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Supplementary Material

Chapter 11: The Contemporary Era—Equality/Race/Affirmative Action

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Ricci v. DeStefano, 557 U.S. 557 (2009)

Frank Ricci was a white male and a member of the fire department in New Haven, Connecticut. In 2003, he passed an examination that qualified him for a promotion to lieutenant, a position with increased responsibilities and benefits. Many African-Americans firefighters, noting that white persons passed the examination at substantially higher rates than persons of color, maintained that this disparate effect of the examination violated Title VII of the Civil Rights Act of 1964 (as amended in 1991). New Haven, fearful of a lawsuit, elected not to base promotions on that test. Ricci and other firefighters who would have been promotion-eligible then filed a lawsuit against John DeStefano, the mayor of New Haven, claiming that the decision not to certify the text violated their rights under both the Civil Rights Act and Equal Protection Clause not to be discriminated against on racial grounds. After both the federal district court and Court of Appeals for Second Circuit rejected that claim, Ricci appealed to the Supreme Court of the United States.

Numerous governmental organizations and interest groups filed amicus briefs. The National Association of Police Organizations [NAPO] urged the Court to support Frank Ricci's lawsuit. Their brief claimed,

> *to be both fair and lawful, civil service exam results must be handled free from the taint of racial politics. All too often, the process of law enforcement and the satisfaction felt by its participants are undermined by the injection of race-based decisionmaking like that which the lower court conceded was present in this case. This will not do. NAPO submits this brief of amicus curiae to explain why the Equal Protection Clause bars a municipality from punishing successful civil service exam test-takers on the basis of their skin color, and why to hold otherwise would do damage to law enforcement organizations across the country.*

Prominent industrial-organizational [I/O] psychologists filed an amicus brief urging the justices to sustain New Haven's actions. That brief declared,

> *[b]ased on their expertise in the field of I/O psychology and their experience in employment test design, amici have identified at least four serious flaws in the tests that undermined their validity: (1) their admitted failure to measure critical qualifications for the job of a fire company officer; (2) the arbitrary, scientifically unsubstantiated weighting of the multiple-choice and oral components of the test battery; (3) the lack of input from local subject-matter experts regarding whether the tests matched the content of the jobs; and (4) use of strict rank-ordering without sufficient justification. Members of the Board thus reasonably concluded that it was unlikely, if not impossible, that the tests could be demonstrated to be valid.*

The United States rejected both claims, insisting that the justices avoid making any decision on the constitutionality of affirmative action because crucial facts had not been developed in the lower court. The brief for the Obama administration asserted,

> *This Court should vacate the judgment below and remand for further consideration. The district court correctly concluded that a genuine intention to comply with Title VII's disparate-impact provisions does not constitute intentional racial discrimination, and that strict scrutiny does not apply to a facially neutral action taken in response to such concerns. Neither the district court nor*

the court of appeals, however, adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination in violation of Title VII or the Equal Protection Clause.

The Supreme Court by a 5-4 vote ruled that New Haven violated Title VII of the Civil Rights Act. Justice Kennedy's majority opinion held that New Haven did not have a sufficient basis to believe the city was liable under federal law for using the controversial qualifications test. On what basis did he make that claim? Under what conditions did Kennedy claim that New Haven could have rejected the test scores? Why did Justice Ginsburg disagree? Justice Scalia's concurrence suggested that federal laws banning practices that have disparate impact may be inconsistent with the equal protection clause. Did he correctly perceive a tension? If so, how would you resolve this tension? None of the justices purported to reach the constitutional issues. Had they done so, what would have been the likely conclusion?

JUSTICE KENNEDY delivered the opinion of the Court.

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. . . [R]ace-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.

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Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—i.e., how minority candidates had performed when compared to white candidates. . . . Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race. . . .

. . .

Petitioners . . . suggest that an employer in fact must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit. Again, this is overly simplistic and too restrictive of Title VII's purpose. The rule petitioners offer would run counter to what we have recognized as Congress's intent that "voluntary compliance" be "the preferred means of achieving the objectives of Title VII." . . . Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill. Even in the limited situations when this restricted standard could be met, employers likely would hesitate before taking voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment.

At the opposite end of the spectrum, respondents and the Government assert that an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct. But the original, foundational prohibition of Title VII bars employers from taking adverse action "because of . . . race." . . . Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. That would amount to a de facto quota system, in which a "focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures." . . . Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. . . .

In searching for a standard that strikes a more appropriate balance, we note that this Court has considered cases similar to this one, albeit in the context of the Equal Protection Clause of the Fourteenth Amendment. The Court has held that certain 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. . . .

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The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII . . . . Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. . . . And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.

If an employer cannot rescore a test based on the candidates' race, . . . then it follows a fortiori that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer's ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII's express protection of bona fide promotional examinations. . . .

For the foregoing reasons, we adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.

Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

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The City argues that, even under the strong-basis-in-evidence standard, its decision to discard the examination results was permissible under Title VII. That is incorrect. Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.

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There is no genuine dispute that the examinations were job-related and consistent with business necessity. . . . The CSB heard statements from Chad Legel (the [Industrial/Organizational Solutions, Inc. (IOS)] vice president) as well as city officials outlining the detailed steps IOS took to develop and administer the examinations. IOS devised the written examinations, which were the focus of the CSB's inquiry, after painstaking analyses of the captain and lieutenant positions-analyses in which IOS made sure that minorities were overrepresented. And IOS drew the questions from source material approved by the Department. . . .

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Respondents also lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt. . . . [R]espondents refer to testimony before the CSB that a different composite-score calculation—weighting the written and oral examination scores 30/70—would have allowed the City to consider two black candidates for then-open lieutenant positions and one black candidate for then-open captain positions. (The City used a 60/40 weighting as required by its contract with the New Haven firefighters'

union.) But respondents have produced no evidence to show that the 60/40 weighting was indeed arbitrary. In fact, because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason. . . .

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The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair.

The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.

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JUSTICE SCALIA, concurring.

I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? . . .

The difficulty is this: Whether or not Title VII's disparate-treatment provisions forbid "remedial" race-based actions when a disparate-impact violation would not otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively requires such actions when a disparate-impact violation would otherwise result. . . . But 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. . . . As the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.

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JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

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JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

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The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion. Nor have other persons received promotions in preference to them. New Haven maintains that it refused to certify the test results because it believed, for good cause, that it would be vulnerable to a Title VII disparate-impact suit if it relied on those results. The Court today holds that New Haven has not demonstrated "a strong basis in evidence" for its plea. . . . In so holding, the Court pretends that "[t]he City rejected the test results solely

because the higher scoring candidates were white." . . . That pretension, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.

The Court's recitation of the facts leaves out important parts of the story. Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow. . . .

. . . In the early 1970's, African-Americans and Hispanics composed 30 percent of New Haven's population, but only 3.6 percent of the City's 502 firefighters. The racial disparity in the officer ranks was even more pronounced. . . . Following a lawsuit and settlement agreement, . . . the City initiated efforts to increase minority representation in the New Haven Fire Department (Department). Those litigation-induced efforts produced some positive change. . . . In supervisory positions, however, significant disparities remain. Overall, the senior officer ranks (captain and higher) are nine percent African-American and nine percent Hispanic. Only one of the Department's 21 fire captains is African-American. . . .

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Title VII became effective in July 1965. Employers responded to the law by eliminating rules and practices that explicitly barred racial minorities from "white" jobs. But removing overtly race-based job classifications did not usher in genuinely equal opportunity. More subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions.

In *Griggs v. Duke Power Co.* (1971), this Court responded to that reality and supplied important guidance on Title VII's mission and scope. Congress, the landmark decision recognized, aimed beyond "disparate treatment"; it targeted "disparate impact" as well. Title VII's original text, it was plain to the Court, "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . .

Congress [when passing the Civil Rights Act of 1991] made plain its intention to restore "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*" . . . Once a complaining party demonstrates that an employment practice causes a disparate impact, amended Title VII states, the burden is on the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." . . . If the employer carries that substantial burden, the complainant may respond by identifying "an alternative employment practice" which the employer "refuses to adopt." . . .

Neither Congress' enactments nor this Court's Title VII precedents . . . offer even a hint of "conflict" between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions. . . . Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity. . . .

Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact provision, the Court reasons, it acts "because of race"—something Title VII's disparate-treatment provision. . . . This characterization of an employer's compliance-directed action shows little attention to Congress' design or to the Griggs line of cases Congress recognized as pathmarking.

In codifying the *Griggs* . . . instructions, Congress declared unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity. In keeping with Congress' design, employers who reject such criteria due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination "because of" race. A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict. I would therefore hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity. . . .

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Applying what I view as the proper standard to the record thus far made, I would hold that New Haven had ample cause to believe its selection process was flawed and not justified by business necessity. Judged by that standard, petitioners have not shown that New Haven's failure to certify the exam results violated Title VII's disparate-treatment provision.

Chief among the City's problems was the very nature of the tests for promotion. In choosing to use written and oral exams with a 60/40 weighting, the City simply adhered to the union's preference and apparently gave no consideration to whether the weighting was likely to identify the most qualified fire-officer candidates. There is strong reason to think it was not.

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Relying heavily on written tests to select fire officers is a questionable practice, to say the least. Successful fire officers, the City's description of the position makes clear, must have the "[a]bility to lead personnel effectively, maintain discipline, promote harmony, exercise sound judgment, and cooperate with other officials. . . . These qualities are not well measured by written tests. Testifying before the CSB, Christopher Hornick, an exam-design expert with more than two decades of relevant experience, was emphatic on this point: Leadership skills, command presence, and the like "could have been identified and evaluated in a much more appropriate way." . . .

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Given these unfavorable appraisals, it is unsurprising that most municipal employers do not evaluate their fire-officer candidates as New Haven does.

This case presents an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place. But what this case does not present is race-based discrimination in violation of Title VII. I dissent from the Court's judgment, which rests on the false premise that respondents showed "a significant statistical disparity," but "nothing more." . . .

. . . I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best way to stop discrimination on the basis of race is to stop discriminating on the basis of race. . . .

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. . . The plurality cites in support those who argued in Brown against segregation, and Justice THOMAS likens the approach that I have taken to that of segregation's defenders. . . . But segregation policies did not simply tell schoolchildren where they could and could not go to school based on the color of their skin. . . .; they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history . . . is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). . . .

Finally, what of the hope and promise of *Brown*? For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* (1954) challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse

so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. . . . Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.