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BACK TO COLOR BLINDNESS:
RECENT DEVELOPMENTS IN RACE DISCRIMINATION LAW IN THE UNITED STATES

BY MARCIA L. MCCORMICK*

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.
>
> --*Justice Oliver Wendell Holmes, Jr.*[1]

I. INTRODUCTION

The United States has a long and somewhat conflicted history of espousing egalitarian values and yet tolerating a certain level of subordination of particular groups to a greater or lesser extent at the same time. Like many countries, it struggles with reconciling the goals of equality, pluralism, and liberty, and the balance has been struck differently at different times. In the current wave of such efforts, the Supreme Court is marking an increasingly formalist approach to the question of discrimination, while Congress appears to be pushing a slightly more substantive approach to discrimination.

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 to the United States Constitution. Additionally, several federal statutes also prohibit discrimination in employment, housing, public accommodations, and education, for example, and most states also have constitutional and statutory prohibitions, as well. Over time, the content of the antidiscrimination norm has been fleshed out in Supreme Court decisions, Congressional debates, and in the media somewhat sporadically. The commitment to racial equality is very present in the public consciousness[2] 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 race discrimination in employment has not been in the forefront of public debate the way it had been in earlier years.

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[1] Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

[2] 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 the last two years. 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.

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, and early cases in the 1970s concerning that statute focused on what practices constituted discrimination on the basis of race. In a wave following those cases, employment 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. Since then, most cases and legislation involving employment discrimination have concerned discrimination on the basis of sex or the more technical and procedural aspects of litigating the issue. And while there had been significant litigation concerning race in the education context, the content of the norm prohibiting racial discrimination in employment had not been addressed by the Supreme Court in many years.

At the end of its most recent 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*.[3] The Court took a decidedly formalist turn, instituting a color-blind standard to define discrimination under Title VII at least in some circumstances.

II. BACKGROUND OF *RICCI V. DESTEFANO*

The case arose from the process used by the City of New Haven, Connecticut to promote firefighters to lieutenant and captain. The 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.[4] The list was created through an examination process, which included both a written and an oral examination, designed by a professional testing company.[5] Sixty percent of the final score was determined by the written test score, and forty percent by the oral test score.[6] The applicants who scored a certain passing minimum were put on the list in rank order from highest to lowest score.[7]

After the tests were administered and the applicants for promotion ranked, City leaders noticed that the highest scores were held by white applicants at a rate disproportionate to their numbers in the applicant pool.[8] Sixty-four percent of the white applicants who took the test for promotion to captain passed, while just under thirty-eight percent of black and Hispanic applicants passed.[9]

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

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[3] 129 S. Ct. 2658 (2009).
[4] *Id.* at 2665.
[5] *Id.* at 2665-66.
[6] *Id.* at 2665.
[7] *Id.*
[8] *See id.* at 2666.
[9] *Id.*

determine whether the list should be used.[10] At those hearings, a number of witnesses testified, some in favor of using the list,[11] some taking no position on using it,[12] and some against using it.[13] Several witnesses, including the test's designer, testified that they believed the test was fair overall,[14] some testified about racial disparities in written tests generally,[15] and some testified about alternative ways to measure qualifications, from weighing the portions of the test differently to entirely different processes.[16] 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—the vote was tied—the list was discarded.[17]

Several white and one Hispanic firefighter sued the City in federal court, arguing that discarding the test results discriminated against them on the basis of race in violation of the Equal Protection Clause of the United States Constitution and Title VII of the Civil Rights Act of 1964.[18] 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.[19] 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.[20]

The district court granted the City's motion. 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,"[21] which meant that the City had not violated

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[10] *Id.* at 2666-71.

[11] 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.

[12] 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. *Id.* 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. *See* 2669.

[13] 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.*

[14] *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 id.* 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).

[15] *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).

[16] 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 suggesting adjusting the ratios or otherwise adjusting the final scores in some way to negate the effects of the disparity. *Id.* at 2667.

[17] *Id.* at 2671.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Ricci v. DeStefano, 554 F. Supp. 2d 142, 160 (D. Conn. 2006).

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.[22] The firefighters appealed, and the intermediate appellate court affirmed the decision of the trial court.[23] The firefighters sought review of the decision by the Supreme Court, which agreed to consider the case and issued its decision at the end of the term.

III. THE COURT'S 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.[24] The Court further held that the City lacked this substantial basis in evidence.[25] Because it had reversed the lower court on statutory grounds, the Court declined to analyze the equal protection issue.[26] Justices Scalia[27] and Alito[28] wrote separate concurrences, and Justice Ginsburg wrote a dissenting opinion.[29]

A. The Majority Opinion

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;[30]

This provision is generally thought to prohibit disparate treatment, also called intentional discrimination.[31] To prove disparate treatment, a plaintiff must show that an employer has treated

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[22] *Id.* at 161-62.
[23] Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008). 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 (2d Cir. 2008).
[24] *Ricci*, 129 S. Ct. at 2673-76.
[25] *Id.* at 2678-81.
[26] *Id.* at 2672, 2681.
[27] *Id.* at 2681 (Scalia, J., concurring).
[28] *Id.* at 2683 (Alito, J., concurring).
[29] *Id.* at 2689 (Ginsburg, J., dissenting).
[30] 42 U.S.C. § 2000e-2(a)(1) (2008). 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) (2008).
[31] *See Ricci*, 129 S. Ct. at 2672.

that plaintiff less favorably than other person because of the plaintiff's protected status, in a case like *Ricci*, because of the plaintiff's race.[32]

Title VII also prohibits disparate impact discrimination, or discrimination in effects:[33]

> 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.[34]

When a plaintiff proves that an employer's neutral practice has a disproportionate negative effect on the plaintiff's protected group, an employer can defend that neutral practice by demonstrating that the practice is "job related for the position in question and consistent with business necessity."[35] 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.[36]

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.[37] In the Court's words, "[t]he City rejected the tests results because the higher scoring candidates were white."[38] 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. 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.[39]

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.[40] Under the Equal Protection Clause, a government employer can engage in race-based

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[32] *Id.*; *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (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 (1976) (holding that discriminating against pregnancy was not discrimination "based upon gender as such").
[33] *See* 42 U.S.C. §§ 2000e(a)(2), (k) (2008); Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[34] 42 U.S.C. § 2000e(a)(2) (2008). 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) (2008).
[35] *Id.* § 2000e(k)(1)(A)(i).
[36] *Id.* § 2000e(k)(1)(A)(ii).
[37] *Ricci*, 129 S. Ct. at 2674.
[38] *Id.*
[39] *Id.* at 2675.
[40] *Id.*

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.[41] The Court stated that such a standard was appropriate to balance the competing interests at stake. 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 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.[42]

The Court limited the applicability of the test to a situation like the one in *Ricci*, holding that it would apply only after a promotional or hiring process has been established and employers have told applicants the selection criteria. 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."[43] In other words, a race conscious decision related to a hiring or promotional practice is only discrimination when it has been applied to specific people who have an expectation 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.[44] This rate differential fell well below the level the Equal Employment Opportunity Commission (EEOC) has said will demonstrate a disparate impact. 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 (4⁄5) (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.[45]

And 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 be able to consider any black applicant for a then-vacant lieutenant or captain position.[46]

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[41] *Id.* (citing Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[42] *Id.* at 2676.
[43] *Id.* at 2677.
[44] *Id.* at 2678.
[45] 29 C.F.R. § 1607.4(D) (2009).
[46] *Ricci*, 129 S. Ct. at 2678.

Given the severity of this negative impact on applicants of color, the City was required to look closely at its examination process, in the Court's view.[47] However that hard look did not provide enough evidence that the test was not job related or that there were alternative processes that would cause less impact and still meet the City's legitimate goals, in the Court's view.[48] 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.[49] 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.[50] 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.[51]

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.[52] 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.
>
> 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 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.[53]

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[47] *Id.*
[48] *See id.*
[49] *Id.* at 2678-79.
[50] *Id.* at 2679.
[51] *See id.* at 2679-81.
[52] *Id.* at 2681.
[53] *Id.*

In addition to the majority opinion, there were two concurring opinions and one dissent. I'll describe each of them in turn in the sections that follow.

B. Justice Scalia's Concurrence

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 the Equal Protection Clause.[54] If 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, then Congress cannot require employers to do this consistent with the Equal Protection Clause. 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.[55] 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.[56] However, in order to make the theory serve that purpose, Justice Scalia thought that employers would need some kind of affirmative defense of good faith or good faith plus hiring standards that are reasonable.[57]

C. Justice Alito's Concurrence

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 is, 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.[58] 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. Justice Alito catalogued evidence of this minister's exhortations at the meeting and influence on the mayor and the mayor's staff.[59] 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.[60]

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[54] *Id*. at 2681-82 (Scalia, J., concurring).
[55] *Id*. at 2682 (Scalia, J., concurring).
[56] *Id*. (Scalia, J., concurring).
[57] *Id*. at 2682-83 (Scalia, J., concurring).
[58] *Id*. at 2683-84 (Alito, J., concurring).
[59] *Id*. at 2684-86 (Alito, J., concurring).
[60] *Id*. at 2686-87 (Alito, J., concurring).

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 decisionmaking 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.[61]

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.

D. Justice Ginsburg's Dissent

Justice Ginsburg's dissent approached the problem from a different position, providing greater context for the City's action. The population of the City is nearly sixty percent black and Hispanic, and yet the leadership of its fire department is primarily white.[62] This country has 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.[63] The City of New Haven had, in fact, been sued for race discrimination within the fire department.[64] And while people of color are much better represented in the lower ranks of firefighter than they historically were, in the senior ranks, only nine percent of officers are black and nine percent Hispanic.[65] Furthermore, the City was not limited to using a written test, but could have chosen from a variety of testing methods including practical examinations like the assessment center model under civil service rules.[66] 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.[67]

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

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[61] *Id.* at 2687-88 (Alito, J., concurring).
[62] *Id.* at 2690 (Ginsburg, J., dissenting).
[63] *Id.* at 2690-91 (Ginsburg, J., dissenting) (citing House of Representatives report supporting the amendment to Title VII that extended liability to state and local governments).
[64] *Id.* at 2691 (Ginsburg, J., dissenting); *see also* Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs, 66 F.R.D. 457 (D. Conn. 1975).
[65] *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting).
[66] *Id.* (Ginsburg, J., dissenting).
[67] *Id.* at 2691-92 (Ginsburg, J., dissenting).

disparate impact liability for the City.[68] Testimony indicated that firefighters of color had significantly greater obstacles in getting copies of the study materials than had the white firefighters.[69] 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. This change also increased the representation of firefighters of color in leadership positions significantly.[70] Furthermore, the testimony from the testing experts cast doubt on the validity of a written exam to test performance-type positions.[71] 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.[72] 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.[73]

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.[74] 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 that person of employment opportunities or other otherwise adversely affect his or her status.[75] Additional language in the statute prohibited the use of professionally developed ability tests if those tests results were used to discriminate.[76] 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.[77]

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[68] *Id.* at 2692 (Ginsburg, J., dissenting).
[69] *Id.* at 2693 (Ginsburg, J., dissenting).
[70] *Id.* (Ginsburg, J., dissenting).
[71] *Id.* at 2693-95 (Ginsburg, J., dissenting).
[72] *Id.* at 2695 (Ginsburg, J., dissenting). 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.* (Ginsburg, J., dissenting). In fact both of the board members who voted to use the list urged the city to reform the process. *Id.* (Ginsburg, J., dissenting).

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 (Ginsburg, J., dissenting).
[73] *See id.* at 2703-07 (Ginsburg, J., dissenting).
[74] *Id.* at 2696-97 (Ginsburg, J., dissenting) (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.
[75] *Id.* at 2697 n.2 (Ginsburg, J., dissenting); 42 U.S.C. § 2000e-2(a)(2) (2008).
[76] *Id.* (Ginsburg, J., dissenting); 42 U.S.C. § 2000e-2(h) (2008).
[77] *Id.* at 2697-98 (Ginsburg, J., dissenting) (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 process serve the legitimate employment goals of the employer. *Id.* at 2698 (Ginsburg, J., dissenting); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Congress restored the test to its prior incarnation in 1991. *Ricci*, 129 S. Ct. 2698 (Ginsburg, J., dissenting); *see also* Civil Rights Act of 1991, 131 Pub. L. No. 102-166, 105 Stat. 1071.

Additionally, the dissent disagreed that acting to avoid a disparate impact could be viewed as disparate treatment consistent with Congress' design of Title VII.[78]

> 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.[79]

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.[80]

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.[81] 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.[82]

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 not labeled voluntary considerations of the protected status of a person benefitted by such a plan discrimination against those not benefitted.[83] 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.[84]

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

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[78] *Ricci*, 129 S. Ct. at 2699 (Ginsburg, J., dissenting).
[79] *Id.* at 2701 (Ginsburg, J., dissenting) (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).
[80] *Id.* at 2700 (Ginsburg, J., dissenting) (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.
[81] *Id.* at 2699 (Ginsburg, J., dissenting).
[82] *Id.* at 2699 n.5 (Ginsburg, J., dissenting).
[83] *Id.* at 2700 (Ginsburg, J., dissenting).
[84] *Id.* (Ginsburg, J., dissenting) (quoting Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616 (1987)).

disparate impact.[85] 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.[86] 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.[87]

IV. THE IMPACT OF *RICCI*

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.[88] 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,[89] 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 conceive 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.[90]

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.

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[85] *Id.* at 2701-02 (Ginsburg, J., dissenting) (citing *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring), and noting two equal protection cases—*Croson*, 488 U.S. at 500 and *Bush v. Vera*, 517 U.S. 952 (1996)—in which the standard required only a prima facie case of a violation, something that was present here).
[86] *Id.* at 2702-03 (Ginsburg, J., dissenting).
[87] *Id.* at 2703 (Ginsburg, J., dissenting); *see also* 42 U.S.C. § 2000e-12(b); 29 C.F.R. §§ 1608.3, 1608.4 (2009).
[88] *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. Meyers, *Bias Ruling Creates Confusion for Employers*, PITTSBURGH POST-GAZETTE, Aug. 18, 2009, at A7.
[89] Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
[90] Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

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 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.[91] 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.[92]

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

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[91] *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[92] *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 787-90, 127 S. Ct. 2738, 2788-97 (2007) (Kennedy, J., concurring).

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.[93]

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.[94] 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 nonpregnant category included both men and women.[95] 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 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 is not whether the employer's reason is correct as an absolute matter, but whether the employer honestly believed in the truth of the reason.[96] 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?[97] 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

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[93] *See also* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: White(ning) Discrimination, Race-ing Test Fairness*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507344.
[94] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (describing age and pension status as correlated but analytically distinct).
[95] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).
[96] *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 86-87 (4th ed. 2007) (collecting cases).
[97] *Ricci*, 129 S. Ct. at 2675.

only question that would have remained was whether the defendants honestly believed that the process was 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 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 decisionmakers 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 constituency; he does not say that he would have held as a matter of fact that this was the City's actual motivation.[98]

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.[99] 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. 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.[100] As a part of that effort, this Court

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[98] 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. *Ricci*, 129 S. Ct. at 2688 (Alito, J., dissenting). 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.

[99] Michael J. Zimmer, Ricci*'s Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529438.

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

has recognized that employers must be given incentives to voluntarily comply with the statute.[101] To say that an action taken to avoid discriminating is itself discrimination may make such voluntary compliance efforts incredibly more difficult if not impossible.

These critiques all depend on one thing, however. They depend on the lower courts and the Supreme Court in subsequent cases interpreting the language from the opinion in its most sweeping manner. Another story can be told of the effects of this case that cabin it severely.

First, the case could have been much worse (or better depending on your political view). The Court declined to analyze the equal protection claim asserted by the plaintiffs. As it is, Congress can change the analysis for future cases by amending Title VII. And importantly, the Court did not strike down the disparate impact provisions as unconstitutional, something that may have some support in a variety of contexts.[102]

The case seems to be something of a compromise between employees and employers generally: Once a hiring or promotional process has begun, an employer may not deviate from that process over concerns that the process discriminates unless there is a strong basis in evidence to believe that the practice would not survive a disparate impact lawsuit. Employers can act before there is a "provable, actual violation," but only if there is this strong basis in evidence to believe that there is a provable violation. Importantly, there is no restriction on what employers can do to try to design a process for making employment decisions that are fair for all regardless of race before any process is put into effect.

Thus, the result may make it difficult for employers to navigate Title VII, although maybe not more than it was before this decision. Depending on how litigation by firefighters now alleging that the process caused an illegal disparate impact against them goes, employers may do nothing to evaluate their hiring or promotional processes until those processes have run their courses. There is very little incentive for employers to try to avoid disparate impact liability any more than they would have before this decision, and more incentive not to change anything, just in case that change is itself discrimination.

Still, there is cause for concern that the language may lend itself to sweeping interpretation. The majority insisted that this decision did not affect a decision by an employer to make changes to its hiring and promotional processes before beginning those processes, but if a desire to avoid discrimination is a discriminatory motive, then wouldn't creating a process designed to avoid racial effects also be intentional discrimination? That process is designed and implemented because of the races of applicants. Maybe the difference is that it does not consider

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

[102] *See Ricci*, 129 S. Ct. at 2681-83 (Scalia, J., concurring); *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (declining to assess the constitutionality of the disparate impact provision in voting rights by overruling lower court on statutory grounds); Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 34 IND. L. REV. 345 (2004) (analyzing how creating disparate impact liability may exceed Congress' power under the Fourteenth Amendment); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) (laying out the argument that Congress may not have the power to require third parties to engage in action that if done by the federal government would be considered discrimination).

any particular individual's race because there are no individual applicants until the process is begun.

In the end, this case may simply boil down to the specific facts of this case. Employers are extremely risk-averse, overestimating the costs of wrongful discharge litigation as a hundred times greater than what it actually costs.[103] The majority may thus view claims of such fears ubiquitous, believing that good faith belief is too easy to claim and too difficult to disprove. Accordingly, the Court may be viewed as simply having inserted a reasonableness requirement to guard against employers relying on this as a reflexive excuse. Granted, the requirement seems to go beyond reasonableness in this case, but in another case with more evidence in the record about all of the context Justice Ginsburg provided, perhaps the application will seem less stringent.

V. CONCLUSION: CONGRESS AND NEXT STEPS

The media in the United States portrayed this case as an affirmative action case and the disparate impact theory of discrimination as simply another word for affirmative action. And to many, affirmative action is simply discrimination. The preference for more black candidates (or candidates multiple races) is equated with a preference for fewer white candidates.

The City resisted those labels for its conduct as did many employment discrimination scholars, for good reasons. Affirmative action is a hotly contested issue. The premise that affirmative action for people of color is discrimination against white people ignores the reality of hiring patterns and the history or race-based discrimination in this country. Additionally, affirmative action usually requires some positive act, and here the City took no affirmative action; instead it failed to act. Ordinarily, a failure to act is not viewed as sufficiently affirmative to be considered affirmative action.

But there is something important about viewing the case in that way. Many people assumed that had the races of the applicants been reversed, the City would have used the list. In other words, if white firefighters had passed the test at half the rate firefighters of color had passed, the City would not have questioned the test's validity and instead would have been pleased with the results. That assumption is questionable; there was no evidence to suggest this would happen, but was instead based on people's views about the City's desire to promote more firefighters of color and fewer white firefighters. Still, the City never explicitly asserted that had the races of successful test takers been reversed it would still have been concerned about disparate impact discrimination.

Which leads to the question of whether that should matter. As a policy matter, should we define discrimination in purely formal terms, which we sometimes do, or should we define discrimination at least sometimes in substantive terms, recognizing subordination, which we also sometimes do. Perhaps the City was forced into this position because we do, more often than not,

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[103] Cynthia Estlund, *How Wrong Are Employees about their Rights, and Why Does It Matter?*, 77 N.Y.U L. REV. 6, 11 (2002) (citing a study by the RAND corporation, JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY (1992) and Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Thread of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992)).

have to shoehorn substantive equality goals into formalist structures. So maybe it is time to revisit the issue of formal versus substantive equality.

Related to that is the question of what Congress might do to neutralize the effect of this decision and possibly make clear that Title VII must be interpreted through a substantive equality lens. Congress currently seems willing to consider substantive equality goals, for example recently passing amendments to the Americans with Disabilities Act that reversed the effects of several formalist Supreme Court decisions and once again emphasized the role of accommodations and substantively equal outcomes.[104]

Two related challenges, aside from the normal challenges of getting legislation enacted, face a Congress that wishes to legislatively overrule the Court's decision: whether it is better to have the public debate on the hotly contested issue of formal versus substantive equality; and if not, how to draft the language to not force the Supreme Court to deal with the issue in equal protection terms, as Justice Scalia suggested was inevitable.

On the first issue, it might be very good for us as a nation to engage the debate and work to reach greater consensus. At the same time, we seem to have trouble actually making progress on many hotly contested issues, as much of the rhetoric anticipating this decision and the current efforts to reform our health care system show. But failure is not inevitable; we are capable of greater consensus in hotly contested issues, as the progress on marriage and employment rights for sexual minorities has demonstrated.

Still, assuming that Congress does not have the political will to engage the American public in that debate right now, the challenge of drafting language remains. Language that requires an employer to take a particular action when faced with some evidence of a disparate impact may be considered to violate the Equal Protection Clause, or at least might provide ground for that to be tested. And with the current personnel on the Court, it is hard to say whether the disparate impact provisions would survive. Congress might be able to draft permissive language, however, re-defining what constitutes disparate treatment under the statute. That permissive statute might say something like, "it shall not be an unfair employment practice for an employer to reject the results of a promotional or hiring process when the employer is presented with prima facie evidence that the process has worked a disparate impact on a protected group." That language seems to codify the approach of the dissent, and does not seem to mandate any particular employer action, which may save it from an equal protection challenge.

In the end, this story is not over, not just because the law remains unsettled and the norms contested, but also more practically. While the plaintiffs who would have been eligible if the list were used have been promoted, several other firefighters have sued over the process, including firefighters who would have been eligible for promotion had a different weighting of the tests been used.[105] So even if Congress does not act to neutralize the effect of the Court's decision, we may nonetheless have the chance to continue the debate.

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[104] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3557.
[105] *See* Alison Leigh Cowan, *Firefighter Test Brings New Haven a Fresh Suit*, N.Y. TIMES, Oct. 15, 2009, at A24.