RICCI V. DESTEFANO: SMOKE, FIRE AND RACIAL RESENTMENT

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INTRODUCTION

Ricci v. DeStefano involved claims that the City of New Haven, Connecticut discriminated against a group of white and Hispanic firefighters who received the highest scores on two civil service examinations.[2] Statutory claims were asserted under Title VII of the Civil Rights Act of 1964.[3] Two separate constitutional claims alleged violations of the Fourteenth Amendment of the U.S. Constitution.[4] One of these claimed reverse discrimination to the disadvantage of the white and Hispanic firefighters, and the other contended that New Haven created an unlawful racial classification when it declined to promote the white and Hispanic firefighters.[5]

In 2003, New Haven's Civil Service Board administered examinations for Lieutenant and Captain positions.[6] The examinations were developed by an outside consultant and

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[2] Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (reversing and remanding the Second Circuit, which had affirmed the District Court's decision to grant summary judgment for the defendants).

[3] *Id.*

[4] Ricci v. DeStefano, 554 F. Supp. 2d 142, 160 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[5] *See id.*

[6] *Ricci*, 129 S. Ct. at 2664-66.

administered for the first time in 2003.[7] When the results were tabulated, a disproportionate percentage of African Americans firefighters received lower test scores, making them ineligible for promotion.[8]

When an examination excludes a disproportionate percentage of a racial group, it must be "validated."[9] This process confirms that a test actually predicts successful job performance or that it accurately measures skills that are closely related to important elements of job performance.[10] After the disparate impact was discovered, New Haven's Civil Service Board held hearings to determine whether the results should be certified.[11] During those hearings, conflicting testimony was presented concerning the examinations' validity.[12] The Civil Service Board ultimately concluded that too many doubts had been raised concerning the validity of the tests.[13] It decided against making any promotions based on the test results.[14]

The white and Hispanic firefighters who were adversely affected filed suit in the local federal court.[15] The trial judge ruled that New Haven's decision was not discriminatory because it was motivated by the examinations' disparate impact and flaws in the test design.[16] For the same reasons, the judge ruled that the City had not engaged in discrimination that violated the U.S. Constitution.[17] The plaintiffs appealed to the United States

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[7] *Id*. at 2665-66.

[8] *Id.* at 2666, 2692.

[9] *Ricci*, 554 F. Supp. 2d at 154-55.

[10] *See id*.

[11] *Ricci*, 129 S. Ct. at 2667-71.

[12] *See id*.

[13] *See id*. at 2671.

[14] *Id.*

[15] *Id*.

[16] Ricci v. DeStefano, 554 F. Supp. 2d 142, 159-160 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[17] *Id.* at 161-62.

Court of Appeals for the Second Circuit,[18] which affirmed the trial court's decision.[19]

The Supreme Court granted the white and Hispanic firefighters' petition for a writ of certiorari and reversed the lower court's rulings.[20] The majority found that New Haven acted with intent to discriminate against the white and Hispanic firefighters.[21] The decision conflated intent to avoid liability with a decision motivated by discriminatory animus.[22] The majority also created an entirely new standard for complying with Title VII by holding that an employer facing potential claims alleging disparate treatment and others alleging disparate impact can take actions to avoid liability only if it has a "strong basis in evidence" for doing so.[23] The majority also ruled that the promotional tests had been validated when the record contained conflicting evidence on this question.[24] The evidence concerning the examinations' validity was at best mixed, but the majority chose to discount the evidence in New Haven's favor as a few "stray (and contradictory) statements."[25]

This article examines the reasoning of the *Ricci* decision. The first section reviews the proceedings in the trial. The second section examines the Supreme Court's decision. The third section explains how a psychological disposition known as "racial resentment" may have influenced Associate Justice Samuel Alito's vote, which was critical to the 5-4 majority. Section IV shows why the imposition of the "strong basis in evidence" standard was not warranted. Sections V and VI describe the evolution of the disparate impact theory and

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

[19] *Id.*

[20] *Ricci*, 129 S. Ct. at 2672.

[21] *Id.* at 2673.

[22] *See id*. at 2710 (Ginsburg, J., dissenting).

[23] *Id*. at 2677.

[24] *Id*. at 2679-80.

[25] *Id*. at 2680.

explain how the *Ricci* decision undermines the Civil Rights Act of 1991. Sections VII and VIII examine the requirements that govern standardized examinations and the job-relatedness obligation and apply them to New Haven's promotional examinations. The article concludes with discussion of why the entry of a summary disposition was inappropriate.

THE EXAMINATION CONTROVERSY AND THE PROCEEDINGS IN THE TRIAL COURT

The events leading up to this case began in November and December of 2003, when the New Haven Civil Service Board administered written and oral examinations for promotions to the Lieutenant and Captain positions within the New Haven Fire Department.[26] The promotion and hiring process is governed by the City Charter, which established a merit system.[27] A consulting firm, I/O Solutions (IOS), designed the examinations.[28] The written exam counted for 60% of an applicant's score and the oral exam for 40%.[29] Those with a total score above 70% on the exam would pass.[30] Under the charter's "Rule of Three," the City was obligated to fill each vacancy by choosing a candidate from the top three scorers on each of the examinations.[31]

Forty-one applicants participated in the Captain examination; twenty-five were white, eight black, and eight Hispanic.[32] Twenty-two of them passed: sixteen whites, three blacks, and three Hispanics.[33] The City Charter required that

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[26] Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006)., *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Ricci, 554 F. Supp. 2d. at 145.

[33] *Id*.

positions were to be filled from among the three individuals with the highest scores on the exam.[34] The top nine scorers included seven whites and two Hispanics.[35] This meant that no blacks and only two Hispanics would have been eligible for promotion.[36] On the Captain examination, the pass rate for whites was 88%, more than double that of minorities.[37] Seventy-seven applicants participated in the Lieutenant examination; forty-three of the test takers were white, nineteen were black, and fifteen were Hispanic.[38] Thirty-four candidates passed: twenty-five whites, six blacks, and three Hispanics.[39] There were eight vacancies.[40] As the top ten scorers were white, no blacks or Hispanics would have been promoted.[41] On the Lieutenant's examination, the pass rate for whites was 60.5%, for African-Americans 31.6%, and Hispanics 20%.[42]

New Haven's Civil Service Board (CSB) is an independent agency that administers the City's civil service employment system, including supervising the competitive examination process and reviewing test results before certifying lists of eligible candidates.[43] After the test results were released, questions were raised about the disproportionate percentage of minority candidates who received lower test scores.[44] The CSB held five hearings between January and March of 2004 to

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[34] *Id.*

[35] *Id.*

[36] *See id*.

[37] *Id.* at 153-54.

[38] *Ricci*, 554 F. Supp. 2d at 145.

[39] *Id.*

[40] *Id*.

[41] *Id.*

[42] *Id*. at 153.

[43] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2665-66 (2009).

[44] *See Ricci*, 554 F. Supp. 2d at 145.

determine whether to certify the examination results.[45] Evidence presented during the hearings raised substantial questions concerning the validity of the Lieutenant and Captain examinations.[46] Ultimately, the CSB declined to certify the examination results because a disproportionate percentage of black applicants had been excluded, and the examinations had not been validated in accordance with the Equal Employment Opportunity Commission's (EEOC) Guidelines.[47]

A group consisting of one Hispanic and seventeen white firefighters filed a civil action alleging that they were denied promotional opportunities on the basis of their race in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[48] The trial court analyzed the plaintiffs' Title VII claims the using *McDonnell Douglas* burden-shifting framework.[49]

Ricci was resolved without a trial on the basis of a summary judgment motion.[50] The trial court assumed, for the sake of argument, that the plaintiffs had established a prima facie case based on New Haven's acknowledgment that the examinations' disparate impact persuaded it to decline to certify the results.[51] The trial court found that the city's concern about the

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[45] *Id.* at 145.

[46] *See Ricci*, 129 S. Ct. at 2667-71.

[47] *See Ricci*, 554 F. Supp. 2d. at 150-54.

[48] *Id.* at 144.

[49] *Id.* at 151-52 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Under *McDonnell Douglas*, a plaintiff must establish a *prima facie* case by proving (1) membership in a protected class; (2) qualifications for the position; (3) an adverse employment action; and (4) circumstances supporting an inference of discrimination. *Id.* After a prima facie case has been established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* If the employer does so, the burden shifts to the plaintiff to prove that the proffered justification is a pretext and the defendant was actually motivated by discriminatory animus. *Id. See also* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143-44 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-11 (1993).

[50] *Ricci*, 554 F. Supp. 2d at 145.

[51] *Id.* at 152.

examinations' adverse impact was a legitimate, nondiscriminatory reason for declining to certify the examination results.[52] The court also found that the plaintiffs did not show that the City's proffered justification was a pretext for unlawful discrimination.[53] For the same reasons, the trial court found that the city did not create a racial classification or act with a discriminatory motive when it declined to certify the examination results.[54]

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit.[55] A panel of three circuit court judges adopted the district court's decision.[56] The panel later issued an opinion that concluded that New Haven was not liable for its decision against certification of the examinations because it was attempting to fulfill its obligations under Title VII.[57] After a motion for rehearing en banc, the circuit judges voted 7-6 to deny the request.[58]

THE SUPREME COURT'S DECISION

The Supreme Court held that New Haven acted with an intent to discriminate against the white and Hispanic firefighters.[59] It said "[w]hatever the City's ultimate aim-however well intentioned or benevolent it might have seemed-the City made its employment decision because of race. The city rejected the test results solely because the higher scoring candidates were white."[60] The white and Hispanic firefighters

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[52] *Id.* at 160.

[53] *Id.*

[54] *Id.* at 161-62.

[55] *See* Ricci v. DeStefano, 264 F. App'x 106, 107 (2d Cir. 2008).

[56] *Id.*

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

[58] *See generally* Ricci v. DeStefano, 530 F.3d 88 (2d Cir. 2008).

[59] Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

[60] *Id.*

argued that it is not permissible for employers to take race conscious employment actions to avoid disparate impact liability.[61] They also claimed that an employer must be in violation of the disparate impact provisions before it can use those provisions as a defense to a disparate treatment suit.[62] The majority rejected these arguments, recognizing they were incompatible with Congress' intent to encourage voluntary compliance as the preferred means of achieving the objectives of Title VII.[63]

The majority also rejected New Haven's argument that a good faith belief in its actions were necessary to comply with the disparate impact requirement as being enough to justify race conscious actions to avoid liability.[64] It believed that such a standard could encourage de facto "quota system[s]," or that employers might discard test results with the intent to maintain some preferred racial balance.[65] To resolve what it viewed as a tension between the disparate impact and disparate treatment requirements, the majority imported a standard from affirmative-action jurisprudence under which race conscious actions by government actors are constitutional when there is a "strong basis in evidence" that remedial actions are necessary.[66]

The majority held that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious,

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[61] *Id.*

[62] *Id.*

[63] *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in the judgment)). *See also* Johnson v. Transp. Agency of Santa Clara Cnty., Cal., 480 U.S. 616, 640 (1987) (citing *Wygant*, 476 U,S, at 290 (O'Connor, J., concurring in part and concurring in the judgment)).

[64] *Ricci*, 129 S. Ct. at 2674-75.

[65] *Id.* at 2675.

[66] *Id.* at 2675 (quoting Richmond v. J.A. Cronson Co., 288 U.S. 469, 500 (1989) (further citations omitted)).

discriminatory action."[67] The majority also stated, "[a]pplying 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."[68]

The Court found that the white and Hispanic firefighters were entitled to summary judgment after concluding there was no genuine dispute that New Haven did not have a strong-basis-in-evidence for believing it would face disparate impact liability if it certified the examination results.[69] The majority also ruled that the examinations were job-related and consistent with business necessity.[70] It also held that an equally effective alternate selection device was not available.[71]

RICCI AND RACIAL RESENTMENT

"Racial resentment" refers to an intense, emotional opposition to policies designed to assist racial minorities.[72] Some of the objections are principled and ideological, but for many opponents, there is a strong emotional component. Many who oppose affirmative action believe that it obligates employers to give jobs to unqualified minorities.[73] They feel that it requires ill-prepared and undeserving black students to be admitted to universities at the expense of better-qualified white students.[74] Racial policies designed to promote racial equality are viewed as giving blacks an unfair and undeserved advantage in employment, college admissions, and government contracting

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[67] *Id.* at 2677.

[68] *Id.* at 2676.

[69] *Ricci*, 129 S. Ct. at 2677.

[70] *Id.* at 2678.

[71] *Id.* at 2679.

[72] *See* DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 104-05 (1996).

[73] *See id*. at 83-84.

[74] *See id*.

programs.[75] The perception that blacks are being afforded special treatment breeds racial animosity and ill will.[76]

The *Ricci* case provoked racial resentment because it was viewed by many as an example of less qualified blacks receiving an undeserved benefit at the expense of more qualified whites.[77] This accounts for several of the debates that surrounded the case, the intense media attention it received and the role it played in Associate Justice Sonya Sotomayor's confirmation hearings.[78] In the media, *Ricci* became a proxy in the longstanding debate about the legitimacy of affirmative action policies.[79]

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[75] *Id.* at 105-06.

[76] *Id.*

[77] *See, e.g.*, Charles Krauthammer, *Ricci Case Smokes Out Reverse Discrimination*, BOSTON HERALD.COM (July 5, 2009), http://www.bostonherald.com/news/opinion/op_ed/view.bg?articleid=1182981&srvc=next_article; Bill Mears, *High Court Backs Firefighters in Reverse Discrimination Suit*, CNNPOLITICS.COM (June 29, 2009), http://www.cnn.com/2009/POLITICS/06/29/supreme.court.discrimination/index.html; Warren Richey, *U.S. Supreme Court Takes up 'Reverse Discrimination' Case*, THE CHRISTIAN SCI. MONITOR (Jan. 9, 2009), http://www.csmonitor.com/2009/0109/p25s30-usju.html.

[78] *See e.g.*, David R. Cameron, Op-Ed., *An Indictment of New Haven*, BOSTON GLOBE, July 5, 2009, at 9, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/05/an_indictment_of_new_haven/; Adam Cohen, Editorial, *White Firefighters, Black Airline Passengers and Judge Sotomayor*, N.Y. TIMES, June 25, 2009, at A22, *available at* http://www.nytimes.com/2009/06/25/opinion/25thu4.html?ref=opinion; Richard A. Epstein, *Ricci vs. DeStefano*, FORBES.COM (June 29, 2009 2:30 PM EDT), http://www.forbes.com/2009/06/29/ricci-destefano-new-haven-supreme-court-affirmative-action-opinions-columnists-firefighters.html; Stanley Fish, *Because of Race: Ricci v. DeStefano*, N.Y. TIMES.COM (July 13, 2009, 10:00 PM), http://fish.blogs.nytimes.com/2009/07/13/because-of-race-ricci-v-destefano/?em; *U.S. Voters Disagree 3-1 With Sotomayor On Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action*, QUINNIPIAC UNIV. (June 3, 2009), http://www.quinnipiac.edu/x1295.xml?ReleaseID=1307.

[79] The literature on affirmative action is extensive. A sampling of some of the more recent books includes THE AFFIRMATIVE ACTION DEBATE (George Curry ed.,1996); AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? (Francis J. Beckwith & Todd E. Jones eds., 1997); TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION (2005); TERRY

Discrimination can be subtle and complex. Antidiscrimination jurisprudence assumes that discrimination is conscious and motivational rather than a product of how information is perceived and processed at an unconscious level.[80] Courts adhere to legal theories that emphasize intentionality.[81] Over the last two decades, however, a substantial body of empirical and theoretical work in cognitive psychology has confirmed that the causes of discriminatory actions often operate at an unconscious level without the perpetrator's awareness of the source.[82] Discrimination is viewed by many as a behavioral component of racial prejudice, but it is better understood as an interaction of social cognitions about race and behavioral outlets that bring congruence to a person's racial preferences and social settings.[83] Many of these ideas and beliefs are formed during the early childhood years,[84] and could thus serve as a basis for judgments about events, groups and ideas during the adult years. Socialized beliefs can

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EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1997); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005); J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION, AND THE SEARCH FOR JUSTICE (2006). For a detailed catalogue of the literature *see also* AFFIRMATIVE ACTION: AN ANNOTATED BIBLIOGRAPHY (A. M. Babkina ed., 2d ed. 2004).

[80] KINDER & SAUNDERS, *supra* note 72, at 105-06.

[81] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280-81 (1979) (a discriminatory purpose must be proved); Vill. Of Arlington Heights v. Metro. Hous. Devel. Corp., 429 U.S. 252, 264-71 (1977) (proof of a racially discriminatory intent is required to show a violation of the Fourteenth Amendment); Washington v. Davis, 429 U.S. 229, 239 (1976) (proof of an intent to discriminate is required to prevail on a claim of discrimination asserted under the Fourteenth Amendment).

[82] The literature is too voluminous to be captured in a single footnote. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 1246-71 (2002) (surveying the extensive body of literature in social psychology and social neuroscience that explain how unconscious bias operates).

[83] JAMES M. JONES, PREJUDICE AND RACISM 425-27 (2d ed. 1996).

[84] *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 739 (1995).

provoke negative sentiments when individuals make judgments about issues that activate stereotypes.[85]

Overt racism has diminished considerably in the years since the Civil Rights laws were enacted.[86] Today, although most whites subscribe to the norm of racial equality, negative stereotypes persist that provoke racial resentment.[87] Racial resentment is different from traditional prejudice because its adherents do not believe that African-Americans are biologically inferior.[88] The disposition is not usually overt; it resides deep within an individual's psyche and is related to norms of individual responsibility.[89] This sentiment originates from social dominance, authoritarian orientations and other personality traits and is often expressed through stereotypes and other biases.[90]

Polling data shows that many whites believe that blacks are deficient in values such as patriotism, hard work, obeying laws and refraining from immoral behavior.[91] As the legal barriers to

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[85] *See generally* JONES, *supra* note 83.

[86] *See* HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 143-56 (rev. ed. 1997).

[87] *See* KINDER & SANDERS, *supra* note 72, at 115. This disposition has been variously labeled "symbolic racism," "modern racism" and "racial resentment." These attitudes include a belief that discrimination does not impose a significant impediment to black advancement. African-Americans should simply work harder to improve their economic and social status. These are slightly different interpretations of the same phenomenon. The more overt forms of prejudice and racism have declined, but negative stereotypes about blacks persist. *See* Patrick. J. Henry and David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCHOL. 253, 254-58 (2002).

[88] *See* KINDER & SANDERS, *supra* note 72, at 115.

[89] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

[90] KINDER & SANDERS, *supra* note 72 at 113-115.

[91] *See* Lawrence Bobo & James R. Kluegel, *Status, Ideology and Dimensions of Whites' Racial Beliefs and Attitudes: Progress and Stagnation, in* RACIAL ATTITUDES IN THE 1990'S: CONTINUITY AND CHANGE 99-105 (Steven A. Tuch & Jack K. Martin, eds. 1997).

equality were removed decades ago by Civil Rights laws, some whites believe that the continuing levels of violence and poverty in many minority communities reflect the residents' failure to take advantage of the opportunities available to them.[92] They also perceive impoverished African Americans residing in inner city communities as persons who do not value personal responsibility, individualism, hard work, discipline and self-sacrifice.[93] Under this view, fraud and abuse in the welfare system, escalating crime rates and the dissolution of the traditional family reflect those shortcomings.[94]

Racial resentment is triggered by unconscious stereotypes that are invoked during the categorization process.[95] "Categorization" is the way in which the brain processes large amounts of information.[96] It operates at a level independent of conscious attitudes, beliefs and perceptions. Categorization is an essential cognitive activity enabling individuals to reduce the enormous diversity in the world to a manageable level.[97] Categorization is the process of understanding what something is by knowledge of things to which it is similar and from what things it is different.[98]

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[92] Michael K. Brown, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*, 58 DEPAUL L. REV. 645, 667 (2009) (explaining racial resentment). *See also* john a. powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV.785, 801-03 (2009).

[93] Brown, *supra* note 92, at 667; *see also* powell, *supra* note 92, at 801-03.

[94] *See* KINDER & SANDERS, *supra* note 72.

[95] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-90 (1995)

[96] *See id.* at 1198-99; Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 CALIF. L. REV. 997, 1034 (2006); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180-235 (2005); JOHN L. JACKSON, JR., RACIAL PARANOIA: THE UNINTENDED CONSEQUENCES OF POLITICAL CORRECTNESS 81-109 (2008).

[97] *See Krieger, supra* note 95, at 1187-90

[98] *See id.*

This process can develop at an early age. Psychologist Frances Aboud, has conducted and published an extensive body of research on prejudice in young children.[99] In a study of young children aged three to five, volunteers working under Aboud's direction were given a half-dozen positive adjectives such as "good," "kind," "clean" and an equal number of negative adjectives such as "mean," "cruel" and "bad."[100] They asked children to match each adjective to one of the two drawings.[101] One drawing depicted a white person; the other showed a black person.[102] The results showed that seventy percent of the children assigned nearly every positive adjective to the white faces and nearly every negative adjective to the black faces.[103] Commenting on Aboud's research, Shankar Vedantam explained in *The Hidden Brain* that these attitudes are not taught by the children's parents or teachers; they are the products of unspoken messages emanating from the environments in which they reside.[104]

Vedantam's book explores the findings of social psychologists about unconscious bias, which is located in the "hidden brain." He explains, among other things, that young children experience a world in which most people who live in nice houses are white. Most people on television are white, especially the people shown in positions of authority, dignity and power.

Most of the storybook characters that children see are white, and it is the white children who perform heroic, clever and generous things. Their hidden brains, which are fluent in the language of associations, conclude that there must be an unspoken rule in society that forces whites to marry whites

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[99] *See generally* FRANCES ABOUD, Children and Prejudice (1988).

[100] *See* SHANKAR VEDANTAM, THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS AND SAVE OUR LIVES 66-72 (2010).

[101] *See id.*

[102] *See id.*

[103] *See id.*

[104] *See id.*

because every where they look white husbands are married to white wives. Their hidden brains also conclude that there must be an unspoken rule about who can visit whose homes, because most of the time friends who visit each other belong to the same race.[105] Young children who are trying rapidly to orient themselves in their environments can draw conclusions that are superficially correct but are factually wrong.[106] They receive messages about race not once or twice, but thousands of times.[107] Everywhere a child looks, whether it is on television, in movies, in books or online, their inferences are confirmed. The occasional exceptions, such as a racially mixed couple, do not register.[108] As they grow older these messages remain in their in their unconscious psyches, but can be triggered by the categorization process. Categorization allows individuals to relate new experiences to old experiences; the unfamiliar becomes familiar. Each object and event in the world is perceived, remembered and talked about not as something unique, but as a category about which an individual has some knowledge. It is virtually automatic and measured in milliseconds. Unconscious stereotyping is part of the categorization process. It involves, among other things, the creation of a mental image of a "typical" member of a particular category. Individuals are perceived as undifferentiated members of a group, lacking any significant differences from other individuals within the group. Common traits are assigned to the entire group.[109] Unconscious stereotypes cause many whites to feel that African Americans make unwarranted demands for governmental assistance, including such policies as affirmative action.[110]

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[105] *See id*. at 71-72.

[106] VEDANTAM, *supra* note 100, at 73.

[107] *See id*. at 72-73.

[108] *See id*. at 73.

[109] *See Krieger*, *supra* note 95, at 1187-90.

[110] Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL., 414, 416 (1981).

Evidence of racial resentment and unconscious discrimination can be found in Associate Justice Samuel Alito's concurring opinion in *Ricci.*[111] Alito described at length, and in considerable detail, the events surrounding the decision not to certify the firefighters' examinations.[112] He presented an elaborate scenario in which New Haven's Mayor, Frank DeStefano, was heavily influenced by Reverend Boise Kimber, an African American minister.[113] Alito emphasized Mayor DeStefano's close ties to Kimber and described him as a "politically powerful" minister and "self-professed . . . kingmaker" in New Haven.[114] Alito depicted Kimber as what might be described as an "angry black militant" who intimidated whites by calling them racists in public settings. Under Alito's scenario, Kimber engineered the decision to prevent the white and Hispanic firefighters from receiving promotions. According to Alito:

> Reverend Boise Kimber . . . is a politically powerful New Haven pastor and a self-professed "kingmaker." . . . On one occasion, "[i]n front of TV cameras, he threatened a race riot during the murder trial of the black man arrested for killing white Yalie Christian Prince. He continues to call whites racist if they question his actions. . . . [On another occasion] Rev. Kimber told firefighters that certain new recruits would not be hired because "they just have too many vowels in their name[s]." . . . After protests about this comment, Rev. Kimber stepped down as chairman of the BFC . . . but he remained on the BFC and retained "a direct line to the mayor."[115]

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[111] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2684-89 (2009) (Alito, J., concurring).

[112] *See id.*

[113] *See id.* at 2684.

[114] *Id.*

[115] *Ricci,* 129 S. Ct. at 2684-85 (citations omitted).

After attributing the CSB decision to Kimber's influence on Mayor DeStefano, Alito concluded that "a reasonable jury could easily find that the city's real reason for scrapping the test results was not a concern about violating the disparate impact provisions of Title VII, but a simple desire to please a politically important racial constituency."[116]

Alito's reliance on a statement of undisputed facts attached as an appendix to a petition for a writ of certiorari was improper. An appendix is not evidence. There was no opportunity to cross-examine the individuals who made the assertions on which Alito relied. Kimber was not given an opportunity to respond to Alito's stereotypical portrayal of him as an angry black bigot who frightened and intimidated whites. Kimber is an imposing, dark-complexioned, African American male.[117] Alito's harsh portrayal fits the longstanding "Black Buck" stereotype; a large, hot-tempered, threatening, black male who defies white authority.[118] Alito's negative perception of Kimber suggests that he viewed *Ricci* through a fog of unconscious racial stereotypes and saw the case as an example of less-qualified blacks benefiting from a "rigged" process that disadvantaged more-deserving whites. This indicates that unconscious bias and racial resentment may have influenced Alito's vote, which was vital to the 5-4 majority.

Similar emotional reactions are suggested in the majority opinion which held that a new disparate impact standard was needed to prevent employers from establishing racial

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[116] *Id.* at 2688. As Justice Ginsburg's dissent points out, Mayor DeStefano was not the decision-maker; the decision was made by the CSB. *Id*. at 2707-08 (Ginsburg, J., dissenting).

[117] *See Reverend Dr. Boise Kimber*, CONNECTICUT STATE MISSIONARY BAPTIST CONVENTION, http://www.ctbaptist.org/index.php?page=president-s-bio (last visited Mar. 12, 2011).

[118] *See e.g.*, HARRY M. BENSHOFF & SEAN GRIFFIN, America on Film: Representing Race, Class, Gender, and Sexuality at the Movies 76-78 (1st ed. 2004); Donald Bogle, Toms, Coons, Mulattoes, Mammies, And Bucks: An Interpretive History of Blacks in American Films 10-14 (4th ed. 1991); Michelle Wallace, *Race, Gender and Psychoanalysis In Forties Film: Lost Boundaries, Home Of The Brave And The Quiet One*, *in* BLACK AMERICAN CINEMA 257-60 (Manthia Diawara ed., 1993) (relying on Bogle, *supra*).

"quota[s]."[119] The word "quota" in an affirmative action context provokes intense emotions.[120] In *Divided by Color*, the authors examined racial resentment.[121] The authors noted that of the six policy questions they examined, the issue of "quotas" elicited more racial resentment than any other question.[122] The authors explained that:

> "Quotas" is a highly charged and contentious term, used often by opponents of affirmative action policies and programs. . . . It calls up an odious history of discrimination, [and] exclusion. . . . "Quotas" is a rallying point, a powerful symbolic weapon in the rhetorical war against affirmative-action, and it appears to work, by our analysis, at least in part by activating whites' racial resentments.[123]

This may explain at least some of the majority's fear that employers would establish quotas without any evidence to support its assumption. The rigid, numerical quotas to which the majority referred were struck down in *Regents of the University of California v. Bakke*[124] and *City of Richmond v.*

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[119] *Ricci*, 129 S. Ct. at 2675.

[120] President George Bush vetoed the Civil Rights Act of 1990 labeling it a "quota bill." *See* Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 986 (1993). The "quota" label protected Bush from being seen as opposing equal employment opportunities. *See id.* at 990. Defining the alternative to quotas as "merit" allowed individuals to support the President's veto as the correct moral decision while ignoring continuing discriminatory employment practices. *See id.* at 986-90.

[121] *See generally* KINDER & SANDERS, *supra* note 72.

[122] *Id.* at 274.

[123] *Id.*

[124] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (upholding a challenge to a policy in which sixteen seats in a medical school's entering class were reserved for minority applicants).

Croson.[125] Maintaining the sort of quota that the majority anticipated could require the cooperation of several career civil servants in a conspiracy to engage in unlawful conduct. Public employees in municipalities the size of New Haven are hired pursuant to a merit selection system.[126] This typically starts with the posting of a vacancy in which a public announcement of the vacancy is made.[127] Applicants take a Civil Service examination administered by career employees in the human resources department and final selections are made from applicants who receive passing scores.[128] Several employees are involved in the process. Official records are created and maintained.

The majority assumed, without any evidence, that career civil servants would be willing to enter into wide-ranging conspiracies to engage in unlawful conduct that would jeopardize their careers and expose them to civil and possibly criminal liability.[129] In a municipality the size of New Haven the implementation of an unlawful system designed to maintain a racially balanced workforce would require the cooperation of several individuals, such as an elected mayor and/or some other high level official and the career civil servants in the city's human resource department who screens applications, interviews applicants, administers civil service examinations and maintains personnel records.[130]

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[125] City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (striking down a city requirement that non-minority-owned prime contractors set aside 30% of their business for minority-owned subcontractors).

[126] JOHN NALBANDIAN, Public Personnel Management: Contexts And Strategies 196-201 (5th ed. 2002).

[127] *Id.* at 197.

[128] *See id*. at 200.

[129] *See, e.g.*, CONN. GEN. STAT. ANN. § 1-240(a) (West, Westlaw through Jan. 1, 2011) (punishing those who dispose of public records without required approval or who alter any public record).

[130] For example, there are six employees in the New Haven Department of Human Resources. *Human Resources Staff Directory*, CITY OF NEW HAVEN, http://cityofnewhaven.com/HumanResources/StaffDirectory.asp (last visited Mar. 12, 2011).

Official records would have to be falsified. The conspiracy would have to include the managers of the various municipal departments in which the "quota" employees were placed. The scenario that the majority imagined would be extremely difficult to implement in a municipal government with civil service rules governing hiring and several career civil servants involved in the hiring process. It would be virtually impossible to keep such a system secret. If public employee unions learned that a selection process was "rigged," they would likely object strenuously and file grievances.

Under the majority's scenario, a mayor or some other high-level official may need to order career civil servants to risk their livelihoods by breaking laws. An elected official who attempts to persuade career civil servants to perform an unlawful act would be taking a great personal risk and it is unlikely that a career civil servant would obey an unlawful order. An elected official might be motivated to please an "important political constituency," but the career employees would likely have nothing to gain and much to lose. The majority's conspiracy theory lacks credibility, as it requires too many people to engage in too much unlawful conduct.[131] The concern about quotas may stem from an unconscious fear that less qualified and undeserving black firefighters may benefit at the expense of "better" qualified whites.

[131] The majority declined to address the constitutional issues that the white and Hispanic firefighters asserted. Ricci v. DeStefano, 129 S. Ct. 2658, 2664-65 (2009). In a concurring opinion, Justice Scalia suggested that the disparate impact provisions of Title VII may violate the Equal Protection Clause of the Fourteenth Amendment by arguing that "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." *Id.* at 2682 (Scalia, J., concurring). This is an entirely speculative assertion and even if it were true, employers, rather than the government, would likely create the racial classifications. The 1991 Act does not impose racial quotas nor was it intended to coerce employers to maintain a racially balanced workforce. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

THE "STRONG BASIS IN EVIDENCE" REQUIREMENT

New Haven's actions to avoid disparate impact liability under Title VII should not have been conflated with an intent to discriminate on the basis of race. These are separate and entirely different motivations. There is a difference between acting with discriminatory animus and taking an action that has a collateral affect on a group of employees. In *Personnel Administrator of Massachusetts v. Feeney*, the Court considered whether a Massachusetts law giving veterans a lifetime preference in filling open civil service positions discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.[132] The Massachusetts law adversely affected women, as a group, but it does not appear that it was enacted with an intent to discriminate against them. The law instead benefits veterans, most of whom were men. The negative effect on women was not by itself enough of a violation of the Equal Protection Clause.[133] The Supreme Court held that discriminatory intent "implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[134]

The same reasoning applies here. It appears that New Haven knew that the white and Hispanic firefighters would not be promoted if it disregarded the test results, but that does not mean that discriminatory animus was its motive. The Court confused "in spite of" with "because of."[135] New Haven decided against making promotions based on the test results *in spite* of, not *because of*, the affect its decision would have on the white and Hispanic firefighters.

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[132] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 259 (1979).

[133] *Id.* at 279.

[134] *Id* (citations omitted). *See also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-67 (1977); Washington v. Davis, 426 U.S. 229, 238-41 (1976).

[135] *See Pers. Adm'r of Mass.*, 442 U.S. at 279.

If New Haven made promotions based on flawed test results and the African-American firefighters prevailed in a discrimination suit against the City, the white and Hispanic firefighters would not be able to claim discrimination because they would not have been entitled to benefit from flawed examinations. The majority did not address this very real possibility. Whenever a disparate impact analysis is performed, the race of the applicants must be ascertained to determine whether a selection practice produces a disparate impact. This only occurs when too many whites pass the test. The process of determining whether an examination satisfies Title VII's disparate impact requirements does not discriminate against white test takers.

The majority imposed the new standard to address what it perceived to be a conflict between the disparate treatment and disparate impact theories.[136] It resolved the "problem" by imposing a requirement that employers must have a "strong basis in evidence" for believing that a selection device causes a disparate impact and is not job-related and supported by a business necessity.[137]

This standard was imported from affirmative action cases in which the Court held that governmental actions taken to remedy past discrimination must have a "strong basis in evidence" to support a determination that remedial action is necessary.[138] Under the strict scrutiny standard, governmental actions that create racial classifications must have a "compelling justification" and the means chosen must be "narrowly tailored" to achieving the government's goals.[139] In a series of decisions beginning with *City of Richmond v. Croson*, the Court has held that governmental affirmative action programs can be justified

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[136] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

[137] *See id.* at 2675-76.

[138] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 754-55 (2007); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 510 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

[139] *See* Loving v. Virginia, 388 U.S. 1, 9 (1967)); Korematsu v. United States, 323 U.S. 214, 216 (1944);United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

when they have a compelling justification and the means chosen are narrowly tailored to achieve the government's goal.[140]

In some affirmative action cases, a "strong basis in evidence" has been required to satisfy the "compelling justification" requirement, the first prong of strict scrutiny.[141] For example, in *Wygant v Jackson Board of Education*, the Jackson, Michigan Board of Education added a layoff provision to the Collective Bargaining Agreement between the Board and the Jackson Education Association that would protect employees who were members of minority groups from layoffs.[142] Under the amendment, teachers with the most seniority would be retained, except that the percentage of minority workers laid off could not be greater than the percentage minority workers employed at that time.[143]

When layoffs became necessary in 1974, tenured, non-minority teachers were going to be laid off while minority teachers on probationary status were retained. Rather than complying with the Collective Bargaining Agreement, the Board retained the tenured teachers and laid off probationary minority teachers. The Union and two minority teachers filed a civil action challenging the Board of Education's actions.[144]

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[140] Grutter v. Bollinger, 539 U.S. 306 (2003) and Gratz v. Bollinger, 539 U.S. 244 (2003) (affirmative action admission program which gave weight to minority applicant's race); *Adarand Constructors, Inc.* (affirmative action program developed by the federal government awarding extra points when minority contractors were used); Metro Broad. Inc. v. Fed. Commc'ns Comm'n, 497 U.S. 547 (1990) (minority applicants for broadcast licenses were given preference if all other relevant factors were roughly equal, and a separate policy permitted broadcasters in danger of losing their licenses to sell their stations to minority buyers), *overruled by Adarand Constructors, Inc.*; *Croson*, 488 U.S. at 508.

[141] The strong basis in evidence has been imposed in cases in which a governmental entity is seeking to remedy the present effects of past discrimination or current discriminatory practices. *See Croson* at 510. *See also Adarand*, 515 U.S. at 222. It does not apply to educational programs where the goal is to serve the government's compelling interest in promoting student body diversity. *See Grutter*, 539 U.S. at 328-33.

[142] *Wygant*, 476 U.S. at 270.

[143] *Id.*

[144] *Id.* at 271.

The Supreme Court struck down the provision of the Collective Bargaining Agreement that required the retention of probationary minority employees while non-minority workers with greater seniority were laid off.[145] The Union argued that the Board's interest in providing minority role models for its minority students, as an effort to alleviate the effects of societal discrimination, was sufficiently "compelling" to justify the racial classification used in the layoff provision.[146]

The Supreme Court disagreed because there had been no history of official discrimination in the Jackson public school system and therefore there was no "compelling justification" for the layoff plan. The role model justification was not accepted based on Justice Powell's view that "societal discrimination" was too amorphous a basis for imposing a racially classified remedy.[147]

In *City of Richmond v. Croson*, the Supreme Court struck down an ordinance that required thirty percent of the City's construction subcontracts to be reserved for minority contractors.[148] The majority found that the ordinance violated of the Equal Protection Clause of the Fourteenth Amendment.[149] Applying strict scrutiny to the City's plan, the Court held that a state or local subdivision would have a compelling justification for acting to eradicate the effects of discrimination in its jurisdiction. If the City of Richmond had shown that it was a "passive participant" in a system of racial exclusion in the local construction industry, it could have take affirmative steps to dismantle the system.[150] However, the generalized assertion of past discrimination during a City Council hearing, during which the ordinance was enacted, was not a sufficient factual

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[145] *Id.* at 284.

[146] *Id.* at 275.

[147] *Id.*

[148] *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

[149] *Id.* at 498-506.

[150] *Id.* at 509.

predicate.[151] The City needed particularized findings of discrimination in the local construction industry.[152]

Contrary to the claims asserted by the white and Hispanic firefighters,[153] *Ricci* was not an affirmative action case. The City's actions did not establish a minority "set aside" program in which governmental policies created racial classifications. There was no need to justify a race conscious affirmative action program. The decision to discard the examination results was not part of an across the board policy in which the race of minority applicants was a factor in the selection process. New Haven made an ad hoc determination about two examinations after it discovered that the examinations had a disparate impact and a flaw in the design. Unlike *Ricci*, in the several affirmative action cases decided by the Supreme Court, race was deliberately used as a factor in policies that conferred a government benefit.[154] Because there was no race conscious

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[151] *Id.* at 479-81, 510.

[152] *Id.* at 510.

[153] *See* Brief for Petitioners at 61 Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1428_Petitioner.pdf.

[154] In the several affirmative action cases that the Supreme Court has decided, race was deliberately used as a factor in policies that conferred a government benefit. *See* Grutter v. Bollinger, 539 U.S. 306, 315-16 (2003) (affirmative action law school admission program which gave weight to minority applicant's race); Gratz v. Bollinger, 539 U.S. 244, 253-55 (2003) (affirmative action university admission program which gave weight to minority applicant's race); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 208 (1995) (affirmative action program developed by the federal government awarding extra points when minority contractors were used); Metro Broad. Inc. v. Fed. Commc'ns Comm'n, 497 U.S. 547, 556-57 (1990) (minority applicants for broadcast licenses were given preference if all other relevant factors were roughly equal, and broadcasters in danger of losing their licenses to sell their stations to minority buyers), *overruled by Adarand Constructors, Inc.*;City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-79 (1989) (affirmative action program developed by a municipally reserving 30 percent of subcontracts for minority contractors); Johnson v. Transp. Agency of Santa Clara Cnty., Cal., 480 U.S. 616, 620-21 (1987) (sex could be used as a plus factor in a multifaceted selection process designed to increase the number of female workers); United States v. Paradise, 480 U.S. 149, 154-55 (1987) (a negotiated consent decree including numerical hiring and promotional goals for minority employees); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 511-12

affirmative action program, there is no valid justification for imposing a new and more rigorous standard in a disparate impact case.

The factual circumstances surrounding *Ricci* are unlikely to arise in many future cases but the decision is likely to have a chilling effect on employers. The examinations involved in this case were administered for the first time without any pre-examination tryouts; they were designed to give weight to the oral and written components in a manner prescribed by a union contract rather than principles developed by experts in industrial psychology; the validity of the tests was disputed; testing experts were critical of the design of the examinations; and there was evidence that an equally effective alternative selection device was available.[155] These were not typical circumstances. Employers can avoid circumstances like those in *Ricci* by making sure standardized examinations are properly validated by experts and by using pre-examination "tryouts" as part of that process.

Rather than providing guidance to employers and courts, the majority has created confusion. In affirmative action cases, the Court has said that the "strong basis in evidence" standard requires not only findings regarding the extent of the governmental unit's past racial discrimination, but also that those findings define the scope of the remedy.[156] These considerations do not apply in this situation. *Ricci* was not a case in which a municipality was establishing an affirmative

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(1986) (allowing race-conscious relief in a consent decree); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270-71 (1986) (collective bargaining agreement that required the retention of probationary minority teachers when non-minority teachers were laid off); Fullilove v. Klutznick, 448 U.S. 448, 453-54 (1980) (a federal program that reserved a specified percentage of government contracts for minority contractors), *overruled by Adarand Constructors, Inc.*; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

[155] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2665-68 (2009); Brief for Industrial-Organizational Psychologists as Amici Curiae Supporting Respondents at 5-25, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-328_RespondentAmCuIndus-OrgPsychologists.pdf

[156] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 754 (2007); *Adarand*, 515 U.S. at 222; *Croson*, 488 U.S. at 504; *Wygant*, 476 U.S. at 277.

action program to remedy past discrimination; therefore, there was no need for "strong basis in evidence" to justify New Haven's actions. In *Ricci*, the contours of the "strong basis in evidence" standard were not clearly defined.[157] The majority did not identify the quantity and quality of evidence needed or who bears the burden of proof. Instead, the standard is vague and amorphous and does not give employers fair warning of what is required to establish a "strong basis in evidence."

THE DISPARATE IMPACT THEORY

The decision in this case conflicts with a long line of cases interpreting the disparate impact theory. Under the disparate impact theory, practices or policies that are facially neutral but exclude a disproportionate percentage of a protected group violate Title VII if they are not shown to be "job-related."[158] A showing of discriminatory intent is not required; if the plaintiff shows that a policy or practice has a disparate impact, the employer must demonstrate that the challenged practice is job-related and supported by a business necessity.[159] If an employer satisfies those requirements, a plaintiff can still prevail if she can show that there is an equally effective alternative employment practice that the employer refuses to adopt.[160]

This case also involved the use of standardized tests. Written examinations were at the center of one the Supreme Court's

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[157] *See generally* Ricci v. DeStefano, 129 S. Ct. 2658 (2009). In *Croson*, the Court stated that establishing a "strong basis in evidence" requires proper findings regarding the extent of the government unit's past racial discrimination. *See* 488 U.S. at 510. This would not apply in this case or other cases like this, as New Haven was not acting to remedy past discrimination.

[158] 42 U.S.C.A. § 2000e-2(k)(1)(A) (West, Westlaw through P.L. 111-231); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). For an examination of the history of the disparate impact theory, *see* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (2005) (Professor Belton represented the plaintiffs in *Griggs*).

[159] *See* 42 U.S.C.A. § 2000e-2; *Albermarle*, 422 U.S. at 405, 425; *Griggs*, 401 U.S. at 432.

[160] 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii).

earliest Title VII decisions, *Griggs v. Duke Power Company*.[161] In *Griggs*, the Supreme Court considered the validity of employment practices that excluded a disproportionate percentage of minority applicants.[162] The employer in *Griggs* had restricted black employees to lower paying jobs in the labor department.[163] After Title VII became effective, access to the higher paying positions became conditioned upon a high school diploma and a passing score on two standardized tests.[164] These new requirements excluded a disproportionate percentage of black applicants.[165] The Supreme Court held 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."[166]

The Court concluded that Title VII required the removal of "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classifications."[167] Although Section 703(h) of Title VII permits standardized tests,[168] the Court held that they cannot be used if they operate to exclude members of protected groups and "cannot be shown to be related to job performance."[169] The Court reasoned that the

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[161] *Griggs*, 401 U.S. at 427-28.

[162] *Id.* at 426.

[163] *Id.* at 427-28.

[164] *Id.*

[165] *See id*. at 429.

[166] *Id.* at 430.

[167] *Griggs*, 401 U.S. at 431.

[168] *See* 42 U.S.C.A. § 2000e-2(h). Section 703(h) was added during the debates on Title VII by Senator John Tower of Texas. *See Griggs*, 401 U.S. at 434-36 (citations omitted). Tower feared that proposed legislation would prevent employers from using standardized examinations as a screening device. *See id*. at 436 n.12. He introduced an amendment specially authorizing "professionally developed ability tests." *See id*. at 435 (internal quotations omitted). The original amendment was defeated but a substitute amendment proposed by Senator Tower was adopted and incorporated as § 703(h). *See id.* at 434-35 (citations omitted).

[169] *Griggs*, 401 U.S. at 431.

Griggs examinations were not "job-related" because many of the company's white employees who had not graduated from high school or taken tests successfully performed the jobs in question.[170]

In a later case, *Albemarle Paper Company v. Moody*, an employer required applicants for certain skilled positions to have a high school diploma and to obtain a passing grade on a standardized test.[171] As was the case in *Griggs*, the diploma and test requirements excluded a disproportionate percentage of black applicants.[172] The employer attempted to validate the test using the EEOC Guidelines that were approved in *Griggs*.[173] The Supreme Court found that the validation studies were flawed because they were not sufficiently correlated to the jobs in question.[174] The Court reiterated its holding in *Griggs* that "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer 'meets a burden of showing that any given requirement (has) . . . a manifest relationship to the employment in question.'"[175]

In another case, *Connecticut v. Teal*, a group of black employees of a Connecticut state agency were temporarily promoted to supervisory positions.[176] To secure permanent status as supervisors, they were required to pass a written examination.[177] A disproportionate percentage of the black candidates did not pass the examination.[178] Connecticut eventually promoted 22.9% of the black candidates and 13.5% of the white candidates.[179] Connecticut contended the end result,

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[170] *Id.* at 431-32.

[171] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 426-27 (1975).

[172] *Id.* at 409-11.

[173] *Id.* at 429-30.

[174] *See id.* at 430-36.

[175] *Id.* at 425 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

[176] Connecticut v. Teal, 457 U.S. 440, 442-45 (1982).

[177] *Id.* at 443.

[178] *Id.* at 444.

[179] *Id.*

which was more favorable to blacks than to whites, was a valid defense to a suit alleging a disparate impact claim.[180] The Supreme Court disagreed and held that measuring a disparate impact at the "bottom line" ignored Title VII's guarantee that black applicants compete equally with white workers on the basis of job-related selection criteria.[181]

Legal scholars have suggested differing theoretical justifications for the disparate impact doctrine. In *Griggs*, the Supreme Court suggested that the written test penalized African-Americans who had received inferior educations in North Carolina's segregated schools.[182] Census data showed that only twelve percent of blacks in North Carolina had high school diplomas compared to thirty-four percent of the white population.[183] The diploma and test requirements were added on the day that Title VII became effective.[184] As one commentator observed, "[p]ermitting the tests and degree requirement without any justification other than a vague desire to improve the quality of the workforce effectively would have preserved the segregated job lines that Title VII was intended to eradicate."[185] In *Griggs* and *Albermarle*, the hastily imposed examination requirement looked suspiciously like a pretext for discrimination.

Professor Robert Belton suggests that the language of Title VII itself provides a foundation of the disparate impact theory:

> There is no real dispute that at the time Congress enacted Title VII, it intended to prohibit blatant, overt, or intentional racially discriminatory employment practices in the private sector. The terms "to discriminate," "intended," and

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[180] *See id.* at 445.

[181] *See id.* at 449-52.

[182] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[183] *Id.* at n.6

[184] *Id.* at 427-28.

[185] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 721 (2006).

> "intentionally" are used repeatedly throughout the Act. . . . Had Congress wanted to prohibit only intentional discrimination, it could have easily accomplished that goal by only including section 703(a)(1), which provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[186]

Belton argued that the inclusion of 703(a)(2) suggests that Congress intended to prohibit more than intentional discrimination because this section does not mention the terms "intent" or "discriminate."[187]

Professor George Rutherglen believes the Supreme Court developed the disparate impact theory to prevent pretextual discrimination by institutional defendants when direct evidence of intentional discrimination is not available.[188] Under this interpretation, the disparate impact model serves as a proxy for motive, allowing plaintiffs to "smoke out" employers who are acting with discriminatory intent when the proof needed to establish a discriminatory intent is lacking. Another rationale for the disparate impact theory is that it serves Title VII's goal of eliminating artificial and unnecessary obstacles to individuals' advancement, without regard to whether the beneficiaries of the policy have themselves been the victims of discrimination.[189]

In *Lewis v. City of Chicago*, Judge Richard A. Posner pointed to another theory:

> The concept of disparate impact was developed for the purpose of identifying discriminatory

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[186] Belton, *supra* note 158, at 438 (citations omitted).

[187] *Id.* at 438-440.

[188] George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1345 (1987).

[189] Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 966 (2005).

> situations where, through inertia or insensitivity, companies were following policies that gratuitously-needlessly-although not necessarily deliberately, excluded black or female workers from equal employment opportunities. Often these were policies that had been adopted originally for discriminatory reasons and had not been changed when the employer ceased deliberately discriminating-if he had; for another way of looking at the disparate impact approach is that it is primarily intended to lighten the plaintiff's heavy burden of proving intentional discrimination after employers learned to cover their tracks.[190]

The debates about the theoretical foundations for *Griggs* were not resolved, but in 1991 Congress endorsed this doctrine.

THE CIVIL RIGHTS ACT OF 1991

The Court's ruling in *Ricci* conflicts with the Congressional intent of the Civil Rights Act of 1991, which was enacted to codify and strengthen the disparate impact doctrine. The "strong basis in evidence" standard undermines the goals of the 1991 Act. In February of 1990, Senator Edward Kennedy introduced the Civil Rights Act of 1990 in the Senate.[191] The conference report version of S. 2104 passed the Senate on October 16, 1990, by a vote of sixty-two to thirty-four.[192] The House followed the Senate on October 17th in passing the measure by a vote of 273-154.[193] President George H. W. Bush vetoed the bill and returned it to the Senate on October 22,

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[190] Lewis v. City of Chicago, 528 F.3d 488, 491-92 (7th Cir. 2008) (quoting Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164 (7th Cir. 1992)), *rev'd*, 130 S. Ct. 2191 (2010).

[191] *Bill Summary & Status*, THOMAS (LIBRARY OF CONGRESS), http://thomas.loc.gov/cgi-bin/bdquery/z?d101:SN02104:@@@R (last visited Mar. 17, 2011).

[192] 136 CONG. REC. S15,399 (daily ed. Oct. 16, 1990).

[193] 136 CONG. REC. H9975 (daily ed. Oct. 17, 1990).

1990.[194] Bush claimed that it would produce quotas and offered to sign into law a more modest bill which he attached to his veto message.[195] On October 24, 1990, the Senate's veto override effort fell one vote short of the required sixty-seven with a tally of sixty-six to thirty-four.[196] The following year, Congress enacted another bill and in November of 1991, the two-year battle over civil rights reform ended when President Bush signed the Civil Rights Act of 1991.[197]

> The provisions most relevant to the *Ricci* case state:
>
> An unlawful employment practice based on disparate impact is established under this title only if --
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[198]

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[194] 136 CONG. REC. S16,418 (daily ed. Oct. 22, 1990).

[195] *See id*.

[196] 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990).

[197] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[198] *Id.* at § 105 (codified at 42 U.S.C.A. § 2000e-2(k)(1)(A) (West, Westlaw through P.L. 111-231)).

There is nothing in these provisions that support the "strong basis in evidence" standard that the Court imposed in *Ricci.* The 1991 Act was prompted in part by the decision in *Wards Cove Packing Co., Inc. v. Atonio,* which tightened the requirements for establishing a prima facie case and relaxed the "business necessity standard," thus heightening the burden of proof for plaintiffs.[199] In the years following the *Albermarle* decision, conflicting interpretations developed concerning the employer's evidentiary burden after a disparate impact is shown. To some courts, the phrase "business necessity" meant that a practice producing a disparate impact had to be necessary to the safe and efficient operation of the employer's business.[200]

Other courts interpreted "job-relatedness" as a more relaxed evidentiary standard under which a practice producing a disparate impact needed only to serve, in a significant way, the legitimate goals of the employer.[201] In *Dothard v. Rawlinson*, the Supreme Court struck down a minimum-weight requirement that excluded a disproportionate percentage of female applicants from prison guard positions.[202] The Court stated in a footnote that to satisfy the business necessity standard, "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[203]

Despite the language in *Dothard*, some courts concluded that the "business necessity" standard was too exacting. In *Contreras v. City of Los Angeles*, the U.S. Court of Appeals for the Ninth Circuit considered the validity of a standardized examination that had an adverse impact on Spanish-surnamed applicants.[204] The court concluded that an employer's

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[199] Wards Cove Packing Co. v. Atonio, Inc. , 490 U.S. 642, 659 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-75, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

[200] Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977).

[201] Contreras v. City of Los Angeles, 656 F.2d 1276, 1279-80 (9th Cir. 1981).

[202] *Dothard*, 433 U.S. at 332.

[203] *Id.* at 331 n.14.

[204] *Contreras*, 656 F.2d at 1271.

evidentiary burden could be satisfied if it showed the challenged employment practices "significantly serve, but are neither required by nor necessary to, the employers legitimate business interests."[205]

The majority in *Wards Cove Packing Co., Inc. v. Atonio* adopted this more relaxed standard.[206] The employer in that case operated salmon canneries in remote Alaska locations.[207] Employees in the lower-paying classifications consisted of Filipinos and non-white Alaskan natives.[208] The higher-paying, non-cannery jobs were occupied almost exclusively by white males.[209] Evidence presented at the trial showed that the employer's workforce was racially stratified.[210] The Supreme Court held that the plaintiffs should not have relied on statistical comparisons of the racial composition within the employer's workforce.[211] Rather, the comparisons should have been made using the racial composition of the employer's workforce as compared to the racial composition of the qualified population in the relevant labor markets.[212] The Court also held that as part of the prima facie case, the plaintiffs were obligated to identify

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[205] *Id.* at 1280.

[206] Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-75, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

[207] *Id.* at 646.

[208] *Id.* at 647.

[209] *Id.*

[210] *Id.* at 663 n.4 (Stevens, J., dissenting).

[211] *Id.*at 651. This conclusion was reached despite the evidence that showed that the employer had a racially stratified workforce and the housing for workers was segregated. *Id.* at 663 n.4 (Stevens, J., dissenting).

[212] *See Wards Cove*, 490 U.S. at 650. The majority in *Wards Cove* relied on the ruling in *Hazelwood Sch. Dist.*, which held that the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." *Wards Cove*, 490 U.S. at 650 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (internal quotations omitted)).

the specific practices that caused the disparate impact.[213] The Court ruled that to establish "business necessity," the employer must show only that the challenged practice served, in a significant way, the legitimate goals of the employer.[214]

After passage of the 1991 Act, an unlawful employment practice based on disparate impact is established if (1) a plaintiff demonstrates that an employer uses an employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and (2) the employer cannot show that the challenged practice is both "job-related" for the position in question and "consistent with business necessity."[215]

The legislative history examined above makes it clear that the Civil Rights Act of 1991 restored *Griggs* and overturned *Wards Cove*. The interpretive memo entered into the record by Senator Danforth states that the "terms 'business necessity' and 'job-related' are intended to reflect the concepts enunciated by the Supreme Court in [*Griggs v. Duke Power Co*] and in the other Supreme Court decisions prior to [*Wards Cove Packing Co. v. Atonio*]."[216] These provisions were enacted to codify and strengthen the disparate impact doctrine. The ruling in *Ricci* undermines them.

The disparate impact theory does not require quotas; it provides an incentive for voluntary compliance with Title VII. Disproportionate selection and/or promotion rates can cause underrepresentation. Underrepresentation is determined by comparing the percentage of minorities and/or women in an employer's workforce to the percentage of minorities and/or

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[213] *Wards Cove*, 490 U.S. at 657. This interpretation was derived from Justice O'Connor's opinion in *Watson v. Fort Worth Bank & Trust*, in which she stated that a "plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

[214] *See Wards Cove*, 490 U.S. at 660-61.

[215] 42 U.S.C.A. § 2000e-2(k) (West, Westlaw through P.L. 111-231).

[216] 137 CONG. REC. S15,273-01 (daily ed. Oct. 25, 1991).

women available in the relevant labor market.[217] The labor market is the geographic region from which the company's employees are hired. This could be local, statewide, a region consisting of more than one state, or nationwide, depending upon the employer's recruitment practices. If special qualifications are required (such as a college degree or a special license), those are taken into account in determining availability.[218] Underrepresentation exists when the percentage of women and/or minorities in an employer's workforce is significantly lower than the percentage of women and/or minorities in the relevant labor market.[219] The Supreme Court provided a basis for this view where it explained:

> Statistics showing racial or ethnic imbalance are . . . often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though . . . Title VII imposes no requirement that a work force mirror the general population.[220]

Disproportionate selection rates, significant underrepresentation of minorities or women in an employer's workforce, and the underrepresentation of women and/or minorities in high level positions are statistically unlikely to

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[217] *See Wards Cove*, 490 U.S. at 650; *Hazelwood*, 433 U.S. at 308; ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS & ROBERTO L. CORRADA, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 189-211 (7th ed. 2004) (citations omitted).

[218] *See Hazelwood*, 433 U.S. at 308 n.13.

[219] *See id*. at 308-09.

[220] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

occur by chance. Prudent employers should determine what is causing the disparities to make sure that they are not the product of intentional or unconscious discrimination. That does not mean, however, that the disparate impact doctrine coerces employers to develop racial "quotas" or to maintain racially balanced workforces. Discrimination is not a relic of a distant past that is practiced by a few outliers with a "taste for discrimination." It still occurs regularly at conscious and unconscious levels.

STANDARDIZED EXAMINATIONS AND THE JOB-RELATEDNESS REQUIREMENT

The promotional examinations in *Ricci* produced a disparate impact and there was no determination that they were job-related. At a minimum, this issue should have been remanded for determination at the trial court. The use of standardized examinations as a screening device is a longstanding practice that is permissible under Title VII, which states:

> [n]otwithstanding any other provision . . . it shall not be an unlawful employment practice for . . . an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[221]

However, standardized tests that produce a disparate impact must be validated in accordance with the EEOC's Guidelines.[222]

A disparate impact is shown when the pass rate for minority test takers is significantly lower than the pass rate for nonminority test takers. The EEOC's Guidelines state:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty

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[221] 42 U.S.C.A. § 2000e-2(h) (West, Westlaw through P.L. 111-231).

[222] *See* 29 C.F.R. § 1607.3(A) (2010).

> 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. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.[223]

In *Ricci*, the Captain and Lieutenant examinations disqualified a disproportionate percentage of African-American test-takers.[224] On the Lieutenant examination, the pass rate for whites was 60.5%, for African-Americans 31.6% and for Hispanics 20%.[225] On the Captain examination the pass rate for whites was 88%, which was more than double that of minorities.[226] This differential violated the EEOC's four-fifths rule and was sufficient evidence of an adverse impact.[227]

When employers use standardized tests as part of a selection process, the EEOC's Uniform Guidelines on Employee Selection Procedures require validation when a test produces an adverse impact.[228] The Guidelines state:

> [t]he 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

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[223] 29 C.F.R. § 1607.4(D) (2010).

[224] Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[225] *Id.* at 153.

[226] *Id.* at 153-54.

[227] *Id.* at 154.

[228] *See* 29 C.F.R. § 1607.2 (2010).

> with these guidelines, unless the procedure has been validated in accordance with these guidelines. . . .[229]

Validation is a process which confirms that an employment test is "predictive of or significantly correlated with important elements of job performance."[230] There are three validation techniques approved by the EEOC's Guidelines: criterion, content, and construct validation.[231] Criterion validation requires the employer to establish a statistically significant correlation between successful performance on a standardized examination and successful performance of the job.[232] Content validation requires the employer to establish that examinations directly measure important job-related behaviors.[233] Construct validation requires the employer to establish that the test measures the more abstract characteristic it claims to measure and that the characteristic is important to successful job performance.[234]

The EEOC's Guidelines state that:

> [f]or the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines . . . . Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. . . .

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[229] 29 C.F.R. § 1607.3 (2010).

[230] 29 C.F.R. § 1607.5(B) (2010).

[231] *See id.*

[232] *See id.*

[233] *See id.*

[234] *See id.*

> Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. . . . Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.[235]

In a case brought by black and Hispanic police officers, *Guardians Ass'n v. Civil Service Commission*, the court explained validation requirements.[236] The plaintiffs in *Guardians* alleged that entry-level examinations had a disproportionate impact and were not job-related.[237] The U.S. Court of Appeals for the Second Circuit affirmed the trial court's finding that the examinations had an adverse impact on black and Hispanic applicants and had not been properly validated.[238] The court explained the requirements for test validation, stating:

> (1) the test-makers must have conducted a suitable job analysis, and (2) they must have used reasonable competence in constructing the test itself. . . . (3) that the content of the test must be related to the content of the job. . . . [and] (4) the content of the test must be representative of the content of the job. Finally, the test must be used with (5) a scoring system that usefully selects from

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[235] 29 C.F.R § 1607.5(A)-(B) (2010). *See generally* Robert M. Guion, Assessment, Measurement, and Prediction for Personnel Decisions (1997).

[236] Guardians Ass'n of N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n of N.Y.C., 630 F.2d 79, 94-95 (2d Cir. 1980).

[237] *Id.* at 83.

[238] *Id.* at 113.

> among the applicants those who can better perform the job.[239]

As the discussion in the following section demonstrates, the question of whether New Haven's examinations were validated was never resolved.

NEW HAVEN'S PROMOTIONAL EXAMINATIONS

In *Ricci*, the examinations excluded a disproportionate percentage of black test takers and there was conflicting testimony regarding the examinations' validity.[240] Evidence presented during the CSB hearings also indicated that another, equally effective screening device was available that would not cause an adverse impact.[241] After this information came to light, New Haven decided that it would not certify the examinations.[242] During the CSB hearings, IOS's project manager explained how the examinations were developed.[243] Performing what is known as a "job analysis," IOS personnel interviewed a random sample of New Haven Fire Department Lieutenants, Captains, and Battalion Chiefs to determine the structure of the department, the tasks required of firefighters at each rank, and the materials the department used for training.[244] A job analysis questionnaire was distributed that asked New Haven's Lieutenants and Captains to provide information about the relative importance of specific tasks, knowledge areas, skills, and abilities.[245] The questionnaire also

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[239] *Id.* at 95. *See also* BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 188-221 (C. Geoffrey Weirich et al. eds., 4th ed. 2007).

[240] *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 145-51 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[241] *See id*. at 154.

[242] *See id*. at 150.

[243] *Id.* at 148

[244] *Id.* at 147.

[245] *Id.*

asked how important each task was to successful job performance and the frequency of need to perform them.[246]

Importance and frequency answers were entered into a metric called "criticality or essentiality."[247] Tasks above a certain threshold of importance were designated for testing on the written and oral portions of the exams.[248] The questions were based on study materials contained in a syllabus that was distributed to applicants.[249] After the examinations were drafted, two independent reviewers evaluated them.[250] Evaluators for the oral portion of the examinations were selected from fire departments outside Connecticut.[251] All but one of the evaluation panels had one African-American, one Hispanic, and one white assessor.[252] The assessors were trained to grade the oral exams consistently, utilizing checklists of desired criteria.[253] Each panelist held a position that was equal or higher in rank than the positions that were being tested.[254]

During the CSB hearings, there were conflicting opinions concerning the validity of IOS's tests.[255] Christopher Hornick, Ph.D., a psychologist with a consulting firm, stated that written tests were not as valid as other selection procedures that were available.[256] He identified an alternative, the "assessment center process," in which candidates would demonstrate their knowledge of the relevant operating procedures and show how

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[246] *Ricci*, 554 F. Supp. 2d at 147.

[247] *Id*.

[248] *Id*.

[249] *Id.*

[250] *Id*..

[251] *Id.*

[252] *Ricci*, 554 F. Supp. 2d at 147.

[253] *Id*.

[254] *Id*. at 147-48.

[255] *See id*. at 148-49.

[256] *See id*.

they would address problems instead of verbally stating answers to questions or identifying the correct item on a written test.[257] To the contrary, a Fire Program Specialist for the U.S. Department of Homeland Security who had retired from a municipal fire department contended that the test was appropriate.[258] A professor of counseling psychology at Boston College explained the influence of race and culture on the test performance of minority firefighters.[259] Some firefighters testified that the tests were fair while others claimed they were not.[260] New Haven's Corporation Counsel, Thomas Ude, testified that the examinations were problematic because they excluded a disproportionate percentage of black test takers.[261] He also explained that Title VII did not require the CSB to determine the examinations' job-relatedness because examinations that cause a disparate impact should not be used when there is an alternate screening process that would not produce an adverse impact.[262]

The white and Hispanic firefighters contended that because the firefighters' examinations had an adverse impact on minority firefighters, New Haven was obligated to validate the examination rather than refusing to certify the results.[263] The trial court rejected that argument after concluding that "[the] guidelines do not require or mandate a validity study where an employer decides *against* using a certain selection procedure that manifests [a disparate] impact . . . ."[264] There was no dispute that the examinations excluded a disproportionate number of African-American test takers.[265] Therefore, the

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[257] *Id*. at 149.

[258] *Ricci*, 554 F. Supp. 2d at 149.

[259] *Id.*

[260] *See id*. at 146.

[261] *See id*. at 145-46, 150.

[262] *Id.* at 145-46.

[263] *Id.* at 144-46.

[264] *Ricci*, 554 F. Supp. 2d at 155.

[265] *See id*. at 145.

critical question during the CSB hearings was whether the examinations had been properly validated.[266] The evidence was at best mixed, with some experts contending the examinations were valid and other experts concluding that the examinations were flawed and that equally effective alternate selection devices were available that would not produce a disparate impact.[267]

The amicus brief submitted by the Society for Industrial and Organizational Psychology, an organization of experts in the field of industrial organizational psychology, identified several flaws in New Haven's examinations.[268] That brief stated that the examinations did not measure leadership skills that are critical qualifications for supervisory positions.[269] It also faulted the arbitrary weighting of the multiple-choice and oral components of the tests; the lack of information from local subject matter experts regarding whether the test items matched the content of the jobs; and the use of rank ordering without adequate justification.[270] The brief also noted the availability of an "alternative employment practice," the "assessment center," to which Dr. Hornick referred during his testimony.[271]

Under pre-*Ricci* precedent, New Haven was obligated by the EEOC's Guidelines to decline to certify the examination results. The Civil Rights Act of 1991 states that when a plaintiff proves that an employment practice produces a disparate impact and an equally effective alternative is available, the employer must adopt the alternate practice to avoid liability.[272] One of the

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[266] *See id*. at 154-55.

[267] *See id*. at 144-50.

[268] *See* Brief for Industrial-Organizational Psychologists as Amici Curiae Supporting Respondents at 5-25 Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-328_RespondentAmCuIndus-OrgPsychologists.pdf.

[269] *See id*. at 10-12.

[270] *See id*. at 12-23.

[271] *See id*. at 28-34.

[272] *See* Civil Rights Act of 1991 §105, 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii) (West, Westlaw through P.L. 111-231).

experts in *Ricci*, testified during the CSB hearings that equally effective selection devices were available that would not produce a disparate impact.[273] Under the EEOC Guidelines and the Civil Rights Act of 1991, New Haven was obligated to abandon the Lieutenant and Captain examinations after it learned that an equally effective "alternative employment practice" was available.[274]

This requirement was codified by Congress when it enacted the 1991 Amendments to Title VII. In any legal challenge to the promotion process, the City would have been obligated to prove the examinations' validity. After the CSB hearings, New Haven had ample evidence that the tests were flawed.[275] Thus, the proper course of action was to decline to certify the examination and to develop a selection process that did not produce an adverse impact or one that could be appropriately validated.

RICCI'S UNRESOLVED FACTUAL ISSUES

The Court should not have entered a summary disposition in the *Ricci* case, as there were disputed factual issues. Rule 56 of the Federal Rules of Civil Procedure allows a party to a civil action to obtain a judgment if it can be shown that there are no disputed factual issues which require a trial.[276]

> A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and

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[273] *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 150 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[274] *See id*. at 153.

[275] *See id*.

[276] *See* FED. R. CIV. P. 56. *See also* 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (3d ed. 1998); William W. Schwarzer, Alan Hirsch, & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 445, 452-54 (1992).

> the movant is entitled to judgment as a matter of law.[277]

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[278] "[A] material fact is genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[279] "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[280]

A summary judgment motion challenges the adequacy of the opposing party's evidence. The motion asserts, in essence, that the nonmoving party cannot bear its burden of persuasion at the trial.[281] When a summary judgment motion is presented, the moving party must identify evidence that demonstrates the absence of a disputed issue of material fact.[282] Although the movant cannot prevail merely by alleging that her version of the facts is more plausible, she is not required to negate all of the issues posed by the nonmovant's claim.[283] If the movant does not bear the burden of persuasion at the trial, she is only required to establish that the opposing party lacks the evidence needed to sustain its burden of proof.[284]

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[277] FED. R. CIV. P. 56(a).

[278] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[279] *Id.*

[280] *Id.* at 249.

[281] Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 41 (2000) (citations omitted).

[282] *See id.* (citing FED. R. CIV. P. 56(e) (further citation omitted)).

[283] *Id.*

[284] *See* FED. R. CIV. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970).

In *Celotex Corp. v. Catrett*, the Supreme Court clarified the moving party's obligation when the nonmoving party bears the burden of persuasion at trial.[285] In *Anderson v. Liberty Lobby, Inc.*, the Court held that summary judgment motions are to be evaluated in light of the burden of proof that applies to the merits of a case.[286] Finally, in *Matsushita Electrical Industries Co. v. Zenith Radio Corp.*, the Court established a "plausibility" requirement that imposed a heavier burden on the nonmoving party when the claims asserted in the underlying proceeding are speculative or attenuated.[287] What these cases affirm is the fundamental principle that a summary disposition cannot be entered when there are material facts in dispute. In *Ricci*, the majority's decision concerning the CSB's motives should not have been made at the appellate level because the CSB's intent was a disputed factual issue.

Since the majority adopted a new standard, the case should have been remanded for a trial to determine whether New Haven had a strong basis in evidence for believing that the tests caused a disparate impact and were not job-related and supported by a business necessity.[288] Furthermore, there were other genuine issues of fact in dispute. The majority found that the promotional tests had been validated when the record showed that there was conflicting evidence concerning the examinations' validity. As it was undisputed that the examinations had an adverse impact on African-American test takers, the critical questions were whether the examinations had been properly validated and whether alternate selection procedures were available that would not produce a disparate impact.

The testimony concerning the examinations' validity during the Civil Service Board hearings was mixed. While some fact

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[285] *See Celotex*, 477 U.S. at 325-28.

[286] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

[287] *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 595-96 (1986).

[288] As Justice Ginsburg explains in the dissent, "[w]hen this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance." Ricci v. DeStefano, 129 S. Ct. 2658, 2702 (2009) (Ginsburg, J., dissenting) (citations omitted).

witnesses and experts contended that the examinations were valid, other witnesses and experts contended that the examinations were flawed and that there were alternate selection procedures available that would not produce a disparate impact. The majority chose to discount the evidence in New Haven's favor as a few stray remarks and to accord more weight to testimony that the examinations were valid.[289] The majority seemed to choose which witnesses to believe and which witnesses were not credible. This sort of fact-finding should never occur at the appellate level. It suggests that that majority did not want more deserving whites to be denied promotions based on the claims of "less deserving blacks." The case should have been remanded for a trial. The summary disposition of unresolved factual issues considerably undermines the legitimacy of the majority's analysis in this case and suggests that unconscious motives may have fueled the outcome.

CONCLUSION

The Supreme Court's decision in *Ricci* is analytically flawed. The case should have been a relatively routine application of disparate impact doctrine by the lower courts. The majority went out of its way to hear a case with a questionable claim of "reverse discrimination" and ruled in favor of the white and Hispanic firefighters. It discounted evidence that favored New Haven's position and gave credence to facts that supported the white and Hispanic firefighters. The Court created an entirely new standard that imposes a heavy burden on employers.

Instead of remanding the case for a resolution of the disputed factual issues, the majority directed a summary disposition when there were unresolved factual issues that could have affected the outcome. *Ricci* became a proxy in the emotionally charged debate concerning the legitimacy of affirmative action. The majority's decision did not add anything of value to that controversy nor did it properly resolve the Title VII issues that this case presented.

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[289] *See id.* at 2680-81.