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Untangling Ricci v. Destefano: The Wards Cove of the Twenty-First Century

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UNTANGLING *RICCI V. DESTEFANO*: THE *WARDS COVE* OF THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 was drafted with the intention of eradicating employment discrimination based on race, color, religion, sex or national origin.[1] The Supreme Court, through a series of cases, has, over the years, expanded and then weakened the remedial effect of Title VII. For example, in *Griggs v. Duke Power Co.* the Court held that Title VII not only prohibited intentional discrimination, but also prohibited neutral policies and procedures that had a disparate impact on an identifiable group of individuals.[2] However, in 1989, in *Wards Cove Packing Co. v. Atonio* the Court diminished the force of *Griggs* by imposing new burdens on plaintiffs in disparate impact cases and requiring that employees identify the specific employer practice or decision responsible for the disparate impact,[3] a ruling that required congressional intervention to overturn its more onerous burdens on plaintiffs.[4]

As in *Wards Cove*, the Supreme Court's decision in *Ricci v. DeStefano* is again testing the nation's commitment to civil rights by diminishing the force of Title VII's disparate impact jurisprudence.[5] This note explores the way in which *Ricci* severely limits the ability of employers to

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. *See infra* note 17 and accompanying text.

2. 401 U.S. 424 (1971). *See infra* notes 24–31 and accompanying text.

3. 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *See infra* notes 37–48 and accompanying text.

4. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071.

5. 129 S. Ct. 2658 (2009).

eliminate their own employment practices that have a disparate impact on minorities seeking public employment.

Part II follows, and explains the background of the development and shrinkage of the disparate impact jurisprudence leading to the decision in *Ricci.* Part III explains *Ricci* and its attempted resolution of the tension between the dual requirements found in the 1991 amendments to Title VII, which were aimed at preventing unlawful disparate impact without engaging in prohibited race-based decisions in employment.[6] Part IV concludes the note with an exploration of the new *Ricci* standard which is applicable when reverse discrimination claims are brought against employers, urging adherence to test results. Under the *Ricci* standard, such test results must stand unless there is a "strong basis in evidence" to reject those results. Further, Part IV explores how the circuit courts might apply that standard in the disparate impact context, when its application has differed in the constitutional context from whence it came.

II. BACKGROUND

To fully appreciate the impact of *Ricci* it is important to understand the historical development of Title VII and its rather circuitous route to its current state as the fundamental federal tool to combat discrimination in employment, including public employment.

A. The Path to the Civil Rights Act of 1964

As early as the 1940s, Congress attempted to formulate legislation that prohibited employment discrimination.[7] However, it was not until twenty-four years later that such effort came to fruition with the passage of Title VII.

During that period there were a number of failed attempts at passing national employment antidiscrimination laws, which were aimed primarily at public employment and known as fair employment practices (FEP) legislation.[8] The first attempt at such legislation was a 1941 bill introduced by Congressman Vito Marcantonio, and was entitled "A Bill to Prohibit Discrimination by Any Agency Supported in Whole or in Part

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6. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1071.

7. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 431 (1966).

8. Id. FEP legislation was legislation that attempted to equalize the workforce by implementing federal legislation with the purpose of assisting minority citizens. *Id.* Simply put, FEP legislation can be seen as a predecessor to the Civil Rights Act of 1964.

with Funds Appropriated by the Congress of the United States of America, and to Prohibit Discrimination Against Persons Employed or Seeking Employment on Government Contracts Because of Race, Color, or Creed."[9] The next year, Congressman Marcantonio introduced a second FEP bill entitled "A Bill to Prohibit Discrimination in Employment Because of Race, Color, Creed, Religion, National Origin, or Citizenship."[10] Apparently both bills, like hundreds of subsequent FEP bills, died in committee or were defeated during debate as a result of Senate filibusters.[11] The 1963 House Committee on the Judiciary considered 172 bills addressing FEP, only six of which contained comprehensive antidiscrimination provisions aimed at private employment.[12]

In light of the failure of past efforts, President F. Kennedy emphasized the dire need for national antidiscrimination legislation when he introduced his civil rights package to Congress in 1963 by stating:

> The legal remedies I have proposed are the embodiment of this nation's basic posture of common sense and common justice. They involve every American's right to vote, to go to school to get a job and to be served in a public place without arbitrary discrimination—rights which most Americans take for granted.[13]

Kennedy's civil rights package had eight titles. Title VII, denominated as the Equal Employment Opportunity title, authorized the President to establish a Commission on Equal Employment Opportunity with the sole responsibility of dealing with firms that had governmental contracts.[14] In order for Kennedy's civil rights package to pass, tactical political precision was required, such as gaining support from Everett Dirksen, a Republican Illinois Senator, a political player who would find ways to appease the political divide surrounding Title VII.[15] President Kennedy did not live to see the passage of the Civil Rights Act, but President Lyndon B. Johnson was instrumental in forcing the bill through Congress, and signed the Act into law on July 2, 1964, declaring:

> And the law I will sign tonight forbids [discrimination]. Its purpose is not to punish . . . but to end divisions—divisions which

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9. 87 CONG. REC. 2259 (1941) (introducing H.R. 3994).
10. 88 CONG. REC. 6423 (1942) (introducing H.R. 7412).
11. Vaas, *supra* note 7, at 431.
12. *Id.* at 434.
13. CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 1 (1985) (quoting President's address to Congress).
14. Civil Rights Act of 1963, H.R. Rep. No. 88-914, § 711(b) at 14 (1963).
15. WHALEN & WHALEN, *supra* note 13, at 150–96.

> have lasted too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity.[16]

This led Congress to introduce what has arguably become the largest antidiscrimination legislation in its history. The legislation sought to place all individuals on an equal playing field irrespective of their immutable characteristics.

B. Action Prohibited by Title VII of the Civil Rights Act of 1964

The newly enacted Title VII provided protection from discriminatory actions by employers, and it covered the actions of employers, employment agencies, and labor organizations as well.[17] Section 703 of the Act made it an unlawful employment practice for an employer to make an employment decision, such as hiring, discharging, or one that would affect an employee's status, based on the individual's race, color, religion, sex, or national origin.[18] Subsequent U.S. Supreme Court decisions have both extended and limited the meaning of these protections, the burdens of proof associated with them, and the overall effect of Title VII.

C. Major Supreme Court Decisions Impacting the Effect of Title VII

One of the first cases to expand the effect of Title VII was *Griggs v. Duke Power Co.*, which recognized that a violation of the Act may result from neutral employment practices that impact classes of individuals that

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16. *Id.* at 232. (quoting Radio and Television Remarks upon Signing the Civil Rights Bill, 2 PUB. PAPERS 824–44 (July 2, 1964).

17. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e (2006)). Section 701 of the 1964 version of Title VII defined an employer as "an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.* § 701(b). The current version requires that the employer have fifteen employees, which was codified in the 1972 amendment of Title VII. Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103. Additionally, it no longer contains the language in the original definition of employment agency that excluded "an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance." Civil Rights Act of 1964, § 701(c). *Compare with* 42 U.S.C. § 2000e(c) (2006). Given that the *Ricci* case deals particularly with an employer's decision, this note will only focus on aspects of Title VII that cover the actions of employers.

18. Civil Rights Act § 703(a)(1–2). The 1991 amendment did not change this language. *See* 42 U.S.C. § 2000e-2(a)(1–2) (2006).

the Act protects, which has since been termed "disparate impact."[19] In *Griggs*, thirteen African American employees claimed that a new company policy, requiring employees to have a high school diploma and to pass two standardized general intelligence tests before being transferred to another department, was a violation of Title VII.[20] *Griggs* turned on whether the new prerequisites implemented by Duke Power contravened the discrimination prohibited by Title VII.[21] In its analysis of the issue, the Court was concerned that neither requirement was significantly related to job performance; that the requirements operated to disqualify a covered group of individuals; and that white employees traditionally filled the jobs in question.[22]

In ruling for the minority plaintiffs, the Court began by noting that the plain language of Title VII identified the congressional intent "to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[23] The Court went on to hold that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if *they operate to 'freeze' the status quo of prior discriminatory employment practices*."[24] The Court thus concluded that given the congressional purpose, the statute must give rise to a disparate impact claim even when unintentional discrimination results from neutral policies and procedures disproportionately affecting an identifiable group of individuals.[25] According to the Court, the requirements implemented by Duke Power were nothing more than proxies, which in turn was discrimination, given the years of inferior education endured by African Americans—attributable to the perception that African Americans, as a race, were inferior to whites.[26]

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19. 401 U.S. 424, 429–30 (1971) (rejecting an employment test that was neutral on its face that sought to "'freeze' the status quo of prior discriminatory employment practices").

20. *Id.* at 426–28. Until 1966, Duke Power Company employed African Americans only in its labor department. *Id.* at 427. Positions in the labor department were the lowest paying positions in the company. *See id.* Not until 1966, five months after an employee filed a charge of discrimination with the Equal Employment Opportunity Commission, was an African American transferred into one of the company's higher paying operation departments. *Id.* at 427 n.2.

21. *Id.* at 425–26.

22. *Id.*

23. *Id.* at 429–30.

24. *Id.* at 430 (emphasis added).

25. *Id.* at 431–33.

26. *See id.* at 430.

The *Griggs* Court acknowledged that tests could—and frequently did—disproportionately remove employment opportunities from minorities, and it also demonstrated the attendant difficulties individuals may have in obtaining direct evidence that a practice is created to discriminate against them.[27] The Court did not prohibit employers from using tests, but required that such tests meet a "business necessity" standard—i.e., that the test was sufficiently related to job performance.[28]

The Court acknowledged that Duke Power's good intentions could be gleaned from its efforts to financially assist undereducated employees in obtaining high school training.[29] However, the Court recognized that good intentions or absence of discriminatory intent are not enough. This was because "Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation,"[30] and because good intentions could not "redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[31]

In 1975, the Supreme Court returned to the subject of employee testing in *Albermarle Paper Co. v. Moody*, addressing what an employer must show to establish that pre-employment tests are sufficiently job related to avoid a disparate impact challenge.[32] *Albermarle* involved a class action suit brought by current and former African American employees requesting permanent injunctive relief against "any policy, practice, custom or usage at the plant that violated Title VII."[33]

As in *Griggs*, the employer in *Albemarle* required applicants for employment in the skilled positions, known as the lines of progression, to have a high school diploma and to pass two tests.[34] In addressing the legitimacy of the tests, the Court expanded on the *Griggs* business necessity

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27. *See id.* at 432 (The Court built the case for discrimination only on indirect evidence of educational disadvantage.).

28. *Id.* at 431.

29. *Id.* at 432.

30. *Id.* (emphasis added).

31. *Id.*

32. 422 U.S. 405, 408 (1975).

33. *Id.* at 409 (internal quotation marks omitted).

34. *Id.* at 409–10. The district court determined that the plant had "strictly segregated" the plant's departmental "lines of progression" prior to January 1, 1964. *Id.* at 409. Such segregated lines of progression reserved the higher paying and more skilled lines for white employees. *Id.* These segregated processes continued until 1968 when the lines were reorganized under a new collective bargaining agreement. *Id.* The reorganization left African American employees "locked in the lower paying job classifications," where such positions were placed at the bottom of the white lines. *Id.* (internal quotation marks and citation omitted).

requirement, ruling that "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[35] Accordingly, although the *Griggs*/*Albemarle* standard does not make testing impermissible, it does require a compelling relationship between the test given and the actual job sought.

The disparate impact approach does not extend to constitutional claims brought under the Fourteenth Amendment, because both purpose and effect remain necessary to state a constitutional claim of discrimination.[36] The Court in *Washington v. Davis*, which established that principle, also refused to hold that the standard for constitutional claims of "invidious racial discrimination [was] identical to the standards applicable under Title VII."[37]

Thirteen years later the Supreme Court, in *Wards Cove Packing Co. v. Atonio*[38] weakened the disparate impact approach from *Griggs* by placing a heavier burden on plaintiffs to prove disparate impact cases. *Wards Cove* addressed disparate impact claims brought by non-white cannery workers who alleged that the company's employment practices kept them and other non-white employees from being employed as non-cannery workers.[39] Prior to *Wards Cove*, simply showing a significant statistical difference in the racial composition of the employer's workforce could prove a prima facie case of disparate impact.[40] *Wards Cove*, however, diverged from this standard when it declared that "the proper comparison is between the racial composition of the at-issue jobs and the racial com-

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35. *Id.* at 431 (internal quotation marks omitted).

36. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). Because the case was brought against the District of Columbia Police Department, and Wash. D.C. is not a state, the parties could not bring such suit under the Fourteenth Amendment. Their claim, instead, arose under equal protection, which the court in *Bolling v. Sharpe*, 347 U.S. 497 (1954), read into the federal Due Process Clause of the Fifth Amendment. *Davis*, 426 U.S. at 239.

37. 426 U.S. at 239.

38. 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 171.

39. *Id.* at 647–48. Cannery positions were considered unskilled work, and were predominately filled by non-whites, mostly Filipinos and Alaska Natives. *Id.* at 647. The non-cannery positions were considered skilled work—mostly consisting of machinists and engineers—and were predominately filled by whites. *Id.* at 647 n.3. The salary for non-cannery positions was substantially higher than for cannery positions. *Id.* at 647.

40. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 438 n.6 (1971) (using statistics to show that there was an impact).

position of the qualified population in the relevant labor market."[41] According to the Court, a more rigorous standard for establishing a disparate impact violation was needed to dissuade employers from implementing quota systems designed to avoid lawsuits based upon racial imbalances.[42]

Wards Cove stood for the proposition that a racial imbalance in the defendant's entire workforce, absent something more, did not establish a prima facie case of disparate impact. It further introduced the concept of causation into the disparate impact calculus. Under the new standard, the plaintiff was required to isolate and identify the "specific employment practice[s] that [were] allegedly responsible for any observed statistical disparities," and, once the plaintiff showed the disparate impact in the particular unit, he must then be able to demonstrate that the employer utilized the challenged device to create the disparate impact.[43] As if anticipating an outcry from the civil rights community, the Court opined that this requirement was not unduly burdensome because the civil discovery rules would allow the plaintiff to obtain the necessary records from the employer to establish the claim.[44]

Wards Cove also placed the burden of persuasion on the plaintiff to establish the absence of a business necessity, thus reversing the burden on the employer that applied in *Griggs* and *Albemarle*. Under *Wards Cove*, the employer is required only to state the business justification for its practices.[45] There is no requirement that the challenged practice be "essential or indispensable" to the business.[46] After the employer meets his burden of coming forward, *Wards Cove* leaves it to the plaintiff to prove there was a less discriminatory alternative practice available that would achieve the same business end.[47] However, such alternatives had to be equally effective in achieving the employer's legitimate employment goals.[48] The Court utilized the new burden-shifting[49] scheme to determine

41. *Wards Cove*, 490 U.S. at 650 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)) (internal quotation marks, alterations, and ellipsis omitted).

42. *See id.* at 652.

43. *Id.* at 656–57 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

44. *Id.* at 657.

45. *Id.* at 659.

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

47. *Id.* at 660–61.

48. *Id.* at 661.

49. While some may argue that the burden of proof has always remained with the plaintiff, the Court's discussion in *Wards Cove* provides a different perspective. The Court stated:

if the "challenged practice serve[d], in a significant way, the legitimate employment goals of the employer."[50]

Wards Cove overruled the core of *Griggs*/*Albemarle* with respect to both the showing required for a disparate impact claim, and "business necessity." In both instances the burden on plaintiffs was significantly increased, making it much more difficult to establish such a claim. It would take congressional action to overrule *Wards Cove*, which severely impaired plaintiff's ability to succeed under a disparate impact suit under Title VII.

D. Title VII as Amended in 1991

Just two years later, *Wards Cove* was substantially overturned by the passage of the Civil Rights Act of 1991.[51] In that statute Congress declared that "the decision of the Supreme Court in [*Wards Cove*] has weakened the scope and effectiveness of Federal civil rights protections."[52] Congress expressly rejected the business justification scheme articulated in *Wards Cove*. Instead, it codified the concept of "business necessity" and "job related" as identified and explained in *Griggs* and *Albemarle*.[53] Additionally, the burden of proof scheme articulated in *Wards Cove* was nullified. Under the amendment, once a plaintiff shows that an employer utilized a practice that disproportionately impacted one group (or that an employer failed to utilize a less intrusive alternative), the burden shifts to the employer to either show that the practice did not cause a disparate impact or that such practice was required for business necessity.[54]

The 1991 amendments, however, left the causation requirement of *Wards Cove* largely intact, but under the amendment, a plaintiff can identify the decisionmaking process as a whole as defective, rather than hav-

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> This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employers' "burden of proof" with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden.

Id. at 659–60 (citations omitted).

50. *Id.* at 659.
51. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
52. *Id.* § 2(2).
53. *See id.* § 3(2) (internal quotation marks omitted).
54. *See id.* § 105.

ing to identify each specific incident as required under *Wards Cove*.[55] The amendment also codifies the *Wards Cove* requirement that the plaintiff must identify the specific employment practice challenged and then show the causal link between that practice and the disparate impact.[56]

E. The Testing Dilemma

In 1978, the Equal Employment Opportunity Commission (EEOC), the Civil Service Commission (CSC), the Department of Labor (DOL), and the Department of Justice (DOJ) jointly adopted the Guidelines on Employee Selection Procedures (later renamed the Uniform Guidelines).[57] These guidelines sought to "provide a framework for determining the proper use of tests and other selection procedures."[58] Currently, they indicate that employers should maintain testing records in a manner that would allow the records to be inspected if a procedure is suspected of having an adverse impact on a particular group.[59]

Employers are encouraged to utilize validation studies to ensure that they are adhering to the Uniform Guidelines.[60] There are generally three types of validation studies: criterion-related validity studies, content validity studies, and construct validity studies.

A construct validity study forces an employer to ensure that they have the proper sample of employees to conduct the study.[61] Once the sample is identified, then the employer would necessarily need to "review [the] job information to determine measures of work behavior(s) or performance that are in question."[62] The criteria developed for this type of validity study are "relevant to the extent that they represent critical or

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55. *Id.* sec. 105, §703(k)(1)(B)(i). The statute currently provides:

> With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

Id.

56. Civil Rights Act of 1991, sec. 105, §703(k)(1)(B)(i). *See also supra* notes 43–44 and accompanying text.

57. 29 C.F.R. § 1607 (1978).

58. Uniform Guidelines on Employee Selection Procedure (1978), § 1607.1(B) (2010).

59. *Id*. § 1607.4(A).

60. *See id.* § 1607.5(A) (permitting users to use one of a variety of validation studies).

61. *Id.* § 1607.14(B)(1).

62. *Id.* § 1607.14(B)(2).

important job duties, work behaviors, or work outcomes."[63] Unlike in other validity tests, it is of utmost importance in construct validity studies that potential biases be identified and rating techniques associated with these criteria be developed to avoid such bias.[64]

An integral part of a content validity study is a job analysis that analyzes the "important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s)."[65] A content validity study is not appropriate, however, when an employer is attempting to measure intelligence, aptitude, personality, or traits that the employee is reasonably expected to learn on the job.[66]

When an employer attempts to validate a test that seeks to measure those traits, both prongs of a two-prong test must be met. First, the employer must show that the procedure measures and uses a representative sample of the knowledge, skill, or ability being assessed.[67] Second, the knowledge, skill, or ability being assessed must be a necessary prerequisite to performance of critical or important work in the position(s) in question.[68]

Construct validity studies are more complex than content validity studies, because they require a more sophisticated job analysis that must identify the work behaviors needed to be successful in the position, the critical work behaviors of the job, and identification of the constructs believed to be the underlying elements of successful performance.[69] Each construct identified must be related to the job and shown, by empirical evidence, to be validly related to the performance of critical work behaviors.[70] Thus, the Uniform Guidelines provide additional information as to how such studies should be presented for purposes of validation, but they have proven to create an "extensive and arduous" process for employers to follow.[71]

Furthermore, no matter how carefully an employer seeks to follow the guidelines in devising an appropriate test, one can never fully evaluate validity until the test is administered. That poses the very dilemma that confronted the Court in *Ricci*—how to balance the dual duties

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63. *Id.*
64. *Id.*
65. *Id.* § 1607.14(C)(2).
66. *Id.* § 1607.14(C)(1).
67. *Id.* § 1607.14(C)(4).
68. *Id.*
69. *Id.* § 1607.14(D)(2).
70. *Id.* § 1607.14(D)(3).
71. *Id.* § 1607.14(D)(1).

presented in the 1991 Act. For example, how should a governmental entity deal with the results of a test that suggest a violation of the disparate impact standard, without violating the other statutory requirement: that the state not "alter the results of [an] employment related test[ ] on the basis of race."[72]

III. STATEMENT AND ANALYSIS OF THE CASE

Ricci v. DeStafano,[73] a 2009 Supreme Court decision, sought to answer that question, and resolve contention between the disparate treatment and disparate impact prongs of Title VII—both prongs equally demanding compliance from employers. In *Ricci*, the City of New Haven (City) was sued by seventeen firefighters (sixteen white and one Hispanic) who alleged that the City engaged in discriminatory practices when it rejected employee advancement tests scores after the results showed that a significant number of white candidates passed in comparison to minority candidates.[74] Specifically, the firefighters argued that the City rejected the tests scores based on race because there were insufficient minority candidates eligible for promotion.[75] This argument was rejected by the district court and the Court of Appeals for the Second Circuit.[76] However, Justice Kennedy, writing for the 5-4 majority, reversed, concluding that the City's action in setting aside the tests violated the fundamental principle that "no individual should face workplace discrimination based on race."[77]

A. Background Facts

The City of New Haven Fire Department (Department) administered objective promotional employment tests for the positions of lieutenant and captain in November 2003 and December 2004.[78] Forty-one applicants took the captain exam with sixteen white applicants, three African American applicants, and three Hispanic applicants passing.[79] Sev-

72. 42 U.S.C. § 2000e-2(l) (2006).
73. 129 S. Ct. 2658 (2009).
74. *Id.* at 2664.
75. *Id.*
76. *See id.* at 2671–72.
77. *Id.* at 2681. The Kennedy opinion was joined by Justices Scalia, Thomas, and Alito, and Chief Justice Roberts. Justices Scalia and Alito also filed concurring opinions, while Justice Ginsburg wrote a dissenting opinion joined by Justices Stevens, Souter, and Breyer.
78. Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006), *rev'd*, 129 S. Ct. 2658 (2009).
79. *Id.*

enty-seven applicants took the lieutenant exam with twenty-five white applicants, six African American applicants, and three Hispanic applicants passing.[80] The Department only had seven vacant captain positions available, which meant that when the Department deployed the "rule of three," no African Americans and, at most, two Hispanics, would be eligible for a captain promotion.[81] Likewise, the lieutenant position only had eight vacancies.[82] Since the top ten scorers on the lieutenant exam were white, not a single African American or Hispanic applicant would be eligible for a promotion to lieutenant.[83]

The City's Civil Service Board (CSB), in an attempt to determine whether or not to certify the tests' results, held several meetings between January and March of 2004.[84] At the first CSB hearing, New Haven's Corporation Counsel, Thomas Ude, testified that the tests' results showed "a very significant disparate impact," and that the City needed to decide whether or not to certify the tests.[85] In raising this issue, Ude advised the CSB that "case law does not require that the City find that the test[s] [are] indefensible in order to take action that it believes is appropriate to remedy . . . disparate impact from examination . . . . A test can be job-related and have a disparate impact on an ethnic group . . . ."[86]

The CSB received anecdotal testimony from firefighters and members of the community—some urging certification due to the appropriate materials on the tests and others urging noncertification because the tests seemed unfair. Frank Ricci, a firefighter eligible for promotion, believed certification was appropriate because the test questions came from nationally recognized books and the City of New Haven's Rules and Regulations and Standard Operating Procedures.[87] Additionally, Ricci testified that he spent eight to thirteen hours a day preparing for the tests and that he incurred significant preparation expenses ($1,000).[88] Contrarily, one firefighter expressed his belief that the tests were unfair because the information tested was not used by firefighters.[89] Additionally, others ar-

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80. *Id.*

81. *Id.* at 145. The "rule of three" is a rule from the City's charter mandating that a civil service position be filled by one of the three individuals with the highest scores on the exam. *Id.* Exam results show that Hispanics ranked seven, eight, and thirteen; African Americans ranked sixteen, nineteen, and twenty-two. *Id.* at 145 n.2.

82. *Id.* at 145.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 145–46.

87. *Id.* at 146.

88. *Id.*

89. *Id.*

gued that many of the firefighters did not have access to the necessary books.[90] Donald Day, a representative of the International Association of Black Professional Firefighters, urged noncertification because the Department's previous employment advancement tests actually had given African Americans and Hispanics a real chance of promotion.[91]

Chad Legel, Vice President of I/O Solutions (IOS) (the company responsible for the creation of the tests in dispute) testified to the CSB that the tests were "facially neutral."[92] He supported this testimony by describing the manner in which the tests were developed. In constructing the tests, IOS interviewed a random sample of current lieutenants and captains in the Department to ascertain basic information about the positions.[93] IOS then constructed a written job analysis questionnaire based on the interviews and asked current lieutenants and captains to provide feedback as to how often tasks were performed and how essential such tasks were to the positions.[94] The final written tests were reviewed for "content and fidelity to the source material" by a Battalion Chief from the Cobb County, Georgia Fire Department.[95] A Fire Chief from outside Connecticut reviewed the final oral tests.[96] This validation process was utilized to avoid using internal personnel that could potentially facilitate cheating on the tests.[97]

Other employment test experts testified before the CSB in order to assist the City in reaching a determination regarding certification. Dr. Christopher Hornick, an industrial/organizational psychologist, did not review the tests in detail, but reviewed the final tests' results and concluded that there was a "relatively high adverse impact."[98] Dr. Hornick provided numerous possible explanations for the disparate impact, such as: (a) whites typically outperform ethnic minorities on standardized tests, (b) the weighting system used by the Department could cause the impact, and (c) a lack of internal reviewers results in failure to ensure that relevant information is tested.[99] Dr. Janet Helms, Professor of counseling psychology, also did not examine the tests at issue, but testified

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90. *Id.*
91. *Id.*
92. *Id.* at 147–48.
93. *Id.* at 147.
94. *Id.*
95. *Id.* (quoting Plaintiff's Exhibit Vol. IV(B) at 24–25) (internal quotation marks omitted).
96. *Id.*
97. *Id.*
98. *Id.* at 148. (quoting Plaintiff's Exhibit Vol. IV(D) at 11) (internal quotation marks omitted).
99. *Id.* at 148–49.

that race and culture could influence the test results—noting particularly that 67 percent of those who completed the questionnaires were white.[100] Ultimately, a split vote by the CSB resulted in noncertification of the tests.[101]

B. Lower Courts' Decisions

After the tests' results were rejected, the firefighters filed suit against the City in the federal district court of Connecticut.[102] The firefighters alleged that the City's decision, and/or advocacy, against certification was intentional discrimination against the firefighters in favor of Hispanic and African American employees based on their race.[103] The City countered that the decision not to certify the results was based upon federal, state, and local antidiscrimination laws.[104] Additionally, the firefighters argued that the City's "good faith belief" that certifying tests' results would violate Title VII was pretextual and not a defense to allegations of Title VII violations.[105]

The district court, ruling in favor of the City, determined that the 2003 tests' results showed a disparity and did not pass the EEOC's "four-fifths rule"[106] In examining the tests' results further, the court acknowledged that the pass rate for the lieutenant's exam for white applicants was 60.5 percent, for African Americans it was 31.6 percent, and for Hispanics it was 20 percent.[107] These percentages showed that there was an

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100. *Id.* at 149.

101. *Id.* at 150.

102. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

103. *Ricci*, 554 F. Supp. 2d at 151. The firefighters also raised arguments that are not the subject of this case note. The firefighters alleged that the noncertification vote was due to political pressure, particularly by defendant Reverend Boise Kimber, an African American minister, who was a political supporter of Mayor DeStefano. *Id.* at 150. The firefighters alleged that the defendants urged noncertification for the sake of pleasing minority voters and other constituents in New Haven. *Id.* The firefighters argued that any apparent disparity in the results of the tests was due to the fact that hiring into, and promotion within, the Department, historically had been based on political patronage and promotion of racial diversity rather than merit. *Id.* The firefighters also raised a Fourteenth Amendment Equal Protection claim. *Id.* at 151.

104. *Id.*

105. *Id.*

106. *Id.* at 153. The "four-fifths rule" provides that a selection tool that yields

> [a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4(D).

107. *Ricci*, 554 F. Supp. 2d at 153.

adverse impact rate, of 59 percent (which was less than the recommended 80 percent).[108] Irrespective of the dispute between the parties concerning the final pass rate of minorities for the captain's exam, the court concluded that the passage rate for whites was nearly doubled, yielding an adverse impact rate well below the four-fifths guidelines.[109] In examining the firefighters' pretextual argument regarding test scores, the court reviewed test scores from a 1999 employee advancement test administered by the City of New Haven that also showed an impact that had statistical significance.[110] However, the court determined that the previous adverse impact scores were insufficient to show pretext because African Americans and Hispanics had opportunities for promotion under the 1999 test.[111]

The court rejected the firefighters' validation study argument, specifically stating that the EEOC's Uniform Guidelines validation requirement only applies when an employer is defending a test against a disparate impact claim—not where an employer is rejecting a discriminatory testing model.[112] The firefighters also argued that the City failed to seek alternative methods or conduct a validity test because it was concerned with diversity, which was in effect reverse discrimination.[113] The court rejected this argument and concluded that there was sufficient evidence to show that there were inherent disparities in both testing models, and it was unnecessary for the City to explore alternatives.[114] To reach this conclusion, the court used a series of Second Circuit precedents to

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108. *Id.*

109. *Id.* at 153–54.

110. *Id.* at 154.

111. *Id.* In conforming to the "rule of three," employers must take into consideration an individual's pass rate and their rank. *Id.* In the 1999 test, minority employees' ranks were significantly higher than the 2003 test, allowing minorities to be promoted. *See id.*

112. *Id.* at 154–55. The Uniform Guidelines state:

> The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines . . . .

29 C.F.R. § 1607.3(A).

113. Ricci, 554 F. Supp. 2d at 156–57.

114. *See id.* at 158. The firefighters argued that the City needed to have alternative promotion methods available or identified prior to noncertification, because there was not a specific reason articulated that caused the disparities. *Id.* at 156. The court reviewed the evidence from both perspectives and determined that testing experts (Dr. Hornick and Dr. Helms) had identified varying causes for the disparities and that an identification of the specific reason for the disparities was unnecessary. *Id.*

conclude that the City's motivation not to certify the tests' results with a racially disparate impact did not constitute discriminatory intent.[115]

After the district court ruled in favor of the City, the firefighters appealed to the Court of Appeals for the Second Circuit.[116] The Second Circuit initially issued a summary order, affirming the district court's decision and describing it as a "thorough, thoughtful, and well-reasoned opinion."[117] The Second Circuit then withdrew the summary order and issued a per curiam opinion affirming the district court's decision.[118] The CSB, according to the court, was complying with its obligations under Title VII when an examination has a "disproportionate racial impact."[119]

C. Supreme Court's Majority Opinion

The Supreme Court, ruling in favor of the firefighters, held that rejection of promotional tests' scores could only occur when the employer can demonstrate a strong basis in evidence that if it failed to reject the tests, it will be held liable under the disparate impact provision of Title VII.[120] Justice Kennedy, writing for the majority, reasoned that remedial action based solely upon a statistical showing of racial disparities is a violation of Title VII's disparate treatment provision.[121]

The Court, in an attempt to strike a balance between the disparate treatment and disparate impact provisions of Title VII, turned to Equal Protection jurisprudence and adopted the strong basis in evidence standard.[122] By doing so, the Court rejected the firefighters' argument that an employer cannot take race-based adverse employment actions to avoid disparate impact liability even when it knows that there is a violation.[123]

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115. *Id.* at 157–60. *See* Hayden v. Cnty. of Nassau, 180 F.3d 42, 48–49 (2d Cir. 1999) ("'[R]acial motive' [is not] a synonym for a constitutional violation." (quoting Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998))); Bushey v. N.Y. State Civil Serv. Comm'n., 733 F.2d 220, 225–26 (2d Cir. 1984) (reconfirming that a statistical showing of discrimination below the EEOC's four-fifths rule is sufficient to establish a prima facie case of discrimination, which justifies the use of race-conscious remedies); Kirkland v. N.Y. State Dep't of Corr. Servs., 711 F.2d 1117, 1128 (2d Cir. 1983) ("It is settled that voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination.").

116. Ricci v. DeStefano, 264 Fed. App'x 106, 107 (2d Cir. 2008), *withdrawn and superseded by*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

117. Id.

118. Ricci v. DeStefano, 530 F.3d 87, 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

119. *Id.*

120. Ricci v. DeStefano, 129 S. Ct. 2658, 2664–65 (2009).

121. *Id.* at 2664.

122. *Id.* at 2674–75.

123. *Id.* at 2674.

Such an approach, according to the Court, would "bring compliance efforts to a near standstill."[124] The Court also rejected the City's argument that the appropriate standard is the employer's good-faith belief that its actions are required to comply with Title VII's disparate impact.[125] Such 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."[126]

In striking a balance between the two proffered standards by the firefighters and the City, the Court turned to equal protection jurisprudence and adopted the strong basis in evidence standard.[127] Drawing from *Richmond v. J.A. Croson Co.*,[128] the Court asserted that "government 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."[129] The Court drew upon *Wygant v. Jackson Board of Education*[130] to determine the best way of dealing with disharmonious provisions.[131] Accordingly, when "related constitutional duties are not always harmonious . . . reconciling them requires . . . employers to act with extraordinary care."[132] Applying this new standard to Title VII disparate impact claims, according to Kennedy, "gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."[133]

The majority did not question an employer's affirmative efforts to ensure that all groups have a fair opportunity.[134] Rather, the Court concluded that an employer may not invalidate test results that disturb an "employee's legitimate expectation not to be judged on the basis of race."[135] To allow such disturbance, according to the Court, would be equivalent to the same discrimination Title VII seeks to eradicate and

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124. *Id.*
125. *Id.* at 2674–75.
126. *Id.* at 2675.
127. *Id.*
128. 488 U.S. 469 (1989).
129. *Ricci*, 129 S. Ct. at 2675 (quoting Richard v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).
130. 476 U.S. 267 (1989).
131. *Ricci*, 129 S. Ct. at 2675.
132. *Id.* (internal quotation marks and citation omitted).
133. *Id.* at 2676.
134. *Id.* at 2677.
135. *Id.*

would be antithetical to the belief that employees can enjoy equal opportunity in the workplace, irrespective of race.[136]

The Court then turned to the issue of whether the City had a strong basis in evidence that warranted discarding the promotional tests.[137] The Court acknowledged that the firefighters did not dispute that the City was faced with a prima facie case of disparate impact liability.[138] However, liability would only occur if the employer was unable to show that the examinations were job related and consistent with business necessity, or if there was another valid, but less discriminatory alternative available that the City refused to adopt.[139]

According to the Court, the examinations were valid because the tests were created "after painstaking analyses of the captain and lieutenant positions—analyses in which IOS made sure that minorities were overrepresented."[140] The argument, that the examinations contained contradictory and irrelevant questions, was countered by the fact that IOS entertained such challenges to the questions and provided feedback to the City, as well as the fact that IOS threw out at least one question.[141] Ultimately, the Court concluded that the City "turned a blind eye to evidence that supported the exams' validity" and that the City had not obtained additional detailed information regarding the potential causes of any disparities within the tests from IOS pertaining to such validity.[142]

D. Scalia's Concurring Opinion

Justice Scalia's concurrence explained that he would have gone even further than the majority. In his view, Title VII's disparate impact provision requires employers to engage in discriminatory practices, because it forces them to "evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[143] Scalia seemed most skeptical of the disparate impact provision, as it relates to the Equal Protection Clause, because the disparate impact provision appears to promote racial quotas within the workplace, thus suggesting that

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136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 2678.
140. *Id.*
141. *Id.* at 2679.
142. *Id.*
143. *Id.* at 2682 (Scalia, J., concurring) (citing Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

Scalia might be prepared to strike the discriminatory impact provision of Title VII as violative of the Fourteenth Amendment.[144]

E. Supreme Court's Dissenting Opinion

Justice Ginsburg's dissent for the four-person minority began by quoting *Grutter v. Bollinger*, saying that "in assessing claims of race discrimination, '[c]ontext matters.'"[145] According to Ginsburg, the *Ricci* majority ruled with the presumption that the City disregarded the test results because the higher scoring employees were white—a position that ignored "substantial evidence of multiple flaws" in the tests.[146] Justice Ginsburg, citing to a U.S. Commission on Civil Rights report, acknowledged that "racial discrimination in municipal employment [was] even 'more pervasive than in the private sector.'"[147] It is in this context that race matters, as public employers often "rel[ied] on criteria unrelated to job performance" in their hiring and promotion decisions.[148] This same report, according to Ginsburg, "singled out police and fire departments for having '[b]arriers to equal employment . . . greater . . . than in any other area of State or local government.'"[149] Ginsburg then noted that "[i]t is against this backdrop of entrenched inequality that the promotion process at issue in this [case] should be assessed."[150]

Asserting that the tests were flawed from their conception, Ginsburg stated that the City "did not closely consider what sort of 'practical'

144. *Id.* at 2682–83. Justice Alito, writing the second concurrence, added little to the analysis of the legal issue, but merely stated his view that the City had merely acted because of the pressure placed on it by Reverend Boise Kimber, an African American minister, and other minorities in the community. *See id.* at 2687–88 (Alito, J., concurring).

145. *Id.* at 2689–90 (Ginsburg, J., dissenting) (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

146. *Id.* at 2690.

147. *Id.* (quoting H.R. REP. NO. 92-238, at 15 (1972)).

148. *Id.* (quoting 118 CONG. REC. 1817 (1972)).

149. *Id.* at 2690–91 (quoting 118 CONG. REC. 1817 (1972)) (alterations in original). Ginsburg pointed to the fact that the City of New Haven was no exception to the report's findings, as only 3.6 percent of African Americans and Hispanics were employed by the fire department, despite these two groups comprising of 30 percent of the City's population. *Id.* at 2691. At that time, minority groups were even more underrepresented in the higher-ranked positions as there was only one African American officer out of the 107 officers in the department. *Id.* (citing Firebird Soc. of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs, 66 F.R.D. 457, 460 (Conn. 1975). Ginsburg noted that the disparities in supervisory positions was still prevalent, as African Americans and Hispanics made up about 18 percent of such positions, with only one African American fire captain out of the twenty-one captains overall. *See id.*

150. *Id.*

examination 'would fairly measure the relative fitness and capacity of the applicants to discharge the duties' of a fire officer."[151] Instead, the City decided to continue the test procedure in its two-decades-old union contract, which consisted of a written examination (worth 60 percent) and an oral examination (worth 40 percent).[152] After the tests were administered, the scores revealed major racial disparities, which gave the City "cause for concern about the prospect of Title VII litigation and liability."[153] The City's decision may have been race conscious, but that did not mean that the City engaged in racially disparate treatment.[154]

Ginsburg focused on the majority's assumption that the disparate impact and disparate treatment provisions of Title VII were in conflict with one another. She reiterated that *Griggs* established that Title VII "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[155] As such, in order for the majority to reach its conclusion, it would have to ignore *Griggs*.[156] After reviewing the *Griggs*, *Albemarle*, and *Wards Cove* cases, Ginsburg rejected the majority's assertion that there was a conflict between disparate treatment and disparate impact.[157] She stated, "[n]either Congress' enactments nor this Court's Title VII precedents (including the now-discredited decision in *Wards Cove*) offer even a hint of conflict between an employer's obligations under the statute's disparate treatment and disparate-impact provisions."[158] Ginsburg argued that the two prongs stand on equal footing as they "advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity."[159]

Ginsburg argued that the majority opinion unnecessarily placed the disparate impact and disparate treatment provisions at odds with one another, thereby ignoring the Court's longstanding practice when faced with *alleged* competing clauses, of interpreting "separate provisions of a single Act [as giving] the Act the most harmonious, comprehensive meaning

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151. *Id.*
152. *Id.*
153. *Id.* at 2692.
154. *Id.* at 2696. According to Ginsburg, this was evidenced by the mere fact that all tests' scores were discarded, ensuring that every firefighter, irrespective of race, was similarly circumstanced. *Id.*
155. *Id.* at 2696 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (alteration in original)).
156. *Id*. at 2696–97.
157. *Id.* at 2699.
158. *Id.* (internal quotation marks omitted).
159. *Id.*

possible in light of the legislative policy and purpose."[160] Ginsburg argued that if a voluntary affirmative action plan, which clearly used a protected class as a factor, can survive a disparate treatment challenge, so should an employer using a protected class as a factor in a reasonable effort to comply with Title VII's disparate impact provision.[161] As such, Ginsburg argued that an "employer must have good cause to believe the device would not withstand examination for business necessity" prior to rejecting test scores.[162] Ginsburg, criticizing the newly adopted "strong basis in evidence" standard, argued it was one of limited use because the Equal Protection Clause prohibits only intentional discrimination, thus Equal Protection jurisprudence is of little help in evaluating its operation in disparate impact claims.[163]

IV. IMPLICATIONS IN THE COURTS OF APPEALS

In adopting the "strong basis in evidence" standard for evaluating an employer's rejection of test results on disparate impact grounds, the Court never confronted the fact that the circuit courts have differed greatly on how to apply it in the constitutional context. This section explores how those circuit court splits over the constitutional standard might lead to similar splits over how that test ought apply in the Title VII disparate impact context. Specifically, this section looks at how *Ricci* might have been decided under the First, Fourth, and Tenth Circuits based upon their Fourteenth Amendment jurisprudence.[164]

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160. *Id.* (quoting Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631–32 (1973)). The dissent also stated that "[a] particular phrase need not 'extend to the outer limits of its definitional possibilities' if an incongruity would result." *Id.* (quoting Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006)). *See also id.* at 2700 (The Court rejected a disparate treatment claim and held that under affirmative action, employers may consider gender as one of numerous factors, and such action is consistent with Title VII because the plan sought to eradicate discrimination in the workplace. (citing Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616 (1987))).

161. *Id.* at 2700.

162. *Id.* at 2699. According to Ginsburg, this was the normal and proper standard for Title VII issues. *See id.*

163. *Id.* at 2700–2701.

164. The Second and Seventh Circuits appear to apply an approach similar to the First Circuit. *See, e.g.*, Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195 (2nd Cir. 2006) (affirming an affirmative action program that excluded Spanish and Portuguese descendants from qualifying as Hispanic); McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998) (affirming the city's affirmative action promotion plan for minority firefighters). The Fifth and Sixth Circuits apply an approach similar to the Fourth Circuit. *See, e.g.*, Dall. Fire Fighters Ass'n v. City of Dallas, TX,

A. Strong Basis in Evidence in the First Circuit

The First Circuit appears to exercise a *somewhat* liberal approach when analyzing whether a party has met its strong basis in evidence burden in the constitutional context, as supported by its affirmative action opinion, *Stuart v. Roache*, which concerned whether statistical disparities alone could lead to an inference of discrimination.[165] In *Roache*, white police officers alleged equal protection violations due to the Boston Police Department's affirmative action programs aimed at promoting minority police officers.[166] The *Roache* court was faced with determining if the Boston Police Department violated the Fourteenth Amendment when it promoted minority police officers over white police officers with higher scores.[167]

In determining whether there was a strong basis in evidence for remedial measures, the court first indicated that the statistical figures alone could make out a prima facie case of unlawful discrimination.[168] The court

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150 F.3d 438 (5th Cir. 1998) (striking down the city's out of rank affirmative action promotion plan for minority firefighters); Middleton v. City of Flint, MI, 92 F.3d 396 (6th Cir. 1996) (striking down the city's affirmative action promotion plan for minority firefighters). The Eighth and Eleventh Circuits appear to apply an approach similar to the Tenth Circuit. *See, e.g.*, Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964 (8th Cir. 2003) (affirming the city's affirmative action program that gave preference to minority contractors); Peightal v. Metro. Dade Cnty., 26 F.3d 1545 (11th Cir. 1994) (affirming the city's minority firefighter preference affirmative action program). The Third and Ninth Circuits appear to apply a hybrid approach including some elements of the three main approaches reviewed in the chosen circuits. *See, e.g.*, Contractors Ass'n of Eastern Pa., Inc. v. City of Philadelphia, 91 F.3d 586 (3rd Cir. 1996) (striking down the city's ordinance that authorized a set-aside for African American subcontractors); W. States Paving, Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983 (9th Cir. 2005) (affirming the state's compelling interest for implementing construction affirmative action program).

165. 951 F.2d 446, 451 (1st Cir. 1991).

166. *Id.* at 448–49.

167. *See id.* The issue arose because the Massachusetts Association of Afro-American Police, Inc. (MAAP) sued the Boston Police Department claiming that promotional testing procedures were biased against African American police officers. *Id.* at 448. These procedures, they alleged, created an "all-white cadre of sergeants." *Id.* That case was settled, and the police department entered a Consent Decree "in which (among other things) the [police department] promised to use only promotional tests specifically validated as anti-discriminatory and fair." *Id.*

168. *Id.* at 450. The court pointed to the fact that the Consent Decree indicated that only one of 222 sergeants in the police department was black, even though seventy-two were eligible for promotions at the time. *Id.* The court stated, "[t]he relevant percentages—0.45% black sergeants in a Department with 4.5% eligible black officers would seem to make out a prima facie case of discrimination under disparate impact analysis as applied by many courts." *Id.* (internal quotation marks omitted).

also disposed of the white officers' argument that *City of Richmond v. J.A. Croson Co.*[169] stood for the proposition that even greater disparities were insufficient to meet the strong basis in evidence standard.[170] According to *Roache*, *Croson* did not dismiss the statistics because they were not "strong" evidence of discrimination but because they were improperly compiled.[171] In relying on Justice O'Connor's *Wygant* concurrence, the First Circuit implicitly accepted that once a prima facie case of discrimination is made through statistics, the burden will shift to the non-minority party to discredit the statistics, concluding that "[t]he very purpose of 'disparate impact' analysis is to use a numerical comparison that will help identify a possibly unfair, discriminatory hurdle interposed between the eligible minority applicant and success."[172] This could be understood as using a *Griggs* liberal approach with disparate impact—even in the constitutional context.[173]

The First Circuit's application of Fourteenth Amendment jurisprudence suggests that it might be supportive of minority firefighters if *Ricci* were before the First Circuit on remand. First, the majority opinion in *Ricci* recognized that there was a significant racial adverse impact that

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169. 488 U.S. 469 (1989).

170. *Roache*, 951 F.2d at 450.

171. *Id.* at 450–51. According to the court, the City of Richmond improperly "compared minority participation in the construction industry with general population figures." *Id.* at 450. This was important to the court because "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified* to undertake the particular task." *Id.* (quoting *Croson*, 488 U.S. at 501–02). The court added to this analysis and stated that "where special qualifications are relevant, a comparison to general population figures will not tend to show past discrimination by the specific governmental unit involved, for it may just as well reflect past societal discrimination in education and economic opportunities." *Id.* at 451 (internal quotation marks omitted).

172. *Id.* (relying on Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 293 (1986) (O'Connor, J., concurring)). The *Roache* court emphasized the white officers' unsuccessful attempt at discrediting the statistics utilized by the police department to establish their prima facie case of discrimination. *Id.* The summation given by the court as to why a strong basis in evidence existed for the remedial action was based upon the statistical evidence. *Id.* at 452. Specifically, the four articulated reasons were:

> (1) numbers that make out a "disparate impact;" (2) a past history of entry-level discrimination; (3) allegations of unfair, discriminatory promotional examinations; and (4) no significant effort by the Department or the plaintiffs, here or earlier, to rebut the natural inference of discrimination arising from the first three of these circumstances.

Id.

173. Recall that *Griggs* does not require intent—only that some neutral policy or practice stands as a barrier to an identified group of individuals. *See supra* notes 24–31 and accompanying text.

was not disputed by the white firefighters.[174] This significant adverse impact appears to satisfy the First Circuit's "natural inference of discrimination arising" from a statistical disparity.[175] Furthermore, using the overt discriminatory actions taken by the City of New Haven against minorities in the fire department, as documented by Justice Ginsburg's dissenting opinion, might support such a position.[176] When a governmental entity directly or passively engages in discriminatory actions, remedial measures taken as a result may not be violative of the Fourteenth Amendment. Like the circumstances in *Roache*, the City of New Haven was engaged in a previous litigation which found that "'[o]f the 107 officers in the Department only one was black, and he held the lowest rank above private.'"[177] This litigation, like the previous litigation in *Roache*, resulted in a settlement agreement with the City of New Haven, where the City initiated remedial efforts to increase minority representation within the fire department.[178] Thus, this more liberal application of the "strong basis in evidence" test in the equal protection context suggests that such Title VII disputes involving governmental rejection of test results might lean more in favor of the governmental entity.[179]

B. Strong Basis in Evidence in the Fourth Circuit

The Fourth Circuit, unlike the First Circuit, uses a more stringent approach when determining if a party has met its strong basis in evidence requirement in the constitutional context. When race is an issue in the case, the Fourth Circuit begins from the premise that "the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purposes to overcome. . . . [T]hus . . . race is an impermissible arbiter of human fortunes."[180] That premise has materialized in *Podber-*

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174. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2678 (2009) (recognizing that "[t]he pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII").

175. *See Roache*, 951 F.2d at 452.

176. *See Ricci*, 129 S. Ct. at 2690–91 (Ginsburg, J., dissenting) (discussing how the profession of firefighters had a history of discriminatory action towards minorities).

177. *Id.* at 2691 (quoting Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs, 66 F.R.D. 457, 460 (D. Conn. 1975)).

178. *Id.*

179. *See Roache*, 951 F.2d at 452 (stating that "litigated court findings of recent entry-level discrimination would seem sufficient to justify race-conscious remedies at both entry and promotional levels").

180. Podberesky v. Kirwan, 38 F.3d 147, 152 (4th Cir. 1994) (quoting Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993)). This approach is at odds with the district judge who thought it inappropriate to apply employment case doc-

esky v. Kirwan, a case concerning the University of Maryland at College Park's merit scholarship program aimed specifically at African American students.[181] In support of its remedial scholarship program, the university articulated four present effects of past discrimination, which were determined to form the strong evidentiary basis needed under the Fourteenth Amendment.[182]

Under Fourth Circuit equal protection jurisprudence, it is, however, insufficient to simply point to past discrimination; rather, the past discrimination must be *proven* to be the root of the present effect.[183] This higher burden is imposed by the Fourth Circuit in order to "determin[e] what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[184] As proof of this connection, the university offered that racial incidents occurred with regularity on the campus and were a direct result

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trine in an educational context. *Id.* at 153. This disagreement appears to support the proposition that deploying constitutional standards in the statutory context is difficult and inappropriate at times. The Fourth Circuit quoted the district court judge as saying:

> I have reached the conclusion that in our earlier opinions both I and the Fourth Circuit may have construed too rigid a framework of analysis," and this "[b]ecause I have come to believe that (1) precedents involving employment disputes provide imperfect analogies for determining the constitutionality of an affirmative action program in an education context, and (2) focusing solely upon past discrimination in education cases blurs vision and obstructs understanding . . .

Id. (alterations in original). *See also* Washington v. Davis, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) (arguing that Title VII's standards are not always consistent with constitutional standards and should not be used interchangeably between the two).

181. *Kirwan*, 38 F.3d at 152. There were two scholarship programs available, the Banneker program made available only to African American students and the Francis Scott Key program, which is not restricted to African American students. *Id.* A Hispanic student challenged the university's dual scholarship program claiming an equal protection violation due to the fact that he was ineligible for the Banneker scholarship. *Id.*

182. *Id.* The four articulated reasons were: "(1) The University has a poor reputation within the African-American community; (2) African-Americans are underrepresented in the student population; (3) African-American students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students." *Id.*

183. *See id.* at 153 (The Fourth Circuit remanded this case previously "to allow the district court to determine whether the University could prove that there were present effects of past discrimination which warranted such race conscious remedial action.")

184. *Id.* (quoting *Evans*, 993 F.2d at 1076) (internal quotation marks omitted).

of the racial climate created by the past discrimination.[185] This argument was rejected as too tenuous.[186] Specifically, there was no evidence that implicated past discrimination on the part of the university as opposed to current societal discrimination.[187]

Statistical evidence must point, with some precision, to the alleged discriminatory action in order to be considered valuable in the Fourth Circuit. The "effects [the statistics allege to show] must be examined to see whether they were caused by the past discrimination."[188] The court ruled that statistical evidence of high attrition and low retention rates for African Americans was insignificant, because those rates could have been caused by economic factors.[189] Unlike the First Circuit, there is no inference of discrimination gleaned from statistics available to plaintiffs. The court further reasoned that a student survey articulating racial tensions on campus did not satisfy this burden because the university could not rule out societal discrimination as a factor.[190]

The Fourth Circuit's "strong basis in evidence analysis" is exactly the sort of analysis *Ricci* brought to the statutory context of Title VII disparate impact claims. The City of New Haven would be hard-pressed to meet its burden with the evidence provided to the Supreme Court if it was decided in the Fourth Circuit. In order to begin the discussions of invalidating the test scores, the City of New Haven would need to point to, with some precision, the exact discriminatory cause of the statistical imbalance. This would be a daunting task for the City because the City did not indicate any specific causes of the test discrepancies save for anecdotal evidence and testing experts.[191] The expert's testimony would add

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185. *See id.* at 154.

186. *See id.* at 154–55.

187. *Id.* at 155.

188. *Id.* at 154.

189. *See id.* at 156.

190. *See id.* at 154–55. The court began its discussion of this matter by acknowledging that "any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students." *Id.* at 154. The court also acknowledged that Maryland citizens were aware of this horrid history. *Id.* Nevertheless, "mere knowledge of [such] historical fact[s] is not the kind of present effect that can justify a race-exclusive remedy." *Id.* The court discounted the student surveys by asserting "[t]he frequency and regularity of the incidents, as well as claimed instances of backlash to remedial measures, do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." *Id.* The court, however, did not point to the societal discrimination driving the opinions of these students surveyed.

191. Dr. Hornick testified that an "assessment center process, which would have evaluated candidates' behavior in typical job tasks, would have demonstrated less ad-

virtually no value to the City's case if decided within the Fourth Circuit, because it does not point, with sufficient precision, to the alleged cause of discrimination. Instead, it provides information that is already known to most individuals—people perform differently on tests.

C. Strong Basis in Evidence in the Tenth Circuit

The Tenth Circuit employs a strong basis of evidence analysis that invites the usage of statistics and anecdotal evidence, and that does not require proving conclusively the past or present discrimination. In *Concrete Works of Colorado, Inc. v. City and County of Denver*, the plaintiff challenged Denver's affirmative action ordinance that established certain participating goals for racial minorities and women in construction and professional design projects.[192] Specifically, the plaintiff believed the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it had lost three contracts with Denver because it did not adhere to the annual goals.[193] In opposition to the plaintiff's challenge,

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verse impact." Ricci v. DeStefano, 129 S. Ct. 2658, 2680 (2009) (internal quotation marks omitted). This was ultimately rejected as not raising a genuine issue of material fact pertaining to the tests. *See id.* Janet Helms, a professor of counseling psychology at Boston College, testified to how members from certain racial groups do their jobs differently. *Id.* at 2694 (Ginsburg, J., dissenting). Specifically, she testified that "often because the experiences that are open to white male firefighters are not open to members of these other under-represented groups." *Id.* (internal quotation marks omitted). The Court appeared to discount her offering to the case by noting, for example, that her "primary area of expertise is not with firefighters per se but in race and cultures as they influence performance on tests and other assessment procedures." *Id.* at 2669 (internal quotation marks omitted).

192. 321 F.3d 950, 954 (10th Cir. 2003). There were:

> annual goals for the utilization of minority business enterprises ("MBEs") and women business enterprises ("WBEs"). Of the total dollars spent annually for construction contracts with the City, the goal was 16% to MBEs and 12% to WBEs. The annual goals for professional design and construction services were 10% of annual expenditures to MBEs and 10% to WBEs.

Id. at 956. An MBE was considered a business that was 51 percent owned by one or more minorities, which included Blacks, Hispanics, Asian Americans, and American Indians. *Id.* A WBE was a considered a business that was 51 percent owned by women where one or more women controlled daily business operations. *Id.*

193. *Id.* at 957. The plaintiff in support of its position relied on *Croson*. *Id.* ("'[T]he purpose of strict scrutiny is to smoke out illegitimate uses of race . . . [and] ensure[ ] that the means chosen fit [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)) (internal quotation marks omitted) (alterations in original)).

Denver asserted that it had a compelling governmental interest in "remedying racial discrimination within its jurisdiction."[194]

Remedying racial discrimination appears, in the Tenth Circuit, to be a more important factor in favor of the governmental entity. Denver needed only to show that it had a strong basis in evidence for enacting its remedial measures and was not required to "conclusively prov[e] the existence of past or present racial discrimination."[195] In meeting this burden, Denver could rely on "empirical evidence that demonstrates 'a significant statistical disparity'" and could "supplement the statistical evidence with anecdotal evidence of public and private discrimination."[196]

Denver, like many other jurisdictions, had processes in place by way of "rules, guidelines, and biases [that] operated to effectively bar [minorities] from participating in City contracting."[197] Denver produced evidence that it was not until 1977, when they received a Department of Housing and Urban Development report; they were made aware that their processes were not in compliance with affirmative action requirements.[198] Denver produced extensive statistical evidence that included multiple disparity studies conducted since 1989.[199] In addition, Denver produced anecdotal evidence that indicated the discriminatory methods used by the

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194. *Id.* at 958. The Tenth Circuit recognized that a "clear majority of the Supreme Court has expressly held that '[a] State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions.'" *Id.* (quoting Shaw v. Hunt, 517 U.S. 899, 909 (1996)) (alteration in original).

195. *Id.* Relying on its previous decision in the case, the court indicated that anecdotes complement statistics of discrimination. *Id.* (quoting Concrete Works of Colo., Inc. v. City & Cnty. of Denver (*Concrete Works II*), 36 F.3d 1513, 1520 (10th Cir. 1994) ("Personal accounts of actual discrimination or the effects of discriminatory practices may, however, vividly complement empirical evidence.")).

196. *Id.* (quoting *Croson*, 488 U.S. at 509 (plurality opinion)).

197. *Id.* at 960.

198. *Id.* at 960–61.The Department of Housing and Urban Development conducted an investigation pursuant to a grievance filed by the Minority Association of Contractors. *Id.* The investigative report concluded:

> The [C]ity failed to take those reasonable actions to overcome the effects of conditions which resulted in limited participation in the benefits of the [Community Development Block Grant] Program, and failed to make reasonable efforts to meet the special needs of the minority contractors which in effect resulted in minority contractors not taking full advantage of the [Community Development Block Grant] Program.

Id. at 960. The court also provided the historical context of how the ordinances came into existence, including the discrimination that motivated the ordinances and the remedial measures taken by Denver. *Id.* at 961–62.

199. *Id.* at 962–69.

government.[200] The Tenth Circuit went even further, noting that "it is immaterial for constitutional purposes whether the industry discrimination springs from widespread discriminatory attitudes shared by society or is the product of policies, practices, and attitudes unique to the industry," because Denver provided evidence that the discrimination was present in the construction industry regardless of its genesis in society.[201]

The Tenth Circuit allows an inference to be drawn from evidence produced that there was past or present discrimination.[202] In fact, according to the Tenth Circuit, "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination."[203] In fact, it determined that "[s]trong evidence is that 'approaching a *prima facie* case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination."[204] The Tenth Circuit definitively stated that the strong basis in evidence burden could be met "through the introduction of *statistical and anecdotal* evidence alone."[205]

Armed with promotional tests showing significant statistical disparities between white and minority firefighters and anecdotal evidence attesting to discrimination, the City of New Haven's noncertification of the tests might well be justified. First, the Supreme Court acknowledged that there was a prima facie case of disparate impact.[206] Under the Tenth Circuit's strong basis in evidence approach, the *Ricci* evidence might be suf-

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200. *Id.* at 969–70. Such evidence included, among other things, that minority and women contractors reported that they were subjected to different treatment when on job sites. *Id.* at 969. Some encountered graffiti with racial epithets at job sites. *Id.* Some minorities and women were not hired because the majority-owned firms felt that they lacked the proper competence to handle the jobs. *Id.* There was testimony that women and minorities were harassed by way of being called "bitches," "nigger," and "dumb nigger." *Id.*

201. *Id.* at 972. *But see* Concrete Works of Colo., Inc. v. City & Cnty. of Denver, 540 U.S. 1027, 1030 (2003) (mem.), *denying cert. to* Concrete Works of Colo., Inc., v. City & Cnty. of Denver, 321 F.3d 950 (10th Cir. 2003) (Scalia, J., dissenting) (According to Scalia, who believes the Tenth Circuit misinterprets *Croson*, because "[i]t is inconsistent with *Croson* to permit racial preferences as a remedy for mere 'might-have-been' racial discrimination, established by nothing more than evidence 'from which an inference of past of present discrimination *could* be drawn.'").

202. *Concrete Works*, 321 F.3d at 970 (discussing the lower court's criticism of the evidence produced by Denver).

203. *Id.* at 971 (quoting Concrete Works of Colo., Inc. v. City & Cnty. of Denver (*Concrete Works II*), 36 F.3d 1513, 1522 (10th Cir. 1994)).

204. *Id.* at 971 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)) (first emphasis added).

205. *Id.* at 972 (emphasis added).

206. Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

ficient to meet the City's burden. This is particularly important given that Title VII has codified *Grigg*'s disparate impact, and both disparate treatment and disparate impact are cognizable claims under Title VII.[207] Second, the City of New Haven adduced statistical evidence that showed the promotional tests disproportionately eliminated promotion opportunities for minority groups.[208] Third, there is evidence that study materials were unavailable to minorities.[209] Fourth, the City of New Haven's poor history of hiring minorities was attributed to their inability to turn to other firefighters or their families and communities to obtain assistance.[210] In total, the evidence proffered by the City of New Haven allows for a strong inference of past or present discrimination under the Tenth Circuit's standard.

In summary, it appears the *Ricci* majority opinion employed the more rigid Fourth Circuit "strong basis in evidence analysis" in the statutory context. While the circuits are split in their equal protection jurisprudence, this does not necessarily denote that they would not employ approaches similar to the Fourth Circuit. In fact, it appears that *Ricci* prohibits employers from rejecting test scores that disproportionately affect an identified group of individuals[211]—even when such test fails to properly measure skills.[212] *Ricci* could also be interpreted as protecting nonminority plaintiffs' legitimate employment expectations of upper mobility based upon merit alone—not race.[213] Without clarification from the

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207. *See supra* notes 51–54 and accompanying text.

208. Ricci v. DeStefano, 554 F. Supp. 2d 142, 154 (D. Conn. 2006).

209. *Ricci*, 129 S. Ct. at 2692–93.

210. *Id.* at 2693.

211. *See supra* notes 120–121 and accompanying text.

212. *See* Lynda L. Arakawa & Michele Park Sonen, Note, *Caught in the Backdraft: The Implications of* Ricci v. DeStefano *on Voluntary Compliance and Title VII*, 32 U. Haw. L. Rev. 463, 476 (2010) (arguing that merit-based selection processes do not properly measure the skills sought, but instead embrace social biases).

213. *See* Girardeau A. Spann, *Postracial Discrimination*, Mod. Am., Fall 2009, at 26, 35 (arguing that the majority opinion in *Ricci* "re-struck the balance between white and minority interests in Title VII cases" as it did in affirmative action cases). *See also* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. Rev. 73 (2010). Harris and West-Faulcon describe *Ricci* as a way of turning racial discrimination into "white injury:"

> A close reading of *Ricci* reveals how not all claims of race discrimination are evaluated on a level playing field. Although the holding in *Ricci* is not unambiguous (and in some respects the unusual factual predicate may ultimately limit its reach), *Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury. *Ricci* facilitates this racial project in two distinct but interrelated ways: (1) by whitening discrimination—that is reframing antidiscrimination law's presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred

Supreme Court, it is uncertain as to the exact impact of *Ricci*, but what is certain is that circuits may interpret *Ricci* as requiring them to employ the Fourth Circuit's approach.

V. CONCLUSION

The *Ricci* decision punishes those governmental employers who seek to ensure their policies and procedures are not disproportionately inhibiting an identifiable group. *Ricci* does not expressly overrule *Griggs*, but it is at odds with *Grigg's* essential holding, that Title VII is aimed at limiting both, intentional and unintentional discriminatory consequences of employers' actions, not simply an employers' motivations. Without a more comprehensive or flexible framework for applying the strong basis in evidence standard in a statutory context, many employers will be forced to either violate the disparate impact provision of Title VII by ignoring the adverse impacts of hiring practices on race, or they will continue current discriminatory policies and practices because the *Ricci* standard is so difficult to comprehend.

Justice Scalia emphatically denounced the Tenth Circuit's analysis as a "watered-down 'you don't need to *prove* discrimination' standard."[214] Yet, the Supreme Court provided an unclear heightened standard in the statutory Title VII context when it decided *Ricci*. With such a varying approach in the circuits and the strong basis in evidence standard in the constitutional context, attorneys and their clients may continue to wrestle with *Ricci*'s impact. However, given the Roberts Court's history of undermining the force of remedial legislation, such as Title VII, Congress will likely need to once again step in and amend Title VII to expressly reject the reasoning of *Ricci*.

> claim; and (2) by racing efforts to install fair selection measures—that is, treating the use of job-related assessment tools that correct racial imbalance and better measure merit as racially disparate treatment of whites.

Id. at 81.

214. Concrete Works of Colo., Inc. v. City & Cnty. of Denver, 540 U.S. 1027, 1030 (2003) (mem.), *denying cert. to* Concrete Works of Colo., Inc., v. City & Cnty. of Denver, 321 F.3d 950 (10th Cir. 2003) (Scalia, J., dissenting).