

RICCI v. DESTEFANO: END OF THE LINE OR JUST ANOTHER TURN ON THE DISPARATE IMPACT ROAD?

Charles A. Sullivan*

INTRODUCTION

Reports of the death of Title VII's disparate impact theory of discrimination in the wake of *Ricci v. DeStefano*¹ may be exaggerated.² Widely praised and widely criticized in the newspapers³ and the blogosphere,⁴ *Ricci* is the latest, but not the last, chapter in a long-running feud between Congress and the Supreme Court regarding disparate impact.

As the Supreme Court summarized the theory in *International Brotherhood of Teamsters v. United States*, disparate impact discrimination is the use of "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."⁵ First announced by

* Professor of Law, Seton Hall Law School. B.A., Siena College, 1965; LL.B., Harvard Law School, 1968. The author thanks Michael J. Zimmer and Rebecca Hanner White, his co-authors on *CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION* (7th ed.), for permitting him to draw on their thoughts for this piece. He also thanks his zealous research assistants, Mariel Belanger, Elizabeth Losey, Daniel McGrady, and Anthony Marroney Noto.

¹ 129 S. Ct. 2658 (2009) (link).

² Mark Twain purportedly noted, "Reports of my death have been greatly exaggerated." See Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1153 & n.55 (2006) (link).

³ E.g., James Taranto, *There Is Such a Thing as Too Much Judicial Restraint*, WALL ST. J. ONLINE, July 6, 2009, <http://online.wsj.com/article/SB124683542343497835.html> (link); John Yoo, *Supreme Court Message: No More Quotas*, MIAMI HERALD, July 12, 2009, at L1.

⁴ E.g., Posting of Thomas C to Daily Kos, *Ricci and the Death of Disparate Impact Analysis*, <http://www.dailykos.com/storyonly/2009/7/1/748833/-Ricci-and-the-Death-of-Disparate-Impact-Analysis> (July 1, 2009, 14:23 PST) (link); Posting of Irasema Garza to Huffington Post, *Supreme Court Offers "Strong Basis" But Little Guidance in Ricci Decision*, http://www.huffingtonpost.com/irasema-garza/supreme-court-offers-stro_b_227384.html (July 7, 2009, 18:56 EST) (link); Posting of Marcia McCormack to Workplace Prof Blog, *Ricci Discussion on the Empdiscr Listserv*, http://lawprofessors.typepad.com/laborprof_blog/2009/10/ricci-discussion-on-the-empdiscr-listserv.html (Oct. 7, 2009) (link); Posting of Howard Wasserman on behalf of Kerri Stone to PrawfsBlawg, *Ricci Glitch*, <http://prawfsblawg.blogs.com/prawfsblawg/2009/07/ricci-glitch.html> (July 6, 2009, 06:46 EST) (link).

⁵ 431 U.S. 324, 336 n.15 (1977) (link). For an overview of disparate impact discrimination, see generally 1 CHARLES A. SULLIVAN & LAUREN M. WALTER, *EMPLOYMENT DISCRIMINATION LAW & PRACTICE* § 401, at 243–51 (4th ed. 2009).

the Supreme Court in *Griggs v. Duke Power Co.*,⁶ the theory required a plaintiff to establish a prima facie case of disparate impact discrimination by showing that the challenged employment practice, although facially neutral in its treatment of different groups, in fact fell more harshly on one group, say African Americans or women, than another group, say whites or males. Once that prima facie case was established, the defendant had the burden of persuading the court that a “business necessity” or “job relation” justified the challenged practice.⁷ When the challenged practice was a test with a disparate impact, the employer carried this burden by establishing its validity under technical testing standards developed originally by industrial psychologists and later articulated in federal agency guidelines.⁸

Although disparate impact had evolved in a variety of ways after *Griggs*, it suffered its first near-death experience in 1989 with the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*.⁹ *Wards Cove* diluted the employer’s rebuttal case in two ways. First, the Court redefined the concept of business necessity by taking out “necessity” and replacing it with the notion of reasonable employer justification.¹⁰ Second, *Wards Cove* stated that only a burden of production, not persuasion, passed to the defendant once the plaintiff established a prima facie case of disparate impact.¹¹

Wards Cove was greeted with a firestorm of protest, culminating in the Civil Rights Act of 1991, which revived and, for the first time, explicitly codified the disparate impact theory in Title VII.¹² Finding that *Wards Cove* had “weakened the scope and effectiveness of Federal civil rights protections,”¹³ Congress amended § 703 of Title VII by adding a new subsection (subsection (k)) declaring disparate impact discrimination an “unlawful employment practice.”¹⁴ This codification shifted the burden of persuasion of justification back to the employer and, in a circuitous way, revived the *Griggs* standard of business necessity.¹⁵

⁶ 401 U.S. 424 (1971) (link).

⁷ 1 SULLIVAN & WALTER, *supra* note 5, § 4.03[C], at 283–91.

⁸ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 429–36 (1975) (link); 29 C.F.R. § 1607.1 (2009) (link).

⁹ 490 U.S. 642 (1989) (link).

¹⁰ *Id.* at 659.

¹¹ *Id.*

¹² Pub. L. No. 102–166, 105 Stat. 1071 (1991) (link).

¹³ *Id.*

¹⁴ 42 U.S.C. § 2000e–2(k)(1) (2006) (link). The amendments made other modifications to the theory, including requiring plaintiffs to usually prove precisely what part of a selection process had a disparate impact, 1 SULLIVAN & WALTER, *supra* note 5, § 4.02[B], at 252, and adding an “alternative employment practices” surrebuttal by the plaintiff, *id.* § 4.03[D], at 291.

¹⁵ See *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 487–88 (3d Cir. 1999) (link).

During the debates, Republican opposition to the resurrection of disparate impact was premised on the claim that the theory required “quotas.”¹⁶ This opposition failed to derail the 1991 Act, but the quota question lingered below the surface. Although disparate impact does not require racial quotas in the usual sense of the word,¹⁷ there clearly was a tension between disparate impact and disparate treatment. As the *Teamsters* Court said:

“Disparate treatment” such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.¹⁸

The question, lurking since *Griggs* was handed down, was whether efforts to avoid disparate impact liability by choosing employment practices with a lesser racial impact resulted in disparate treatment liability. In other words, does an employer who rejects an employment practice that disparately impacts blacks (thus jumping out of the disparate impact pan) necessarily intentionally discriminate against whites (thus landing in the disparate treatment fire)?

Decided on the last day of the Court Term in 2009, *Ricci v. DeStefano*¹⁹ finally confronted this question. The majority’s answer: a qualified yes—efforts to avoid disparate impact are sometimes actionable as disparate treatment. *Ricci* reflected the familiar 5–4 split; Justice Kennedy wrote the majority opinion, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Scalia, although joining in the Court’s opinion, also concurred separately, as did Justice Alito, with whom Justices Scalia and Thomas joined. Justice Ginsburg wrote the dissent, which Justices Stevens, Breyer, and Souter joined.

At issue in *Ricci* was a civil service test for promotions in the New Haven, Conn., fire department. The results showed a disparate impact against

¹⁶ See Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489–90 (1996) (link).

¹⁷ Even rigorous application of the theory would not dictate the hiring of particular numbers or percentages of minority workers; all workers would, presumably, be subject to the same criteria, which would include any criteria that, despite their disparate impact on minorities, were justified by business necessity. In that sense, the disparate impact theory might be analogized to “the Texas plan,” which was racially neutral in framing (the top 10% of every Texas high school graduating class is admissible to any Texas state university), but nevertheless motivated by racial considerations. See Danielle Holley & Delia Spence, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.–C.L. L. REV. 245 (1999). Nevertheless, the theory does require employers to take into account the racial impact of their employment practices, which is the basis of the quota objection.

¹⁸ *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

¹⁹ 129 S. Ct. 2658 (2009).

minorities in that African American firefighters passed the test at a lower rate than white firefighters. Because of this impact, the city invalidated the test. White firefighters, who were consequently denied the opportunity for promotion, sued under both Title VII and the Equal Protection Clause, claiming that the decision was racially motivated. The Court, without reaching the constitutional question,²⁰ held that invalidating a test because of its impact on minorities was necessarily disparate treatment of whites under Title VII.

The majority did, however, carve out an exception to liability under the Act where “the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”²¹ To have such a strong basis, it is not enough that the employer show its actions have a disparate impact; rather, the employer must also have a strong basis to believe that it does not have a business necessity/job relation defense. As the Court put it:

The problem for respondents is that a prima facie case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt.²²

The application of this newly-announced test was illustrated by the Court’s disposition of the case before it. Although the district court, affirmed by the Second Circuit, had granted summary judgment for the employer, the *Ricci* majority gave summary judgment for the plaintiffs. It found that there was not even a genuine issue of material fact whether the City had the requisite strong basis in evidence—it clearly did not. Although there had been numerous hearings and submissions prior to the City’s cancellation of the test, there was relatively little analysis of the possible deficiencies of the test in terms of technical test validation requirements, which would have shown the absence of any business necessity. The majority concluded that “there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or

²⁰ See text *infra* at note 73.

²¹ *Ricci*, 129 S. Ct. at 2664.

²² *Id.* at 2678 (internal citations omitted).

because other, equally valid and less discriminatory tests were available to the City.”²³

This holding suggests a kind of hierarchy of discrimination theories—that is, that disparate treatment is the core prohibition of Title VII, with disparate impact playing a lesser role. In fact, the Court read the statute in this fashion, finding that disparate treatment was the thrust of Title VII as originally enacted, with disparate impact added only by the Civil Rights Act of 1991.²⁴ The majority viewed a decision to avoid the disparate impact of a test on African Americans as necessarily constituting a decision to disadvantage the white beneficiaries of the test for racial reasons. For the Court, *Ricci* was a classic case of disparate treatment, and, given that theory’s primacy, it held that such practices had to be stringently limited. Nevertheless, the Court attempted to reconcile Title VII’s articulation of the two theories of liability by carving out a place for disparate impact: what would otherwise be actionable disparate treatment is permissible when the employer has a strong basis in evidence that the action was required by the disparate impact theory.²⁵

The majority bulwarked its argument by looking to §2000e-2(*l*), a provision added to Title VII by the 1991 Civil Rights Act, which bars adjusting test scores by race.²⁶ Reading that clause expansively, the Court wrote:

If an employer cannot rescore a test based on the candidates’ race [], then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision.²⁷

Given this analysis, one might wonder why §2000e-2(*l*) did not play a larger role in the opinion. After all, that section seems to dictate the Court’s opinion that cancellation of the test is *prima facie* unlawful. The answer

²³ *Id.* at 2681.

²⁴ *See id.* at 2672. The dissent challenged this analysis, citing *Griggs* for the proposition that disparate impact was implicit in the statute as originally enacted. *Id.* at 2696–98 (Ginsburg, J., dissenting).

²⁵ *Id.* at 2675 (majority opinion). The majority did not require an actual showing of a disparate impact violation in order to justify disparate treatment, but its “strong basis in evidence” test comes very close. It rejected the dissent’s alternative formulation. *See text infra* beginning at note 53.

²⁶ *See* 1 SULLIVAN & WALTER, *supra* note 5, § 4.05[G][5], at 316.

²⁷ *Ricci*, 129 S. Ct. at 2676. The Court returned to this theme in the context of rejecting a potential alternative (banding of scores) to reduce the disparity of impact. It noted that banding was not a valid alternative because “[h]ad the City reviewed the exam results and then adopted banding to make the minority test scores appear higher, it would have violated Title VII’s prohibition of adjusting test results on the basis of race. § 2000e-2(*l*).” *Id.* at 2680.

might be that §2000e-2(l) is, on its face, limited to tests, and the majority seems to have been seeking a broader rule applicable to all disparate impact scenarios. In any event, to better understand the significance of *Ricci*, both for the future of the disparate impact theory and more broadly for Title VII, several issues must be explored.

I. THE INTENT ELEMENT OF DISPARATE TREATMENT

At first glance, the majority appears to declare that acting to avoid the disparate impact of a proposed employment practice is necessarily disparate treatment and therefore illegal unless within the “strong basis in evidence” safe harbor. Although there is some basis for this reading, it is, ultimately, far too broad. The broad reading can be drawn from a passage in which the majority states:

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 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.” 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.²⁸

The Court went on to reject the district court’s ruling that an intent to avoid disparate impact liability meant that the City did not have the requisite intent for disparate treatment liability. “Whatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.”²⁹

There is considerable tension between this meaning of “because of” and the Court’s previous approach to the intent question. In *Personnel Administrator v. Feeney* (admittedly decided in the Equal Protection context, where intent to act on a prohibited trait is required for heightened scrutiny), the Court held that “‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identi-

²⁸ *Id.* at 2673 (citations omitted).

²⁹ *Id.* at 2674.

fiable group.”³⁰ It seems strange to view the city of New Haven as cancelling the test *because* it wanted to disadvantage the white firefighters, although New Haven certainly knew that that would be the result.³¹ A better reading of the facts (or at least a plausible one) is that New Haven acted to avoid disparate impact liability *despite* the “adverse effects upon an identifiable group” of whites.

If the lower courts apply this broad approach to intent in all disparate treatment cases, *Ricci* will expand Title VII to reach actions taken with knowledge of racial consequences, a view that must apply in both traditional and reverse discrimination cases.

But such a broad view of intent is contradicted by another passage in the opinion, one that seems to reject equating a racial motivation with intent. Although the Court struck down the city’s cancellation of the test, it apparently allowed employers to take other actions on the basis of race:

Nor do we question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. . . . *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.³²

In the context in which it was written, this passage seems to mean that the employer could have adopted its testing (or other practices) to minimize the disparate impact, even though it could not invalidate a test, once it was given, for that reason. For example, some of the alternatives that the Court rejected—such as the use of “assessment centers”³³—might well be appropriate when required at the “front end” in designing a selection process, rather than imposed on the “back end” by invalidating a test after it was administered.

³⁰ 442 U.S. 256, 279 (1979) (internal citation omitted) (link). See 1 SULLIVAN & WALTER, *supra* note 5, § 2.04, at 71.

³¹ Justice Alito’s concurrence took a different view of the matter. He thought the record could be read to allow a reasonable jury to “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.” *Ricci*, 129 S. Ct. at 2688 (Alito, J., concurring).

³² *Id.* at 2677 (majority opinion) (emphasis added).

³³ The Court referred to testimony describing assessment centers as places “where candidates face real-world situations and respond just as they would in the field.” *Id.* at 2669.

What justifies an approach that seems to reject a straightforward causation analysis where racial consideration influences an employer's decision-making? There are three potential answers to this question. First, perhaps the Court was reintroducing the *Feeney* distinction—namely, that intent to avoid disparate impact on minorities is not, *per se*, intent to disadvantage whites. Second, the passage might simply suggest that Title VII's creation of disparate impact liability, which requires parties to consider racial consequences and reduce adverse effects on racial minorities, is a broader exception to the statute's ban on intentional discrimination than the *Ricci* majority seemed to say elsewhere. Allowing potential racial effects to enter the calculus at the outset allows more play for disparate impact. Third, the Court may have recognized that timing affects the expectations of white employees. The majority in *Ricci* repeatedly referred to the white firefighters' expectations of, and reliance on, the use of the test as a promotion method,³⁴ neither of which would exist if the employer's disparate impact calculations occurred early in the process.³⁵ It is not so clear how this "timeline approach" factors into the traditional disparate treatment analysis,³⁶ but *Ricci*'s "strong basis in evidence" requirement may apply only to the end-stages of any selection process. If so, employers would still be free to take potential racial impact into account in the early stages.

II. BUSINESS NECESSITY/JOB RELATION/ALTERNATIVE EMPLOYMENT PRACTICE

There was no question in *Ricci* that the invalidated test had a disparate impact on African Americans and Latinos. The Court noted that "[o]n the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates."³⁷ Given the structure of the selection process, no African Americans would have been considered

³⁴ *E.g.*, *id.* at 2676 ("Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.").

³⁵ In other words, while all firefighters might have a general hope of promotion, no firefighter would have an expectation (much less reasonably rely on) of being promoted based on a test (as opposed to, say, an assessment center) or a particular kind of test, or a particular ratio of test scores to interview scores prior to the City's decision to use one.

³⁶ There has been some question about whether the plaintiffs in *Ricci* had suffered an "adverse employment action," which requires not merely an act of discrimination, but also significant harm, to be cognizable. See 1 SULLIVAN & WALTER, *supra* note 5, § 2.02, at 59. Despite some arguments to the contrary, see Posting of Tristin Green to Concurring Opinions, *Title VII, the Adverse Action Requirement, and Ricci v. DeStefano*, http://www.concurringopinions.com/archives/2009/02/title_vii_the_a.html (Feb. 5, 2009, 23:39 EST) (link), a delayed promotion would seem to qualify. However, at the earlier stage—when the employer is considering which of a variety of hiring or promotion practices to adopt—an individual might not be able to show that he or she was harmed by the ultimate decision precisely because there is no baseline from which to measure disadvantage.

³⁷ *Ricci*, 129 S. Ct. at 2677–78. The lieutenant exam also had disparate pass rates: 58.1 percent for white candidates, 31.6 percent for black candidates, and 20 percent for Hispanic candidates. *Id.* at 2678.

for promotion.³⁸ Had the test been certified and a disparate impact case brought by black firefighters, the *prima facie* case would have been established, shifting the burden of proving business necessity and job relation to New Haven.

The Court acknowledged that the evidence of impact warranted a “hard look” by the city before certifying the results.³⁹ But for the majority that meant trying to ascertain whether going forward would be likely to result in disparate impact liability, which, in turn, meant that there was no business necessity, job relation, or alternative employment practices that would achieve the city’s performance goals with less racial impact.⁴⁰

The majority’s analytical structure requires importing the apparatus of disparate impact wholesale into the disparate treatment question. Where the challenged practice is a test, this would require employers to apply the standards for test validation that the Equal Employment Opportunity Commission and the courts have developed.⁴¹ The majority in *Ricci* spent considerable time detailing how New Haven’s consultant had designed the test, which included detailed job analysis and test construction.⁴² Although the Court recognized that questions had been raised as to the test’s validity during hearings held to determine whether the test should be certified, it did not believe that the information developed provided a strong basis in evidence to doubt the test’s validity. In other words, if the test had been certified and then black firefighters sued the city for disparate impact, the Court believed that those firefighters would have lost.

Although testing has been the major success story of the disparate impact theory, disparate impact reaches all employment practices. Thus, a real question in the wake of *Ricci* is what it means to have a strong basis in evidence for the absence of business necessity/job relation when something other than a test is in issue. For example, one of the Supreme Court’s non-testing disparate impact cases, *Dothard v. Rawlinson*,⁴³ involved an employer’s requirement that job applicants satisfy height and weight minima. Were potential male correctional officers to bring a *Ricci*-style suit today, claiming disparate treatment from the elimination of such requirements, it would seem relatively easy for the employer to show that it had no factual basis to support the job-relation of its former rule.⁴⁴

³⁸ *Id.* at 2678.

³⁹ *Id.*

⁴⁰ *Id.* at 2681.

⁴¹ See 1 SULLIVAN & WALTER, *supra* note 5, § 4.05, at 295–321.

⁴² See *Ricci*, 129 S. Ct. at 2665–66.

⁴³ 433 U.S. 321 (1977) (link).

⁴⁴ In *Dothard* itself, the employer did not attempt to show that a particular amount of strength was needed for the guard position, much less that the height and weight minima correlated to a high degree with the required amount of strength. *Id.* at 331. Of course, *Ricci* may not apply to this kind of decision at all since it is hard to imagine reasonable expectations or reliance by males on the height and weight minima.

Further, at the early stages of an employer's consideration of any selection or promotion process, it is hard to understand how the *Ricci* framework applies. Imagine, for example, that a city is deciding whether to use a traditional test or an assessment center to promote firefighters. This hypothetical city is aware that traditional tests tend to have a greater disparate impact than assessment centers, and, for that reason, it opts for the assessment center approach. Since no test has been developed, much less administered, there cannot be a strong (or any) basis in evidence to think that the test that might have been used would have been invalid. Thus, the whole *Ricci* framework is likely inapplicable to this situation.

An additional question arises with regard to possible alternative selection processes. The *Ricci* Court explicitly recognized that, under Title VII's express terms, even a valid test cannot be used "if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."⁴⁵ Although the alternative business practice doctrine has not yet had much traction in disparate impact cases,⁴⁶ the *Ricci* majority spent considerable time exploring whether there was a genuine issue of material fact of the existence of such an alternative.

The majority rejected three possibilities—a different mix of oral and written tests; changing the "rule of three"⁴⁷ as to who was interviewed on the basis of test results; and using an assessment center. As for the ratio of oral to written scores in computing an overall score, there was no evidence that a different ratio would be "an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions."⁴⁸ The Court also thought it "could well have violated Title VII's prohibition of altering test scores on the basis of race."⁴⁹ Second, the rule of three could not be interpreted to allow "banding" of scores (rounding all scores to the nearest whole number) because § 2000e-(l) prohibited such action: "Had the City reviewed the exam results and then adopted banding to make the minority test scores appear higher, it would have violated Title VII's prohibition of adjusting test results on the basis of race."⁵⁰ Finally, using assessment centers instead of the test could not be justified on the record before the Court since there were, at most, "a few stray (and contradictory)" remarks regarding this alternative.⁵¹

Although the Court's analysis explains why a professionally designed test, once administered, may be hard to challenge, it also suggests that "the

⁴⁵ *Ricci*, 129 S. Ct. at 2678.

⁴⁶ See 1 SULLIVAN & WALTER, *supra* note 5, § 4.03[D], at 294.

⁴⁷ The "rule of three" is very common in civil service systems, and requires the decision-maker to fill each position from among the top three scorers in the selection process.

⁴⁸ *Ricci*, 129 S. Ct. at 2679.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2680.

⁵¹ *Id.*

strong basis in evidence” justification for an employer’s acting to avoid potential practices with a disparate impact may not have as sweeping applicability as *Ricci* might first suggest. Most of the Court’s reasoning is simply inapplicable to the initial decision to pursue a particular selection process. And, if we take literally the language that “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race,” *Ricci* does not mandate a strong basis in evidence for every employer action designed to avoid a disparate impact. Rather, it applies only to actions taken at the back-end of a selection process when employer or applicant expectations have crystallized and reliance on the process has begun.

III. STRONG BASIS IN EVIDENCE

The core of the Court’s holding was the requirement of “a strong basis in evidence” for disparate impact liability in order to justify disparate treatment under Title VII. For the Court, this standard required something less than proof by the employer that it would have been held liable had it gone forward with the test. The majority viewed its rule as striking a balance between unacceptable alternatives.⁵² Thus, the Court looked to the 1991 codification of disparate impact as implying that, sometimes at least, avoiding disparate impact justifies disparate treatment.⁵³ But even requiring an actual disparate impact violation “is overly simplistic and too restrictive of Title VII’s purpose,” since it would discourage voluntary compliance.⁵⁴ In contrast, “an employer’s good-faith belief that its actions are necessary to comply with Title VII’s disparate-impact provision” did not accord enough weight to the statute’s prohibition of disparate treatment discrimination.⁵⁵ As the Court noted:

A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. That would amount to a *de facto* quota system, in which a focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures. Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer’s preferred racial balance.⁵⁶

⁵² See *id.* at 2676.

⁵³ See *id.*

⁵⁴ *Id.* at 2674.

⁵⁵ *Id.* at 2674–75.

⁵⁶ *Id.* at 2675 (internal quotation marks and citation omitted).

The Court thought “a more appropriate balance”⁵⁷ could be struck by looking to its Equal Protection Clause cases, which allowed that “certain state actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.”⁵⁸

The dissent would have applied a looser standard. For Justice Ginsburg and the other dissenters, “an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII’s disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.”⁵⁹ The dissent was not explicit about the meaning of its good-cause standard, which seems to require more than subjective good faith but not as much as the majority’s “strong basis in evidence” test. However, Justice Ginsburg was critical of the majority’s balancing: “It is hard to see how [the majority’s] requirements differ from demanding that an employer establish ‘a provable, actual violation’ *against itself*.”⁶⁰

A. *The Intersection of the Two Theories*

The majority in *Ricci* not only announced its new rule, but also applied it: rather than remanding the case to the district court for application of the strong basis in evidence test, the majority entered summary judgment against New Haven. In short, the city had avoided potential disparate impact liability only by incurring liability under the disparate treatment theory. But the rest of the opinion makes clear this case was not a lose-lose situation, because the city could have avoided liability under both disparate treatment and disparate impact had it had a strong basis in evidence that certifying the test would have led to disparate impact liability.

The majority ended its opinion by noting that “[o]ur holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions.”⁶¹ To this point, the Court may have been correct. But a final sentence confused things. Since

⁵⁷ *Id.*

⁵⁸ *Id.* (internal quotation marks omitted).

⁵⁹ *Id.* at 2699 (Ginsburg, J., dissenting). The dissent also argued that, even under the majority’s more demanding test, a remand was necessary to assess whether the City could establish a strong basis in evidence for its action. *Id.* at 2702–03.

⁶⁰ *Id.* at 2701. It is not so clear why the dissent thought this was such a damning requirement: in the situation in *Ricci*, an employer canceling a test because it had a disparate impact would not be implementing it; thus, proving that the test would have violated Title VII if used does not seem damaging. This can be contrasted with the affirmative action cases where having to prove prior discrimination against blacks to justify an affirmative action plan would often result in liability to blacks. However, it is possible that Justice Ginsburg was concerned that requiring employers to invalidate one test would tend to expose them to disparate impact liability for other tests.

⁶¹ *Id.* at 2681 (majority opinion).

the presumed remedy for the violation the Court found was certifying the test, the possibility of a suit by the black firefighters on disparate impact grounds remained. In a strange passage, the Court addressed this possibility:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.⁶²

However, the Court had previously held that canceling the test because of its disparate impact on minorities was necessarily disparate treatment of whites, even though such liability could be avoided under the strong basis in evidence rule. Thus, there is no doubt about the *risk* of such liability. The whole point of the opinion is that such risk is insufficient to justify rejecting the disparate impact theory.

The final passage, then, makes sense only when read in the context of the rest of the opinion: there is no disparate impact liability when the predicates are not present. But if there is an *unjustified* disparate impact, an employer seeking to comply with the law presumably must refuse to certify the test, despite the resulting disparate treatment of whites. This interpretation complies with the mandate of disparate impact while fitting within the “strong basis in evidence” safe harbor for disparate treatment.

Notice, however, that the Court’s opinion creates a gap: there is no liability under either theory if the employer cancels a test on the basis of a strong basis in evidence of unjustified disparate impact. But if the employer implements the test, even though it has a strong basis in evidence for believing it will violate the disparate impact provision, the employer does not necessarily violate the law. The employer may avoid liability because there is no disparate treatment and there has to be an actual violation of disparate impact before the employer is held liable under that theory—a strong basis is not enough.⁶³

B. Precluding the African American Firefighters from Suing

A final problem arises in the hypothetical disparate impact suit the Court mentions. Indeed, it’s not so hypothetical—such a suit has now been

⁶² *Id.*

⁶³ The size of the gap depends, of course, on the difference in proof required to prove disparate impact and that required to show a strong basis in evidence. The dissent, as we have seen, sees little difference.

filed.⁶⁴ Summary judgment to the white firefighters in *Ricci* itself does not, as a matter of either logic or law, mean that the disparate impact is necessarily justified or that there were not suitable alternative employment practices. From a logical perspective, the fact that an employer failed to adduce sufficient evidence to meet the strong basis in evidence standard of *Ricci* does not mean that the evidence does not exist. In *Ricci* itself, the city of New Haven made some efforts to ascertain if there were problems with the test or its alternatives, and, according to the Court, failed to elicit such a basis. However, the city's efforts might not have been very effective, and, regardless of the situation in New Haven, a disparate impact defendant cannot be allowed to avoid liability under that theory by merely failing to explore the alternatives and then claiming that to act in any other way would result in disparate treatment.

Further, from a civil procedure perspective, the normal rule is that the black firefighters may not be bound by a judgment in a case in which they are not parties. So held *Martin v. Wilks*,⁶⁵ another firefighter case in which white firefighters challenged promotions awarded to African Americans under a consent decree in a suit in which the white plaintiffs were not parties. The Supreme Court held that the whites could not be bound by the prior litigation. *Martin* thus suggests that *Ricci* is wrong to the extent it may be said to prejudge a disparate impact claim by African American firefighters against New Haven.⁶⁶

However, in what might be the final irony of this saga, the 1991 Civil Rights Act that codified disparate impact also modified *Martin v. Wilks*. In an effort to help minority and female plaintiffs retain the gains they made in employment discrimination suits, Congress provided that a prior decree in a civil rights suit can bind nonparties if they either (1) had notice and the opportunity to intervene or (2) were adequately represented in the earlier suit.⁶⁷ Assuming that this statute comports with due process,⁶⁸ it seems likely that at least one prong will be met, which would allow the white firefighters to retain the gains they made in *Ricci*.

⁶⁴ Complaint for Damages and Injunctive Relief at 1, *Briscoe v. New Haven*, No. 3:09-cv-01642 (D. Conn. Oct. 15, 2009) (link). The complaint alleges that the city's decision to weight the written portion of examination as 60% and the oral portion as 40% had a disparate impact on blacks, was "arbitrarily chosen," and was "contrary to standard practice among similar public safety agencies." *Id.* ¶ 1.

⁶⁵ 490 U.S. 755 (1989) (link).

⁶⁶ The Supreme Court recently reaffirmed the general rule of *Martin v. Wilks*, holding in *Taylor v. Sturgell* that there is no general "virtual representation" exception to the rule that a nonparty cannot be bound by an in personam judgment. 128 S. Ct. 2161, 2175 (2008) (link).

⁶⁷ 42 U.S.C. § 2000e-2(n) (2006) (link). See 2 SULLIVAN & WALTER, *supra* note 5, § 12.20[F][2].

⁶⁸ *Taylor* noted that "a special statutory scheme may 'expressly foreclos[e] successive litigation by non-litigants . . . if the scheme is otherwise consistent with due process.'" 128 S. Ct. at 2173 (quoting *Martin*, 490 U.S. at 762 n.2).

IV. ANOTHER CONGRESSIONAL FIX?

Congress rode to the rescue of the disparate impact theory when *Wards Cove* undercut it in 1989.⁶⁹ The stars would seem even more favorable for such a rescue from the effects of *Ricci*. In 1991, there were Democratic majorities in both houses but a Republican president;⁷⁰ today, there is also a Democratic President who has embraced civil rights.⁷¹ But the path might not be so easy. In what might have been intended as a warning to Congress not to override the *Ricci* majority's interpretation of Title VII, Justice Scalia's *Ricci* concurrence stressed that the majority's "resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"⁷² This question is beyond the scope of the current discussion,⁷³ but it is interesting to note that both Justice Scalia's concurrence and Justice Ginsburg's dissent cited Professor Richard Primus's article on the issue.⁷⁴ Professor Primus basically argues that a mechanical application of equal protection jurisprudence could invalidate the disparate impact theory (presumably the point of Justice Scalia's citation⁷⁵), but that a more purposive analysis would permit it. Justice Ginsburg quoted Primus as saying that "[t]he very radicalism of holding disparate impact doctrine unconstitutional . . . suggests that only a very uncompromising court would issue such a decision."⁷⁶

⁶⁹ See discussion accompanying note 12, *supra*.

⁷⁰ Indeed, an earlier version of the Civil Rights Act passed both houses in 1990 but was vetoed by the first President Bush; Congress narrowly failed to override that veto. Sam Fulwood III, *Bush's Veto of Rights Bill Survives in Senate by One Vote*, L.A. TIMES, Oct. 25, 1990, at A1.

⁷¹ The first substantive law President Obama signed was the Lilly Ledbetter Fair Pay Act of 2009. See Charles A. Sullivan, *Raising the Dead: The Lilly Ledbetter Fair Pay Act* (Seton Hall Pub. Law Research Working Paper No. 1418101, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418101 (link).

⁷² *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681–82 (2009) (Scalia, J., concurring).

⁷³ Cf. Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004) (arguing that avoidance of the equal protection question requires holding that whites and males are also protected by the disparate impact theory). See also Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 CATO SUP. CT. REV. (forthcoming 2009, draft on file with SSRN), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462431 (link) (exploring the constitutional question in the wake of *Ricci*); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. (forthcoming 2010, not-to-be-cited-without-permission draft on file with SSRN), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495870 (discussing the equal protection question) (link).

⁷⁴ *Ricci*, 129 S. Ct. at 2682; *id.* at 2700–01 (Ginsburg, J., dissenting). See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

⁷⁵ See *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

⁷⁶ *Id.* at 2700–01 (Ginsburg, J., dissenting) (quoting Primus, *supra* note 74, at 585).

CONCLUSION

In terms of advice to employers, it would seem that, at least theoretically, *Ricci* made things more complicated. Disparate treatment of minorities remains forbidden. Disparate treatment of white males remains forbidden—except to avoid disparate impact against minorities. Disparate impact (that is, unjustified disparate impact) against minorities remains forbidden. The leeway employers had to avoid potential disparate impact suits has been narrowed considerably, but employers still need to assess the impact, the justifications, and the alternatives of various potential courses of action before proceeding. Finally, even where the possibility of disparate impact liability is influencing a course of action, the employer may well remain free to take racial impact into account in choosing among various alternatives (free of disparate impact liability), as long as it does so early enough to avoid disrupting settled expectations.