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Ricci v. DeStefano and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable

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I. Introduction

Although early commentators have focused on Ricci’s discussion of disparate impact, I see what Ricci is saying about disparate treatment as being more important. The majority and concurring opinions make proving disparate treatment much easier than under prior law. One would think that such a change in the law would further the cause of ending discrimination both under Title VII and the Equal Protection Clause of the Fourteenth Amendment, but, paradoxically, it may utterly defeat that cause.

One can see Ricci as the case in which the Court came down in favor of one of two competing interpretations of the Equal Protection Clause and Title VII. Hannah L. Weiner describes the two approaches as “anti-subordination” and “anti-classification.”¹ The anti-subordination principle “is most concerned with actions of a majority race to intentionally subjugate members of a minority race . . . it is when government serves to ‘perpetuate . . . the subordinate status of a specially disadvantaged group that the Fourteenth Amendment is most implicated.”²

The anti-classification principle instead sees equal protection as invalidating all distinctions based on race. Whether the classification is malicious

² Id. at 47-48
or benign, or whether an individual belongs to an historical or contemporary
dominant or subordinate race, does not matter. All such classifications are
invalid.  

*Ricci* (or at least the majority five justices) rejects the anti-subordination
approach: the fact that there were few minority firefighters in the New Haven
fire department was of no consequence. That the results of the test only
perpetrated their under representation only would excuse discarding the test if
there was a strong basis in evidence of disparate impact. Moreover, Justice
Scalia (joined by Justice Thomas) called into question the constitutionality of
disparate impact because it necessitates racial classification. As stated by
Professor Kermit Roosevelt, "...in fact his (Scalia's) five person majority has been
responsible for changing equal protection jurisprudence from doctrine that
protects minorities into one that prohibits certain kinds of classifications,
regardless of who's benefited and who's burdened." My article's thesis is that
this approach, as applied in *Ricci*, leads to several disturbing questions about
both employment and equal protection law, including whether Title VI and the
Equal Protection Clause will have to be repealed to achieve their purposes. .

II. The Case

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3 *Id.* at 48.
4 Kermit Roosevelt, Assistant Professor, University of Pennsylvania Law School,
Justice Scalia’s Constitution – And Ours, Remarks Delivered to the Public Interest
To fill eight vacant lieutenant and seven vacant captain positions in its fire department, the City of New Haven, Connecticut issued two job related exams, one written and one oral, to determine relevant qualifications for promotion. As mandated by its charter (Charter), New Haven was required to place in those open positions the most qualified individuals, as determined by the results of the tests. According to the Charter’s “rule of three”, one eligible candidate from the top three overall scorers was to be chosen for each vacancy. It was the responsibility of the New Haven Civil Service Board (“CSB”) to certify the ranks given to each test taker who had passed the written test.

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

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6 Id.
7 Id.
8 Id.
9 Id. at 2664.
10 Id.
11 Id. at 2664.
Civil Rights Act of 1964. In the end, the examinations were thrown out and those that had performed well were denied promotions.

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

III. How Ricci Defines Disparate Treatment

A. Prior Law

Anyone who tries to describe how Ricci changed the definition of “disparate treatment” is immediately faced with the problem that the Court

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12 Id. at 2671.
13 Id.
14 Id. at 2664.
15 Id.
16 Id.
never has been precise in defining what does constitute disparate treatment.

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

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

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

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

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19 /d.
acts.” Professor Selmi was referring to Washington v. Davis, which held that the disparate impact theory did not apply to Section 1983 actions seeking redress for violations of the Fourteenth Amendment. Thus, the fact that a governmental action (there, a qualifying examination) had a differing effect on whites and blacks was not sufficient to constitute a cause of action. “Intent” was necessary, which means that knowledge of differing effects as to race was not enough. The district court in Ricci ruled that having a racial motive for an action did not make it illegal.

Another necessary element of disparate treatment was that the bias had to cause the harm complained of. Whether it has to be the “but for” cause or just a contributing cause (the “mixed motive” test) has been and still is a matter of controversy. We may start with Price Waterhouse, where Justice Brennan’s plurality of four ruled that the plaintiff need only show that the prohibited intention (there gender) was a “motivating factor” in the decision. Justice O’Connor’s concurring opinion, however, stated that the plaintiff must prove a “substantial” rather than just a “motivating” factor. The Civil Rights Act of 1991, 

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25 Id. at 258.
26 Id. at 258-60.
Sec. 703(m), adopted the Brennan test, stating that discrimination need only be a “motivating factor”.\(^{27}\)

The Court revisited the issue in *Gross v. FBL Financial Services, Inc.*,\(^{28}\) which held that under the Age Discrimination in Employment Act (ADEA), the discrimination must be the “but for” cause of the adverse employment decision.\(^{29}\) The Court rejected the plaintiff’s argument that *Price Waterhouse* controlled.\(^{30}\) In a footnote, the Court pointed out that Congress amended Title VII to allow the discrimination being a “motivating factor”, but did not amend the ADEA.\(^{31}\)

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

**B. Ricci Redefines Disparate Treatment**

\(^{27}\) 42 USCS § 2000e-2(m); see discussion in Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 Wm and Mary L. Rev. 911, 932-3 (2005).


\(^{29}\) *Id.* at 2350.

\(^{30}\) *Id.* at 2348-9.

\(^{31}\) *Id.* at 2349.
We now come to what disparate treatment means post-*Ricci*. Although Justice Kennedy’s opinion spends pages describing the efforts expended by the firefighters who passed the test, the many efforts and resources expended by the City of New Haven in trying to create a fair test, and the long process that ended in the test not being certified, the case’s ruling is simple: the rejection of the test was race based and this violated Title VII. “We conclude that race-based action like the City’s in this case is impermissible under Title VII . . .“32

The sentence concludes with a proviso, “unless the employer can demonstrate a strong basis in evidence that if it had not taken the action, it would have been liable under the disparate impact statute.”33 But how did “disparate impact” become an issue? Because the City’s first reaction to the results of test was that the results were suspect because of the test’s disparate impact on minorities. The City’s Corporation Counsel convened a meeting with the testing company’s vice-president, in which “City officials expressed concern that the tests had discriminated against minority candidates.”34 It was this concern for minority candidates which demonstrates – as a matter of law – that the City violated Title VII:

Our analysis begins with this premise: The City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race – i.e., how minority candidates had performed when compared to white candidates. As the District

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32 *Supra* note 5, at 2666.
33 *Id.*
34 *Id.*
Court put it, the City rejected the test results because “too many whites and not enough minorities would be promoted were the lists to be certified.” (Respondents’ own arguments . . . show that the City’s reasons for advocating non-certification were related to the racial distribution of the results”). Without some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.35

The district court in Ricci had ruled the contrary — having a racial motive did not equal discrimination.36 It relied on a Second Circuit case that noted that, “(E)very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflects a concern with race. That does not make such enactments or actions unlawful or automatically suspect.”37

Thus, the City, and any employer, who wants to change a selection procedure is in a Catch-22 situation. If the reason for change is because the procedure has a disparate impact, that reason, being race based, is a per se violation of Title VII. All race based classifications are bad, per se. Justice Kennedy does give the employer an out—it can (and must) “demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”38 Changing employment practices based on disparate impact, then, is high-risk for the employer; because if the change is based on disparate impact, it automatically violates Title VII, and the

35 Supra note 23, at 152. See also Id. at 2661; Id. at 2673; §2000e-2(a)(1).
36 Supra note 23, at 157.
37 Id.
38 Supra note 5, at 2664.
only defense is the hard one of showing, not just some evidence or a preponderance of evidence, but a "strong basis" in evidence that a disparate impact suit would win. The defendant must pretend it is a disparate impact plaintiff suing itself and assess its chances. If it is wrong, it will lose in a disparate treatment suit. And, if it does or does not change, it may be sued under disparate impact. This is exactly what happened to the City of New Haven, which is now being sued by a firefighter who was not promoted.\footnote{Briscoe v. City of New Haven, 2009 U.S. Dist. Lexis 119948 (D. Conn. Dec. 23, 2010). The district court in Ricci noted that the prior New Haven promotion tests may well have had a disparate impact. Supra note 23, at 153-154.}

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

This finding of an automatic violation changes a principle of the prior law, in which a preference for one group was not seen as necessarily being discrimination against the other. In EEOC v. Consolidated Services, Judge Richard Posner ruled in favor of an employer who relied on word-of-mouth recruitment and wound up with a work force of almost all Polish ethnicity.\footnote{EEOC v. Consolidated Service Systems, 989 F.2d 233 (7th Cir. 1994).} The court held that preferring those of Polish descent was not discrimination against non-Poles. Another instance is the "paramour" cases. The boss promotes a female employee he has been sleeping with. A male employee, who has not been promoted then sues for sex discrimination. The courts have held that there
is no discrimination, just a preference for certain women.\textsuperscript{41} The same result occurs in “cronyism”, where the boss hires and promotes his male buddies.\textsuperscript{42}

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

Whatever the City’s ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.\textsuperscript{43}

In rejecting the City’s argument that an “alternative” selection procedure could be used, the Court again limits disparate impact and expands disparate treatment.\textsuperscript{44} Under the codification of the disparate impact theory in the Civil Rights Act of 1991, once the defendant has demonstrated “business necessity,” the plaintiff may show that another selection procedure—a “valid alternative”—that would have less disparate impact.\textsuperscript{45} The City argued that changing the weighting of the written and oral scores from 60/40 to 30/70 would allow it to consider three black candidates for promotion. It also argued that the City could have modified the “rule of three,” which required that any promotions be made only from the three highest scores on the exam.\textsuperscript{46} The Court ruled that “would have violated Title VII’s prohibition of adjusting test results on the basis of

\textsuperscript{42} Id.
\textsuperscript{43} \textit{Supra} note 5, at 2674.
\textsuperscript{44} Id. at 2678 and 2679–2681.
\textsuperscript{45} Id. at 2673.
\textsuperscript{46} Id. at 2679.
Thus, once a test has been given, it cannot be changed—even if there is evidence that the test had a disparate impact—because the change would also be on the basis of race. This holding both limits disparate impact and expands disparate treatment in showing that any race-conscious act violates Title VII.

C. Limitations on the Scope of Ricci

1. Vested Rights

There are two factors in the majority opinion that limit the scope of the opinion. One is that the Court found that the plaintiffs had a vested right in their promotions. In employment discrimination law, this called an “adverse employment action,” that is some significant term or condition of employment must have been adversely affected for there to be a cause of action for employment discrimination. In Jones v. Clinton, for example, Jones lost her suit against President Clinton because the adverse action against her (for allegedly refusing to perform sexual acts with the then Governor) were only a job reassignment and not getting flowers for Secretary’s Day.48

Ricci’s first paragraphs describe how important promotion is to firefighters and their effort to pass the test:

In the fire department of New Haven, Connecticut—as in emergency-service agencies throughout the Nation—firefighters prize their promotion to and within the officer ranks. An agency’s officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of

47 Id. at 2676; 42 USCS § 2000e-2(l).
the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates. In 2003, 118 New Haven firefighters took examinations to qualify the promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.\footnote{Supra note 5, at 2664.}

The majority opinion goes on to describes how hard Ricci studied for the test:

\begin{quote}
Ricci stated that he had “several learning disabilities,” including dyslexia; that he had spent more than $1,000 to purchase the materials and pay his neighbor to read them on tape so he could “give it (his) best shot”; and that he had studied “8 to 13 hours a day to prepare” for the test.\footnote{Id. at 2667.}
\end{quote}

Once the selection criteria have been made clear, employers “may not then invalidate the test results, thus upsetting an employee’s legitimate expectations not to be judged on the basis of race.”\footnote{Id.}

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

2. Changing the Past or Changing the Future?

The majority opinion’s second limitation is that there the race-consciousness only invalidated a decision made after the test was applied, not before.

Kennedy makes clear that the majority opinion only applies to changing the results retrospectively, not prospectively in designing the test.\(^{52}\)

Professor Zimmer, reading Justice Kennedy’s opinions in Parents Involved\(^{53}\) and Ricci together, concludes that an employer may act prospectively with race-consciousness, but not retroactively, as in Ricci.\(^{54}\)

\(^{52}\) Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end. We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. Id.


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

"(D)isparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles."\(^55\)

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

**D. The Concurring Opinions**

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

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

\(^56\) *Supra* note 5, at 2682.
As the facts of these cases illustrate, Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is, as the Court explains, discriminatory.\textsuperscript{56}

Thus, disparate impact requires classification by race and that the Fourteen Amendment prohibits.

Justice Alito’s concurring opinion argues that the City’s concern with disparate impact was pretextual because “the City’s real reason was illegitimate, namely, the desire to placate a politically important racial constituency.”\textsuperscript{57}

In support of his position, Alito refers to Reverend Boise Kimber, “a politically powerful New Haven pastor and a self-professed ‘king maker.’” To Alito, the Rev. Kimber’s racism is shown by threatening a race riot during the trial of a black man accused of murdering a white man and calling racist whites who questioned his actions.\textsuperscript{58} Justice Alito notes the following: Rev. Kimber had personal ties with New Haven Mayor John DeStefano, he opposed the test certification, informed the Mayor of his opposition, protested to the test certification body, and he and others lobbied the Board not to certify the results.\textsuperscript{59}

\textsuperscript{56} Id.
\textsuperscript{57} Id. at 2684.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 2685.
To Alito, Kimber's lobbying and the decision of the Mayor to reject the test results could lead a jury “easily” to find that the City was really motivated by “a simple desire to please a politically important racial constituency.” Thus, the City may have engaged in intentional racial discrimination . . . “there are some things that a public official cannot do, and one of those is engaging in intentional racial discrimination when making employment decision.” This proving of intentional discrimination by considering the actions of those outside of the government is a powerful tool to find racial discrimination. Village of Arlington Heights, which laid down a multi-part test to judge whether or not a governmental body’s engaged in intentional discrimination, spoke in terms of the statements by governmental officials, not lay citizens. The Court downplayed the influence of those outside the government.

The district court in Ricci ruled that a decision made with a racial and political motivation is not discrimination: "Defendants' motivation to avoid making promotions based on a test with racially disparate impact, even in a

60 Id. at 2684.
61 Id. at 2688.
63 The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or report. In some extraordinary instances, the members might be called stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. Id. at 268.
64 In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants. Id. at 269.
political context, does not, as a matter of law, constitute discriminatory intent...."

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

E. Ricci’s Application to Equal Protection

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

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

65 Supra note 23, at 160.

66 "Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution." Supra note 5, at 2676.
frameworks is the same. The conduct prohibited under one is virtually coextensive with the conduct prohibited under the other.\textsuperscript{67}  

\textit{Ricci} uses an analytical model appropriate to the Equal Protection Clause, not Title VII. The Court ignored the usual methods of deciding Title VII claims. It did not deal with Title VII’s requirement of “adverse employment action.” (Note that the plaintiffs in \textit{Ricci} had not yet been promoted, or had even passed a certified test – the test was to be effective only upon certification.)\textsuperscript{68}  

The district court in \textit{Ricci} used the standard method of deciding Title VII cases. It ruled that there was no adverse action.\textsuperscript{69} The district court in \textit{Ricci} used the \textit{McDonnell Douglas} analysis, standard in disparate treatment cases, to decide the case, but the Supreme Court totally ignored it.\textsuperscript{70} Under \textit{McDonnell Douglas Corp.}, the plaintiff presents a prima facie use, the defendant must then articulate a “legitimate non-discriminatory reason” for the disparate treatment, and then the plaintiff must show that that explanation was pretextual and that the adverse action was the result of discrimination.\textsuperscript{71}  

The Court lastly ignored the tests for motive under Title VII and instead substituted the Equal Protection test of “predominant motive.”\textsuperscript{72} Justice Kennedy imported the “strong basis in evidence” rule for the disparate impart

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\textsuperscript{68} \textit{Id.} at 26-27. See also, \textit{supra} note 23, at 163.
\textsuperscript{69} \textit{Supra} note 23, at 151-161.
\textsuperscript{70} \textit{Id.}; \textit{supra} note 67, at 28.
\textsuperscript{72} \textit{Supra} note 67, at 30-31.
defense from earlier court decisions under the Equal Protection Clause, such as

_Croson_\(^73\) and _Wygant_.\(^74\)

_Ricci_ is then ultimately an equal protection case and an important one.

Professor Zimmer concludes that it takes us closer to an interpretation of the Fourteenth Amendment, which imposes a “color-blind” standard.\(^75\)

IV. What Commentators Think _Ricci_ Means

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

> If Title VII’s prohibition on disparate treatment is understood as a general requirement of color-blindness in employment, then it is

\(^75\) In sum, the _Ricci_ Court took one step closer to a statutory and constitutional “color blind” standard. On one hand, it did not appear to change the equal protection standard applicable to express racial classifications that was established in _Adarand Constructors_: “(A)ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” On the other hand, it likely expanded the scope of application of strict scrutiny to some, but not all situations, where a governmental actor (or a private actor acting under compulsion of law) takes action, knowing the racial consequences of that action. Strict scrutiny does not apply if that action is taken before expectations have been established or reliance interests created in individuals. But strict scrutiny does apply once those expectations have been established. Posting by Michael Zimmer to http://www.concurringopinions.com/archives/2009/11/ricci-the-equal-protection-implications.html (Nov. 28, 2009, 11:40 am EST).
easy to see any race-conscious decisionmaking as disparate
treatment. Disparate impact doctrine does require race-conscious
decisionmaking, so it follows that there is a conflict between the
two frameworks. It’s as simple as that. No court ever took this view
before, but many people now and in the future will regard the
proposition as obvious.\textsuperscript{76}

Professor Primus describes how Ricci’s promise is a radical departure from prior
law. “No court ever took this view before . . . “\textsuperscript{77}:

Disparate treatment doctrine prohibits race-conscious
decisionmaking, and disparate impact remedies are always race-
conscious. There is accordingly a tension between the two
frameworks. That said, no prior decision ever conceived of
disparate impact doctrine as an exception to the prohibition on
disparate treatment. That is why the Ricci Court had to state the
premise in its own voice and without citation. From the traditional
perspective of antidiscrimination law, the idea that disparate
impact remedies are as a conceptual matter disparate treatment
problems is a radical departure.\textsuperscript{78}

Historically, disparate treatment under Title VII covered two different
things: one “is about employers applying different rules to employees of
different races (or sexes, etc.).”\textsuperscript{79} Title VII also bans wrongful employer motive:

Consider a case in which a business located in a heavily white
suburb of a heavily black city has a policy of hiring only people who
live in the suburb. Formally, such a policy does not treat individual
applicants disparately on the basis of their race. But if the policy is
motivated by the desire to exclude black applicants from the city
next door, it is actionable under the heading “disparate treatment,”
despite the absence of disparate treatment by race in the ordinary-
language sense. The discrimination is intentional, and intentional
discrimination is called “disparate treatment.”\textsuperscript{80}

\textsuperscript{76} Supra note 67, at 14.
\textsuperscript{77} Id. at 4.
\textsuperscript{78} Id. at 10.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 11.
Courts and commentators did not see changes to avoid disparate impact as involving disparate treatment based on explicit bias, nor did courts see such action as stemming from an impermissible racial motive.

Professor Michael Zimmer concludes that what the Court found illegal was acting with the knowledge of racial consequences: "Apparently, what got the City in trouble with the Supreme Court was that the City acted, knowing the racial consequences of its decision not to use the test."

This represents a break from prior law. Disparate treatment dealt with intentional discrimination proven by either direct or indirect evidence. Direct

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81 If a written test has a racially disparate impact and the employer throws out the results – as happened in Ricci – the test results are thrown out for all applicants, regardless of race. Any black applicants who did very well on the test are disadvantaged by the disparate impact remedy along with white applicants who did very well. White applicants who did poorly may stand to gain along with black applicants who did poorly. Obviously the decision to throw out the test is race-conscious. But throwing out the test results does not involve “disparate treatment” in the ordinary-language sense of sorting employees into groups and conferring a benefit on members of one group that was withheld from members of the other group. No two employees are given different tests, nor are separate criteria used to evaluate different employees, and no job is given to a Mr. Black but denied to a similarly situated Mr. White. Id. at 12.

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

evidence cases, such as City of L.A. Department of Water & Power v. Manhart and International Union v. Johnson Controls involved expressly discriminatory classifications, which divided employees into two non-overlapping groups. Prof. Zimmer states that in Ricci, “The white plaintiffs were only 25% of all whites who took the test. Looking at the statistics alone, it would seem to be unlikely to support drawing an inference of intentional race discrimination against the members of any of the six groups without drawing the same inference as to the members of each of the six groups. That would not be disparate treatment discrimination.”

Traditionally, one could not draw an inference of discrimination from the decision-maker’s consciousness of the race or gender of the subject employee. As stated by Justice O’Connor in Price Waterhouse v. Hopkins, ‘Race and gender always ‘play a role’ in . . . a benign sense that these are human characteristics of which decisionmakers are aware and may comment on in a perfectly neutral fashion. For example, . . . mere reference to ‘a lady candidate’ might show that gender ‘played a role’ in the decision, but by no

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86 In indirect evidence, the reason given, say, for not hiring blacks was shown to be pretextual because of, for example, overwhelming statistics of racial hiring. See Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95 (U.S. 1962) and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (U.S. 1988).
means could support a rational factfinder’s inference that the decision was made ‘because of’ sex.\textsuperscript{89}

The most glaring example is \textit{Personnel Administrator of Massachusetts v. Feeney},\textsuperscript{90} which found that a veterans preference, where 98\% of the veterans were men, did \textbf{not} show a discriminatory purpose against women.\textsuperscript{91}

Professor Zimmer concludes:

\begin{quote}
\textit{The Court appeared to take a giant leap from the fact that the City knew the racial distribution of the testtakers and the racial consequences of using the test to conclude, as a matter of law, that the decision not to use the scores was “because of” the race of the six different groups.}\textsuperscript{92}
\end{quote}

Professor Primus’ article, \textit{The Future of Disparate Impact}, lays out three interpretations of \textit{Ricci}: the General, the Institutional, and the Visible Victims.\textsuperscript{93}

The “General” would represent a fundamental charge in antidiscrimination law, but its logic is simple: it is “color-blindness, understood as the rejection of race-conscious governmental action, as the guiding value of equal protection.”\textsuperscript{94} Under this reading, disparate impact could only serve as a defensive if it “were found to be narrowly tailored to a compelling governmental interest . . . But compelling interest defenses are always longshots.”\textsuperscript{95}

\begin{footnotesize}
\textsuperscript{89} Id. at 277.  
\textsuperscript{91} Supra note 83; see also id.  
\textsuperscript{92} Id.  
\textsuperscript{93} Supra note 67, at 33–43.  
\textsuperscript{94} Id. at 33.  
\textsuperscript{95} Id. at 34.
\end{footnotesize}
The “Institutional” reading is that public employers may not institute a remedy that is race conscious, but that courts may. A court adjudicating a suit by a black man must notice the race of the plaintiff. “On that institutional reading, Title VII’s disparate impact doctrine is still constitutional, so long as it is implemented by courts. Ricci means only that employers cannot implement race-conscious remedies by themselves.”

The “Visible Victims” reading requires specific innocent parties to trigger liability. For example, in Parents Involved, Justice Kennedy recommended using facially race-neutral means such as redistricting as means to further race integration. Another example is then-Governor George W. Bush’s Ten Per-Cent Plan, which admitted all Texas high school graduates in the top ten percent of their high school class to the University of Texas President Bush’s Justice Department later considered the Plan as a model. Since there were no visible victims, the plan wouldn’t violate equal protection, although it was chosen with race-consciousness.

Professor Primus concludes by stating that the way Court will choose between the three readings may well depend on the facts of the case that will present the issue.

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96 Id. at 38.
97 Supra note 53.
98 Id. at 787-789.
99 Supra note 67, at 39.
100 Id. at 48.
Note that Scalia and Alito (plus Thomas) would come down on the side of the General Reading – any race consciousness by anybody is always bad.

Bruce Willoughby, a Nevada employment lawyer, shows how this may work in practice, noting that that, “The court did not provide any guidelines to educate attorneys and employers on how employers can determine what qualifies as a ‘strong basis in evidence,’” He counsels that the safest course for an employer is just to continue using whatever criteria are in place, ignoring any disparate impact.

V. The Conservative Interpretation

Ricci’s result did not come from nowhere; it is a product of long-standing conservative opposition to equal protection and civil rights. Kenneth L. Marcus’ *Voting Rights and Equal Protection* may serve as the conservative reading of Ricci. It concludes that state voters “may take narrowly tailored race-conscious actions to avoid creating . . . intentional and unconscious discrimination that cannot be proven through other means.” The Equal Protection Clause, however, would prevent Title VII from being used to “level racial disparities that do not arise from intentional or unconscious discrimination.” There is scope,

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102 *Id.*
103 Kenneth L. Marcus, *Voting Rights and Equal Protection*, 2008-09 Cato Sup. Ct. Rev. 53 (2008-09) (it should be noted that the Cato Review is not an academic publication but that of the Cato Institute, a right-wing lobbying institution).
104 *Id.* at 55.
105 *Id.*
however, to voluntarily avoid “systematic racial biases that do not arise from an institution’s present or prior discriminatory actions.”\textsuperscript{106}

Marcus equates changing the selection criteria to avoid any disparate impact on minorities is equivalent to “rigid quotas based on demographic racial balancing.”\textsuperscript{107} He states that “Allocation of public benefits must be made on an individual basis, rather than on the basis of racial group membership.”\textsuperscript{108} The bottom line “is that racially neutral employment decisions will trigger strict scrutiny when they are motivated by a predominantly race-conscious intent.”\textsuperscript{109} Marcus predicts that \textit{Ricci’s} “strong basis in evidence” defense will fall as violative of the Equal Protection Clause. Congress cannot require that employers act to dismantle cultural obstacles to equal opportunity, such as “height and weight requirements for prison guards that may exclude most women, rather than directly measuring strength or other job relevant variables.”\textsuperscript{110}

We have here an example of how a practice can be valid under the no racial classification test, even though it furthers racial subordination, by freezing in place current racial hierarchies. Any present subordination is even constitutionally protected by the Equal Protection Cause. We should pause here in wonder at how the conservatives have managed to take a Reconstruction

\begin{flushright}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.} at 65.
\textsuperscript{108} \textit{Id.} at 69.
\textsuperscript{109} \textit{Id.} at 71.
\textsuperscript{110} \textit{Id.} at 82.
\end{flushright}
amendment, passed after the Civil War, and turned it into a mechanism to preserve white privilege.

In 1990, a conservative thinker, Charles Bolick, complained that conservatives had made "the plight of the white firefighters victimized by reverse discrimination" into "the major civil rights issue of our time." Bolick argued that:

Given limited resources, public interest litigators should represent the most disadvantaged individuals and should try whenever possible to find a plaintiff whose plight outrages people.

So, several years later, we get Frank Ricci, the dyslexic white firefighter, whose understandable and commendable ambitions for promotion and status were taken from him by a racial decision.

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

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

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112 *Id.*
demands and expectations of the abolitionists were quite as slippery a foundation for political decency.\textsuperscript{114}

Conservatives generally approved of the antebellum political system. The Civil War and Reconstruction “constituted one of the two great crises in the decline of the Republic.”\textsuperscript{115} Two conservative writers, Felix Marly and James J. Kilpatrick, thought that the Fourteenth Amendment has been passed “in a ‘scandalous’ fashion.”\textsuperscript{116}

The conservative reaction to the Second Reconstruction, epitomized by Brown \textit{v. Board of Educ.},\textsuperscript{117} was much the same. Their reaction to \textit{Brown} was hardly one of rejoicing that we had established a “color-blind constitution.” Ricci’s premise of anti-discrimination being a zero-sum game hearkens back to Herbert Wechsler’s \textit{Toward Neutral Principles},\textsuperscript{118} in which he could not find a justification for \textit{Brown}. The only neutral principle he could find in \textit{Brown} was freedom of association, but that principle did not dictate \textit{Brown}’s result because “But the freedom of association is denied by segregation, integration forces an association upon those for whom it is . . . repugnant.”\textsuperscript{119} And thus there is no reason to prefer one over another: “Given a situation where the state must practically choose between denying the association to those individuals who

\begin{footnotesize}
\begin{enumerate}
\item Id. at 152.
\item Id.
\item Id. at 34.
\end{enumerate}
\end{footnotesize}
wish it or imposing it on those who would avoid it,” there is no reason to pick one over the other.\textsuperscript{120} 

George H. Nash writes, in \textit{The Conservative Intellectual Movement in America Since 1945}\textsuperscript{121} that L. Brent Bozell, a conservative lawyer, criticized \textit{Brown}’s “very reasoning.”\textsuperscript{122} He argued that \textit{Brown} was wrong because the same Congress that drafted the Fourteenth Amendment established segregated schools in the District of Columbia. William F. Buckley’s \textit{National Review} generally criticized \textit{Brown}. In 1957, an editorial declared:

\begin{quote}
The central question that emerges . . . is whether the White community in ‘the South is entitled to take such measures as one necessary to prevail, politically and culturally, in areas where it does not predominate numerically? The sobering answer is \textit{Yes} – the White community is so entitled because, for the time being, it is the advanced race . . .\textsuperscript{123}
\end{quote}

By 1967, the National Review had evolved to advocate black separatism. “Why not experiment with black administration of black schools, for example, if that was what a majority of black parents really wanted? Why be shackled by clichés about integration?”\textsuperscript{124}

\footnotesize
\begin{flushleft}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} George, H. Nash, \textit{The Conservative Intellectual Movement in America Since 1945} (Thirty-fifth Anniversary Edition 2006)
\textsuperscript{122} \textit{Supra} note 117, at 334.
\textsuperscript{123} \textit{Id.} at 308.
\textsuperscript{124} \textit{Id.} at 437-8. It should be noted that William F. Buckley later recanted and came to be in favor of racial equality. \textit{Q: Did he ever recant his opposition to the civil rights movement? —Chris} “Yes, he did. He said it was a mistake for \textit{National Review} not to have supported the civil rights legislation of 1964-65, and later supported a national holiday honoring Dr Martin Luther King Jr., whom he grew to admire a good deal, above all for combining spiritual and political.
\end{flushleft}
Even though the first conservative reaction to such cases as *Brown* was based on an “originalist” interpretation—that there was no historical basis for desegregation—Justice Scalia (and Justices Thomas, Alito, and Roberts) have switched to a “color-blind” constitution.\(^{125}\) One wonders, however, whether or not only the rhetoric has changed and these self-proclaimed conservatives are still motivated by an animus against the Fourteenth Amendment being at all effective.

**VI. How *Ricci* Makes Title VII and the Equal Protection Clause Unworkable**

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

**A. The Impossibility of Relief**

*Ricci* works against providing relief for race discrimination because it sees providing such relief as zero sum game: relief for the victims of discrimination will necessarily harm those benefited by the discriminatory practice. In *Ricci*, throwing out the test to benefit minorities harmed those who had passed the values. “Sam Tanehaus, Q & A on William F. Buckley, Paper Cuts, 2/27/08, New York Times

\(^{125}\) Hannah L. Weiner in her article *The Subordinated Meaning*, concludes that what Justice Harlan meant by this phrase was that there should be no governmental racial subordination, not that there should be no racial classification (*supra* note 1, at 62-63). *See also* Reva B. Siegel, Equality Talk, 117 Harv. L. Rev. 1470 (2003-2004).
Moreover it was invalid because it necessitated racial classification. Using an alternative testing method was also illegal: “Restricting an employer’s ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII’s express protection of bona fide promotional examinations.” Marcus’ article argues that choosing any selection criteria in order to promote racial diversity is subject to strict scrutiny:

This should have significant ramifications for policies like the University of Texas’s former “Ten Percent Plan,” under which UT guaranteed admissions so students graduating within the top 10 percent of their high school class. There is considerable evidence, . . . which suggest that Texas policymakers adopted this plan in order to diversify the racial composition of UT’s student body. ... As in Ricci, the government used a facially neutral policy to pursue a racially conscious agenda. Under Ricci and Parents Involved, the Ten Percent Plan should trigger strict scrutiny to the extent that Texas’s racial motivations predominated in the institution of the plan.127

Moreover, Congress cannot require charges in selection criteria that work against minorities, even if these criteria have nothing to do with “merit” – i.e., actually ability to do the job:

The requirement that employers use less-disparity-producing alternatives can break down practices that “operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” One example is the use of height and weight requirements for prison guards that may exclude most women, rather than directly measuring strength or other job-relevant variables. ...
... Congress cannot statutorily disassemble such cultural obstacles to equal opportunity. Investigating and responding to the racial impacts of institutional are, after all, race conscious activities that require some degree of racial categorization. Strict judicial scrutiny, which applies in this situation, cannot be satisfied by a government interest in disassembling employment obstacles—unless they result from conscious or unconscious discriminatory animus.  

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

To Marcus, employers may voluntarily change employment benefits that are now not supported by business necessity, but they cannot – due to the Constitution’s ban on race-conscious action – be required to do.

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128 Id. at 82.
129 “In one respect, this point may belabor the obvious. Suppose the Court interprets the Equal Protection Clause expansively and strikes down or substantially limits the disparate-impact provision. In that case, the Ricci strong-basis-in-evidence standard would no longer be applicable to state actors who fear that their employment practices have a disparate impact. Even with a strong basis, the use of race-conscious measures would be a constitutionally forbidden non-starter. The more interesting question is how this equal protection result would affect non-state actors who are subject to Title VII. Would the Ricci standard apply to a large private employer that contemplated race-conscious action to address potential disparate-impact liability? Probably not. After all, Congress cannot require employers to engage in conduct that, if federally conducted, would violate the Equal Protection Clause. If the equal protection bars state actors from engaging in race-conscious activity in order to avoid a disparate impact, then it also bars Congress from requiring private employers to do so. For this reason, further deliberations on the issue underlying Ricci will likely doom the Ricci standard, whether the reviewing Court is sympathetic to Ricci’s premises or not.” Supra note 103, at 78.
130 Id.
The only way then to allow employers – and government – to change practices that have a real discriminatory effect could be to repeal the Equal Protection Clause of the Fourteenth Amendment and Title VII.

Of course, as I will discuss below, Ricci may not, and in my opinion, certainly will not be extended this far. But Willoughby’s advice to employers is sound – until the law becomes clear, employers have to be careful about changing their employment practices.\(^{131}\)

Like a law chilling free speech, the ban on race-consciousness chills employer attempts not to discriminate. This chilling directly contradicts the program Title VII which is based on largely voluntary compliance, mediation, conciliation, and settlement.\(^{132}\)

**B. Empowering Disparate Treatment Plaintiffs**

Although the commentary has focused on how Ricci almost terminated disparate impact as a viable theory of liability, it must be remembered that it did that only after finding disparate treatment: “Our analysis begins with this premise: The City’s actions would violate the disparate-treatment prohibition of Title VII Title VII absent some valid defense.”\(^{133}\)

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

\(^{131}\) Supra note 101.

\(^{132}\) 42 USCS § 2000e-5 (Title VII requires conciliation before the E.E.O.C. can file a suit).

\(^{133}\) Supra note 5, at 2673.
framework, plaintiffs must establish a prima facie case of discrimination account of race. To do so, they must prove: (1) membership in a protected class; (2) qualification for the deposition; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class.” The court goes on to analyze the defendants' proffered "legitimate non-discriminatory reason", here that they desired to comply with the "letter and spirit of title VII", avoiding a disparate impact. The court then goes on to analyze the plaintiffs' claim that the legitimate non-discriminatory reason was pretextual. The court concluded that that any racial motive the plaintiffs had was not discrimination. It found that the plaintiffs had not suffered an adverse employment action and that the political motivations were not enough to establish discrimination. As for the Equal Protection claim, the court held that all the test takers were treated the same – all the results were discarded. Moreover, "The intent to remedy the disparate impact of (the tests) is not equivalent to intent to discriminate against non-minority applicants."
The Supreme Court just did not use this traditional analysis at all, but instead simply concluded: "Without some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race."\textsuperscript{140}

There are two current lawsuits where the plaintiffs rely on the principle that any express race-based decision-making is illegal. \textit{U.S. v. The City of New York} found that the City was liable for disparate treatment against minorities in its hiring of firefighters.\textsuperscript{141} \textit{City of New York}, although it does not explicitly rely on \textit{Ricci}, neatly demonstrates how to turn a disparate impact into proof of disparate treatment. The plaintiffs presented a prima facie case by showing the four of the City’s employment practices (the use of two exams on pass-fail basis and the rank-order selection of applicants on the basis of these two exams) had an adverse effect on black applicants.\textsuperscript{142} As a defense, the City argued that there was no direct evidence of intent to discriminate, but the court ruled that there was no need for a smoking gun.\textsuperscript{143} The City alleged that the designers of the exams attempted to design valid exams and were not racially motivated, but the court held that this was irrelevant. "On the other hand, a showing that the Exams were constructed properly -- that is that they test for relevant job skills and properly differentiate between better and worse candidates – would

\textsuperscript{140} \textit{Supra} note 5, at 2673.
\textsuperscript{142} \textit{Id.} at 51-54.
\textsuperscript{143} \textit{Id.} at 59-66.
be highly relevant to the City's defense..." The city’s knowledge of the
disparate impact of their employment practice leads to a strong inference of
disparate treatment:

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

A case attacking how transportation is funded in the Chicago area,
Public transportation in the Chicago area is run by three entities, Metra, which
consists of trains that primarily serve the suburbs, Pace, the suburban bus line,
and the Chicago Transit Authority (CTA), which serves the City. The Compliant
alleges a great disparity between the Metra, which primarily serves whites, and
the CTA, which primarily serves minorities. For example, Paragraph 7 alleges that
the Metra received an operating subsidy of $4.42 a trip, while the CTA received
$.87. For capital funding, the figures are $4.41 and $.95. The taxes are
disproportionally heavier on Chicago residents. The compliant maintains that
funding suburban riders (who are mostly white) at a higher level than city riders
(who are mostly minority) constitutes intentional discrimination.

144 id. at 69.
145 id. at 104-105 (citing Int’l Bhd. of Teamsters v. U.S., 431 U.S. 324, 336 (U.S.
1977)).
147 id. at Par. 84.
The Complaint uses two approaches, both seemingly derived from *Ricci*, to demonstrate purposeful discrimination. The first parallels Alito’s concurrence in describing the political history of the Chicago area’s transportation funding. The current system stems from what is known in Chicago as the "Council Wars," when the election of a black mayor, Harold Washington, led to a group of white alderman taking control of the City Council and fighting the mayor on everything. The Illinois legislature also joined in to fight Mayor Washington. The complaint cites racially charged statements, as did Justice Alito, to support the claim of intentional discrimination.

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

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148 *Id.* at Count II.  
149 *Id.* at Par. 57.  
150 *Id.* at Pars. 66-82.  
151 *Id.* Par. 74.  
152 *Id.* Pars. 89-91.  
153 *Id.* Pars. 99-102.
In the first part of this section, I argued that *Ricci* makes illegal an employer’s seeking to change a practice that has a disparate impact. In this part, I argue that *Ricci* makes an employer liable for not doing so. *Briscoe* demonstrates that this double bind is not just a theoretical concern of importance only to law professors. Which argument is right? Only time will tell. In the meantime, the conservative goal of making civil right law unworkable seems to have achieved.

**VII. Not So Bad as it Looks**

In reality, *Ricci* probably will not be extended as far as its logical implications. Legal doctrines rarely are. For example, at one time it was predicted by many contracts scholars that promissory estoppel would totally displace the role of consideration in contract law.\(^{154}\) Grant Gilmore, in his *Death of Contract*,\(^{155}\) predicted this. It never happened. The Court will probably find some way to limit its opinion. Furthermore, since *Ricci* was a 5-4 opinion, just one Justice has to change his or her mind or be replaced.

The scholarly commentators offer a few limitations. The Harvard commentary goes back to Justice Kennedy’s decision in *Parents Involved*\(^{156}\) to conclude that *general rules that do not target individuals would be valid*.\(^{157}\) This interpretation thus would permit the Texas 10 Percent Plan.

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\(^{154}\) See, Restatement (Second) of Contracts § 90 (1979).


\(^{156}\) Supra note 53.

\(^{157}\) He would allow facially neutral but race-conscious behavior so long as its goals are not invidious and the problem is addressed in a general way.
The Harvard commentary also agrees with Professor Primus’ “Visible Victims Reading,” under which there has to be a specific harm to identified innocent parties.¹⁵⁸ Let’s say that an employer changes its selection criteria for the future, but does not take any action against those employees already in place. Is the employer’s action illegal? Professor Primus argues probably not:

Obviously, if the Ten Percent Plan increases the proportion of African-Americans who are admitted to the University of Texas, it also decreases the proportion of admits from other racial groups. There are, in the end, losers. ⚫⚫⚫. Successful norm-entrepreneurs could, in principle, persuade the public that there is no moral difference between the two kinds of programs. But as a general matter, it has not worked out that way. At least at this point in history, many people who oppose classificatory affirmative action are comfortable with alternative measures that do not exclude identifiable innocent third parties, even though as a logical matter those alternatives must be excluding someone.¹⁵⁹

To Primus, invisible victims will not get relief:

The concern that a practice marks a group as inferior is a concern about social meaning, as is the concern that the government sees people as members of racial groups rather than as individuals. These have been core matters of equal protection, and appropriately so. Equal protection aims to reduce the public salience of race. When considering the constitutionality of a race-conscious intervention, it is therefore useful to ask whether the measure will reduce or exacerbate the racial divides within the American public. ⚫⚫⚫. Reducing racial divides therefore calls for

without subjecting individuals to different treatment “solely on the basis of a systematic, individual typing by race.” Thus, in the educational context, Justice Kennedy would allow schools to pursue student body diversity by means including “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocation resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” ¹²³ Harv. L. Rev. 282, 289.

¹⁵⁸ Id.; Supra note 67, at 38.
¹⁵⁹ Supra note 67, at 39.
sensitivity not just to what is done or what is intended but what is publicly understood.\textsuperscript{160}

As Primus points out, the standard remedies for disparate impact do not harm third parties. Disparate impact plaintiffs can win monetary relief and injunctions that provide for future relief, but do not have the favored employers who are in place fired or demoted.\textsuperscript{161} The City of New Haven should have gone ahead with the promotions and announced that the written/oral ratios would be changed to allow for more minority promotions, thus avoiding the double litigation disaster that it is now faced with. There is a problem with the respective seniority rights of the disparate impact plaintiffs, and that of the favored employers, but that is a far cry from having promotions rescinded.\textsuperscript{162}

Even though \textit{Ricci} ignored the requirement of adverse employment action, future courts may rediscover it. Let’s say that under in-place promotion standards, whites are promoted more than blacks. The employer charges the process for future promotions, but the new process is not to be put in place for some time. Although the employees had an expectation of certain standards being applied, they did not do any studying or preparation for the new standards. For example assume that academics who expected to being promoted for excellence in teaching were told that in the future publication would be required, with all present professors having a chance to publish. Even

\textsuperscript{160} \textit{Id.} at 41.
\textsuperscript{161} \textit{Id.} at 42.
\textsuperscript{162} See \textit{Franks v. Bowman Transportation Co., Inc.}, 424 U. S. 747 (1976)
if the change were made due to racial reasons, it is hard to see the affected employees getting any relief.

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

The visible victim principle also fits with human psychology, which does see possession as nine-tenths of the law. In experiments, people are asked to bid on a ring. One is now given the ring. The amount of money the ring holder will sell the ring for is usually more than he had bid for it. People usually regard those in possession of something as having a right to it.

Ultimately the majority decision in Ricci rests on the gripping narrative of the hard-working white working class male who has been injured by liberals engaged in racist social engineering. It worked for Jessie Helms and worked in

\[163\] Supra note 1.
Other less-appealing plaintiffs, even if subject to race-conscious decision-making, will have less success. Their stories will just have less traction and resonance.

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

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

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165 *Supra* note 21.
racist!), he expresses the desire not to broaden his hiring criteria for the purpose of obtaining a more qualified (not a more racially diverse) workforce. Many employers may take this route.

**VIII. Conclusion**

**A. What Planet are They On?**

The last words came from Stanley Fish. In his *New York Times* blog, “Think Again,” he comments on the impossibility of *Ricci*:

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

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

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

> Not only is there no escape from race; there is no possibility that those who are obsessed by it—everyone in this case—can ever find the peace Scalia imagines in some nebulous future or the complementariness Ginsburg incorrectly assumes in the present.\^166

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Reading the concurring opinions of Alito and Scalia and some of the commentary makes one wonder what planet the authors are living on. The title of Professor Zimmer’s November 20th blog puts it very well: “Ricci: Color Blind Standards in a Race-Conscious Society?”

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

Thus, disparate impact has devolved into the common-law first bite rule for dogs – one can give one test that has a disparate impact, but after that, it’s disparate treatment.

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168 Supra note 142.
169 “A person, although not the owner of a vicious dog, may make himself liable to others by knowingly keeping or harboring the dog upon his premises, after knowledge of his vicious propensities . . .” (3 C.J.S. 1266, §165).
Ricci effectively overrules Washington v. Davis. We may see this in Munguia v. State of Ill., where plaintiffs are challenging the transportation funding for the Chicago area. The plaintiffs claim that the current allocation of revenues for transportation funding in the area favors whites over minorities. The plaintiffs' tactic is to circumvent Washington v. Davis and Arlington Heights by pleading evidence of racial bias in the initial allocation of funds and the subsequent knowledge that that the white areas are better funded than the minority areas. This knowledge, plaintiffs maintain, constitutes intent.

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

My views may be influenced by living in Chicago, where racial groups and ethnic groups, even those whose ancestors immigrated in the Nineteenth Century, call themselves such things as Irish, Norwegian, or Swedish. And groups are defined narrowly; the Irish are West or South Side Irish, Hispanics are divided into such groups as Mexican, Puerto Rican, or Cuban. One student this semester

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170 Supra note 21.
171 Supra note 147.
172 Supra note 21.
173 Supra note 62.
told me that although her name ended in “ski”, she was Ukrainian, not Polish.

Students at John Marshall can join Black, Hispanic, Jewish, Muslim, Irish, Italian, Arabic, Greek, Asian, and Middle-Eastern student organizations (among others) and then list these organizations on their resumes. Since frequently people proclaim their racial and ethnic identities by putting ethnic insignia (such as national flags) on their cars and clothing, it would be impossible for a decision-maker to be “color-blind.” In a factory, all the boss would have to do is walk on the shop floor. Professor Zimmer succinctly describes Ricci’s double bind:

Should civil rights advocates take Ricci as a progressive step forward? Ricci does seem to have tremendous potential for changing the approach to proving intentional discrimination to the advantage of plaintiffs: Plaintiff can establish liability simply by proving that (1) the defendant knew the racial or gender consequences of its decision and (2) it then made that decision and (3) the plaintiff suffered an adverse employment impact. The intent to discriminate element, which traditionally has been the hardest to prove, becomes simply a question of the defendant’s knowledge of the racial consequences without more. Not only is plaintiff’s burden of proving intent vastly simplified, the Court’s approach seems to knock out the linkage, the “because of” race element, that supposedly joins a defendants’ intent to discriminate to an adverse employment action suffered by the plaintiff “because of” the victim’s race. All that is necessary is proof that the defendant knew the race of those affected by the decision and that those adversely affected were of one race or another or, as in Ricci, of as many racial groups that are involved. Go back to the opening quote. Once the racial consequences of the use of the test were known, a huge debate broke out, with some claiming the use of the test was discrimination and others claiming the refusal to use the test was discrimination. The City picked one of those two outcomes and the Supreme Court found it liable for discrimination in making that choice. If the City had picked the other outcomes, would not there just be a different group of plaintiffs claiming disparate treatment discrimination?174

174 Supra note 83.
Professor Zimmer proposes that employers use the election process of symphony orchestras, using a blind between the auditioners and the performers.  

(Professor Zimmer has told me he was being facetious).

Justice Alito’s use of the presence of the black activists to prove New Haven’s desire to placate a racial minority is even more bizarre, given the realities of American politics. A large portion of the actions of the City of Chicago are done to placate a racial minority. Dividing up the pie on racial and ethnic lines has been an operative principle of American politics for centuries.
All the Rev. Kimber did was just use the political process to represent his constituency which one would think he had a constitutional right to do. Almost all cities in the United States have black, Hispanic, white, or whatever activists.
Title VII was passed in large part due to the actions of a black activist, Dr. Martin Luther King, Jr. Under Alito, Thomas, and Scalia’s view, perhaps the majority of governmental action is unconstitutional, including their appointment to the Supreme Court. Do Justices Scalia, Alito, and Thomas think that their appointments were not to a large part related to their race or ethnicity?

So if Title VII and the Fourteenth Amendment require that we use criteria that are “color blind,” we can use few meaningful criteria (A restaurant maître d’hôtel told me that he only hired Virgos – this would be a race neutral criterion.) Almost any meaningful selection criterion will have some disparate impact, and

175 Id.
once that impact is known – and it almost always will be – the decision to continue or stop using it will be a race conscious decision.

B. Self-Consuming Artifacts

Here we refer to another work by Stanley Fish, *Self-Consuming Artifacts*.\textsuperscript{176} There, Fish argues that certain seventeenth century poems are dialectic, and that the way they proceed is to use art to convey the reader to a point where he transcends art:

> A dialectical presentation succeeds at its own expense; for by conveying those who experience it to a point where they are beyond the aid that discursive or rational forms can offer, it becomes the vehicle of its own abandonment. Hence, the title of this study, *Self-Consuming Artifacts*...\textsuperscript{176}

Similarly, Equal Protection and Title VII should, in the conservative view, work only towards destroying their reason for existence – to achieve racial equality – because their success will make it impossible to consider race. "A self-consuming artifact signifies most successfully when it fails...\textsuperscript{177}

Ricci's adoption of the no 'racial classification' reading of equal protection may mean that the only way to move towards greater racial equality would be to repeal the Equal Protection Clause and Title VII. The amendment and the statute both require the race-consciousness which both the amendment and the statute then make unconstitutional and illegal. Here we

\textsuperscript{176} Stanley Eugene Fish, *Self-Consuming Artifacts: The Experience of Seventeenth-Century Literature* 45 (1972).

\textsuperscript{177} Id. at 3-4.
consider again the Second Circuit opinion quoted by the district court in *Ricci*:

"(E)very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflects a concern with race. That does not make such enactments or actions unlawful or automatically suspect."

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

**C. Ricci’s Dilemmas**

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

1. Whether or not an employer can choose a particular selection criterion to promote racial diversity?
2. Can an employer change a present selection procedure that adversely affects minorities, even if the practice is not justified by business necessity?

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178 *Supra* note 23, at 157.
3. Will disparate impact have a future? Or, more broadly, can Congress invalidate selection criteria that adversely affect minorities, even if they have nothing to with merit?

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

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

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

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

8. Will Primus’s “visible victims” limitation principle be adopted?

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

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

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