recent voluntary desegregation case,[214] the resort to formalism in the employment discrimination context should not have been surprising. And yet for many scholars at least, it was, primarily because most of us did not think of the City's actions as being caused by the races of the test takers who had done well. And disparate treatment law generally requires that an actor act "'because of,' not merely 'in spite of,'. . . adverse effects upon an identifiable group" to be considered to have a discriminatory purpose.[215]

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213. *E.g.*, Robert Barnes, *Justices Rule for White Firemen in Bias Lawsuit*, WASH. POST, June 30, 2009, at A1; Jess Bravin & Suzanne Sataline, *Ruling Upends Race's Role in Hiring*, WALL ST. J., June 30, 2009, at A1; John J. Myers, *Bias Ruling Creates Confusion for Employers*, PITTSBURGH POST-GAZETTE, Aug. 18, 2009, at A7.

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

215. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

We may have come to expect the use of a color-blind or strictly formalist approach when a government considers race as a factor in the promotional process, so that even though that approach has not been imported into Title VII, its importation would not have been surprising. But, this was not a traditional affirmative action case, where the employer explicitly uses race as a criteria for hiring or promotion. In fact, if you believe the City's defense that it had a good faith belief that the test caused a disparate impact, a contention that the Court accepted, the race of the successful test takers was considered only as a point of comparison to the race of the *unsuccessful* test takers. To get to the conclusion that the majority reached, then, required several steps, none of which was a foregone conclusion.

If we accept the City's contention about its motivation, its thought process would have looked like this: 1. City leaders know the results of the exams and the breakdown of candidates by race; 2. City leaders deduce that the black and Hispanic applicants passed at a rate of half or less than the rate at which white applicants passed and that they are ranked respectively lower; 3. City leaders are concerned that the results are not likely to have occurred by chance and so are concerned that the process at least looks like it has caused a disparate racial impact; 4. the City leaders know they will be sued if the process has caused a disparate racial impact or even looks like it has; 5. the City decides not to use the results of the process based on a desire not to get sued for the disparate racial impact.

The last step, to infer that a desire not to get sued for a disparate racial impact action is by definition a desire to use race as the single criterion for acting, is a bit of a stretch. To conclude that the results of the process were discarded because of race of the plaintiffs, the majority had to equate the desire *not to discriminate against two groups* (or at least not to get sued for discrimination) with a desire *to discriminate against another group*. In other words, that knowledge of the races of individuals or race consciousness automatically equated with race discrimination. As a normative matter, this premise is troubling. To say that concern over the possibility of a discriminatory effect is itself a discriminatory motive seems to create a terrible theory of discrimination, a moral equivalence that automatically pits groups against one another in zero-sum fashion in competition for jobs.

We have come a long way in the more than forty years since Title VII was enacted. Race is becoming less salient with every new generation of workers. A decision by the Court equating Title VII compliance efforts with discrimination is likely to reverse that trend. And if that trend is reversed, not only do we freeze our progress toward racial justice where we are, or perhaps move backwards, but we also make race something always to be contested, a zero-sum game, with every promotion given to a person of color an injury to a white person. Suggesting that white people are injured when an employer decides not to act out of concern that the action would discriminate reinforces the notion that white people have some sort of greater entitlement to jobs or promotions

than do people of color.[216] It creates an incentive for white people to resist employer compliance with Title VII, and it creates an incentive for white people to resist social advancement of people of color in other settings as well. Such an incentive would take racial politics back to the 1960s or before.[217]

The Court's decision thus represents implicit rejection of the basis for the Court's early decisions on Title VII, that discrimination in employment was common, that absent some other good explanation for an adverse action, discrimination was a reasonable explanation for it, and that without incentives, employers would not look critically at what was really required to perform a job and whether this individual could do that. Instead, they could rely on old proxies for fitness without examining them critically. Now it seems that the Court is concluding that discrimination against people of color is rare and assertions of discrimination are suspect, and that the continued lack of attainment by people of color is because of limitations in those people, not obstacles in the system. And that worldview likely really drove the decision. Much of the Court's discussion shows a number of such background assumptions: that written tests are valid predictors of merit regardless of the type of job, at least when designed by testing experts; that efforts to make a test race neutral are more important than the effects of the test; and when distinctions based on race are made, white people are injured.[218]

This latter point is especially interesting in this case, because it demonstrates perhaps the biggest weakness in the majority's approach, at least from a conservative viewpoint – that it was not color blind or formalist at all. The Court's usual formalist approach looks first to the explicit distinctions an employer makes. If the employer does not make a distinction explicitly using a protected status, then the distinction will not be "because of" that protected status at first glance. A plaintiff may prove that the non-protected-class criterion was actually used as a proxy to target people in the protected class, but usually that criterion has to line up perfectly with the protected class.[219] And so discrimination on the basis of pregnancy, itself not gender per se, was not discrimination on the basis of sex because even though only women could be pregnant, the non-pregnant category included both men and women.[220] Here, the City's explanation that it feared a disparate impact suit was not race per se. Moreover, applicants who would have been promoted had the list been used

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216. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that an employer is prohibited under Title VII to require a passing of a standardized general intelligence test as a condition of transfer to jobs which had been filled only by white employees as part of a long-standing practice of giving preference to white, where the test was not shown to be significantly related to successful job performance).

217. *See Parents Involved in Cmty. Sch.*, 551 U.S. at, 787-90 (Kennedy, J., concurring).

218. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 118, 143 (2010).

219. *Cf.* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (describing age and pension status as correlated but analytically distinct).

220. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (quoting Geduldig v. Aiello, 417 U.S.484, 496-97 n.20 (1974)).

included applicants from all backgrounds, and the pool of those who would get a second chance at promotion if the list were discarded also included members from all backgrounds. There was no strict formal separation on the basis of race.

The Court's decision also presents a number of other doctrinal problems. Before this decision, the employer's reason and whether that proffered reason was a pretext for discrimination were viewed as subjective matters. The question was not whether the employer's reason was correct as an absolute matter, but whether the employer honestly believed in the truth of the reason.[221] While the Court insisted that it was not dealing with the subjective motivation of the City, its opinion reveals some significant sleight of hand, essentially getting to the subjective issue without admitting it. By focusing on the amount of evidence that the City had before it and requiring such evidence to be "substantial," the Court implicitly suggested that it did not believe that the City was actually motivated by a fear of disparate impact liability. Why else discuss how easy it would be for an unscrupulous employer to use the fear of litigation as a pretext for making decisions based on race alone?[222] If the Court were really concerned that the claim would be easy to use as a pretext, it could have analyzed the case as involving pretext instead of trying to expand the definition of discrimination. Alternatively, the Court could have suggested that the appropriate analytical tool was to analyze the City's actions as causing a disparate impact on the white firefighters. Both of these are strategies used when neutral appearing reasons are actually covers for intentional use of a protected status as a qualification.

If the Court had been consistent with prior cases and treated the issue as a question of pretext, though, it would not have been able to enter summary judgment for the plaintiffs. The only question that would have remained was whether the defendants honestly believed that the process might cause an illegal disparate impact sufficient to provoke litigation and whether they wanted to avoid that result, or instead whether the defendants desired to deny promotions to the plaintiffs *because* they (or at least the majority of them) were white. In other words, the question would be whether the defendants used race or a race linked criterion as a proxy for fitness for promotion. That is a factual question. If we take the majority's acceptance of the City's reason or Justice Ginsburg's view of the facts, the Court would have had to affirm the grant of summary judgment. There was simply no evidence that the City decision makers acted because the most successful candidates were white, and they did not want white firefighters to get promoted. And even if we take Justice Alito's view of the facts, reaching that question would have still have required the Court to remand the case to the district court for trial on the issue of pretext. Justice Alito emphasized that a reasonable jury *could* find that the fear of a disparate impact suit was simply a pretext for placating a vocal racial

221. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 86-87 (C. Geoffrey Weirich et al. eds., 4th ed. 2007).

222. *Ricci*, 129 S. Ct. at 2675.

constituency; he does not say that he would have held as a matter of fact that this was the City's actual motivation.[223]

Other doctrinal problems created by the case relate to the series of inferences the Court had to have made to conclude that the City was motivated to not use the list because of the race of the successful candidates. First, the Court makes something of a leap between knowledge of the races of the applicants and a desire to act because of race alone. The Court may have made it easier for plaintiffs to prove discrimination. A plaintiff may be able to prove disparate treatment by proving that the defendant knew the plaintiff's protected status and made an adverse employment action injuring that plaintiff, because making a decision in light of that knowledge made the decision "because of" the protected status.[224] Similarly, it is possible that the Court has recognized some kind of transferred intent that benefits anyone injured by an adverse employment action that was motivated by race, regardless of whether the race of the plaintiff was what motivated the employer.[225] And so, for example, the black and Hispanic firefighters who would have been eligible for a promotion apparently have a cause of action for disparate treatment in this case because the city was motivated in the Court's view by the race of the white firefighters. Similarly, if the city had decided not to use the list because some black or Hispanic firefighters might be eligible for promotion, and they did not want to promote anyone of those races, all of the white firefighters would also have a cause of action for failure to promote.

An additional doctrinal problem is posed by the fact that the City at least said it was trying to voluntarily comply with Title VII. The goal of Title VII is to eradicate discrimination, to change the social norms so that people no longer engage in acts that discriminate on the basis of race, in other words, to avoid the harm of discrimination.[226] As a part of that effort, this Court has recognized that employers must be given incentives to voluntarily comply with the statute.[227] To say that an action taken to avoid discriminating is itself discrimination may make such voluntary compliance efforts incredibly more difficult if not impossible.

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223. Ricci, 129 S. Ct. at 2688 (Alito, J., concurring). Arguably, even under Justice Alito's version of the facts, judgment would have to be affirmed for the City. Justice Alito engages in his own sleight of hand, seemingly admitting that being motivated by racial politics is not itself race discrimination, but asserting that in this case, the City pandered to a racial politics by engaging in intentional discrimination. *Id.* This seems to dodge the question of subjective motive, which Justice Alito claimed to be addressing, by hiding behind the new definition of discrimination crafted by the Court, which begs the question of *how* pandering to racial politics was in this case using race as the main criterion for fitness for promotion.

224. Michael J. Zimmer, *Ricci's "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1259 (2010).

225. Kerri Lynn Stone, *Ricci Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 751, 752 (2009).

226. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

227. *See, e.g.*,. Faragher v. City of Boca Raton, 524 U.S. 775, 806-07 (1998).

CONCLUSION

As the doctrinal problems described above show, the Court's decision in *Ricci* raises more questions than it answers about where the law against employment discrimination is headed in the future. Taken in the context of other recent cases, the Supreme Court's decisions seem to be viewing the issue of discrimination in ever more simplistic terms, and the majority of Justices seem to be viewing individual claims of discrimination by groups historically discriminated against with increasing skepticism. Whether or not American society is truly post-race or post-sex, it seems that the majority of Supreme Court Justices are.

It is not only their view of sex and race relations that seems narrow, however. At least a sizeable minority of the Justices seem to view government power, at least in some contexts, in very narrow terms. The majority of Justices essentially held in *Ricci* that there were limits on the way private employers can act as they scrutinize their employment practices to root out barriers to equal opportunity. More importantly, the Court viewed that mandate to scrutinize employment practices with substantial disdain. It may not be that large a step to Justice Scalia's suggestion that Congress is limited in how it can address discrimination. Thus, Justice Scalia's concern about Congress's power to prohibit discriminatory effects in the private sector is just one example of the many dangers faced by our laws against employment discrimination.