The War between Disparate Impact and Equal Protection

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Title VII of the Civil Rights Act of 1964 forbids job discrimination based on race, color, religion, sex, or national origin.[1] Title VII was originally enacted as a regulation of interstate commerce and applied only to private employers. In 1972, however, the Act was extended to the public sector pursuant to Congress's Fourteenth Amendment authority to ensure that ''[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.'' Because the Equal Protection Clause was intended to guarantee equal opportunities rather than equal outcomes, the Supreme Court's application of that clause has focused on intentional discrimination. Title VII initially barred only disparate treatment, which encompasses only such intentional discrimination and, under some interpretations, also unconscious bias. But under Title VII, Congress expanded the reach of anti-discrimination litigation: Employers may be held accountable not only for disparate treatment, but also for disparate impact, which refers to discriminatory effects arising out of workplace policies or procedures, even when an intent to discriminate cannot be proven.

On its face, the New Haven firefighters' case, *Ricci v. DeStefano*, is about the tension between these two sides of Title VII.[2] At root, however, the real war is between disparate impact and the Equal Protection Clause.

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[1] 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq.

[2] 557 U.S. ____, 129 S. Ct. 2658 (2009).

I. Introduction

''The way to stop discrimination on the basis of race,'' Chief Justice John Roberts recently wrote, ''is to stop discriminating on the basis of race.''[3] In other words, state actors can best achieve equal treatment by eliminating all governmental racial preferences. This notion builds upon Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, which proclaimed that ''our Constitution is colorblind, and neither knows nor tolerates classes among its citizens.''[4] It contrasts, however, with Justice Harry Blackmun's equally canonical view that ''in order to get beyond racism, we must first take account of race.''[5] To the extent that anti-discrimination jurisprudence now adopts—or shuttles between—these conflicting views, a difficult question emerges for disparate-impact doctrine: Under what circumstances, if any, can state actors intentionally discriminate in order to avoid the unintended discrimination that might otherwise result from facially neutral policies?

The question is whether such race-conscious actions are consistent with the constitutional guarantee that no person will be denied ''the equal protection of the laws.'' Although posed in *Ricci*, the issue is not resolved there. As Justice Antonin Scalia observed in his concurrence to that decision, the Court's narrow resolution of *Ricci* ''merely postpones the evil day'' the Court will have to decide the central, looming 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?''[6] As Scalia acknowledges, ''The question is not an easy one.''[7] It is, however, both important and timely. Because ''the war between disparate impact and equal protection will be waged sooner or later . . . it behooves us to begin thinking about how—and on what terms—to make peace between them.''[8]

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

[4] Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[5] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

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

[7] *Id.*

[8] *Id.* at 2683.

Although *Ricci* does not resolve this conflict, it does identify the problem clearly and suggests that a future case will resolve it. *Ricci* holds that employers may not subject employees to disparate treatment without a strong basis in evidence to believe that facially neutral application of their employment policies would entail liability for disparate impact.[9] Writing for a five-justice majority, Justice Anthony Kennedy based the Court's opinion entirely on Title VII. Significantly, Kennedy emphasized that the Court does not address ''the constitutionality of the measures taken here in purported compliance with Title VII,'' nor does it ''hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.''[10] In other words, the Court explicitly reserved the option to hold, in a later case, that the prospect of disparate-impact liability is never a sufficient justification, under the Equal Protection Clause, for the use of racially preferential employment measures.

This article will argue that equal protection is consistent with disparate impact only when the latter provision is narrowly construed. Disparate impact plays an important role in identifying and eliminating intentional and unconscious discrimination that cannot be proved through other means. Even under strict scrutiny, state actors may take narrowly tailored race-conscious actions to avoid creating such discriminatory impacts.[11] On the other hand, disparate impact is also sometimes used to level racial disparities that do not arise from intentional or unconscious discrimination. Equal protection does not permit state actors to take race-conscious actions for this purpose. Because Title VII's disparate-impact provision is based in significant part on this less-than-compelling rationale, this article will argue that it must be narrowed or struck down. Finally, disparate impact may also be used to eliminate systemic racial biases that do not arise from an institution's present or prior discriminatory actions. Equal protection may permit state actors to conduct certain

[9] *Id.* at 2675 (Kennedy, J.) (majority opinion).

[10] *Id.* at 2676.

[11] Under the Equal Protection Clause, courts will strictly scrutinize state laws that discriminate on the basis of race. Strict scrutiny requires the state to show that the law is, first, justified by a compelling governmental interest and, second, narrowly tailored to achieve that interest.

narrowly tailored race-conscious actions to avoid disparate impacts of this sort, although Congress cannot constitutionally require them.

II. Background

Ricci is a challenge to the New Haven Civil Service Board's decision not to certify the results of a promotional examination in the city's fire department brought by 18 white and Hispanic firefighters who likely would have been promoted based on their strong performance on the test. CSB had come to its decision after finding that very few African American or Hispanic firefighters scored highly enough on the examination to be promoted. CSB had been advised by counsel that certifying the results could render New Haven liable to minority candidates under Title VII's disparate-impact provision.

Firefighting is a field in which, as Justice Ruth Bader Ginsburg observed in her dissent, ''the legacy of racial discrimination casts an especially long shadow.''[12] Congress took note of this history in 1972 when it extended Title VII to state and local government employers. Specifically, Congress took note of a U.S. Commission on Civil Rights report that found that racial discrimination in municipal employment was even ''more pervasive than in the private sector.''[13] In particular, the USCCR had criticized fire and police departments for ''[b]arriers to equal employment . . . greater . . . than in any other area of State or local government,'' finding that African Americans held ''almost no positions in the officer ranks.''[14] The USCCR had reported that intentional racism was partly responsible, but that the problem was exacerbated by municipalities' failure to apply merit-based hiring and promotion principles. Instead, government agencies often relied on nepotism, political patronage, and other practices that reinforced long-standing racial disparities.

Historically, New Haven's fire department has been characterized by stark racial disparities similar to what the USCCR had observed nationwide. In the early 1970s, for example, African Americans and Hispanics composed 30 percent of New Haven's population, but only 3.6 percent of the city's 502 firefighters. In recent years, African

[12] Ricci, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

[13] *Id.* at 2690 (quoting H. R. Rep. No. 92-238, p. 17 (1971)).

[14] *Id.* at 2690–91.

Americans and Hispanics have remained significantly under-represented among New Haven's senior firefighting officers. For example, only one of the fire department's 21 captains is black. New Haven did not present any evidence, however, to demonstrate that New Haven's fire department had previously engaged in racial discrimination.[15]

In 2003, 118 firefighters took New Haven's promotional examinations to qualify for advancement to lieutenant or captain.[16] New Haven conducted these examinations infrequently, so the results would dictate which applicants would be considered for promotion during the following two years. The examination had both written and oral components. New Haven's contract with its firefighters' union required that the written exam would account for 60 percent and the oral exam 40 percent of an applicant's total score. The CSB's charter established a ''rule of three,'' under which municipal hiring authorities must fill any vacancy by selecting a candidate from the top three scorers.

New Haven contracted with Industrial/Organizational Solutions, Inc. to develop and administer the tests. IOS specializes in designing examinations for fire and police departments. IOS began its test-design process by conducting analyses to identify the knowledge, skills, and abilities that are essential for the positions. IOS interviewed incumbents and their superiors, conducted ride-alongs and observed on-duty officers. Based on these practices, IOS prepared questionnaires and administered them to most incumbent department officers. At every stage, IOS over-sampled minority officers so that the results would not be biased towards white applicants. In order to prepare the oral examination, IOS used its job analysis data to develop hypothetical situations that would test relevant job requirements. Candidates were given the hypotheticals and asked to address them before a three-person panel of assessors. Sixty-six percent of the panelists were minority group members, and every assessment panel had two minorities.

Seventy-seven firefighters took the lieutenant examination: 43 whites, 19 blacks, and 15 Hispanics. Only 34 candidates passed:

[15] Amicus Br. of Claremont Inst. Center for Const. Jurisprudence, Ricci v. DeStefano, 2009 WL 507011 at *19, citing Pet. App. 938a–945a, 1013a–1037a.

[16] Ricci, 129 S. Ct. at 2664.

25 whites, 6 blacks, and 3 Hispanics. When the examination was conducted, eight lieutenant positions were vacant. Under New Haven's ''rule of three,'' the top ten candidates were eligible for promotion. All 10 of them were white. Subsequent vacancies would have allowed at least three black candidates to be considered for promotion to lieutenant. Forty-one firefighters took the captaincy examination: 25 whites, 8 blacks, and 8 Hispanics. Twenty-two passed: 16 whites, 3 blacks, and 3 Hispanics. Because seven captain positions were vacant, nine candidates were immediately eligible for elevation: 7 whites and 2 Hispanics. In other words, if the CSB had certified the results, no black firefighters could have been considered for any of the then-vacant promotional opportunities.

When the racial disparities in the test results were revealed, a heated public debate ensued. Some firefighters threatened to sue New Haven for disparate-impact discrimination if the department made promotions based on the examinations. Others threatened to sue if New Haven discarded the test results because of the racial composition of the candidates who would otherwise be promoted. New Haven's attorney, Thomas Ude, counseled the city that under federal antidiscrimination law, ''a statistical demonstration of disparate impact,'' in and of itself, ''constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer initiated, voluntar[y] remedies—even . . . race-conscious remedies.''[17] The test-maker, meanwhile, insisted that there was ''nothing in those examinations . . . that should cause somebody to think that one group would perform differently than another group.''[18] At Ude's urging, New Haven sided with the protesters and discarded the examinations.

The plaintiff firefighters alleged that New Haven (and various officials) discriminated against them based on their race by disregarding the test results, in violation of both Title VII's disparate-treatment provision and the Fourteenth Amendment's Equal Protection Clause. New Haven defended its actions, arguing that it had refused to certify the examination results based on a good-faith belief that, had it certified the results, it would have been liable under Title VII's disparate-impact provision for adopting a practice that adversely affected minority firefighters.[19]

[17] *Id.,* 129 S. Ct. at 2666–67 (quoting App. to Pet. for Cert. in No. 07-1428, p. 443a).

[18] *Id.,* 129 S. Ct. at 2668 (quoting App. in No. 06-4996-cv (CA2), at A961).

[19] *Id.* at 2661.

III. The Supreme Court's Opinion

Justice Anthony Kennedy, writing for the Court, reversed the Second Circuit and held in favor of the plaintiffs. Justice Kennedy began with the observation that New Haven's actions would violate Title VII's disparate-treatment prohibition absent some valid defense.[20] This is important, because the district court had characterized New Haven's actions as involving ''the use of race-neutral means to improve racial and gender representation.''[21] After all, New Haven had discarded all test results, rather than treating results differently based on the race of the test-taker.

In *Parents Involved in Community Schools v. Seattle School District No. 1,* Justice Kennedy had appeared to argue that such race-neutral measures do not trigger strict scrutiny under the Equal Protection Clause. But here, Kennedy emphasized that New Haven decided not to certify the results because of racial disparities in performance. Quoting the district court, Kennedy characterized New Haven's view as that ''too many whites and not enough minorities would be promoted were the lists to be certified.''[22] Absent sufficient justification, Kennedy explained, such ''race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race.''[23]

Kennedy next considered whether the intent to avoid disparate-impact liability justified disparate-treatment discrimination that would otherwise be prohibited. He rejected the firefighters' argument that it can never be permissible under Title VII for an employer to ''take race-based adverse employment actions in order to avoid disparate-impact liability—even if the employer knows its practice violates the disparate-impact provision.''[24] As Kennedy explained, this approach would ignore Congress's decision when codifying the disparate-impact provision in 1991 to expressly prohibit both forms of discrimination. Apparently, in a situation where either disparate treatment or disparate impact could be avoided, but not both, Kennedy surmised that Congress wanted the courts to establish relevant standards rather than categorically prohibit one or the other.

[20] *Id.* at 2664.

[21] Ricci, 554 F. Supp. 2d at 157.

[22] Ricci, 129 S. Ct. at 2673 (quoting Ricci, 554 F. Supp. 2d at 152).

[23] *Id.* (citing 42 U.S.C. § 2000e-2(a)(1)).

[24] *Id.* at 2674.

Similarly, Kennedy rejected the argument that an employer must violate the disparate-impact provision before it can use the fear of a disparate-impact suit as a defense to a disparate-treatment claim. Forbidding employers from undertaking race-based action unless they know, with certainty, that their conduct violates the disparate-impact provision would ''bring compliance efforts to a near standstill.''[25]

On the other hand, Kennedy also rejected New Haven's argument that race-based employment decisions can be justified by an employer's mere good-faith belief that its actions are necessary for compliance with Title VII's disparate-impact provision.[26] Kennedy explained that allowing employers to violate the disparate-treatment prohibition based on a mere showing of ''good-faith'' would encourage race-based decisionmaking at ''the slightest hint of disparate impact.''[27] This would, Kennedy aptly observed, ''amount to a *de facto* quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'''[28] Moreover, it could encourage employers to manipulate employment practices in order to engineer the employer's ''preferred racial balance.'' ''That operational principle,'' Kennedy wrote, ''could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing.''[29]

Triangulating between these two absolute positions, Kennedy adopted a new standard based on Equal Protection Clause jurisprudence. In the past, the Court had held that some race-conscious state remedial actions are constitutionally permissible, but only if there is a '''strong basis in evidence''' that such remedial actions were necessary.[30] Applying the strong-basis-in-evidence standard to Title VII, Kennedy argued, would give effect to both disparate treatment

[25] *Id.* at 2674.

[26] *Id.*

[27] *Id.* at 2675.

[28] Ricci, 129 S. Ct. at 2675, (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality opinion)).

[29] Ricci, 129 S. Ct. at 2675 (citing 42 U.S.C. §2000e-2(j)).

[30] Richmond v. J. A. Croson Co., 488 U. S. 469, 500 (1989) (plurality opinion by O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)).

and disparate impact, allowing violations of the former in the name of compliance with the latter only in limited circumstances. Employers would not be barred from race-based decisionmaking unless and until there were a provable disparate-impact violation, but they would be required to demonstrate strong evidence of disparate-impact liability.

Applying this standard, Kennedy found that New Haven lacked a strong basis in evidence for its actions. He acknowledged that the racially adverse impact here was significant and that New Haven indisputably faced a prima facie case of disparate-impact liability. On the captain's examination, white candidates had a 64 percent pass rate compared to 37.5 percent for black and Hispanic candidates. On the lieutenant's exam, 58.1 percent of the white candidates passed while only 31.6 percent of black candidates and only 20 percent of Hispanic candidates passed. The pass rates for minorities were approximately half those for white candidates and thus fell significantly below the Equal Employment Opportunity Commission's 80-percent threshold, which triggers the disparate-impact provision of Title VII.[31] As Kennedy put it, based on the degree of adverse impact reflected in the results, ''respondents were compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact.''[32]

Nevertheless, Kennedy insisted 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.''[33] Kennedy reasoned that New Haven could have defended against a disparate-impact claim if the examinations were job-related and consistent with business necessity, and there were no equally valid, less discriminatory alternative that New Haven had rejected even though it served the city's needs.

IV. Discussion

A. The Nature and Extent of the Conflict

Ricci is significant as the first case to identify the conflict between equal protection and disparate impact. Title VII's disparate-impact

[31] See 29 CFR §1607.4(D) (2008).

[32] Ricci, 129 S. Ct. at 2678.

[33] *Id.*

provision provides that employment practices with adverse ethnic or racial impacts violate Title VII unless (i) the practices are job-related and based upon business necessity and (ii) there are no adequate, less-discriminatory alternatives.[34] Like other governmental actions, this provision conflicts with the Equal Protection Clause to the extent that it (or a state actor implementing it) classifies people by racial groups, has an illicit motive, or allocates benefits on the basis of race.

Justice Ginsburg denies the existence of any conflict in her *Ricci* dissent, arguing that the Court's decision ''sets at odds'' two ''core directives'' which, properly interpreted, advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.''[35] Ironically, it was one of Ginsburg's former clerks, Professor Richard A. Primus, who first identified and explored the conflict in a seminal *Harvard Law Review* article, ''Equal Protection and Disparate Impact: Round Three.''[36] The conflict is best understood when broken down into the three areas in which disparate-impact doctrine and practice would violate equal protection: racial classifications, illicit motives, and racially allocated benefits.

1. Racial Classifications

Under the Equal Protection Clause, the courts subject all state actors' racial classifications to strict scrutiny, regardless of whether minority groups are helped or harmed by the classification.[37] Disparate impact may entail suspect racial classifications in two respects: first, in the legislation itself, which would subject the congressional enactment to strict scrutiny; second, in actions taken by public employers to comply with the legislation. Equal protection concerns are particularly acute where disparate-impact compliance entails preferential treatment or the use of quotas by public employers.[38]

[34] 42 U.S.C. § 2000e-2(a), (k)(1)(A). In addition to race and national origin, this provision also covers disparate impacts on the basis of color, sex and religion.

[35] Ricci, 129 S. Ct. at 2699 (Ginsburg, J., dissenting) (citing McDonnell Douglas Corp. v. Green, 411 U. S. 792, 800 (1973)).

[36] Richard Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493 (2003).

[37] See Croson, 488 U.S. at 494 (1989) (plurality opinion) (citing Wygant, 476 U.S. at 279–80); see also *id.* at 520, 527–28 (Scalia, J., concurring).

[38] See, e.g., Watson, 487 U.S. at 992 (O'Connor, J., plurality).

Title VII's disparate-impact provision does not expressly discuss particular racial groups. If a race-based cause of action is pursued, however, agencies, litigants and courts will have to classify people according to their race.[39] As *Ricci* illustrates, employers may be driven by compliance concerns to classify their employees and candidates by race in order to avoid the prospect of disparate-impact liability. Worse, as Justice Kennedy observes, employers may also use the prospect of disparate-impact liability as a pretext to justify their efforts to achieve a particular ethno-racial balance in their workforce.

As long ago as *Watson v. Fort Worth Bank & Trust* (which predated the 1991 Civil Rights Act), Justice O'Connor recognized ''that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures.''[40] This is a potentially widespread problem because racial disparities are ubiquitous in every realm of social encounter—if only because, as O'Connor observed, ''It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.''[41] Despite Title VII's nominal aversion to the use of racial preferences,[42] an employer faced with the resulting disparities may find it cheaper to use racial preferences than to determine whether the disparities arise from policies that are job-related and consistent with business necessity. As Justice O'Connor noted, it would be ''unrealistic to suppose that employers can eliminate, or discover

[39] Primus, *supra* note 36 at 508.

[40] See Watson, 487 U.S. at 992 (O'Connor, J., plurality).

[41] See *id.*

[42] See 42 U. S. C. § 2000e-2(j):

> Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.''[43]

Hence the ''Hobson's choice'' for public employers: ''If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted.''[44] Naturally, the ''prudent employer'' will take care to discuss such programs ''in euphemistic terms,'' but ''will be equally careful to ensure that the quotas are met.''[45] An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism. The tendency of disparate-impact law is to pressure employers to effectuate quotas in just this manner: Employers increasingly understand that disparities will not survive a disparate-impact challenge except to the extent that existing processes can be tied to business necessities. Justice O'Connor argued that various evidentiary mechanisms can counteract this tendency, including the requirements of the prima facie case, causation requirements, and burdens of proof.[46] Whether they have done so is an empirical question, but *Ricci* provides new reasons for concern.

Ironically, this point is well illustrated in Justice Ginsburg's dissent. As Ginsburg reveals, New Haven's fire department could have designed the racial composition of its senior officers fairly precisely by altering the respective weights assigned to the written and oral components of its promotional examinations. Because minorities had a comparative advantage on the oral component, New Haven could increase the minority pass rate by overweighting that section. Indeed, the city's failure to do so is subject to precisely the attack that Ginsburg levels—that written examinations cannot properly evaluate certain important professional competencies (e.g., complex

[43] See Watson, 487 U.S. at 992 (O'Connor, J., plurality) (citation omitted).

[44] See *id.* at 993 (1988) (O'Connor, J., plurality); see also Roger Clegg, Disparate Impact in the Private Sector: A Theory Going Haywire, Briefly . . . Perspectives on Legislation, Regulation, and Litigation v.9 no.12 (Dec. 2001) at 11 (''And so—surprise—many defendants will simply ensure that the disparate impact does not occur in the first place, by taking steps to guarantee that their numbers come out right.'').

[45] See *id.* at 993 (1988) (O'Connor, J., plurality).

[46] See *id.* at 994–98 (1988).

behaviors, interpersonal skills, and ability to succeed under pressure). Given the ability to determine the likely racial outcome of alternative testing protocols, New Haven would always be subject to disparate-impact liability except to the extent that the city adopts promotional mechanisms that yield no adverse statistical outcomes on racial minorities—tests that achieve rigid quotas based on demographic racial balancing.

2. Illicit Motives

Since *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court has subjected governmental actions motivated by discriminatory intent to strict scrutiny.[47] The Court has consistently applied this principle, not only to statutes that contain express racial classifications, but also to facially race-neutral statutes that are motivated by a racial purpose. Clearly, intentional discrimination is the core concern both Title VII and the Equal Protection Clause. Disparate impact, say its proponents, is a means of uncovering surreptitious intentional discrimination. For this reason, the Court has considered the '''correction of past discrimination to be a compelling government interest [when] eliminat[ing] the discriminatory effects of the past as well as [barring] like discrimination in the future.'''[48] Indeed, to the extent that the disparate-impact provision serves the ''prophylactic'' function of preventing intentional discrimination, it can be seen as a means of enforcing equal protection.[49]

a. Congressional motives

The problem is that the purpose of Title VII's disparate-impact provision is not limited to ascertaining hidden discriminatory intent or unconscious bias. If this were its sole purpose, as Justice Scalia noted in his concurrence, then employers would be permitted to assert a defense of ''good faith.''[50] The unavailability of that defense suggests that something other than discriminatory intent is at issue.

[47] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. 429 U.S. 252 (1977).

[48] Freeman v. Pitts, 503 U.S. 467, 511 (1992) (quoting Green v. County Sch. Bd. 391 U.S. 430, 438 n. 4 (1968)).

[49] See Tennessee v. Lane, 541 U.S. 509, 520 (2004) (''When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.'').

[50] 129 S.Ct. at 2682.

Professor Primus adds that other technical features, such as the unavailability of damages in disparate-impact litigation, further demonstrate that Congress viewed disparate-impact as addressing something more and perhaps less than intentional discrimination.[51] This in turn raises a fundamental question: If Congress intended the disparate-impact provision to address something other than intentional discrimination, what exactly was Congress trying to address?

Congressional motives may have included a desire to increase racial diversity in the workforce other than by reducing discrimination. Former White House counsel Boyden Gray has disclosed that a ''principal motivation'' for the Civil Rights Act of 1991, which codified the disparate-impact provision, was to achieve racial balancing.[52] Some critics opposed the disparate-impact provision of the 1991 Act on the ground that it was a ''government mandate for proportional quotas.''[53] Indeed, law professor Nelson Lund has written that nearly all of the congressional debate leading up the Civil Rights Act of 1991 concerned ''whether and to what extent'' Title VII's disparate-impact provision encouraged employers to implement quotas or to discriminate in favor of minorities in other ways.[54] It has been observed that public resistance to quotas led Congress to strip from the 1991 Act many of the provisions that would have significantly increased the pressure on employers to achieve proportional representation.[55] The resulting compromise did not, however,

[51] Primus, *supra* note 36 at 521–522. To the extent that disparate-impact litigation reveals intentional discrimination, there is no reason why wrongdoers should not have to repay the victims of their discrimination to the same extent as in disparate-treatment cases. Congress's failure to provide for damages in disparate-impact cases suggests a tacit recognition that liable employers may be responsible for something less onerous than intentional discrimination.

[52] See Boyden Gray, The Civil Rights Act of 1991: A Symposium: Disparate Impact: History and Consequences, 54 La. L. Rev. 1487, 1491 (Jul. 1994) (quoting William Coleman, a prominent advocate for the disparate impact provision, as announcing his motivation during a White House meeting: ''What I need is a generation of proportional hiring, and then we can relax these provisions.'').

[53] Michael Carvin, Disparate Impact Claims Under the New Title VII, 68 Notre Dame L. Rev. 1153, 1153 (1993).

[54] Nelson Lund, The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform, 6 Geo. Mason L. Rev. 87, 88 (Fall 1997).

[55] See Kingsley R. Browne, Civil Rights Act of 1991: A ''Quota Bill,'' a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?, 43 Case W. Res. L. Rev. 287, 380–381 (1993).

eliminate the use of statistical evidence to pressure employers to alter the demographic composition of their workforces.

b. Public employer motives

The other potentially problematic governmental motivations are those of public employers who rely upon disparate impact to justify their adoption of race-conscious practices. As the *Ricci* case illustrates, governmental employers rely on the disparate-impact provision when undertaking significant employment decisions. After all, Equal Employment Opportunity Commission regulations emphasized that Congress, in passing Title VII, ''strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action.''[56] Employees who disfavor nonminority applicants by canceling promotions to avoid creating a disparate impact, as in *Ricci*, are likely engaged in race-based actions. Even before *Ricci*, the Court had rejected as ''flawed'' the argument that strict scrutiny did not apply because of the need to consider race for purposes of compliance with antidiscrimination law.[57]

3. Allocation of Benefits on the Basis of Race

With characteristic bluntness, Justice Scalia describes the allocation problem as a conflict between two legal principles. On the one hand, the disparate-impact provision ''not only permits but affirmatively requires'' race-based actions ''when a disparate-impact violation would otherwise result.''[58] On the other hand, ''if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties (e.g., employers, whether private, State, or municipal) discriminate on the basis of race.''[59] To Scalia, the facts of *Ricci* and other disparate-impact cases illustrate that the disparate-impact provision ''place[s] a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions

[56] 29 C.F.R. § 1608.1(b).

[57] Shaw v. Reno, 509 U.S. 630, 653 (1993).

[58] 129 S. Ct. at 2682 (2009).

[59] *Id.* (citations omitted).

based on (because of) those racial outcomes.''[60] Such ''racial decisionmaking,'' Scalia observes, is ''discriminatory'' under *Ricci.*

Equal protection recognizes a ''personal right[] to be treated with equal dignity and respect'' which may be affronted by state actions that treat people less as individuals than as ethnically determined racial members.[61] This right reflects the ''ultimate goal'' of ''eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race.''[62] ''The idea is a simple one: 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'''[63] This command is violated when any individual ''is disadvantaged by the government because of his or her race.''[64] More broadly, strict scrutiny is applicable ''when the government distributes burdens or benefits on the basis of individual racial classifications.''[65] It was for this reason that the Court struck down the undergraduate admissions policy at the University of Michigan,[66] which failed to provide an individualized process of review, while upholding the law school admissions policy at that same institution.[67]

The firefighters argued with some plausibility that New Haven's actions more heavily emphasized racial labeling than the University of Michigan had in *Gratz v. Bollinger.* The allocation of benefits at issue here, it must be emphasized, is not merely that minorities disproportionally benefit from antidiscrimination laws because they are disproportionately subjected to discrimination. Instead, the concern here is that public employers, pressured by the prospect of disparate-impact liability, will employ preferences or quotas to

[60] *Id.*

[61] See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

[62] See *id.* at 495 (plurality opinion) (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 320 (1986) (plurality opinion)).

[63] Miller v. Johnson, 515 U.S. 900, 911 (1995), (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks and citations omitted)).

[64] Adarand v. Pena, 515 U.S. 200, 230 (1995).

[65] Parents Involved, 551 U.S. at 719.

[66] Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

[67] Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

groups disfavored by existing statistical disparities. The problem is not the existence or size of the resulting reallocation—which would be unobjectionable if it resulted from the elimination of intentional or subconscious discrimination—but rather the means employed.

Allocation of public benefits must be made on an individual basis, rather than on the basis of racial group membership. Failure to do so, the Court has instructed, may reflect racial prejudice,[68] perpetuate pernicious stereotypes,[69] foster social balkanization, and frustrate the goal of achieving a ''political system in which race no longer matters.''[70] As the *Adarand* Court said, ''whenever the government treats any person unequally because of [his] race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of Equal Protection.''[71]

4. Ginsburg's Claim of Illusoriness

Justice Ginsburg's dissent denies the very existence of this conflict, arguing that ''Title VII's disparate-treatment and disparate-impact proscriptions must be read as complementary.'' Before *Ricci*, Ginsburg argued, there had been not ''even a hint of 'conflict' between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions.'' It is only the *Ricci* opinion itself that ''sets at odds the statute's core directives.''

According to Professor Primus, thinking about the possibility ''that equal protection might affirmatively prohibit the use of statutory disparate impact standards departs significantly from settled ways of thinking about antidiscrimination law.''[72] Indeed, other

[68] See Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

[69] Metro Broadcasting, 497 U.S. at 604 (O'Connor, J., dissenting) (citation omitted).

[70] Shaw, *supra* note 57 at 657.

[71] Adarand, 515 U.S. at 229–230.

[72] Primus, *supra* note 36 at 495. Indeed, *Davis* appeared to bless Congress's use of disparate impact in federal civil rights statutes. See Davis, 426 U.S. at 248. Primus, however, points out that this language was merely dicta. Primus, *supra* note 36 at 497–98. Moreover, as Primus observed, ''equal protection has changed a great deal since *Davis* was decided, and the changes raise questions about a statute that places people in racial categories and measures liability in part by reference to the allocation of employment opportunities among those racial groups.'' *Id.* at 495. In Primus's provocative formulation, ''Pre-*Davis,* many courts and commentators believed that state actions creating disparate impacts violated equal protection; post-*Adarand,* one could well ask whether state actions prohibiting disparate impact violate equal protection.'' *Id.* at 496 (internal citations omitted).

scholars had also observed that disparate-impact theory was widely accepted before *Ricci*.[73] In this sense, there is some truth to Ginsburg's argument. Moreover, to the extent that the disparate-impact provision is narrowly construed as a means to limit intentional or even unconscious discrimination, the conflict dissolves. The problem is that disparate impact has grown in ways that exceed that core purpose, and that is the source of its conflict with both disparate treatment and equal protection.

It may be true, as Ginsburg argued, that before *Ricci* the Supreme Court had never explicitly questioned the conformity of Title VII's disparate-impact component with equal protection. The Court's prior failure to recognize this conflict does not, however, prove that the conflict did not exist. What Ginsburg apparently means is that, before *Ricci*, conflicts between the two provisions were largely decided in favor of disparate impact—and disparate treatment had been construed narrowly enough to avoid the appearance of discord.

B. Ricci*'s Contribution to the Resolution of the Conflict*

In a dark prophesy or curse, Ginsburg argues that the majority's opinion ''will not have staying power.''[74] Beyond its identification of the disconnect between disparate impact and equal protection, *Ricci* provides three potentially important contributions towards a resolution: the Court's treatment of race-neutral diversity policies, its discussion of disparate-impact quota-tendencies, and its establishment of a strong-basis-in-evidence standard.

1. Treatment of Race-Neutral Diversity Policies

The key fact in *Ricci* is that disparate-treatment analysis was triggered by an employment decision that arguably had race-conscious intent and effects, even though it treated employees of all races in an identical manner—by discarding their test scores. The intent of the employment decision could be characterized either as race-neutral (anti-discrimination compliance) or as race-conscious (altering the racial composition of promoted candidates). While both factors were undoubtedly in play, the separate opinions of Justices Kennedy, Scalia, and Samuel Alito all reflect the majority's conclusion that

[73] See, e.g., Deborah Malamud, Values, Symbols, and Facts in the Affirmative Action Debate, 95 Mich. L. Rev. 1668, 1693 (1997).

[74] Ricci, 129 S. Ct. at 2690.

race-conscious motivations predominated. The most salient lesson from Justice Kennedy's majority opinion is that facially neutral employment decisions will trigger disparate-treatment analysis when they are motivated by a predominantly race-conscious intent. After *Ricci,* one can draw a parallel lesson from Kennedy's *Parents Involved* concurrence: Facially neutral educational decisions will trigger strict scrutiny when they are motivated by a predominantly race-conscious intent. That link between the two opinions has broad implications.

The lower courts had decided that New Haven's decision to discard its examination results should not even trigger disparate-treatment analysis, because the action was facially neutral. As the district court reasoned, ''all the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion.''[75] Justice Ginsburg was similarly convinced that ''New Haven's action, which gave no individual a preference, was simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly.'''[76]

Some thought that this argument would appeal to Justice Kennedy. In *Parents Involved,* Kennedy had insisted that school boards could pursue diversity objectives through the way in which they select new school sites; draw attendance zones; allocate resources for special programs; recruit students and faculty; and track enrollments, performance, and other statistics.[77] Significantly, Kennedy argued, ''These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.''[78] Some commentators interpreted this language as a signal that race-neutral diversity plans would not trigger strict scrutiny even if they are motivated by a racial intent.[79] If this interpretation had been correct, however,

[75] Ricci v. DeStefano, 554 F. Supp. 2d 142, 158 (Conn. 2006), aff'd, 530 F.3d 87 (2d Cir. 2008) (per curiam).

[76] Ricci, 129 S. Ct. at 2696 (Ginsburg, J. dissenting) (quoting 554 F. Supp. 2d at 157).

[77] Parents Involved, 551 U.S. at 788 (Kennedy, J., concurring).

[78] *Id.*

[79] See, e.g., Samuel Estreicher, The Non-Preferment Principle and the ''Racial Tie-breaker'' Cases, 2006–2007 Cato Sup. Ct. Rev. 239, 249–50 (2007).

then Kennedy should have ruled with New Haven in *Ricci.* After all, if school districts can redraw school boundary lines in order to achieve diversity goals, then employers should be able to rewrite examinations in order to achieve antidiscrimination goals.

Viewed through the lens of *Ricci, Parents Involved* now takes on a different complexion. In light of *Ricci,* it now appears that some commentators' initial interpretation was incorrect. Kennedy's *Parents Involved* concurrence may now be better understood as arguing that facially neutral state actions should be subjected to strict scrutiny whenever racial considerations are the ''predominant'' governmental motivation. Kennedy prefers this standard, adopted from voting rights cases, to the less stringent ''but for'' standard, under which defendants might be held liable if they would not have engaged in the challenged conduct ''but for'' the impermissible motivation.[80] This is consistent with the position, established in *Ricci,* that facially race-neutral governmental practices that are motivated by racial purposes should be treated judicially in the same manner as if their race-consciousness were overt.[81] Taking *Ricci* and *Parents Involved* together, the Court has established that racially neutral governmental actions with a predominant racial motive trigger both strict scrutiny and disparate-treatment analysis.

The scope of decisions covered by this new rule is potentially broad, encompassing racially motivated decisions by school districts to redraw school boundaries or employ socioeconomic factors in student assignment decisions, state universities to institute percent-rank plans, and private universities to give admissions or financial

[80] Kennedy's point is that government bodies sometimes have mixed motives for the questionable decisions that they make. A school board, for example, may redraw school boundary lines because it reduces overcrowding, simplifies bus routes, and increases each school's student body diversity in terms of both family income and race. Under the predominant-motivation approach, the school board's decision would trigger strict scrutiny only if racial diversity is the board's predominant motivation. If the board's other goals figured equally in its decisionmaking, then race is not the predominant motivation, even if they would not have been sufficient to support the decision without the added factor of race.

[81] Some commentators interpreted *Parents Involved* in this manner from the start. See George La Noue & Kenneth L. Marcus, ''Serious Consideration'' of Race-Neutral Alternatives in Higher Education, 57 Cath. U. L. Rev. 991, 1012–13 (Sum. 2008); Brian Fitzpatrick, Essay, Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 Mich. J. Race & L. 277, 290 (2007).

aid preferences on the basis of either student economic status or such factors as whether a student is the first person in his family to attend college. In all of these cases, strict scrutiny and disparate-treatment analysis are both triggered.

This should have significant ramifications for policies like the University of Texas's former ''Ten Percent Plan,'' under which UT guaranteed admissions to students graduating within the top 10 percent of their high school class.[82] There is considerable evidence, including contemporaneous admissions, which suggest that Texas policymakers adopted this plan in order to diversify the racial composition of UT's student body, in the face of a judicial decision which precluded the explicit consideration of race. 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.[83]

Where strict scrutiny applies, the defendant not only must proffer a compelling governmental interest but also must satisfy the stringent demands of narrow tailoring: Have less racially intrusive alternatives been subjected to the rigors of ''serious, good-faith consideration''?[84] Is the program limited by explicit sunset provisions?[85] Does the institution regularly monitor the program to determine its continuing necessity?[86]

[82] See Brian T. Fitzpatrick, Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan, 53 Baylor L. Rev. 289, 291–93 (2001).

[83] See, e.g., Kenneth L. Marcus, Diversity & Race-Neutrality, 103 Nw. U. L. Rev. Colloquy 163, 166–67 (2008), available at http://ssrn.com/abstract=1284652.

[84] See Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (requiring ''serious, good faith consideration of workable race-neutral alternatives'').

[85] See *id.* at 342 (articulating the principles that ''all governmental use of race must have a logical end point'' and that ''the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity''); Croson, 488 U.S., at 510 (plurality opinion) (discussing the importance of the principle that any ''deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter. . .''); Stephanie Monroe, Guidance Letter, Use of Race in Student Admissions, (Aug. 28, 2008) at 2, available at http://www.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html (reminding postsecondary institutions that ''the use of race must have a logical end point'').

[86] See *id.* (reminding postsecondary institutions that ''[p]eriodic reviews are necessary'' when race is used as a factor in college admissions).

2. The Tendency of Disparate Impact Towards Quotas

Ricci is also important for its recognition, particularly in the Scalia concurrence, that disparate-impact compliance can lead to quotas. The question of quotas is significant because the Court had long established that ''[p]referential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'''[87] *Ricci* reiterates *Watson*'s concern that disparate impact, when not sufficiently constrained by evidentiary standards, will tend to pressure employers to establish quotas. ''Even worse,'' *Ricci* adds, is the prospect that employers could reengineer employment practices in order to achieve a ''preferred racial balance.''[88] Thus, the *Ricci* Court held that anything less than the strong-basis-in-evidence standard creates the risk of ''a *de facto* quota system, in which . . . an employer could discard test results . . . with the intent of obtaining the employer's preferred racial balance.''[89]

Justice Kennedy's majority opinion insists that quota-seeking designed for disparate-impact compliance offends Title VII's express language, which does not call for outright racial balancing.[90] Justice Scalia deftly pierces this conceit: While disparate-impact laws may not require employers to impose racial quotas, neither do such laws provide a ''safe harbor.''[91] Yet, in effect, disparate impact forces employers to impose quotas when quotas are the most cost-effective way to satisfy the requirements of disparate impact. Under these circumstances, Scalia argues, Congress is as liable for the employer's imposition of a quota as if Congress had established the quota itself. By analogy, he hypothesizes a private employer who refrains from imposing a racial quota but who deliberately designs hiring practices to reach the same result. Such an employer, Scalia points out, would be liable for employment discrimination, ''just one step up the

[87] Watson, 487 U.S. at 993 (internal citations omitted).

[88] Ricci, 129 S. Ct. at 2675.

[89] *Id.*

[90] *Id.* at (citing § 2000e–2(j)).

[91] Ricci, 129 S. Ct. at 2681 (Scalia, J., concurring).

chain.''[92] From this analogy, Scalia reasons that governmental pressure to alleviate disparate impact ''would therefore seemingly violate equal protection principles.''[93] It does not matter that race is considered only ''on a wholesale, rather than retail, level'' because equal protection requires the government to treat citizens as individuals.[94]

3. The Strong-Basis-in-Evidence Test

As *Ricci*'s Kennedy-Scalia dialogue on the topic of quotas suggests, public employers must be held to a standard that can ferret out disparate-impact concerns that are merely pretextual. Thus, when the Court addresses the conflict between disparate impact and equal protection, it may be tempted to rely upon *Ricci*'s strong-basis-in-evidence test. Unfortunately, the new standard is problematic in several respects: its inappropriate focus on the government's interest in liability-avoidance (as opposed to its interest in nondiscrimination), its apparent unworkability, and the unlikelihood that it is sufficiently well-considered to endure over time.

a. Incorrect focus on liability-avoidance

The first concern is that *Ricci*'s discussion of the government's interest in avoiding disparate-impact liability is, at best, a circuitous articulation of the government's proper interest. To the extent that disparate impact is a trustworthy device for identifying actual discrimination, state actors who are sincere about compliance should be less concerned about the prospect of liability than they are about the violation itself. In other words, they should be more concerned about doing the right thing than they are about being sued for doing wrong. The government's proper interest, then, is to provide equal protection, not to avoid liability for discrimination. The fact that New Haven articulates its interest primarily in terms of liability-avoidance merely confirms that the city was driven by the *ex post* disparate impact of the promotional examination, not by an *ex ante* conviction that certification of the examination would actually have been discriminatory. This is a distressing symptom of the pathology of disparate-impact doctrine.

[92] *Id.* at 517.

[93] *Id.*

[94] *Id.*

The focus on liability-avoidance generates subsidiary problems for the strong-basis-in-evidence standard. For example, should the public employer's basis in evidence depend on factors unrelated to the presence of actual discrimination, such the credibility of witnesses, the availability of evidence, the sympathetic qualities of the likely plaintiffs, or its own unsympathetic qualities? To the extent that the government's requisite interest is defined in terms of the basis in evidence for its calculation of potential liability, the answer to all these questions must be yes. Of course, none of these questions addresses the prospect that the government is engaged in discrimination sufficient to justify actions that would otherwise violate equal protection. Obviously, the government's interest is in avoiding conduct that would actually be discriminatory, regardless of whether it would be found to be such by a court. The strong-basis-in-evidence standard should support the government's determination that the practices in question are intentionally discriminatory or at least that they are motivated by unconscious bias.

b. Ineffectiveness of the standard

Justice Ginsburg argues that the strong-basis-in-evidence standard is inapposite, vague, and yet perhaps more stringent than the majority acknowledges. With some justification, she argues that ''[o]ne is left to wonder what cases would meet the standard and why the Court is so sure this case does not.'' Ginsburg is probably correct to complain that the majority ''stacks the deck . . . by denying respondents any chance to satisfy the newly announced strong basis-in-evidence standard.'' As she argues, the proper course would have been to remand the case for a determination of New Haven's compliance.[95]

Indeed, Justice Kennedy is flatly wrong when he states, in defense of the Court's preemptory ruling, that New Haven's evidence of disparate-impact liability was ''nothing more'' than ''a significant statistical disparity.'' New Haven had also presented less statistically discriminating alternatives that would have promoted important business objectives, such as underweighting the written component

[95] See, e.g., Johnson v. California, 543 U. S. 499, 515 (2005).

of the examination or eliminating it altogether—as the nearby town of Bridgeport had with marked success.[96]

Given the findings that the lower courts had already made, it is likely that they would have found that New Haven did in fact have a strong basis in evidence to believe that it faced probable disparate-impact liability. This would in turn have led to another Second Circuit decision in favor of New Haven, which the Court could have reversed only by deciding the constitutionality of Title VII's disparate-impact provision. Justice Alito responds to Ginsburg's dissent by presenting copious evidence to show that New Haven discarded its examination results in order to satisfy a politically powerful constituency, rather than to avoid unintentional discrimination. Alito's evidence is quite convincing: New Haven's supposed fear of disparate-impact liability may well have been a pretext to engage in politically driven racial balancing. This does not, however, address Ginsburg's underlying point.

Regardless of New Haven's motives, a strong case can be made that the city would have been liable under existing disparate-impact law to the extent that it had failed adequately to consider alternative procedures that would have generated less racially disparate results. It is not clear whether Kennedy and Alito's failure to acknowledge this point demonstrates the unworkability of the substantial-basis standard or merely that it was incorrectly applied. Even if the latter were the case, however, it does not speak well of a newly created judicial standard when the issuing court cannot apply it properly.

c. Likely impermanence of the standard

Will the strong-basis-in-evidence test endure even in the context in which *Ricci* presents it—as a standard for determining when state actors may legitimately take race-conscious action to avoid disparate-impact liability? Ginsburg predicts that it will not. She is likely correct but not necessarily for the reasons that she has in mind. Ginsburg clearly yearns for the day when an ideologically

[96] Ginsburg was also concerned by testimony that some exam questions were not relevant to New Haven's firefighting procedures and that firefighters had unequal access to study materials which fell in part along racial lines. That is because many white candidates could get materials and assistance from family members in the fire department, while most minority candidates were ''first generation firefighters'' who lacked such support networks. Ricci, 129 S. Ct. at 2693 (Ginsburg, J., dissenting).

reconstructed Court will overturn *Ricci* and embrace a vigorous conception of disparate impact. Depending on the timing of future Supreme Court vacancies, that is certainly a possibility. It is also possible, however, that a Court substantially similar in composition to the present one will continue the work that *Ricci* began. That Court would likely narrow the scope of the disparate-impact provision in order to conform it to the requirements of the Equal Protection Clause. Interestingly, *Ricci*'s strong-basis standard would no better survive the ruling of a sympathetic Court than it would an unsympathetic one.

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 issues underlying *Ricci* will likely doom the *Ricci* standard, whether the reviewing Court is sympathetic to *Ricci*'s premises or not.

C. The Proper Resolution

1. Anti-Discrimination Device

The core purpose of the disparate-impact provision is the government's compelling interest to identify and eliminate intentional or unconscious discrimination that cannot be proved through the disparate-treatment provision.[97] Given the difficulty of proving conscious

[97] See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (''Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.'').

intent, let alone the near-impossibility of demonstrating implicit bias, disparate impact provides a means of enforcing antidiscrimination laws in an age when bigots seldom announce their prejudices.[98] Employers seldom leave behind direct evidence of discriminatory animus.[99] This is particularly true in the case of large corporate employers, whose intent must be gleaned from their various agents, who may have differing motivations, overlapping authority, and practices that differ from formal policy. For this reason, the disparate-impact provision permits plaintiffs to prove discrimination by presenting evidence of the discriminatory effects of employment practices and by demonstrating that the employer's justification offered for these practices is pretextual.[100] As discussed above, the narrowly tailored use of disparate-impact analysis to effect this purpose is constitutionally unproblematic.

In practice, the constitutionality of applying disparate impact will turn on the question of narrow tailoring. Difficult problems arise, as arguably occurred in the *Ricci* case, when public employers shift the allocation of employment benefits in order to avert racial disparities that cannot be justified by business necessity. The government should not be in the position of requiring actual, present, intentional discrimination as a means of averting the prospect of potential, perhaps unconscious, discrimination. Even when disparate-impact analysis is employed as a prophylactic device to avert intentional discrimination, it should be used in a way that does not generate other forms of discrimination. The use of racially preferential practices, quotas or double standards, for example, will seldom—if ever—be the least intrusive means of achieving the government's antidiscrimination interest. Courts will likely need to address this issue on a case-by-case basis to ensure that the method chosen to avert discrimination is least likely to exacerbate the problem it is intended to redress.

[98] See, e.g., Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (''Frequently the most probative evidence of intent will be objective evidence of what actually happened.'').

[99] U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (''There will seldom be 'eyewitness' testimony to the employer's mental processes.'').

[100] George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297, 1309–10 (1987).

2. Leveling Device

Beyond its role in combating intentional and unconscious discrimination, disparate impact has also been used more broadly as a means of redistributing employment opportunities. As the Court explained in *Watson v. Fort Worth Bank & Trust*, ''the necessary premise of the disparate-impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.''[101] The idea is that employers who lack discriminatory animus may nevertheless, and for no good reason, adopt practices that have the effect of limiting employment opportunities for women and minorities. As *Griggs* instructed, ''Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.''[102] The government's motive in redistributing employment opportunities, however, absent intentional or unconscious discrimination, is on weaker ground than its motive in avoiding actual discrimination.

Because this latter strand of disparate-impact law is on much weaker footing constitutionally, one potential approach is to interpret the disparate-impact provision as serving only the purpose of combating intentional or unconscious discrimination.[103] As Justice Scalia and Professor Primus have pointed out, however, this interpretation is difficult to maintain in light of various statutory provisions, such as the absence of a good-faith defense. Given this problem, the Court may be forced to strike down the disparate-impact provision and encourage Congress to reenact it without its problematic features.[104] This will ensure that disparate impact is grounded on a compelling governmental interest.

[101] Watson, 487 U.S. at 987 (1988).

[102] Griggs, 401 U.S. 424, 432 (1971); see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (''[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.'').

[103] Primus, *supra* note 36.

[104] Roger Clegg has floated legislative language to produce this result. See Clegg, *supra* note 44, at 34–35:

> In any action brought under 42 U.S.C. 2000e–2(k), no respondent shall be found liable if it can demonstrate that the challenged practice was neither adopted with the intent of discriminating on the basis of race, color, religion, sex, or national origin nor applied unequally on the basis of race, color, religion, sex, or national origin.

Professor Primus argues that limiting disparate impact to its role in addressing intentional discrimination fails to address what he considers to be a larger purpose of antidiscrimination law: eradicating ''historically embedded hierarchies.''[105] As a practical matter, Primus concedes that disparate-impact litigation no longer plays a significant role in creating opportunities for large numbers of nonwhite workers. However, Primus argues that disparate impact's ''symbolic or expressive functions'' are nevertheless important because they shape the way in which the public understands antidiscrimination law and policy.[106] For this reason, Primus urges the courts not to perpetuate ''a worldview on which racial inequity is primarily the product of present bad actors rather than largely a matter of historically embedded hierarchies.''[107]

These arguments, however, provide a less-than-compelling rationale for abiding conduct that violates the fundamental right to equal protection of the laws. Symbolic or expressive functions may be important, but they cannot outweigh the harms of actual discrimination. Moreover, disparate impact's symbolic and expressive functions are not entirely benign. When it degenerates into preferential treatment, dual standards, and racial quotas, disparate impact may affect the institutionalization of race-consciousness and, with it, the entrenchment of pernicious stereotypes, social division, resentment, and stigmatization.[108] Nevertheless, there may be some truth to the notion that governmental agencies must be permitted to address—in a race-conscious but not racially preferential manner—those structural forms of bias that, although not supported by current discriminatory intent, nevertheless affect the demographic compositions of the workforce. This issue is best understood in terms of disparate impact's function as a ''diversity management device.''

3. Diversity Management Device

A third function of disparate impact is to identify practices that, while not supported by present discriminatory intent, have the function of restricting employment opportunities by gender or race. This

[105] Primus, *supra* note 36 at 499.

[106] *Id.*

[107] *Id.*

[108] See, e.g., Clegg, *supra* note 44 at 11–14.

might be described as a ''diversity management'' device in the sense that it is intended to address frictions that arise from human differences, rather than to address present intentional or subconscious discrimination or to advance particular racial outcomes.[109] For example, an agency may have a dominant culture—a ''body of unspoken and unexamined assumptions, values, and mythologies''—which historically developed around a predominantly white male workforce and to which white males can more easily adapt than members of other groups.[110] Certain practices within this culture (e.g., advancing employees who seem to be a good ''fit'') may have an adverse impact on minorities and women.

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.''[111] 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.[112] In *Griggs,* for example, the Court held that Title VII prohibits disparate impact regardless of an employer's intentions, announcing that Title VII ''proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.''[113]

The last two sections explained, however, why Congress cannot statutorily disassemble such cultural obstacles to equal opportunity. Investigating and responding to the racial impacts of institutional culture 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. On the other hand, it is troublesome to suggest that government actions to address such cultural issues—for example, auditing agency practices to identify nondiscriminatory obstacles to equal advancement—cannot be

[109] See Gill Kirton and Anne-Marie Greene, The Dynamics of Managing Diversity: A Critical Approach, 2d ed. (2005) at 123–127.

[110] See R. Roosevelt Thomas Jr., From Affirmative Action to Affirming Diversity, in Harvard Business Review on Managing Diversity (2001) at 16–17.

[111] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[112] See Dothard v. Rawlinson, 433 U.S. 321 (1977).

[113] Griggs, 401 U.S. at 426 n.1.

undertaken proactively by state actors without offending equal protection. While Congress may not be able to mandate such activities, it seems that public employees must be permitted to voluntarily undertake them.

V. Conclusion

There is one point on which Justice Ginsburg agreed with her former clerk's ''Equal Protection and Disparate Impact'' analysis in the *Harvard Law Review.* ''The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection,'' Primus insisted (and Ginsburg approvingly quoted) ''suggests that only a very uncompromising court would issue such a decision.''[114] This may be true. At the same time, it is no less true that the very incompatibility of current disparate-impact doctrine with equal protection suggests that only a very irresponsible court could uphold the former in a challenge based on the latter. At any rate, it is not clear that ''compromising'' is the best attribute that we can expect from a court enforcing equal protection nor that we should prefer our jurisprudence in this area to be ''compromised.''

This article has explained why Title VII's disparate-impact provision, as currently drafted, cannot survive a challenge based on the Equal Protection Clause. Congress can best save the provision by providing an exception for good-faith employer behavior that is not motivated by any form of discriminatory animus. Even when limited in this manner, however, disparate impact is still susceptible to various forms of abuse when it provides the basis for race-conscious state actions. This can be curtailed by judicious enforcement of the narrow-tailoring requirement. Specifically, the courts should look with great skepticism at state actions that entail any form of racial or ethnic preference or quota. On the other hand, equal protection does not prohibit—and indeed its underlying values may encourage—the voluntary, non-preferential efforts by public or private employers to eliminate policies and practices that tend to limit equal employment opportunities without adequate business or public policy justification.

[114] Primus, *supra* note 36 at 585.