

## READING RICCI: WHITENING DISCRIMINATION, RACING TEST FAIRNESS

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*This Article posits that the Supreme Court's decision in Ricci v. DeStefano does not evaluate all claims of discrimination on a level playing field but rather "whitens" discrimination and "races" test fairness. The authors explicate how Ricci whitens discrimination by reframing antidiscrimination law's presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim; Ricci races test fairness by finding that efforts to use job-related assessment tools that correct racial imbalance and better measure merit constitute racially disparate treatment of whites. Under Ricci all forms of racial attentiveness—like attending to the racial impact of promotional exams—become racial discrimination. This conflation derives in part from the application of the colorblindness/race-consciousness dyad, which obscures the more finely grained distinctions between racial attentiveness and inattentiveness that better parse the question of whether, in a given circumstance, taking account of race constitutes race discrimination. Contrary to Ricci's presumptions, not all racially attentive conduct is discriminatory; nor is all racially inattentive conduct nondiscriminatory. Secondly, while Ricci was framed as a reverse discrimination case, the authors evaluate it as a disparate impact claim using empirical analysis to examine the promotional lists at the heart of the Ricci lawsuit and to assess the effect of the City's failure to comply with accepted professional standards for proper test design and test use on Black and Latino firefighters and white firefighters who were not part of the Ricci plaintiff class. From this vantage point, New Haven's exams did not identify the most qualified candidates but instead unfairly and unnecessarily reproduced the fire department's racially skewed status quo. Nevertheless, in Ricci, the City's efforts to ameliorate this racial imbalance*

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Our thanks to Professors Tomiko Brown-Nagin, Devon Carbado, Guy-Uriel Charles, Jerry Kang, Alexandra Natapoff, and Noah Zatz for their insightful and timely comments. This Article also benefited from the authors' participation in the Hot Topics Panel, "Reading Ricci: The New Haven Firefighters Case" at the 2010 Annual Meeting of the American Association of Law Schools, where the comments of panelists Christine Jolls and Michael Selmi were especially helpful. We also thank our research assistants Keiara Auzenne, Shawn Chang, Adhana Davis, and Jelani Lindsey. We are especially grateful also for the superb research assistance provided by Cheryl Fischer Kelly and the entire research staff at UCLA School of Law Library as well as Joshua Phillips of the Loyola Law School Library.

*were themselves treated as attempts to racially rig the results, exemplifying how the pursuit of fair testing was raced. The Article concludes by evaluating proposals geared towards rectifying Ricci's dilution of Title VII disparate impact law, situating these alternatives in the broader context of the agenda to prevent the conversion of antidiscrimination law into discrimination itself.*

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## INTRODUCTION

In the ornate chambers of Congress, before a phalanx of reporters and a national television audience, a uniformed firefighter took the witness seat. Testifying on behalf of a group of fellow firefighters, the witness recounted the many obstacles to equal opportunity and fair treatment on the job. "My colleagues and I have faced numerous discriminatory

practices and policies that have been imposed by our department which has sadly and repeatedly succumbed to racial agendas and political pressure. Opportunities for promotion—even for well-qualified applicants—have been thwarted by manipulation of promotional criteria to get to a desired racial outcome. While the department has claimed that its decisions regarding selection criteria and tests have been fair and race-neutral, in fact, the department’s actions have unfairly excluded highly qualified candidates like ourselves. It was only through resort to the courts that our rights have been vindicated and that we gained what we were entitled to but previously were denied because of the color of our skin. On behalf of all of us I want to express my gratitude for being allowed to tell this story—a story that is not only about a particular group of firefighters in one department but is one that is common to firefighters across the country.” By all accounts, the witness’s testimony was moving, engendering expressions of empathy from the audience. Several members of Congress hailed the witness for taking a courageous stand and making a significant contribution to the struggle for civil rights.

We imagine the foregoing is a familiar story about the struggle for equal opportunity waged by minorities against fire departments—an arena that historically has been overwhelmingly white and male, and consequently has been at the vortex of the fight against employment discrimination. In fact, however, this account also reprises the testimony given during Senate Judiciary Committee hearings on the nomination of Judge Sonia Sotomayor to the United States Supreme Court.<sup>1</sup> The narrator—a key witness for the Republican opposition to the nomination—was Frank Ricci, the named plaintiff in the recently decided *Ricci v. DeStefano*.<sup>2</sup> In that case, Ricci along with nineteen other firefighters, eighteen white and one Latino, had successfully charged the city of New Haven, Connecticut with racial discrimination for declining to certify promotional test results that were racially skewed against Black and Latino applicants.

The City defended its decision as required by Title VII of the Civil Rights Act of 1964, prohibiting the unnecessary use of selection devices that exclude job applicants on the basis of race or gender—an assertion with which the district court,<sup>3</sup> and then Judge Sotomayor on review, agreed.<sup>4</sup> In opposition, Ricci, who had scored well on the fire lieutenant promotional exam, contended that the City’s decision was racially motivated: Merit had been overridden by

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1. See *Continuation of the Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States Before the S. Judiciary Comm.*, 111th Cong. (2009) (statement of Frank Ricci, Director of Fire Services, Connecticut Council on Occupational Safety and Health) [hereinafter *Testimony of Ricci*], available at <http://judiciary.senate.gov/pdf/07-16-09RicciTestimony.pdf>.

2. 129 S. Ct. 2658 (2009).

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

4. *Ricci v. DeStefano*, 530 F.3d 87(2d Cir. 2008) (per curiam).

racial favoritism and illegitimate political concerns. Ricci's central argument was that, in refusing to use exam results because they excluded virtually all nonwhite candidates from promotion, the City had engaged in intentional race-based discrimination against him and his fellow firefighter-plaintiffs, all but one of them white. On this view then, Judge Sotomayor's decision in favor of New Haven in the court below was a grave racial injustice that had been rectified by the Supreme Court's 5-4 ruling for "the New Haven 20"—a case one Senate Judiciary Committee member described as "one of the most important cases in the country's history."<sup>5</sup> Basic rights to fairness and equality were, after a lengthy struggle, finally upheld.

While Ricci's complaint did not ultimately derail Judge Sotomayor's confirmation, Ricci won not only in the Supreme Court but, arguably, in the court of public opinion as well. For the most part, Ricci's account constitutes the prevailing view of the case: The tests were fair, and the City threw them out only because Black and Latino firefighters could not pass them,<sup>6</sup> thereby infringing on the Ricci plaintiffs' right to be promoted. Not only did senators on the Judiciary Committee opposing Sotomayor receive this narrative favorably, many who supported her nomination did not directly challenge Ricci's characterization of his case as one that sought to protect valid standards of merit and defended important principles of civil rights law.<sup>7</sup>

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5. *Panel IV of the Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States Before the S. Judiciary Comm.*, 111th Cong. (2009) (comments by Sen. Hatch of Utah, S. Judiciary Comm.), available at [http://www.nytimes.com/2009/07/16/us/politics/16confirm-text.html?page\\_wanted=65](http://www.nytimes.com/2009/07/16/us/politics/16confirm-text.html?page_wanted=65).

6. Available statistics on the racial composition of the New Haven Fire Department include only Black, Latino, and white firefighters. See Ricci, 129 S. Ct. at 2691-95 (Ginsburg, J., dissenting). This may reflect the fact that according to a 2004 projection from 2000 census data, Asian/Pacific Islanders were 0.04 percent of the population, and Native Americans just 0.004 percent. See LLOYD MUELLER & KARYN BACKUS, CONNECTICUT DEP'T OF HEALTH, TOWN-LEVEL BRIDGED RACE ESTIMATES FOR CONNECTICUT (2000). In 2004, Blacks were 30 percent, and Latinos were 16 percent of New Haven's entry-level firefighters. The senior officer ranks were 9 percent Black and 9 percent Latino. Only one of the captains was Black. Ricci, 129 S. Ct. at 2691.

7. The defense of Sotomayor's decision in the case was largely limited to the assertion that her decision followed the law as it existed at the time, not that her decision was substantively correct. See 'Hardball With Chris Matthews' for Monday, July 13, at 2 (July 13, 2009), available at [http://www.msnbc.msn.com/id/31905856/ns/msnbc\\_tv-hardball\\_with\\_chris\\_matthews](http://www.msnbc.msn.com/id/31905856/ns/msnbc_tv-hardball_with_chris_matthews) (quoting Senator Durbin's response to a question Chris Matthews posed regarding Senator Durbin's opinion of Justice Sotomayor's decision in Ricci: "I think her ruling was the only ruling that she could have handed down. It reflected 38 years of court decisions. It reflected the trial court's decision, the appellate panel's decision and the full appellate court, and she joined in to what was clearly the precedent. Along came the Supreme Court, and by a 5 to 4 vote, a very close vote, turned it over and said, 'We're going to do it differently.' How can you hold that against her? I mean, she was really taking the law as given to her over the years and applying the law to the set of facts she was given"); CQ Transcriptions, *Wade Henderson Testifies at Sonia Sotomayor's Confirmation Hearings*, WASH. POST, July 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071603085.html> ("Judge Sotomayor has participated in thousands of

There is a less familiar story, however—one that challenges the perspective and assumptions underlying Frank Ricci’s account. Consider the following hypothetical alternative narrative:

Meanwhile, African American firefighter James Watkins<sup>8</sup> and several other Black, Latino, and white firefighters watched Frank Ricci’s testimony on television at the firehouse and in their homes in New Haven, Connecticut. No member of their multiracial group of “almost-made-it” candidates got to tell the country their version of the story. Indeed, even when white and minority firefighters told local papers they did not think the two-part test they took related to the job, these accounts went unmentioned by the national media.<sup>9</sup> If the Democrats on the Senate Judiciary Committee had invited Watkins to testify, he might have said: “Contrary to media reports, not all Black firefighters failed the promotional exams. Some of us not only passed; some actually did well. I know because I am one of them. Despite the fact that I scored well, when I was asked to be a plaintiff in Frank Ricci’s “reverse discrimination” lawsuit, I declined. I declined because I disagree with Ricci’s view of the exams. Like Ricci, I sacrificed time with loved ones to spend long hours studying and bought expensive test preparation materials and worked hard. But, in my view, at the end of the day, I took an exam that really had little to do with my ability to be a fire officer. What does a written multiple-choice test that assesses who has memorized the most fire terms have to do with who has the better command presence to lead a squad of firefighters safely in and out of a burning building? Is New Haven really

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cases and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult case of *Ricci v. DeStefano*. Whatever one may feel about the facts of this case, we all agree that the Supreme Court, in its *Ricci* decision, set a new standard for interpreting Title VII of the ‘64 Civil Rights Act. Using this one decision to negate Judge Sotomayor’s seventeen years on the bench does a disservice to her record and to this country.”).

8. James Watkins is African American and a twelve-year veteran of the New Haven Fire Department. He passed the lieutenant exam but was ranked 15<sup>th</sup> on the promotional list, meaning he passed the test with scores higher than one of the *Ricci* plaintiffs but not high enough to be considered for the eight lieutenant vacancies open when the *Ricci* case was filed. See *infra* Part III.A.2.a. He was asked to join the *Ricci* litigation but declined to do so. See Paul Bass, *Firebirds, NAACP: Ricci Won’t Stop Us*, NEW HAVEN INDEP., June 30, 2009, [http://www.newhavenindependent.org/archives/2009/06/the\\_supreme\\_cou\\_1.php](http://www.newhavenindependent.org/archives/2009/06/the_supreme_cou_1.php).

9. New Haven firefighters Abraham Colon and James Watkins have been quoted as follows: “‘Do I feel the test should be thrown out? That’s not for me to decide,’ said Lt. Colon, the department’s EMS supervisor who took the captain’s test. ‘Was the test relevant to our job? No, it was not.’” William Kaempffer, *Firefighters Say Tests for Promotion Are Flawed*, NEW HAVEN REG., Jan. 21, 2004, available at <http://www.nhregister.com/articles/2004/01/21/import/10840559.txt>.

“‘I think the test was unfair,’ said firefighter James Watkins, an African-American who echoed the sentiments of many others in the department. He said some of the questions were misleading and outdated and related to tactics in New York, not [New Haven].” William Kaempffer, *Fire Exams Pose Problems, City Lawyer Says*, NEW HAVEN REG., Jan. 23, 2004 [hereinafter Kaempffer, *Fire Exams Pose Problems*], available at <http://www.nhregister.com/articles/2004/01/23/import/10855004.txt>.

interested in selecting “fire buffs” or does the City need the best firefighters—Black, Latino, or white—who really have what it takes to do the job? To put it another way, if the New York Yankees gave draft picks a multiple-choice test on player stats and baseball history and then chose players in rank order by their test scores, the team would have a bunch of guys who could not bat, pitch, or catch.<sup>10</sup> By failing to judge our ability to really “do” the real-world tasks required of officers, the City did more than violate the civil rights of Black and Latino firefighters; it also denied promotion to white firefighters who, like qualified minority firefighters, would have scored higher on a test that actually assessed merit in terms of job performance. If the City had used a better test, the upper ranks of the New Haven firefighter department would be more diverse and more qualified AND the citizens of New Haven would be safer.”

While we posit this account as imaginary, it emerges from a very concrete reality: the struggle of minorities and women to integrate the stubbornly segregated profession of firefighting.<sup>11</sup> The opening narrative now claimed by Ricci previously represented the experiences of minority (and, with respect to gender, women) firefighters. Such women and nonwhite men testified before Congress many times before Ricci spoke to the Senate.<sup>12</sup> Even after overt exclusion ended when fire departments became subject to antidiscrimination laws, officials—often encouraged by white, male-dominated unions<sup>13</sup>—used formally neutral selection criteria, including job-irrelevant tests, to preserve the racially and gender skewed status quo previously achieved by blatant discrimination and nepotism.<sup>14</sup> Time and time again the courts have been called upon to assess whether the criteria utilized really assessed job performance or were in fact

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10. See Ricci v. DeStefano, 129 S. Ct. 2658, 2704 n.12 (2009) (Ginsburg, J., dissenting) (quoting Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1023 (1st Cir. 1974)).

11. See discussion *infra* Part I.A.

12. As litigants in major civil rights cases seeking to desegregate municipal fire departments, minority and women firefighters often put their careers and well-being on the line. See discussion *infra* Part I.A.

13. New Haven Local 825 had been on the opposing side of virtually every civil rights lawsuit filed by minority firefighters in New Haven, Connecticut. See, e.g., Broadnax v. City of New Haven, 851 A.2d 1113, 1119 (Conn. 2004) (stating that New Haven Firefighters Local 825 intervened in the action as a defendant); New Haven Firebird Soc’y v. Bd. of Fire Comm’rs, 630 A.2d 131, 132 (Conn. App. Ct. 1993) (“Firefighters for Fairness and Equity, Inc., a group comprised of fire fighters whose promotions were at risk, and Local 825 of the International Association of Firefighters, AFL-CIO (union) intervened as defendants.”).

14. Fire departments adopted formally neutral employment tests and practices to replace blatantly racial and sexist policies of exclusion in a manner quite similar to the defendant in the seminal Title VII disparate impact case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which found unlawful an employer’s institution of a high school diploma and minimum aptitude test score requirement on the day Title VII took effect in a community where African Americans had long been denied education due to de jure segregation.

discrimination by other means. Courts have frequently found departmental processes unnecessarily exclusionary, especially for minorities and women.<sup>15</sup> Like many civil rights litigants before them, the claims that James Watkins and his Black and Latino colleagues could assert are grounded in rights guaranteed by basic antidiscrimination law.<sup>16</sup>

Had this group—call them the New Haven 13+<sup>17</sup>—opted to file a Title VII disparate impact case against New Haven (the type of lawsuit that the City feared if it had certified the exams), the central allegation would have been that reliance on the racially disparate test results was unjustifiable: No African American firefighters and, at most, two Latinos would have been promoted. This is because the tests did not actually measure job-related merit, and there were other less discriminatory<sup>18</sup> and more intelligently designed<sup>19</sup> assessment tools available. So, instead of identifying the most qualified candidates, New Haven's exams unfairly and unnecessarily reproduced the racially (and gender) skewed status quo.<sup>20</sup>

However, in popular and legal discussion of *Ricci*, the questions this alternative narrative raised—issues regarding the racial impact and merit implications of

15. See discussion *infra* Part I.A. See, e.g., *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1023–25 (1st Cir. 1974) (ruling that the state firefighter's exam, which had an adverse impact on minorities and women, "was not professionally developed; its content does not appear to be job related; the cutoff score of 70 is arbitrary; the validation study reveals no correlation to overall measures, either subjective or objective, and only minimal correlation to two individual objective tasks"); *Hayden v. Nassau County*, 180 F.3d 42, 46–47 (2d Cir. 1999) (upholding efforts by the police department to switch from multiple-choice exams that created substantial underrepresentation of women and minorities to a new test that was job related and minimized adverse impact on minorities); *United States v. City of New York*, 683 F. Supp. 2d 225, 238, 262 (2010) (ruling that the City's firefighter exam "did not actually test for the job-related abilities they were intended to test for," "the examinations were written at an unnecessarily high reading level," and "the chosen cutoff scores for the examinations did not bear any relationship to the necessary job qualifications"; and further characterizing the City's firefighting policies as "34 years of intransigence and deliberate indifference"); *The Civil Rights Act of 1991: Hearings on H.R. 1 Before the H. Comm. on Educ. & Labor*, 102d Cong. 384 (1991) [hereinafter *Civil Rights Act Hearings*] (testimony of Brenda Berkman, President, United Women Firefighters).

16. See discussion *infra* Part III.A.

17. See discussion *infra* Part III.A.2.

18. Title VII proscribes the use of formally neutral criteria and devices that produce significant adverse impact, unless the employer can demonstrate that they are job related and required by business necessity, and there are no less discriminatory alternatives available. See 42 U.S.C. §§ 2000e-2(k)(1)(A)–(C) (2006).

19. See Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. (forthcoming 2011).

20. See discussion *infra* Part III.B. Gender remains a powerful and complex factor as well. One could say that with respect to certain domains, the victim is more specifically a white male. But as is evidenced by recent reverse discrimination debates, white women have appeared as victims of antidiscrimination policies as well as beneficiaries of them. Compare *Grutter v. Bollinger*, 539 U.S. 306, 306–07 (2003) (white women plaintiffs challenging operation of affirmative action), with *Johnson v. Transp. Agency*, 480 U.S. 616, 616–17 (1987) (white women as beneficiaries of affirmative action).

the fit (or lack thereof) between the job and the test—have largely gone unengaged. Although cases like those filed by minority and women firefighters had been enormously influential in the development of civil rights law, they now seem to have little traction in defining contemporary conceptions of discrimination. Instead, the prevailing view is that the exclusion of minorities through testing is presumptively fair, and the paradigmatic victim of race discrimination is now white.<sup>21</sup>

Significant racial fissures have long been part of the nation's history<sup>22</sup> and continue to be evident in contemporary public discourse regarding race<sup>23</sup> and

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21. See Brief of The Center for Individual Rights et al. as Amici Curiae in Support of Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 815209 [hereinafter CIR brief] (focusing on whites as the primary victims of discrimination today); Richard Talbot Seymour, *Affirmative Action Programs Today*, A.L.I., Dec. 7, 1995, at 2–3 (reporting an upward trend in the filing of reverse discrimination claims with the EEOC from 1987 to 1994); see also James Fraser & Edward Kick, *The Interpretive Repertoires of Whites on Race-Targeted Policies: Claims Making of Reverse Discrimination*, 43 SOC. PERSP. 13 (2000) (exploring the social psychology of whites' claims regarding reverse discrimination); Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515 (1990) (describing how the Supreme Court decisions of 1989 undermined affirmative action programs and legitimized whites' reverse discrimination claims); Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1062 (1995) (explaining how “the Court uses the image of a thoroughly multiracial America to recast whites as just another group competing with many others”); Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE. W. RES. L. REV. 53, 53 (1999) (“The idea that Whites, in particular white males, are the new victims of discrimination is steadily gaining acceptance among white Americans.”); Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 841 (2008) (arguing that “individualized reverse race discrimination claims” are overshadowing “legitimate discrimination claims, advanced by injured racial groups”); Robin Abcarian et al., *Conservatives Say It's Their Turn for Empowerment*, L.A. TIMES, Sept. 17, 2009, at A1 (noting Ricci's assertion in his Senate testimony that Judge Sotomayor had ruled against him because he is white as tapping into notions of white victimhood); Juan Williams, *Affirmative Action's Untimely Obituary*, WASH. POST, July 26, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402101.html?sid=ST2009072403325> (“[Whites] pretend that the nation is already so transformed that a colorblind America is a reality and that affirmative action is superfluous, so much so that white employees in a city fire department—an arena long dominated by Irish and Italian Americans—need help from the Supreme Court to get a promotion.”).

22. With regard to the issue of slavery, for example, abolition and advocacy for the liberation of Blacks was seen as a derogation of property rights. See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1160 (2006) (noting a senator's argument in the 37th Congress that the abolition of slaves would diminish slave owners' property rights); Claudia Dale Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 66, 73 (1973) (chronicling the debate in the 37th Congress over paying white slave owners should slavery be abolished).

23. Consider, for example, the debate over President Carter's assessment that race is a driving factor in some of the most virulent criticism of President Obama. See, e.g., Jeff Zeleny & Jim Rutenberg, *As Race Debate Grows, Obama Steers Clear of It*, N.Y. TIMES, Sept. 17, 2009, at A1. Debate over whether race was a salient factor in explaining the lack of response to the survivors of Hurricane Katrina also revealed a racial divide. See, e.g., Cheryl I. Harris & Devon W. Carbado, *Loot or Find: Fact or Frame?, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 87 (David Dante Troutt ed., 2007) (discussing racial framing of events in Katrina's aftermath as shaping



testing.<sup>24</sup> The competing narratives about the *Ricci* case could then be seen as a reflection of that divide. While we have no quarrel with that assessment, we find more striking other aspects of the Supreme Court's treatment of, and the broader public discourse about, the issues in *Ricci*. A close reading of *Ricci* reveals how not all claims of race discrimination are evaluated on a level playing field. Although the holding in *Ricci* is not unambiguous (and in some respects the unusual factual predicate may ultimately limit its reach), *Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury. *Ricci* facilitates this racial project in two distinct but interrelated ways: (1) by whitening discrimination—that is reframing antidiscrimination law's presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim; and (2) by racing efforts to install fair selection measures—that is, treating the use of job-related assessment tools that correct racial imbalance and better measure merit as racially disparate treatment of whites.

Arguably, even before *Ricci*, modern antidiscrimination law's central narrative was that potential changes to the racial status quo in the workplace, in business, and in schools and universities, threatened and compromised the rights and legitimate expectations of whites as a group.<sup>25</sup> Over the long colorblind march of the past two decades, the Court has embraced the view—albeit by a bare five-vote majority—that racially attentive<sup>26</sup> actions or public policy are

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conflicting images of Black survivors as victims and as criminals). The same was true of the question of whether race was implicated in the arrest of Professor Henry Louis Gates. See, e.g., Charles M. Blow, *Welcome to the 'Club'*, N.Y. TIMES, July 25, 2009, at A23.

24. Rowland Nethaway, *Standardized Tests Are Fair Way to Assess Skills*, TODAY'S NEWS-HERALD, June 1, 2000, at 5A (contrasting the view of the president of the NAACP Legal Defense and Education Fund, who compared standardized tests used in many public schools with racist tests used to keep Blacks from voting or getting into traditionally white schools or professions, with test supporters' views that the NAACP is simply unhappy with the test results and that "most widely administered standardized tests are painstakingly vetted to be as free of racial or cultural bias as humanly possible").

25. See The U.S. Equal Employment Opportunity Commission, Commission Meeting on Race and Color Discrimination, Remarks of Jocelyn Frye, General Counsel, National Partnership for Women and Families and CoChair, Leadership Conference on Civil Rights Employment Task Force, Apr. 19, 2006 [hereinafter EEOC, Commission Meeting on Race and Color], available at <http://www.eeoc.gov/abouteeoc/meetings/archive/4-19-06/frye.html> (noting that whites' claims of discrimination are more successful in court than nonwhites'); Cecil J. Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 477 (2006) (discussing "use of the rhetoric of White innocence in the context of the Court's concern with protecting 'innocent' Whites in affirmative action cases"); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 325 (2003) (noting that a majority of the prevailing plaintiffs in recent race discrimination cases have been white). Recent leading Supreme Court decisions have also tended to focus on whites as the purported victims of discrimination. See, e.g., *Parents Involved in Cmty. Schs., v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

26. See discussion of racial attentiveness *infra* Part II.A.

inherently suspect, no matter the motive.<sup>27</sup> This doctrinal move has effectively constrained the operation of antidiscrimination law and remedies—indeed turning the remedies into racial injuries and further legitimizing a narrative in which whites are (or are at risk of being) repeatedly victimized because of their race. This ideological and doctrinal reorientation is not the product of a “post-racial” framework that disavows the significance of race and minimizes the salience of racial discrimination because society is now “colorblind.” Nor is the premise that people of all races are equally vulnerable to discrimination; rather, the underlying racial frame is that present-day discrimination is largely a problem confronting whites.

Doctrinally, *Ricci* reinforces this view. Even though the New Haven fire-officer corps had long been overwhelmingly white, under *Ricci*, whites were racial victims because, as a group, they did not again receive virtually all the jobs. This result was not dictated by precedent. Indeed, the district court and Judge Sotomayor’s panel affirmed the City’s decision not to rely on racially exclusionary tests to avoid exacerbating disparate impact because the law seemed clear: Prior to *Ricci*, the Court had never held that an employer risks Title VII disparate treatment liability for *failing to use an employment test that produces racially adverse impact*.<sup>28</sup> *Ricci*’s innovation was to protect discriminatory testing that favors whites by doctrinally treating the City’s efforts to avoid disparate impact liability as conclusive evidence of an impermissible racial motive that violates the statute’s proscription against disparate treatment. Ameliorating disparate impact against minorities is thus secondary to the core concern of protecting white interests.

*Ricci* does not subject disparate impact standards to strict scrutiny equal protection review. It does however impose on employers a standard imported from that doctrinal arena to constrain employers from taking “race-based action” to avoid disparate impact liability: According to the Kennedy majority, unless there is “a strong basis in evidence to believe that, had it not taken the action,”<sup>29</sup> liability would follow from using employment tests that adversely impact minorities, employers must use them or face disparate treatment liability for

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27. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to a federal affirmative action program even if the purpose is “benign”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that the City’s affirmative action program requiring minority participation in public works contracts because of a pattern of exclusion was subject to strict scrutiny review, notwithstanding the government’s remedial purpose).

28. In addition to prohibiting intentional discrimination—“disparate treatment”—Title VII prohibits “disparate impact”—employment practices that have an unjustified discriminatory effect on the basis of race, gender, or national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 703 (2006). See *infra* discussion of the *Ricci* decision in Part I.D.

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

claims filed by whites.<sup>30</sup> In importing the remedial limits imposed as a matter of equal protection doctrine to statutory antidiscrimination law, *Ricci* marks an important step in “whitening” the Title VII disparate treatment standard by making it easier for whites than nonwhites to succeed on claims that they are the victims of intentional race discrimination.

Concomitantly, what we find noteworthy in this context is how test fairness has been “raced.” We use the term “race” as a verb<sup>31</sup> here to refer to the attribution either in political discourse or legal doctrine of an impermissible racial motive to racially attentive but explicitly antiracist<sup>32</sup> and formally race-neutral actions and practices. Calls for employers to adhere to race-neutral and long-standing psychometric best practices are viewed suspiciously as racial preference policies in disguise. Instead of fairness and innovation in testing being understood as a policy position consistent with merit-based selection, fairness in testing is often reinterpreted as virtual affirmative action for certain nonwhite racial groups. Thus, in *Ricci*, minority firefighters’ claims that the New Haven promotional exams were poor measures of job-related merit have been “raced” as a claim of entitlement to racially proportionate test results; their claims have repeatedly been likened to a race-based affirmative action policy designed to increase racial representation and diversity.<sup>33</sup> While *Ricci* appears to support the

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30. See discussion of the “strong basis in evidence” standard *infra* p. 85.

31. This use of race as a verb builds on and relies upon the work of Kendall Thomas, who first invoked this concept. As he explained, race can be considered not as a noun but as a verb. It is a socially constructed meaning or idea. This meaning is continuously reinforced and cumulatively reenacted through acts and interpretations of those acts. Thus, in that sense “we are raced.” See Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 61 (1993) (quoting Kendall Thomas, Comments at Frontiers of Legal Thought Conference, Duke Law School (Jan. 26, 1990)).

32. See *infra* Part II.A (discussing racial attentiveness).

33. Title VII antidiscrimination law generally and Title VII disparate impact law most specifically have likewise been equated to an affirmative action promotion policy. The conflation of Title VII disparate impact law as equivalent to an explicit race-based affirmative action policy is how political commentators, politicians, and the media have most actively “raced” *Ricci*—in some instances, grossly misrepresenting the facts in the *Ricci* case to fit the familiar narrative of prior affirmative action controversies over “minority set-asides,” requiring bidders on city and federal contracts to make efforts to use minority subcontractors, and race-conscious admissions policies seeking to achieve greater racial diversity in selective admission to public undergraduate and graduate schools. See, e.g., Christopher Caldwell, *The Limits of Empathy for Sonia Sotomayor*, TIME, June 8, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1901478,00.html> (describing Sotomayor’s decision in the *Ricci* case as a defense of “racial preferences”); David Paul Kuhn, *Left Dodges Moral Debate on Ricci Case*, REAL CLEAR POLITICS, June 30, 2009, [http://www.realclearpolitics.com/articles/2009/06/30/left\\_dodges\\_moral\\_debate\\_on\\_ricci\\_case.html](http://www.realclearpolitics.com/articles/2009/06/30/left_dodges_moral_debate_on_ricci_case.html) (describing the dissenting opinion in *Ricci* as “uphold[ing] the city’s effort to find any means to hold fast to conventional affirmative action”). Confusion seemed to reign with regard to how the case and the reaction to it are characterized. Compare Chris Rizo, *Obama Says Supreme Court Moving the Ball on Affirmative Action*, LEGAL NEWSLINE, July 2, 2009, available at <http://www.legalnewsline.com/news/221784-obama-says-supreme-court-moving-the-ball-on-affirmative-action> (describing Obama’s reaction to the *Ricci* decision as “praising” the holding favoring white firefighters and noting that the Court was “moving the

legality of race-conscious employer actions during the test-design stage and before administering a test,<sup>34</sup> it effectively weakens expert fairness standards: Post-testing evaluation of racially skewed tests according to scientific professional testing standards is, under *Ricci*, a racial preference. Thus, through framing the City's conduct as affirmative action, *Ricci* doctrinally and conceptually "whitens" discrimination and "races" test fairness: It positions whites as the disempowered race<sup>35</sup> vis-à-vis city officials who are beholden to politically powerful minorities seeking unearned preferences for members of their race. Next, it casts whites as meritorious, hardworking victims of racially rigged procedures as against nonwhites whose test scores presumptively demonstrate that they are not deserving, or at least are less so.

Remarkably, *Ricci* treats the tests at issue as presumptively valid even absent evidence that they actually measured job performance, were appropriately weighted and used, or that less discriminatory alternative selection criteria were considered—all criteria imposed by law. In so doing, the decision ignores the central question—one that was key to New Haven's assessment of whether the firefighter exams should be certified: Did candidates' scores on the tests correlate to job performance and thus identify the best candidates for the job? Ironically, while *Ricci*'s heightened burden on employers seeking to voluntarily comply with disparate impact law will fall most heavily on racial minorities,<sup>36</sup> the *Ricci* majority's decision will also potentially harm individual white firefighters like those in the foregoing alternative narrative. Racing test fairness

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ball on affirmative action"), with Mark Sherman, *Obama: Court Leaves Room for Affirmative Action*, ABCNEWS, July 2, 2009, <http://abcnews.go.com/Politics/wireStory?id=7987251> (describing the same interview with the AP in which Obama said the Supreme Court was "moving the ball" to limit affirmative action but emphasizing that the ruling still allows employers to take race into account).

34. See *Ricci*, 129 S. Ct. at 2677.

35. See discussion *infra* Part II.E (discussing *Ricci*'s repositioning of whites as subordinated and disempowered).

36. This harm has multiple dimensions—group-based and individual. Cf. Complaint at 6, *Briscoe v. City of New Haven*, No. 3:09-CV-01642 (CSH) (D. Conn. Oct. 15, 2009) [hereinafter *Briscoe* Complaint] (asserting that an individual African American firefighter who is positioned at Rank 24 on the 2003 lieutenant list was harmed by the City's failure to give the oral portion of the exam greater weight because he would have ranked fourth on a list where the oral section was weighted at 70 percent and asserting that African Americans as a group were harmed by failure to properly weight the oral portion because two other African American firefighters would have ranked in the top twelve under this alternative weighting). This case, filed by Michael Briscoe, a candidate for lieutenant, was dismissed in April 2010 on the basis that the decision in *Ricci*, directing summary judgment for the plaintiffs, effectively foreclosed his disparate impact claim. The court ruled: "Given the logical consequences of the strong-basis-in-evidence standard announced in *Ricci*, the holding in *Ricci* that the City's action in refusing to certify the 2003 examination results violated Title VII's disparate-treatment prohibition necessarily forecloses a subsequent claim that the results of the same 2003 NHFD promotional examinations must be rejected because they violated Title VII's disparate-impact prohibition." *Briscoe v. City of New Haven*, No. 3:09-CV-1642 (CSH), 2010 WL 2794212, at \*8 (D. Conn. July 12, 2010).

has cross-racial implications even as *Ricci* effectively favors the use of tests that racially skew in favor of whites.

As we proceed, we explore both the doctrinal and ideological mechanics of how the *Ricci* majority opinion “whitens” discrimination and “races” test fairness. In Part I, we focus on the actual factual background of the case and offer a detailed examination of the litigation in the lower courts as a predicate to the Supreme Court’s decision. This analysis reveals the ways in which the facts were framed by a particular narrative in which whites are the principal victims of discrimination as a consequence of the operation of antidiscrimination law. We further provide a close doctrinal analysis of *Ricci* that maps how antidiscrimination law has been or potentially will be affected by the decision. *Ricci* effectively imports strict scrutiny equal protection analysis into Title VII’s substantive provisions by requiring that an employer have a “strong basis in evidence” for believing it is vulnerable to disparate impact liability before it takes any action to avoid or mitigate disparate impact against minorities. In the *Ricci* majority’s view, when an employer lacks such evidence and decides to cancel tests that adversely impact minorities, the employer’s decision constitutes intentional discrimination against whites. We particularly note that the decision potentially broadens the scope of an employer’s defense to disparate impact claims brought by racial minorities even as it lessens the standard of evidence that white plaintiffs must produce to substantiate claims of systemic disparate treatment.

In Part II we link this doctrinal shift to the ideological realignment of antidiscrimination law to center on the experiences and perspectives of whites. Here, we describe the process of whitening discrimination in greater detail, noting several dimensions in which discrimination is reconceived in ways that favor whites as a racial group. We deploy the concepts of racial attentiveness and inattentiveness as distinct from colorblindness and race consciousness to provide a more nuanced account of the relationship between racial awareness and discrimination. Notwithstanding the *Ricci* majority’s view, not all racially attentive conduct is discriminatory; nor is all racially inattentive conduct nondiscriminatory. Similarly, racial neutrality is not uniquely produced by racial inattention; some racially attentive conduct can be effectively race neutral. Obscuring this complexity furthers the racial skew of antidiscrimination law. Race neutrality is similarly manipulated in ways that entrench white entitlement to overrepresentation. We further explore how whites are framed as the more meritorious group in opposition to presumptively unqualified or less qualified nonwhites, while whites simultaneously occupy the traditional nonwhite position of the subordinated and disempowered group in this new racial

narrative. This facilitates the conversion of antiracist, neutral remedies into discrimination against whites.

Part III explains the manner in which *Ricci* effectively “races” test fairness—equating it with a racial preference for nonwhites. We analyze how the *Ricci* majority transforms efforts to reduce test unfairness into an illegitimate taking of rights and privileges that accrue to those who are successful under the existing testing regime—in this instance, whites. In this Part we provide statistical and empirical analysis to consider the facts not only through the frame of “reverse discrimination” proffered by *Ricci* and his fellow litigants but also through the lens of a hypothetical legal challenge filed by James Watkins and other Black, Latino, and white firefighters. We utilize this hypothetical case to empirically evaluate the effect that the City’s failure to comply with professional standards for proper test design and use had on this group of potential claimants. We have recreated the fire lieutenant and captain rank-order list of exam scores from publicly available data to replicate as closely as possible the promotional lists at issue in *Ricci*. In addition to explicating evidence that alternative performance-based assessments were available to the City, we use the promotional lists we have constructed to conduct our own empirical experiment regarding the effects of simply reversing the weighting given the two subcomponents of the tests—weighting the oral portion 60 percent and the multiple-choice section 40 percent, rather than 40–60 as the City did. Our empirical and legal analysis in this Part illuminates why the City’s refusal to certify the test results was correct in light of both existing law and Title VII’s overall purposes in promoting merit-based decisionmaking over exclusionary, non-job-related filters. Under *Ricci*, efforts to comply with federal law requiring the construction of fair tests—those that are less racially skewed against minorities and that measure job performance—and prohibiting illegitimate test use are not viewed as efforts to move towards the goal of race neutrality, but rather become conclusive evidence of racial discrimination against whites. Pursuing test fairness, according to the logic in *Ricci*, is then, by definition, a racial agenda.

We conclude in Part IV by considering the contours of possible congressional responses, evaluating both a fix to *Ricci*’s weakening of Title VII disparate impact law as well as a legislative amendment like that contemplated by Justice Ginsburg’s dissent, which would replace the *Ricci* majority’s high burden of “strong basis in evidence” with a less onerous “good cause” standard consistent with pre-*Ricci* Supreme Court Title VII precedent. Finally, we consider *Ricci*’s broader implications. We ultimately conclude that *Ricci* is a warning that a majority of the Court’s current members subscribe to views that effectively confer the robust protection of civil rights laws on only one race. We read *Ricci* as an

important signal of the urgent need for political discourse and lawmaking that reject the supposition that antiracist efforts to end racial inequalities are tantamount to discrimination against whites.

## I. RICCI GOES TO COURT

Although many commentators have characterized the lawsuit filed by the *Ricci* plaintiffs as an affirmative action case, and the *Ricci* plaintiffs claimed to be victims of “reverse discrimination,” the facts in *Ricci* disclose no race-conscious affirmative action policy, nor did Blacks or Latinos directly benefit from the employer’s conduct. In fact, the actual issue in *Ricci* was whether the city of New Haven’s professed concern that it would be unable to successfully defend itself against a Title VII disparate impact case filed by Black and Latino firefighters was merely a pretext masking the City’s motivation to discriminate against white firefighters. This question of discriminatory intent is, in the first instance, a matter of Title VII doctrine regarding the requisite proof in disparate treatment cases.

Four members of the Supreme Court, the three-judge Second Circuit Court of Appeals panel, including now–Supreme Court Justice Sonia Sotomayor, and the federal district court trial judge who first presided over the *Ricci* case, all concluded that New Haven had legitimate reservations about the 2003 tests, thus refuting the plaintiffs’ claim of discriminatory motive or intent. The City’s assessment that the tests were flawed was ultimately affirmed by the only expert evaluation of the design and usage of the 2003 tests submitted to the courts in the *Ricci* litigation—the Supreme Court amicus brief filed by leading employment testing experts, which stated that the exams and their use were not scientifically defensible and that less discriminatory alternative forms of assessment were available.<sup>37</sup> Nevertheless, a five-vote majority of the Court overturned the Second Circuit and the district court, and applied a new standard retroactively to hold in favor of the “New Haven 20”—the predominantly white group of plaintiffs in the *Ricci* litigation.

In this Part, we situate the *Ricci* case within the litigation-fraught history of the New Haven Fire Department and the City’s position as a repeat defendant in race discrimination lawsuits filed by Black and Latino firefighters. We also analyze the factual background of the case, some of which has received little

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37. Inclusion of a performance-based test component, administered at firefighter “assessment centers,” and weighted in order to optimally measure candidates’ ability to perform the job of fire officers is an example of one such alternative. See, e.g., Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents at 12–13, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 796281 [hereinafter Industrial-Organizational Psychologists Amicus Brief].

attention, and situate the decision in light of the law as it existed prior to *Ricci*. Based on relevant precedent and the facts of the *Ricci* case as presumed on summary judgment, we conclude that New Haven properly determined that its refusal to certify the tests was justified by Title VII disparate impact law.<sup>38</sup> The problem, as it turned out, was that New Haven was reading the law as it existed, not Title VII law as it would be transformed by the five-justice *Ricci* majority. We begin by examining the facts of *Ricci* against the backdrop of both historical and contemporary patterns of racial exclusion and discrimination against minority firefighters. Next, we trace the case from its origins in the dispute before the Civil Service Commission, through the decisions in the lower courts and to the Supreme Court. We do so in order to more fully explicate the way in which race was embedded into the troubled terrain against which this case emerged and was decided.

A. “Déjà Vu All Over Again”: *Ricci*’s Historical Context

When the results of an employment test—such as the firefighter promotional exams that New Haven administered—skew against a certain racial group, Title VII’s disparate impact provision requires employers to demonstrate that their tests are fair measures of job-related merit and that no other “less discriminatory” selection methods are available.<sup>39</sup> In other words, the substance of a disparate impact complaint by minority firefighters would be that the City’s use of facially race-neutral criteria—promotional tests unrelated to job performance—produced significant racial disparities that unnecessarily screened out qualified Black and Latino candidates. For New Haven, this kind of disparate impact claim was not new; the City had been repeatedly and successfully sued by African Americans and Latinos over its hiring and promotional practices—virtually all facially race neutral—that operated to shut nonwhites out. In this regard, New Haven was hardly unusual. Overt and intentional racial exclusion and segregation remained pervasive in many urban fire departments

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38. The *Ricci* plaintiffs’ complaint was not limited to Title VII. Instead, it included a “kitchen-sink” list of federal, state, and local statutory and constitutional claims. Complaint in Joint Appendix at 176–98, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 454249 (stated claims included: 42 U.S.C. § 1983; local claims under the city charter, which provides for a merit-based system of promotion based on competitive examination, prohibits discrimination in classified service on the basis of race, sex, age, national origin, or political or religious opinion, lays down the City Personnel Director’s duties regarding civil service examinations, and provides for a “Rule of Three” procedure for selection of the three highest-scoring applicants for promotion in classified service; a First Amendment claim (under the U.S. and Connecticut Constitutions) regarding political affiliation and rights of association; an equal protection claim; and deprivation of property interests without due process under the Fourteenth Amendment).

39. See *Ricci*, 129 S. Ct. at 2673.



even decades after *Brown*.<sup>40</sup> While this discrimination sometimes took the form of explicit refusals to hire or recruit anyone other than white male applicants, in other instances departments relied upon the use of facially neutral selection criteria to provide a racial barrier to minority applicants.<sup>41</sup> Indeed, the endemic and compelling evidence of racial exclusion and segregation in fire departments was one of the principal reasons that, in 1972, Congress extended application of Title VII to public employers.<sup>42</sup>

One year after the amendment, in 1973, New Haven's record with reference to minority hiring and promotions in the Fire Department remained abysmal. At a time when the City's population was 30 percent minority, eighteen of 502 firefighters were Black, and there were no Latinos; one out of 107 officers was Black; none were Latino.<sup>43</sup> This led to a lawsuit brought by the Firebird Society—an organization of Black New Haven firefighters—challenging systemic discrimination in hiring and promotions.<sup>44</sup> Notably, the Firebird plaintiffs contended that along with a host of other practices, the department's entry and promotional exams were discriminatory in their effects.<sup>45</sup> The

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40. This Subpart draws on the comprehensive history recounted in the NAACP-LDF's amicus brief. See Brief for NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Respondents, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328) [hereinafter NAACP Legal Defense Fund Amicus Brief].

41. The classic example is the use of the high school diploma requirement to screen out Black applicants from higher-paying jobs at the company. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

42. The congressional record on the 1972 Act includes the 1969 report from the United States Commission on Civil Rights that documented widespread discrimination in public employment and in fire departments in particular. See 118 CONG. REC. 1817 (1972) (noting that “barriers to equal employment are greater in police and fire departments than in any other area of State and local government”).

43. See Nicole Allan & Emily Bazelon, *The Ladder*, SLATE, June 25, 2009, <http://www.slate.com/id/2221250/entry/2221298> (“In 1973, 18 of 502 firefighters (3.6 percent) were black, and none was Hispanic, though by that time, the city's population was 30 percent minority. None of the 34 captains in the force was black.”).

44. *Firebird Soc’y of New Haven, Inc. v. New Haven Bd. of Fire Comm’rs*, 66 F.R.D. 457 (D. Conn. 1975), *aff’d mem.*, 515 F.2d 504 (2d Cir. 1975).

45. *Id.* at 459–60. This was consistent with national trends. Hearings on the 1991 Civil Rights Acts included testimony from women and minority firefighters who recounted discrimination that continued well after the enactment of the 1972 amendments. Civil Rights Act Hearings, *supra* note 15, at 384 (testimony of Brenda Berkman, President, United Women Firefighters) (“I took the written test in December, 1977 with 409 other women and 24,000 men. Almost all of us passed. Although 389 women passed the written test, only 88 took the physical test because it was rumored that no women could pass it. We were required to perform seven tests: a dummy carry, a hand grip, a broad jump, a flexed arm hang, an agility test, a ledge walk, and a one-mile run. The rumor turned out to be accurate: although 7,847 men passed the physical exam, not a single woman passed it. I decided to challenge the test because I did not believe it tested fairly for the skills needed to be an effective firefighter”); *The Civil Rights Act of 1990: Hearings on S. 2104 Before the S. Comm. on Labor & Human Res.*, 101st Cong. 543 (1990) (testimony of Carl Cook) (“Mr. Henson says he was a medic, a driver and an acting officer and I was not. In fact, I was certified as a driver in 1979. I drove a fire truck from 1979 until the time I was promoted to Fire Lieutenant in 1984. What Mr. Henson did not tell you was that blacks could not become medics or acting officers because of race discrimination and that the judge found in 1985 that it was unfair to use this discrimination

litigation was resolved by a federal court consent decree requiring the department to develop appropriate (merit-based and job-related) entrance and promotional exams, and to modify other promotion procedures to ameliorate the disparate impact on minority firefighters.<sup>46</sup> This lawsuit was followed by another in 1989 and yet another in 1998, both successfully contesting, under state civil service and antidiscrimination laws, the department's promotional practices that effectively gave a racial preference to white applicants.<sup>47</sup>

Yet, despite some civil rights successes in the courthouse, the firehouse—or at least its command structure—remained racially segregated. As of 2005, only one of New Haven's twenty-one fire captains was Black and of the thirty-two officers at the rank of captain or higher, there were three Blacks and three Latinos.<sup>48</sup> The fact that the upper-ranks remained predominately white does not appear to be a matter of availability. Nearly one-third of the entry-level positions are currently held by Blacks,<sup>49</sup> while Latinos occupy 16 percent of those jobs.<sup>50</sup> The City's population is roughly 60 percent Black and Latino.<sup>51</sup>

Of course, in the years since the first lawsuit in 1973, white firefighters had also challenged the department's hiring and promotional practices, specifically contending that efforts to increase minority hiring infringed on their civil rights. As in many other cities, New Haven's Fire Department was under intense

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against black people like me. It is not that I did not try to become a medic. I applied for training as a medic in 1976 and again in 1978, but was refused. The sad fact was that black persons were not permitted to have such training. Before the consent decrees, blacks were never made medics or leadworkers or acting officers. The white supervisors picked who they wanted and they always wanted whites.”)

46. *Firebird Soc'y*, 66 F.R.D. at 461–63.

47. See *Broadnax v. City of New Haven*, 851 A.2d 1113 (Conn. 2004) (finding that the practice of using lower-ranked white officers to fill positions budgeted for higher rank was unfairly increasing the number of whites placed into the candidate pool for promotions in violation of civil service rules); *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 593 A.2d 1383 (Conn. 1991) (holding that disproportionate promotion of whites to positions not yet vacant was violative of civil service rules); see also NAACP Legal Defense Fund Amicus Brief, *supra* note 40, at 15–16.

48. See NAACP Legal Defense Fund Amicus Brief, *supra* note 40, at 17.

49. *Id.*

50. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009) (Ginsburg, J., dissenting). New Haven's entry-level statistics are actually better than the national numbers—only 8.2 percent of firefighters are Black according to 2008 statistics from the Bureau of Labor Statistics. See Allan & Bazelon, *supra* note 43. However, like the national picture, its supervisory ranks remain predominately white and male. See Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 27, *Ricci*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 815205 (“In 2008, only 8.2% were [B]lack, and of first-line supervisors, only 5.8% were [B]lack.” (citing U.S. DOL, Bureau of Labor Statistics, Labor Force Statistics from the Current Pop. Survey, Table 11 (2008), <http://www.bls.gov/cps/cpsaat12.pdf>)).

51. U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/09/0952000.html> (last visited Sept. 14, 2010).

scrutiny by both minority and white candidates.<sup>52</sup> While race discrimination claims brought by white firefighters in New Haven had not been successful, New Haven was acutely aware of the fact that litigation over its process could ensue from any group of disappointed applicants. Thus, New Haven had a substantial incentive to find a method for making promotion decisions that was legally defensible and fair to individuals of all races.

#### B. The New Haven 20 Emerges

No matter what the New Haven Civil Service Board did with the results of the 2003 lieutenant and captain tests, “someone was going to be unhappy.”<sup>53</sup> In fact, someone was bound to be unhappy enough to sue.<sup>54</sup> The key question under Title VII—no matter who sued—was whether the City could defend its use of the test results and establish that there were no less discriminatory alternatives available. When the matter appeared on the agenda of the New Haven Civil Service Board in early 2004, Thomas Ude, the lawyer for the Board, opined that the City should not certify the promotional lists for several reasons. First, Ude predicted that minority firefighters would likely sue New Haven under section 703(k) of Title VII, alleging that the use of the lieutenant and captain exams had an unjustified “adverse impact” on the basis of race. He noted that the 2003 exams had produced far worse disparities than prior exams given by the fire department or exams given in other city departments. Second, he emphasized that Title VII did not require either that the City find that the test was not job related or otherwise indefensible in order to take action that it believed appropriate to remedy disparate impact, since tests that are job related “can still be rejected because there are less discriminatory alternatives for the selection process.”<sup>55</sup>

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52. Competition for police and fire jobs remains fierce nationally because, relative to other jobs that do not require degrees in higher education or specialized training, both offer relatively good pay and—particularly with reference to firefighting—high status. See CAROL CHETKOVICH, *REAL HEAT: GENDER AND RACE IN THE URBAN FIRE SERVICE* 7 (1997).

53. Kaempfer, *Fire Exams Pose Problems*, *supra* note 9 (“And [the City’s lawyer] acknowledged that no matter what the Civil Service Commission decides, some people will be unhappy.”).

54. When city officials concluded that the results of the 2003 lieutenant and captain examinations constituted adverse impact under Title VII federal employment discrimination law, the City, because of the possibility that the results might be voided, did not notify firefighters of their scores on the 2003 exam. See *Ricci*, 129 S. Ct. at 2666–67. Letters were mailed to each candidate who took the 2003 exams, informing them of the initial January 22 Civil Service Board meeting. Ricci received notice of the hearing, though he did not initially receive the results.

55. Ed Stannard, *A Fire Litmus Test*, *NEW HAVEN REG.*, June 28, 2009, available at [http://www.nhregister.com/articles/2009/06/28/news/new\\_haven/a1test.txt--interesting](http://www.nhregister.com/articles/2009/06/28/news/new_haven/a1test.txt--interesting).

Not surprisingly, at a subsequent hearing, the test-developer, Industrial/Organization Solutions, Inc. (IOS), defended the tests by describing the job analyses undertaken to design them, citing the company's expertise in test development.<sup>56</sup> IOS's representative pointed out that the oral exam was explicitly constructed "to gain maximum diversity," so there were Blacks and Latinos on all but one of the assessment panels, and the exams were "facially neutral."<sup>57</sup> Nevertheless, another expert in employment testing noted that—while whites frequently outperformed minorities on most standardized tests—the "surprising" amount of adverse impact may have come both from the fact that written tests were "not as valid as other procedures that exist" as well as the fact that the multiple-choice portion of the exams comprised 60 percent of candidates' overall composite score.<sup>58</sup>

Ricci and a nearly all-white group of firefighters<sup>59</sup> retained a lawyer, Karen Torre, who appeared before the Board in its second meeting. According to Torre, considering the adverse impact of the tests on minority test takers was unfair to white firefighters.<sup>60</sup> Though she alleged no evidence of overt animus against her clients, nor any city policy or procedure that had been purposefully used against them, she cited her experience litigating cases against the New Haven Police Department, which, she said, had exposed a practice of "race-based

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56. Ricci v. DeStefano, 530 F.3d 88, 105–06 app. B (2d Cir. 2008) (district court ruling on Cross-Motions for Summary Judgment summarizing five hearings held by the City of New Haven Civil Service Board between January and March 2004 on the issue of whether to certify the test results and summarizing testimony of Chad Legel, Vice President of Industrial/Organization Solutions, Inc. (IOS)).

57. *Id.* at 106 (quoting Chad Legel, Vice President of IOS).

58. *Id.* at 107 (quoting Christopher Hornick, PhD). The New Haven Civil Service Board also heard from a number of nonexpert witnesses. These included firefighters like Watkins and Ricci who had taken the 2003 exams and shared their facial, test-taker perspectives on the fairness of the tests. Other nonexpert witnesses criticized New Haven's exams and expressed their view that examinations that weighted the oral portion more heavily than the multiple-choice and/or included a performance-based assessment like those used in other nearby jurisdictions were better alternatives. Still others urged the City to conduct a validation study, predicting that such a study would support going forward with promotions without regard to the racial consequences. *Id.* at 104–05.

59. The group numbered eleven at this time but eventually grew to include twenty plaintiffs and adopted the nickname "the New Haven 20." *In Re: Fire Captain and Fire Lieutenant Promotional Examinations: Verbatim Proceedings of the City of New Haven Civil Service Board 17* (Feb. 5, 2004) [hereinafter Feb. 5, 2004 Verbatim Proceedings] ("I'm here on behalf of eleven firefighters who have retained my office to represent them. That list is growing, however. I expect to be representing a fair number more.").

60. At the February 5, 2004 meeting, Torre said the racial differences in promotion were "too statistically insignificant to even be talking about disparate impact, particularly with respect to the Captains' exam." *Id.* at 21. Despite the history of successful antidiscrimination lawsuits against the City, Torre asserted that there was "absolutely no—no support for the suggestion" that there had been racial discrimination against minorities in civil service promotions in the City over the past twenty years and "absolutely no empirical evidence" to suggest that the promotional tests were biased. *Id.* at 22, 25–27.

promotions” for police department positions, as well as expert confirmation that the police department promotional tests were “fair.”<sup>61</sup>

In response to Torre’s assertions, Ude correctly explained the legal burden that New Haven would need to satisfy in order to avoid Title VII disparate impact liability if sued by African American and Latino firefighters.<sup>62</sup> Because minority plaintiffs would be able to persuade the court of the existence of “less discriminatory alternatives” to the 2003 promotional exams, Ude advised the Board not to certify the lieutenant and captain promotional lists.

There was additional cause for concern. Not only was there the matter of the test content, but Title VII, the federal Uniform Guidelines for Employee Selection Procedures (Uniform Guidelines),<sup>63</sup> and case law are all clear that employers can be held liable for *improperly using* an otherwise psychometrically valid or job-related test.<sup>64</sup> Thus, the City would have been unable to justify the promotions if it could not validate the rank-order use of the exam results,<sup>65</sup> the designation of a combined oral and written score of seventy as the passing score for the exams, and the 60 percent written/40 percent oral weighting of the rankings—a formula imposed by virtue of a provision in the collective bargaining agreement.<sup>66</sup> At the time of the hearings, the City had no such evidence, and

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61. *Id.* at 27, 31. On the morning of the second Civil Service Board meeting, February 5, 2004, an opinion piece authored by Frank Ricci’s attorney, Karen Torre, appeared in New Haven’s major newspaper. In the essay, Torre asserted that New Haven City Hall had already “made a mockery of the [civil service] merit system” and disregarded the city charter because the City’s first African American police chief had “doled out” promotions “along racial lines, often to low-scoring candidates with horrible work records.” Karen Lee Torre, *Race Politics Again Threaten to Harm City*, NEW HAVEN REG., Feb. 5, 2004, available at <http://www.newhavenregister.com/articles/2004/02/05/import/10920055.txt>.

62. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 150 (D. Conn. 2006).

63. See *infra* text accompanying notes 270–271.

64. See discussion *infra* Part III.

65. Rank-order use refers to the practice of promoting based on the scores as sequentially ordered beginning with the highest scorers and working down. The basic assumption is that a candidate who ranks higher, even by one point, is better qualified than the lower scoring candidate. See *infra* Part III.A.3 for further explanation of the construction of the lists, list rank, and list position.

66. The contract in effect at the time imposed the 60–40 split. See *Ricci*, 554 F. Supp. 2d at 145 (citing the agreement as the source of the weighting). While the civil service rules called for four types of testing—written, oral, mental/physical, and performance—they did not require any specified weighting. See Joint Appendix, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 454249; *In Re: Fire Captain and Fire Lieutenant Promotional Examinations: Verbatim Proceedings of the City of New Haven Civil Service Board* 28 (Mar. 11, 2004) [hereinafter Mar. 11, 2004 Verbatim Proceedings] (noting that the 60–40 weighting is derived from the union agreement, not civil service rules). There was no expert evidence offered that established the validity of this weighting. Nevertheless, the oral component of the exam has been challenged by white firefighters as unfairly structured to increase the scores of minority candidates who have historically scored lower on past exams than their white counterparts. See William Kaempffer, *Racial Tension Flaring Up at NHFD*, NEW HAVEN REG., June 20, 2004, available at <http://www.nhregister.com/articles/2004/06/20/import/12022590.txt>. Indeed, during contract negotiations in prior years, the union sought to have the oral exam eliminated, but the City refused. *Id.* The current contract is silent on the weighting question. AGREEMENT BETWEEN CITY OF NEW HAVEN AND NEW

thus was in danger of losing a Title VII disparate impact case filed by minority firefighters because of “improper test use.”<sup>67</sup> At the final hearing, Ude once again strenuously argued against certifying the exam results, stating that promotions based on them would violate federal law and the city charter and would not be “in the best interests of the firefighters and lieutenants who took the exams.”<sup>68</sup> Ultimately, the Civil Service Board split two to two on the question of certifying the exams.<sup>69</sup> As a result, the promotional lists based on the exams were not certified.<sup>70</sup>

### C. *Ricci* in the District Court and Second Circuit

As promised, the New Haven 20<sup>71</sup> filed suit in May 2005 alleging intentional discrimination on the basis of race—that they had not been promoted because they were white and because of their political affiliation.<sup>72</sup> The New Haven 20’s complaint also asserted that city officials had two motivations for their actions—“race-based discrimination” and “political favoritism” in violation of “the New Haven Charter, the state and federal constitutions, and state and federal antidiscrimination laws.”<sup>73</sup> Most relevant to the *Ricci* plaintiffs’ Title VII disparate treatment claim was their allegation that the City—at the urging of New Haven Mayor John DeStefano—had caved to political pressure to please minority voters and thus had “collaborated and conspired with one another to cause the City to discard the [2003] examination results” by “concocting” pretextual reasons for refusing to establish an eligibility list based on the exam results.<sup>74</sup>

In asserting that the City’s concern that it could not defend the tests was pretextual, the *Ricci* plaintiffs were contending that in fact the City was

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HAVEN FIRE UNION, LOCAL 825 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, JULY 1, 2006–JUNE 30, 2011 (2006), available at <http://cityofnewhaven.com/HumanResources/pdfs/2006-2011%20Local%20825.pdf>.

67. See discussion of improper test use *infra* Part III.

68. *Ricci*, 129 S. Ct. at 2670.

69. *Ricci*, 554 F. Supp. 2d at 150.

70. One member abstained because a relative was among the candidates on the lists. *Id.* at 150 n.5.

71. Only eighteen of the twenty *Ricci* plaintiffs scored high enough on the 2003 exams to appear on the promotional list below in Part III. This is the likely reason *Ricci* plaintiffs Roxbee and Kottage filed a motion to withdraw from the *Ricci* lawsuit. See Plaintiffs’ Revised Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment and in Support of Plaintiffs’ (sic) Motion for Summary Judgment, at 2 n.1, *Ricci*, 554 F. Supp. 2d 142 (No. 304CV01109). However, they did not actually withdraw from the case.

72. The *Ricci* plaintiffs’ complaint alleged that firefighters without affiliation to the Democratic Party were the victims of purposeful violations of the city civil service rules. Amended Complaint at 16–18, *Ricci*, 554 F. Supp. 2d 142 (No. 304CV01109).

73. *Id.* at 38.

74. *Id.* at 37.

intentionally discriminating against them on the basis of race. Ricci's counsel invoked the three-part *McDonnell Douglas-Burdine* burden-shifting test as a way of proving this claim.<sup>75</sup> Under the test, plaintiffs have the burden of first establishing a prima facie case—here that they applied for the positions, that they met the job qualifications, and that they did not get the jobs.<sup>76</sup> The defendant may then rebut the prima facie case by offering a legitimate nondiscriminatory reason for its action—something that the defendant need only offer, not prove by a preponderance of the evidence.<sup>77</sup> Finally, the plaintiff must then prove that the employer's given reason is a pretext for discrimination. Importantly, simply demonstrating that the employer's stated reason was false does not meet the requisite standard of proof of discrimination; the burden of proving discrimination remains with the plaintiff.<sup>78</sup>

In this instance, since the City asserted its desire to avoid a Title VII disparate impact lawsuit (like one that could potentially be brought by the New Haven 13+, our hypothetical groups of plaintiffs) as its reason for refusing to certify the 2003 exam results, the Ricci plaintiffs had the ultimate burden of demonstrating that the reason offered by the City was “not its true reason[ ], but a pretext for discrimination.”<sup>79</sup> The central question then was whether the plaintiffs had evidence that the City had discriminated against them because they—with one exception—were white.

On cross motions for summary judgment, the district court held in favor of New Haven. In an exhaustive analysis of the relevant Title VII provisions as well as the equal protection claim, the district court ruled that the Ricci plaintiffs lacked evidence that the defendants' actions were motivated by intent to discriminate on the basis of race.<sup>80</sup> Even allowing for all the inferences in favor of the plaintiffs—the summary judgment standard—and setting aside the City's objection that the plaintiffs could not demonstrate that they were treated differently because of their race when no one was promoted, the court's analysis of the facts and the disparate impact standard under Title VII led it to conclude that there was insufficient evidence of pretext for discrimination.<sup>81</sup> According to the district court, the Ricci plaintiffs' claim rested upon the

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75. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting out the order and allocation of proof in claims involving intentional discrimination). Typically, the *McDonnell Douglas* standard is invoked where the plaintiffs lack direct evidence of discrimination, as the standard relies on inferences from circumstantial evidence.

76. *See* *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

77. *Id.*

78. *See id.*; *see also* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 518 (1993).

79. *Burdine*, 450 U.S. at 253.

80. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 161–62 (2006).

81. *See id.* at 160.

assertion that the City was racially motivated in contravention of Title VII because it assessed that too many whites and too few minorities would be promoted based on the test results. For the plaintiffs, this “diversity rationale” amounted to “reverse discrimination.”<sup>82</sup>

The district court rejected this line of reasoning. Citing *Hayden v. County of Nassau*,<sup>83</sup> a Second Circuit case involving a county’s decision to reconfigure tests to reduce disparate impact on Blacks, the court noted that “nothing in our jurisprudence precludes the use of race neutral means to improve racial and gender representation . . . [T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.”<sup>84</sup> With respect to the Fourteenth Amendment complaint, the district court further found that there was neither a racial classification nor any evidence of discriminatory intent or motive.<sup>85</sup>

The district court opinion granting the defendants’ motion for summary judgment on all counts was appealed to the Second Circuit. There, a three-judge panel that notably included then-Judge Sonia Sotomayor affirmed the decision below in a short summary order.<sup>86</sup> While the order noted that the panel was “not unsympathetic to the plaintiffs’ expression of frustration,” as Ricci is dyslexic and had made significant efforts to score well on the test, this did not establish a Title VII disparate treatment claim where the Board’s actions were taken in accordance with Title VII’s disparate impact proscriptions.<sup>87</sup>

Shortly thereafter, the Second Circuit considered a request to hear the case en banc. After the poll was concluded on June 9, 2008, the three-judge panel withdrew the summary order and filed a per curiam opinion adopting the reasoning of the district court.<sup>88</sup> The en banc petition produced a divided court,

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82. *Id.* at 156–57.

83. 180 F.3d 42 (2d Cir. 1999).

84. *Id.* at 51. While the *Ricci* plaintiffs sought to distinguish *Hayden* on the grounds that the remedy in that case was installed pursuant to court ordered consent decrees, the district court was not persuaded that this distinction was meaningful, noting that the remedial purpose of Title VII would be undermined if an employer had to wait until it was sued before voluntarily pursuing less discriminatory alternatives. *Ricci*, 554 F. Supp. 2d at 159. Further, the *Ricci* plaintiffs’ complaint that they, unlike the complainants in *Hayden*, were actually injured because “they were deprived of promotions, and disadvantaged” by having to compete again, was similarly rejected because in the district court’s view, the City’s decision not to utilize the test results affected all applicants equally. Thus, there was neither any disparate impact, nor a disparate treatment claim. *Id.*

85. *Ricci*, 554 F. Supp. 2d at 161–62.

86. *Ricci v. DeStefano*, 264 F. App’x 106 (2d Cir. 2008).

87. *Id.* at 107.

88. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008). Under the rules of the Second Circuit, rulings by summary order do not have precedential effect. 2d Cir. R. 32.1.1. A summary order is typically issued where the law in the jurisdiction is established. Alternately, a published opinion with precedential value is issued when existing law is not yet settled, it is a case of first impression, circuits are split, or there is



with seven of the thirteen judges voting to deny.<sup>89</sup> Ricci's lawyers then filed a petition for certiorari that the Supreme Court granted.

#### D. Ricci Before the Supreme Court

By the time *Ricci* reached the Supreme Court on April 22, 2009, the New Haven 20 had developed a national media campaign and website as part of a well-organized effort to shape the public debate. Ricci and his counsel hammered on the themes of "reverse discrimination" and "racial politics," and the media largely echoed their claim that the City had cast aside the search for the best candidates in pursuit of racial representation.<sup>90</sup> The City's position that it had acted, in fact, in defense of merit was largely lost in the debate. As the City's lawyer put it, "It was not about politics. This administration has hired and promoted more firefighters than any other based on merit, to the extent that it can be determined . . . Merit includes everyone's merit, not just the white guys."<sup>91</sup>

Amici curiae began to line up for and against the City's position. Less than a month after the inauguration of President Barack Obama, the United States filed an amicus curiae brief in support of the City arguing for vacatur and remand. On the one hand, the United States agreed that race-attentive

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otherwise cause for analysis of the law to establish precedent on the issue. 2d. Cir. R. IOP 32.1.1. While some Sotomayor critics asserted that the summary order was entered in the case to hide the opinion, if the law is clear, then under the rules, the court can issue a summary order. See Liz Halloran, *Sotomayor Opponents Stake Out Lines of Attack*, NPR, May 27, 2009, <http://www.npr.org/templates/story/story/php?storyid=104627387> (noting that critics charged that Sotomayor's use of the summary order was improper, as it did not address important issues in the case). Obviously, the question of the legitimacy of the use of the summary order turned not only on the facts and governing precedent, but also on vastly different perspectives on how those facts and doctrine were understood and characterized. While it is not entirely clear why the panel decided to withdraw the summary opinion and issue a per curiam opinion, it is likely the case that it was designed in part to respond to the charge that the panel was trying to hide its decision. While both the summary order and per curiam opinion were published, the former appeared in the less well-known Federal Appendix. The publication of the per curiam opinion also allowed the panel to explicitly reaffirm the logic and findings detailed in the district court opinion.

89. *Ricci*, 530 F.3d at 89. Judge Calabresi's opinion in support of the denial of a hearing en banc rested largely on the assertion that the *Ricci* plaintiffs failed to demonstrate that the City's stated reason for discarding the test result—that it was based on an effort to comply with and avoid liability under Title VII—was pretextual and that the City was actually driven by "directly racial-political reasons" to favor minority applicants. *Id.*

90. See, e.g., Stuart Taylor Jr., *Simple Injustice*, NAT'L J., Dec. 13, 2008, at 10 (arguing that "[a] denial of review would . . . leave the racial-preference machinery . . . grinding steadily on without interruption"); George F. Will, *The Wreck of a Spoils System*, WASH. POST, Apr. 26, 2009, at A15 (asserting that when none of the Black candidates did well enough to qualify for the available positions, political pressure from a "rabble rousing minister with close ties to the mayor" produced a decision by the City to cancel the lists).

91. William Kaempffer, *White Firefighters File Suit Against City*, NEW HAVEN REG., July 9, 2004, available at <http://www.nhregister.com/articles/2004/07/09/import/12273150.txt>.

compliance with the disparate impact provisions of Title VII did not constitute intentional discrimination, and that the City's actions to avoid disparate impact liability should be judged by a reasonableness standard rather than a strong basis in evidence standard.<sup>92</sup> However, the United States argued that the district court opinion had not adequately evaluated evidence relating to the plaintiffs' claim of pretext, such that the case should be remanded.

In a 5–4 opinion, the Supreme Court declined this middle course, not only reversing the order granting summary judgment to the City, but going much further and granting summary judgment to the plaintiffs on their disparate treatment claim. Justice Kennedy's opinion for the majority proceeded from the premise that the City's action constituted intentional race discrimination prohibited by Title VII's disparate treatment provision.<sup>93</sup> New Haven's effort at compliance with Title VII's disparate impact provision—choosing not to certify the 2003 promotional exam results because of the significant statistical disparity in favor of whites—was illegal under Title VII “absent some valid defense.”<sup>94</sup> According to the majority view, “Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.”<sup>95</sup> Because the City “rejected the test results solely because the higher scoring candidates were white”<sup>96</sup>—a factual proposition with which the dissenters vehemently disagreed<sup>97</sup>—this led, by itself, to the majority's conclusion that New Haven's action was racially discriminatory against the predominately white group of *Ricci* plaintiffs.

Accordingly, Justice Kennedy observed that the question was not whether the City's conduct was discriminatory—that was established per se; the issue was

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92. Oral argument took place on April 22, 2009. Prior to the election of Barack Obama to the Presidency, the Office of the Solicitor General—which represents the administration's position in cases before the Court—had been occupied by Theodore Olson and other race conservatives whose position with regard to race and antidiscrimination law closely mirrored that of the *Ricci* plaintiffs. Still, the change in administration did not make for a complete realignment of the government's position in the case. The Obama administration argued that the district court had not “adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained [on petitioners' disparate treatment claim, including] whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination.” Though the district court had cited to evidence in support of the City's assertion that its motive was to comply with Title VII, there were also statements that seemed to point to other possible motives, thus requiring a reconsideration of the issue of pretext. Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 6, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

93. See *Ricci*, 129 S. Ct. at 2672.

94. *Id.* at 2673.

95. *Id.* at 2674 (emphasis added).

96. *Id.*

97. *Id.* at 2690 (Ginsburg, J., dissenting) (stating that the *Ricci* majority “ignores substantial evidence of multiple flaws in the tests New Haven used . . . fail[ing] to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes”).

“whether the City had a lawful justification for its race-based action.”<sup>98</sup> Fashioning the question before it as “whether the purpose to avoid disparate-impact liability [against minorities] excuses what otherwise would be prohibited disparate-treatment discrimination [against whites],”<sup>99</sup> the majority first rejected the *Ricci* plaintiffs’ argument that it is never permissible under Title VII to take race-based action to avoid Title VII disparate impact liability. A blanket rule prohibiting employers from taking action unless they are certain they are in violation of Title VII disparate impact law would run contrary to Congress’ intent that “‘voluntary compliance’ [by employers] be the ‘preferred means of achieving the objectives of Title VII.’”<sup>100</sup> However, Kennedy also rejected the rule suggested by New Haven and the United States—that an employer with a “good-faith belief that its actions are necessary to comply with Title VII’s disparate-impact provision[s]” can take race-conscious action.<sup>101</sup> The majority offered two principal reasons: First, Congress did not include such an exception in Title VII;<sup>102</sup> and second, permitting employers to take race-attentive action based only on “good faith” would make it possible for employers to “discard test results (or other employment practices) with the intent of obtaining the employer’s preferred racial balance.”<sup>103</sup>

Instead of adopting either New Haven or the United States’ suggested approaches, Kennedy borrowed the “strong basis in evidence” standard the Court set forth previously as applicable to public entities that voluntarily adopt race-based affirmative action policies.<sup>104</sup> After distinguishing employers’ test-design and *pre-testing* “affirmative efforts” to ensure the fairness and job-relatedness of

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98. *Id.* at 2674.

99. *Id.*

100. *Id.* (citing *Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O’Connor, J., concurring in part and concurring in the judgment)). “Even in the limited situations when this restricted standard could be met, employers likely would hesitate before taking voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment.” *Ricci*, 129 S. Ct. at 2674.

101. *Ricci*, 129 S. Ct. at 2674–75.

102. *Id.* at 2675 (“[W]hen Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new disparate-impact provision in subsection (k).”).

103. *Id.* (“That operational principle could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing.”).

104. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (citing *Wygant*, 476 U.S. at 277; see also Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1150 (2009) (noting that “in the contracting context, the Supreme Court has established that the federal factual prerequisite for adopting a voluntary affirmative action policy is that a government entity that opts to consider race in the contracting process must have evidence sufficient to create a ‘strong basis’ for the conclusion that the use of race-conscious measures is needed to remedy the effects of discrimination”).

selection criteria,<sup>105</sup> the majority concluded that “once [a testing] process ha[d] been established and employers have made clear their selection criteria,” they may not “engage in intentional discrimination” that invalidates the test results unless the employer has “a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”<sup>106</sup> By requiring employers to have a strong basis in evidence that an employment test is not job related or that alternatively, less discriminatory tests exist—in addition to the threshold statistical evidence of adverse impact, the Court made it substantially more difficult for employers to assess when they can take action to avoid disparate impact. While stopping short of requiring an employer to prove a case against itself, the majority opinion held that employers that choose not to rely on the results of a test in circumstances like those at issue in *Ricci*, and take a course of action that applies to all racial groups, should be held to the same evidentiary burden that applies to employers who adopt “racially preferential”<sup>107</sup> affirmative action policies under Fourteenth Amendment equal protection doctrine. The Court claimed that the imposition of the strong basis in evidence standard “as a matter of statutory construction” was necessary to resolve the “statutory conflict” between Title VII’s disparate impact and disparate treatment provisions.<sup>108</sup> Casting a further cloud over employers’ voluntary compliance, Kennedy noted that *Ricci*’s holding did not address whether meeting the strong basis in evidence standard would satisfy Fourteenth Amendment equal protection concerns.<sup>109</sup>

According to the opinion, the strong basis in evidence standard should be applied in cases where an employer discards a test “in sole reliance upon race-based statistics”<sup>110</sup> when the promotional process reaches the stage it had under the facts in *Ricci*—“once th[e] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results.”<sup>111</sup> However, Kennedy was very clear that the holding of the case did not restrict “an employer’s affirmative efforts to ensure that all groups have a fair

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105. *Ricci*, 129 S. Ct. at 2677 (“Nor do we question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made.”).

106. *Id.*

107. Justice Ginsburg referred to such cases as ones concerning “the constitutionality of absolute racial preferences,” *id.* at 2701 (Ginsburg, J., dissenting), and observed that “[t]his litigation does not involve affirmative action.” *Id.* at 2700.

108. *Id.* at 2676. Kennedy reasoned that Title VII’s prohibition against rescoring a test based on the candidates’ race, a reference to a psychometric practice known as “race norming,” supported the adoption of the higher evidentiary standard.

109. *See id.*

110. *Id.*

111. *Id.* at 2677.

opportunity” in the employment process.<sup>112</sup> Specifically, Kennedy distinguished an employer’s invalidation of test results after selection criteria have been clearly established—a characteristic more often found in public employment civil service contexts than in private employment—from race-conscious actions taken before job candidates take a test, thereby ostensibly limiting *Ricci*’s strong basis in evidence standard to post-testing action.<sup>113</sup>

The question of whether New Haven had sufficient evidence to justify its refusal to certify the 2003 promotional exams occupied a good deal of the Court’s attention.<sup>114</sup> The Court essentially reevaluated the evidence the City presented below to the district court and Second Circuit and, contrary to those courts, concluded that there was very little evidence that the tests were flawed or that other, equally valid and less discriminatory tests were available.<sup>115</sup> Rejecting the United States’ request that the case be remanded for a fuller articulation of the factual record—which notably did not include expert witness analysis of the exams—the Court both reversed the summary judgment in favor of New Haven and granted summary judgment for the *Ricci* plaintiffs.<sup>116</sup>

Despite repeatedly affirming the validity of Title VII disparate impact law, the five-justice majority undermined the provision it had deemed entitled to deference.<sup>117</sup> It did not supply advice to public employers caught in a future situation similar to New Haven’s as to how to accomplish voluntary compliance with Title VII disparate impact law. Nor did the decision further Title VII’s goal of eliminating job-irrelevant tests that unnecessarily exclude minorities and women. Instead, the *Ricci* majority offered only the following decidedly ambiguous language:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that,

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112. *Id.*

113. “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.” *Id.*

114. *See id.* at 2664–72.

115. *See id.* at 2679–80 (rejecting 30–70 alternative weighting of oral and written portions of the exam, score banding to take into account standard error of measurement, and performance-based assessment centers as less discriminatory alternatives that were available to the City).

116. *Id.* at 2680–81.

117. Kennedy’s opinion acknowledged that completely forbidding employers to take race-based action in order to avoid disparate impact liability “would run counter to . . . Congress’s intent that ‘voluntary compliance’ be ‘the preferred means of achieving the objectives of Title VII.’” *Id.* at 2674 (rejecting *Ricci* plaintiffs’ suggestion that all race-based action is prohibited by Title VII, “even if the employer knows its practice violates the [Title VII] disparate-impact provision”).

had it not certified the results, it would have been subject to disparate treatment liability.<sup>118</sup>

Narrowly interpreted, this paragraph is a party-specific direction to the lower court as to how to proceed on remand in the *Ricci* litigation. The use of the term “the City” is clearly a reference to the city of New Haven, not a general reference to “an employer” used earlier in the opinion to set forth the Court’s holding. Nevertheless, especially in light of Justice Scalia’s concurring opinion expressing the view that Title VII’s disparate impact provision is “at war” with its disparate treatment provision,<sup>119</sup> this language may be interpreted (or arguably, misinterpreted) by employers, lower courts, or the Supreme Court in future decisions as a new employer defense to disparate impact lawsuits—the types of cases most likely to be filed by minorities and women—that Congress did not include anywhere in Title VII.

## II. WHITENING DISCRIMINATION

In this Part, we explain how and why we conclude that *Ricci* has effectively skewed Title VII’s doctrinal regime to favor discrimination claims by whites. We note that, paradoxically, in the name of greater racial equity, *Ricci* has actually entrenched racial inequality by buttressing employers’ defenses to disparate impact claims by minorities while simultaneously reducing the evidentiary burden for white plaintiffs bringing allegations of disparate treatment. We describe this doctrinal realignment as “whitening discrimination.”

*Ricci* reconfigures and ultimately whitens discrimination, effectively privileging whites as a racial group.<sup>120</sup> *Ricci* furthers this larger project in multiple ways: It suppresses racial attentiveness; it skews the concept of racial neutrality; it privileges disparate treatment claims over disparate impact claims; it treats disparate impact as a form of affirmative action and repositions whites as racially disempowered protagonists in the struggle for civil rights.

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118. *Id.* at 2681. See discussion *infra* Part III (explaining how this statement operates to “race” test fairness).

119. *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring) (“But the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”).

120. We say “as a group” to acknowledge that individual whites as well as certain subgroups may, in particular instances, not enjoy the benefits of group membership. For example, white women, like women of color, suffer extreme forms of exclusion in the context of employment and promotion in fire departments throughout the country. The same, however, is not true with respect to all domains.

### A. Suppressing Racial Attentiveness

One common way of understanding the debate in *Ricci* is that it reflects the difference between colorblindness and race-consciousness as opposing concepts of equality. Thus, the majority opinion rejecting the City's decision to jettison the test results because nearly all the jobs would go to whites could be read as upholding the principle of colorblindness as against "express, race-based decisionmaking [that] violates Title VII's command."<sup>121</sup> Here, however, we offer the alternate frame of racial attentiveness and inattentiveness as a more finely grained lexicon that more accurately parses the question of whether, in a given circumstance, taking account of race constitutes racial discrimination. This issue was at the heart of the *Ricci* case and engendered a dispute that was on full display during the oral argument in *Ricci*. Justice Souter repeatedly challenged the lawyer who argued for Ricci in the Supreme Court, pointing out that, in claiming that avoiding disparate impact on minorities was tantamount to disparate treatment of whites, he was "mak[ing] no distinction between race as an animating discriminating object on the one hand and race consciousness on the other."<sup>122</sup> On the other side, Chief Justice Roberts repeatedly asked the government and the City's lawyers to clarify the distinction between racial discrimination and race-conscious action, as he remained confused about the difference.<sup>123</sup> In part, this debate reflects not only the different philosophical and ideological positions of the justices; it also reflects the way in which the meaning of race-consciousness and colorblindness has been overdetermined by particular normative assumptions and preferences. For Justice Roberts, race-consciousness is inherently problematic, while for Justice Souter it is not.

We propose to evaluate *Ricci* through a related but different paradigm: racial attentiveness and racial inattentiveness. Racial attentiveness as we deploy it here means to formally or explicitly assess or attend to the racial dimensions of an

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121. *Ricci*, 129 S. Ct. at 2673.

122. Transcript of Oral Argument at 9, *Ricci*, 129 S. Ct. 2658 (No. 07-1428). Justice Souter further admonished:

[A]s I understand it you are imposing your strong basis in evidence test on what you referred to a second ago as the use of race, and that cannot be correct, because the use of race includes race-conscious decisions which are not discriminatory decisions, and they certainly do not implicate the—the obligation that you want to impose. You—if—if your argument is going to be coherent with what we start with, it can't be based merely on the use of race because if it does, then you are, in effect, turning any race-conscious decision into a discrimination decision, and that equation we certainly haven't made and we're never going to make.

*Id.* at 18–19.

123. "Can I get back just-just since I don't understand it yet, the distinction between intentional racial discrimination and race conscious action." *Id.* at 54.

act, proposal, or conduct.<sup>124</sup> In some contexts, racial attentiveness implicitly invokes a concern for equality and fairness. Indeed, certain aspects of antidiscrimination law embody an obligation to be racially attentive—that is, to attend to and mark the way race appears and functions.<sup>125</sup> At the same time, as we utilize it here, racial attentiveness does not ineluctably compel any particular action in and of itself, nor does it entail any a priori conclusion about its effects. Given legal, normative, and political constraints inherent in any particular context, being racially attentive might not directly point to a fair resolution, for example, where there appear to be competing interests among two or more racially subordinated groups. Consequently, this is why we assert that racial attentiveness can lead to race-positive, race-neutral, or race-negative results.

On the other hand, racial inattentiveness—not considering or invoking awareness of the racial implications of some conduct, action, or decision—need not entail an explicit rejection of the role that race might play in all situations: It may simply involve not formally marking or attending to race in a given context. Consider *Anderson v. Martin*,<sup>126</sup> a case in which a state law required candidates' race to appear on the ballot. When the provision was challenged by Black candidates for a local school board, the Supreme Court unanimously held that racially labeling the candidates amounted to a violation of equal protection

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124. We say formally because we do not think the evidence supports the idea that completely ignoring race is cognitively possible or normatively desirable. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 18 (1991). Thus, we do not address here the very real phenomenon of implicit bias in which, despite lack of conscious racial animus, our unidentified beliefs and stereotypes influence our perceptions and our behavior. See Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. (forthcoming 2010).

125. Prior court decisions have affirmed this reading of antidiscrimination law. In *Raso v. Lago*, 135 F.3d 11, 12–13 (1st Cir. 1998), a group of predominantly white former residents of an urban redevelopment area challenged a modification to a redevelopment plan that originally provided a preference to those who were displaced by the project in the selection of tenants for the new housing. Because the effect of this preference would have been to effectively shut out all Black and Latino families from the new housing, the allocation was changed to include some minorities in the applicant pool in order to comply with fair housing requirements. *Id.* at 14. White former residents of the area charged that the change was racially motivated and thus violated the Constitution as well as Title VII. *Id.* at 15. The court rejected the claim, noting that while it was clear that the change in the allocation had been racially motivated—in the sense that the agency had an objective of increasing minority applicants—that did not mean that it was illegal discrimination. As the court put it, "Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Id.* at 16. Notably, in this circumstance, the government's actions might be characterized as racially attentive both in the formal sense that it apprehended the racial implications of its facially race-neutral policy and in the more substantive sense that the interests of Black and Latino communities were taken into account. Thanks to Guy-Uriel Charles for pointing out this distinction. We acknowledge that while there is a good deal of interface between both of these notions of racial attentiveness, our major focus is on the perception question—whether race was formally or explicitly noted, marked, or assessed.

126. 375 U.S. 399, 400–01 (1963).



because it facilitated and legitimated the exercise of racial bias and prejudice among voters. Thus, in some instances racial inattentiveness might be a useful intervention towards achieving racial fairness.

Put another way, racial attentiveness and inattentiveness, as we articulate them here, are decoupled from particular normative claims, unlike colorblindness and race-consciousness. Both racial attentiveness and inattentiveness can lead to a race-positive (producing either individual or group-wide benefit), race-negative (producing either individual or group-wide harm), or race-neutral (individuals and groups not affected differently) action or decision.

Although race consciousness is often viewed as inherently problematic, racial attentiveness need not lead to race-negative consequences. Consider the census as one such example: Race is formally acknowledged and recorded, but even though official actions taken subsequently may produce race negative or race positive results, the act of accumulating data on the basis of race is not itself a race-positive or -negative action.<sup>127</sup> On the other hand, racial inattentiveness could produce race-negative action or consequences. The classic example is *Griggs v. Duke Power Co.*, where the employer's decision to require a high school education and a passing score on a standardized general intelligence test as conditions of employment or transfer to a higher position produced significant racial disparities, even though there was no evidence that the employer took account of race in adopting the policy.<sup>128</sup> Whether the consequences are positive, negative, or neutral is obviously deeply contested. For example, while proponents of colorblindness contend that racial inattentiveness leads to race-neutrality, critics often argue that racial inattentiveness entrenches structural inequality and racially prefers dominant groups.<sup>129</sup> The point here is that this

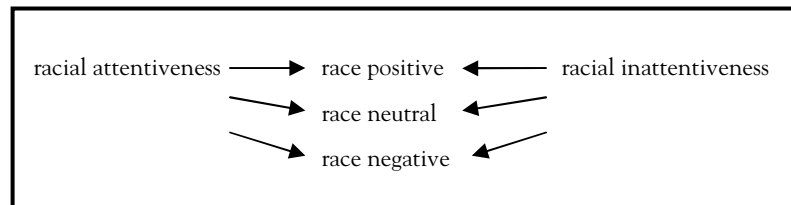
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127. In characterizing the census as an example of a racially attentive action that is neither race positive or negative, we do not mean to ignore that the way in which normative and political judgments about race are structured into the data collection process, both at the level of constructing the categories and in determining how some assignments are made despite the overt reliance on self-classification. See, e.g., Manav Bhatnagar, Note, *Identifying the Identified: The Census, Race and the Myth of Self-Identification*, 13 TEX. J. ON C.L. & C.R. 85, 94 (2007) (contesting the notion that the census is a neutral data collection process because of how the government creates categories and handles the data so that some persons are reclassified, and structures the census in a way that persistently undercounts minorities). Here, we provisionally characterize the census as racially attentive governmental action that is race neutral primarily because it is not race-specific in its application and its purpose, as distinct from its usage. See *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans*, No. 00020693, 2001 U.S. App. LEXIS 23316 (5th Cir. Oct. 10, 2001) (rejecting the plaintiffs' equal protection challenge to race and ethnicity questions on the census because of the distinction between self-classification that underlies the data collection by the census and the government's use of the data and (at least now) the presumption of benign intent).

128. 401 U.S. 424 (1971).

129. See, e.g., Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008) (describing how "anti-preference" admissions regimes that ban considerations of race operate

more nuanced taxonomy helps illuminate how both benefits and harms can derive from either racial attentiveness or inattentiveness.<sup>130</sup> The diagram below schematically illustrates this relationship.



Analyzing the case through this lens of racial attentiveness and inattentiveness allows us to see that *Ricci* suppresses a particular *form* of racial attentiveness. Put another way, by declaring the City’s cancellation of the test results to be disparate treatment of whites because the City relied on “the raw racial results,” the Court treated racial attentiveness as race-negative conduct per se. In fact, the City’s actions were both racially attentive and race neutral; the tests were cancelled for everyone, not for any particular racial group.<sup>131</sup> Everyone

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to instantiate a racial preference or advantage for applicants who do not see race as salient); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (analyzing how the provisions of the tax code that are non-race-specific operate in ways that systematically disadvantage Blacks). Mapping out the full dimensions of this paradigm is beyond the scope of this Article, but we offer it here to illuminate a conceptual issue in *Ricci*. We acknowledge that whether a particular action or consequence is race neutral, race positive, or race negative reflects not merely factual but also normative judgments and perspectival position. Our aim is to offer an analytical tool that challenges the notion that either taking account of race or failing to take account of race is ineluctably tied to particular outcomes.

130. Another example of an effort to offer a more refined consideration of how race might or should figure in particular decisionmaking contexts comes from a critique of the racial classification of sperm donors in assisted reproduction. As one author describes it, major sperm banks not only categorize donors by race, but also organize searches by characteristics that make race one of three primary features, and until relatively recently, shipped vials that were color-coded by race. See Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1853–54 (2009). This sorting system reinforces and facilitates the exercise of racial preferences that impart negative social meanings, producing what Fox calls “discriminatory expression.” *Id.* at 1854. In response, Fox examines possible alternative methods of organizing the information about the race of the donor: a race-blind method, in which the information would be withheld; a race-sensitive method, in which race would be disclosed along with other donor attributes but would not be a defining feature of the decisionmaking framework; a race-attentive method, which is how the banks currently present the information by designing the search function to enable prospective parents to select for the donors by race; and finally, a race-exclusive method, in which the race of the donor would become the predominant or determinant factor in the way the information was presented. *Id.* at 1887–88. Our use of the term race-attentive is not synonymous with this description, but Fox’s project, like ours, proceeds from the insight that providing a more nuanced account of the way in which race is considered is important and indeed crucial to a more accurate mapping of discrimination.

131. This dispute over whether efforts to comply with disparate impact law could fairly be characterized as discriminatory spilled over into the opposing views on whether the City’s actions were “race neutral,” as discussed in the following Subpart. We do not, therefore, mean to treat the description of

would have to prepare and take the tests again. Yet this action was deemed a racial disadvantage to whites, barred doctrinally by Title VII, and the City's attention to racial disparities was considered evidence of discriminatory intent as a matter of law. Treating the City's racially attentive analysis under disparate impact law as a form of intentional discrimination per se not only represented a departure from Title VII law but rewrote antidiscrimination law in an unequal way.

*Ricci's* doctrinal contortions produce racial asymmetry in the burdens and presumptions of Title VII law in several respects. First, by imputing race-specific harm to a race-neutral decision, the *Ricci* plaintiffs were given a racial preference: Unlike ordinary Title VII plaintiffs, they were relieved of any requirement to demonstrate pretext or prove an impermissible racial motive.<sup>132</sup> While we recognize that employers' claims of benign motive have not precluded and ought not preclude a serious inquiry into actual justifications (as sometimes discriminatory behavior comes in the guise of protective conduct), we note here that the *Ricci* plaintiffs were not required to supply any evidence that rebutted the City's claim of good faith compliance with the statute.<sup>133</sup> They were instead granted summary judgment: The City's "race-based" actions supplied sufficient evidence of the critical element of intent, thus obviating a need for the Court to consider the validity of the claim of pretext.<sup>134</sup> The Court's holding on this point presumes that the question to be determined is whether the City was racially motivated in refusing to certify the test results. Under Title VII, a determination of this issue would be a factual inquiry into motive. However, *Ricci* supplants this evidentiary inquiry with a kind of *ipse dixit* logic that imputes an illegitimate

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the City's actions as race neutral as incontrovertible. The point is rather that this characterization—like the question of whether a particular action or policy constitutes a racial classification—is a normative-laden determination. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

132. See Michael J. Zimmer, *Ricci's "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. (forthcoming) (arguing that while the focus of much commentary has been on the effect of *Ricci* on disparate impact law, the decision may have inadvertently affected disparate treatment standards by making it possible for plaintiffs to prove that an employer's actions were taken without any evidence of animus or intent to discriminate).

133. While we do not agree with Justice Alito's characterization of the racial context of the City's decision as evidence that it caved to political pressure, see *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683–89 (2009) (Alito, J., concurring), notably even this assessment of whether the City's reason—Title VII compliance—was pretextual, or was otherwise cover for an illegitimate motive, is absent from the majority's decision.

134. One might argue that once the employer admitted that race was a motivating factor in its decision, this supplied the requisite proof. However, under the 1991 Civil Rights Act, while liability attaches to such actions, the employer can offer evidence that it would have reached the same decision anyway, even absent the discriminatory motive, and thereby limit claims for damages or compensatory relief. 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

discriminatory motive into all inquiries regarding racial effects or racial dynamics. Prior to *Ricci*, Second Circuit precedent as well as established case law in other jurisdictions flatly rejected this characterization.<sup>135</sup> *Ricci* implicitly overrode this precedent even as the majority opinion disclaimed serious engagement with disparate impact or disparate treatment doctrine. Doing so would have required the *Ricci* plaintiffs to meet the standards of proof established by statute and precedent rather than allowing the plaintiffs to benefit from the Court's presumption.

Second, the City's action in response to racial disparities is treated as disparate treatment per se that can only be permitted if the City demonstrates a "strong basis in evidence"—more than a good faith belief—that it faced liability for the disparate impact claim. Since all the parties conceded that the tests and the rules governing the construction of the lists produced significant racial disparities,<sup>136</sup> the City's defense turned on complex issues of job-relatedness, business necessity, and the availability of less discriminatory alternatives.<sup>137</sup> Employers ostensibly implementing antidiscrimination law who face disparate treatment claims brought by white workers must meet the yet-to-be-defined, complicated standard of "strong basis in evidence," while employers defending against disparate impact suits brought by minorities need only invoke their good faith fear that they will be subject to disparate treatment liability. The "good faith belief of the employer" then does not function in a racially neutral way.<sup>138</sup>

Finally, the Court's conflation of all racially attentive processes with race-negative consequences for whites not only flattens out and obscures the complex relationship between racial attentiveness, particular decisions, and outcomes; it does so in ways that skew antidiscrimination law in favor of whites as a group. Because all remedial measures on behalf of racial minorities can at some level be characterized as racially attentive, treating racial attentiveness—attending to the racial consequences of one's actions—as a form of discriminatory motivation

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135. In *Hayden v. Nassau*, the Second Circuit explained in the context of its equal protection analysis:

[P]laintiffs are mistaken in treating "racial motive" as a synonym for a constitutional violation. Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically "suspect" . . .

*Hayden v. Nassau*, 180 F.3d 42, 49 (2d Cir. 1999) (quoting *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998)). Reducing adverse impact on minorities does not equate to reverse discrimination against whites. See *id.* at 51 ("[T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.").

136. See *Ricci*, 129 S. Ct. at 2677.

137. *Id.* at 2678.

138. The Authors thank Noah Zatz for helping us to clarify this point.

destabilizes virtually all remedial options, even those expressly authorized by settled doctrine and federal statutory law.

## B. Skewing Racial Neutrality

As noted in the previous Subpart, the question of whether the City's actions should be characterized as race neutral was a central dispute in the case. We contend that racial neutrality is reconstructed in *Ricci* to skew the results towards whites as a group. First, racial imbalance that favors whites is treated as a race-neutral baseline that is presumptively legitimate. Second, in recasting the City's race-neutral actions as racially discriminatory with respect to whites, the doctrinal rules regarding proof of motive and intent shift in ways that favor whites.

### 1. White Racial Dominance as Racial Neutrality

Consistently overlooked in much of the debate over *Ricci* was the fact that the plaintiffs claimed reverse discrimination in the context of white dominance of the positions in question. Despite the fact that certification of the tests would have ensured that virtually all of the open promotional positions would have gone to whites, the *Ricci* plaintiffs asserted—and the Court agreed—that the white firefighters' rights had been abridged by the City's decision not to proceed with the promotions and exacerbate gross racial disparities. In ruling that the City was in effect compelled to implement tests and procedures that resulted in no promotions for Black firefighters and only two for Latinos, the decision ensured a continued pattern of racial imbalance in the officer ranks that favored whites. This racial disparity was presumptively fair, as intrusions on this allocation, even by race-neutral means, were deemed to upset “the high, and justified, expectations of the candidates who had participated in the testing.”<sup>139</sup> This was so notwithstanding the fact that had the City proceeded with the promotions based on the list, the results would have been very near “the inextinguishable zero,” decreed in prior case law as significant evidence of discrimination.<sup>140</sup> In its decision, the Court supported this imbalanced outcome as one whites could reasonably expect, and as one that “neutral” decisionmaking would inevitably reproduce.

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139. *Ricci*, 129 S. Ct. at 2681.

140. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

## 2. Motive, Intent, and Impact

It is also worth considering the contrast between how *Ricci* treats questions of motive, intent, and impact with the treatment of these same issues under equal protection analysis. While it has never been the case that equal protection doctrine and Title VII are completely symmetrical, *Ricci* further exacerbates the distinctions in ways that are decidedly non-neutral.

As previously described, there was no question that the tests and the processes used to construct the promotional lists produced significant racially disparate impact. Yet, the majority concluded that the City's motive was discriminatory, and as a result, what the City claimed was a race-neutral action was in fact discriminatory treatment of whites. The question of illegitimate motive is subject to considerably different analysis in the context of equal protection doctrine. Recall *Palmer v. Thompson*, in which the city of Jackson, Mississippi chose to close its swimming pools after a federal court ordered the City to desegregate all public facilities.<sup>141</sup> Although the City said maintenance and cost concerns were its formal reasons for the pool closure, there was evidence of a discriminatory motive: The mayor had made several statements to the press expressing intent to defy the court order and maintain segregation.<sup>142</sup> Nevertheless, the Court refused to find any constitutional violation. The majority opinion argued that the mayor's statements could not be imputed to the City Council, nor could it be said that the impact of the decision was discriminatory, since the

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141. *Palmer v. Thompson*, 403 U.S. 217 (1971).

142. The facts in *Palmer v. Thompson* are instructive:

On May 24, 1962, nine days after the District Court's decision in *Clark v. Thompson*, the Jackson Daily News quoted Mayor Thompson as saying: "We will do all right this year at the swimming pools . . . but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling." . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold." . . . On May 24, 1963, the Jackson Daily News reported that "Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races." On the next day, the same newspaper carried a front page article stating that "Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation." During May and June 1963, the Negro citizens . . . demand[ed] that the city desegregate public facilities . . . On the day following this meeting, the Jackson Daily News quoted the mayor as saying, "In spite of the current agitation, the Commissioners and I shall continue to plan and seek money for additional parks for our Negro citizens. Tomorrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed \$100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances." On May 30, 1963, the same paper reported that the mayor had announced "[p]ublic swimming pools would not be opened on schedule this year due to some minor water difficulty."

*Id.* at 250–51 (White, J., dissenting) (internal citations omitted).

pools were closed to Blacks and whites alike.<sup>143</sup> In contrast, under *Ricci*, an illegitimate discriminatory motive is presumed from the City's stated intent to comply with Title VII, and this motive is sufficient to read the City's race-neutral action as racially disparate treatment of whites. Thus, the *Ricci* plaintiffs did not have to prove discriminatory motive or intent or actual disparate impact. Under *Palmer* and *Washington v. Davis*,<sup>144</sup> however, plaintiffs must prove both to prevail on an equal protection claim.

### C. Disparate Treatment Over Disparate Impact

The majority opinion in *Ricci* frames the central problem in the case as an inherent conflict between the disparate treatment and disparate impact provisions of Title VII. As we have discussed, *Ricci* resolves this conflict by installing, in particular circumstances, a hierarchy that favors disparate treatment over disparate impact claims. Indeed, Kennedy's opinion advised that should the City face a disparate impact lawsuit on these facts, "in light of our holding . . . the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."<sup>145</sup>

*Ricci* purports to simply clarify doctrinal standards under Title VII in order to navigate what it describes as the tension between disparate impact doctrine that requires racial assessments and disparate treatment claims that can only be avoided by ignoring race. Yet *Ricci* itself heightens the contradiction by conflating the City's efforts to avoid disparate impact liability with race-conscious, discriminatory decisionmaking. As the majority read it, the City would not certify the test results "because the higher scoring candidates were white;"<sup>146</sup> thus, the City's decision was race-based and inherently discriminatory—the very essence of disparate treatment on the basis of race. The prohibition against disparate treatment is then primary over disparate impact doctrine that—according to the majority in *Ricci*—is a source of racial injury to whites. While it might be formally neutral to consider disparate treatment a higher-order claim than disparate impact, it effectively prefers claims by whites since, as a group, whites are far more likely to allege disparate treatment rather than disparate

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143. See *id.* at 227.

144. 426 U.S. 229 (1976).

145. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009). Note here that the strong basis in evidence standard is articulated as what the City believes regarding its vulnerability to disparate treatment liability. The original formulation in the opinion, however, describes the standard as applicable to the employer's belief regarding its disparate impact liability.

146. *Id.* at 2674.

impact because very few race-neutral rules or processes operate to disadvantage whites vis-à-vis Blacks and Latinos.<sup>147</sup>

#### D. Converting Disparate Impact Into Affirmative Action

For the most part, *Ricci* did not appear in public or legal discourse as a dispute about disparate treatment. *Ricci*'s story comfortably traveled with widely circulated notions of "reverse discrimination" and "racial preference." Indeed, *Ricci* was largely seen as an affirmative action case,<sup>148</sup> even though neither the

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147. The Supreme Court has recognized that facially neutral laws frequently operate to advantage whites and burden minorities, even as it has declined to intervene to ameliorate racial disparities. See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (refusing to intervene to ameliorate racial disparities in the imposition of the death penalty because of far-reaching implications); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269 (1977) (upholding a neighborhood's decision to deny zoning for moderate and low income housing, thus protecting real property values for whites, while conceding that the decision would "bear more heavily on racial minorities"); *Washington v. Davis*, 426 U.S. 229, 248 (1976) (establishing a presumption that facially neutral laws or rules that create racial disparity violate equal protection unless there is a strong justification the laws "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than the more affluent white"). Moreover, scholars in various legal fields have analyzed how facially neutral laws and practices produce racial disparities. See, e.g., Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1498-1507 (1997) (demonstrating that due to the joint return provisions of the Internal Revenue Code, Blacks are disproportionately penalized with higher taxes as a result of getting married and whites disproportionately receive the benefit of lower taxes when they marry); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1743-44, 1756, 1771 (2004) (stating because the Bankruptcy Code "generally favors employed debtors with wealth over unemployed debtors or those with income . . . [g]iven the racial employment and wealth gaps, the Code systematically favors white debtors"); Tanya Dugree-Pearson, *Disenfranchisement: A Race-Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359, 374-75 (2002) (arguing that given the disproportionate numbers of Blacks in prison, facially neutral laws that disenfranchise former offenders "disintegrat[e] the minority vote"); Beverly Moran, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1231 (2007) (analyzing how "[t]he combination of the tremendous tax benefits for home ownership and the private practices and policies that kept blacks from that home ownership shows how the intersection of a neutral law with a race-charged situation compounds race effects").

148. The *New Haven Register* reported:

The Commission on Human Rights and Opportunities [CHRO] recently ruled in favor of the city and dismissed the complaints, filed in June after the city threw out two promotional tests because too few minorities scored well. . . . Attorney Karen Torre, who represents the firefighters, said she was not surprised by the decision. She filed with the CHRO primarily because the government requires it before filing a civil rights action. She said she's filed a number of complaints with CHRO and lost every one, including one for two white New Haven police officers who were not promoted; they went on to win more than \$800,000 from a federal jury. Torre said her experience has been that the CHRO, the state agency that hears discrimination cases, is comprised mainly of affirmative action advocates.

See also Williams, *supra* note 21 (describing *Ricci* as a case about affirmative action). William Kaempffer, *Panel Tosses Firefighters' Discrimination Claim*, NEW HAVEN REG., Nov. 6, 2004, available at <http://www.nhregister.com/articles/2004/11/06/import/13307990.txt>.



facts nor the law supported that understanding.<sup>149</sup> Unlike the government defendants in typical affirmative action cases, the City's challenged action was not a race-conscious effort to increase the number of minority applicants selected in order to remedy past or ongoing racial discrimination. Unlike defendants in "real" affirmative action cases that concede that their policies are explicitly race conscious and litigate the issue of whether their consideration of race is justified, New Haven denied having a racially discriminatory motivation.<sup>150</sup> Instead, the City contended that it could not legally rely on the results of the 2003 tests because it lacked evidence of their job-relatedness—a required element of proof under Title VII disparate impact law once the results revealed a significant racial imbalance. Nevertheless, before, during, and after the case was decided, *Ricci* has been framed as an affirmative action case.<sup>151</sup>

This conflation of disparate impact with affirmative action is not simply a result of doctrinal confusion: It represents the continuation of earlier

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149. As Susan Carle's excellent historical analysis of disparate impact points out, there are important differences between disparate impact and affirmative action, deriving from both the underlying rationales animating activists' efforts to install them as well as their operation, as the former works at the front end to encourage employers to avoid discriminatory practices and thereby avoid the need for the latter. Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis* (Am. Univ. Wash. Coll. of Law Working Paper, Jan. 18, 2010), [http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1009&context=fac\\_works\\_papers](http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1009&context=fac_works_papers).

150. The City argued throughout that they acted on "a good faith belief that Title VII mandated non-certification of the examinations." *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151 (2006).

151. A variety of media outlets, from major newspapers to popular blogs, referred to *Ricci* as a "landmark reverse discrimination case." The New Haven 20's efforts to shape the public discourse of the debate were largely successful, as the media often utilized sound bites from Torre and the New Haven 20 in their reporting. See, e.g., Jeremy Kutner, *Firefighters in Historic Supreme Court Case Finally Promoted*, CHRISTIAN SCI. MONITOR, Dec. 11, 2009, available at <http://www.csmonitor.com/USA/Justice/2009/1211/Firefighters-in-historic-Supreme-Court-case-finally-promoted> (describing *Ricci* as a "reverse discrimination lawsuit" and ending the article with a quote from *Ricci* saying that "[t]he debate was always about quality officers and merit over politics"); A.G. Sulzberger, *Bias Suit a Test of Resolve for Hispanic Man*, N.Y. TIMES, July 2, 2009, at A20 (presenting a piece about Vargas, the only nonwhite in the New Haven 20, and quoting him as saying, "I want [my sons] to have a fair shake, to get a job on their merits and not because they're Hispanic or they fill a quota . . . What a lousy way to live"); Editorial, *Obama Team Pushes Quotas, The Justice Department Is Playing Divisive Racial Games*, WASH. TIMES, Jan. 22, 2010, at B2 ("[I]n *Ricci v. DeStefano* last year, the Supreme Court ruled in favor of white Connecticut firefighters who were denied promotions they had earned through a fair exam. In that case, the high court was clear: It rejected anything approaching 'a de facto quota system' . . ."); Abigail Thernstrom & Stephan Thernstrom, Opinion, *New Haven's Racial Test: Merit Doesn't Matter for City Firefighters*, WALL ST. J., Apr. 22, 2009, at A15 ("The issue in *Ricci* was simply stated by Judge José Cabranes, dissenting from a cursory, unenlightening opinion by the Second Circuit Court of Appeals. 'At its core,' he wrote, 'this case presents a straight-forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?'); By *Attacking Ricci, Democrats Are Comparing Skin Color to a Disability*, SAY ANYTHING BLOG, July 14, 2009, [http://sayanythingblog.com/entry/by\\_attacking\\_ricci\\_democrats\\_are\\_comparing\\_skin\\_color\\_to\\_a\\_disability](http://sayanythingblog.com/entry/by_attacking_ricci_democrats_are_comparing_skin_color_to_a_disability) (stating that "*Ricci*, rightfully, accused his employers of reverse discrimination").

conservative racial projects rejecting disparate impact theory. While disparate impact doctrine was inaugurated in the *Griggs* decision by unanimous vote of the Burger Court—hardly known as a liberal bench—race conservatives have contested the basic premise of disparate impact doctrine from its inception.<sup>152</sup> They dispute that pervasive racial disparities are often an important sign of racial discrimination, instead arguing that such disparities are merely evidence of minority cultural dysfunction and a failure to assimilate to basic middle class values.<sup>153</sup> Disparate impact law that requires attention to group effects was deemed to inherently conflict with the premise that the law protects individuals, not groups.<sup>154</sup> Thus, while *Griggs* is still formally acknowledged as governing law, some—particularly race conservatives—have sought to challenge its vitality or applicability to contemporary claims of discrimination by characterizing it as “judge-created doctrine” despite its codification.<sup>155</sup> Others—both defenders and detractors of disparate impact doctrine—have characterized disparate impact as a mechanism for smoking out intentional discrimination that is cloaked in race-neutral selection processes: a way of finding the stealth disparate treatment case.<sup>156</sup> However, even when race conservatives have formally acknowledged the legitimacy of *Griggs*, in truth they seek to bury disparate impact doctrine, not to praise it.<sup>157</sup>

152. See Carle, *supra* note 149, at 6 (noting that opposition to disparate impact theory has been longstanding). Importantly, Carle also notes that disparate impact theory predated *Griggs* and had been well established under state antidiscrimination law before the Civil Rights Acts of 1964. *Id.*

153. See Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 912 (2006) (noting that as notions of biological inferiority have come under criticism, the explanation for ongoing racial disparities offered by conservatives and growing numbers of liberals is that Blacks in particular are culturally deficient, in that they undervalue education and hard work, are unwilling to accept family responsibilities, and are committed to a set of deficient cultural practices).

154. See, e.g., Roger Clegg, *The Bad Law of “Disparate Impact”*, 138 PUB. INT. 79, 86 (2000) (“Disparate-impact theory has always been without merit. A civil-rights suit ought to focus on whether people of different races are treated differently *because* of their race. That is the common-sense meaning of ‘discrimination,’ and that is what the 1964 act clearly said and meant. The question of intent, rather than incidental effect, ought to be at the heart of every lawsuit.”).

155. See, for example, Karen Lee Torre, Ricci’s lawyer, in a debate with Victor Bolden at Quinnipiac University School of Law after *Ricci*. *Ricci Revisited*, NEW HAVEN INDEP., Aug. 18, 2009, [http://newhavenindependent.org/index.php/archives/entry/ricci\\_revisited/](http://newhavenindependent.org/index.php/archives/entry/ricci_revisited/); YouTube.com, *New Math: Ricci v. DeStefano*, Parts I and III, <http://www.youtube.com/watch?v=qBKAw8g8Qw8> (last visited Oct. 2, 2010); <http://www.youtube.com/watch?v=pFc-CanoIQE> (last visited Oct. 2, 2010); and <http://www.youtube.com/watch?v=pqqmttsigg> (last visited Oct. 2, 2010).

156. See Primus, *supra* note 131, at 498–99 (explaining one interpretation of disparate impact doctrine).

157. This hostility to disparate impact doctrine was reflected in the policy decisions under successive conservative Republican administrations in which federal agencies explicitly disavowed disparate impact as part of agency enforcement policy. See, e.g., MICA POLLOCK, *BECAUSE OF RACE: HOW AMERICANS DEBATE HARM AND OPPORTUNITY IN OUR SCHOOLS* 52 (2008) (describing how the Office of Civil Rights in the Department of Education under Bush-appointed Gerald Reynolds initially conveyed that “employees would not be allowed to pursue disparate impact analysis in evaluating educational

The challenge to disparate impact law surfaced again in the wake of the Court's 5–4 decision in *Wards Cove Packing Co. v. Atonio*,<sup>158</sup> which lightened the burden on employers in establishing business necessity. When Congress proposed legislation that overruled the holding, in part by reinstating both the disparate impact cause of action and restoring the standard for business necessity, opponents claimed that it was a “quota bill.”<sup>159</sup> George H.W. Bush indeed vetoed the bill, again objecting to its enactment of racial quotas.<sup>160</sup> The bill was finally adopted into law as the 1991 Civil Rights Act over the president's veto, but arguments associating disparate impact with racial quotas continued to

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opportunity,” followed in Bush's second term by a formal entry “into an updated *Case Resolution and Investigation Manual* guiding OCR employees' work [that] discouraged even potential disparate impact cases”) (citing OFFICE FOR CIVIL RIGHTS, OCR CASE RESOLUTION AND INVESTIGATION MANUAL § 106 (2005), available at [http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html#I\\_6](http://www.ed.gov/about/offices/list/ocr/docs/ocrcrm.html#I_6)). “In order for OCR to proceed, the complainant must provide OCR with sufficient information to support the factual basis for the complainant's belief that discrimination has occurred and when it occurred. Generally, statistical data alone are not sufficient, absent allegations that actions by a recipient, if true, would violate one of the laws that OCR enforces.” OFFICE FOR CIVIL RIGHTS, *supra*, § 106.

158. 490 U.S. 642 (1989).

159. Conservatives have frequently voiced opposition to disparate impact, often on the grounds that it induces “racial quotas.” See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 232–36 (1992) (discussing how disparate impact theory encourages racial quotas).

160. Indeed, George H.W. Bush's 1990 veto of the amendments to Title VII, designed to overturn the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), on the issue of business necessity, was predicated on the assertion that the codification of disparate impact amounted to a “quota bill.” David S. Broder, *Quayle Calls for Mending GOP 'Fissures' on Budget, Gulf*, WASH. POST, Nov. 11, 1990, at A13 (“If the Democrats reject President Bush's compromise proposals and carry through on their promise to re-pass the civil rights bill that Bush vetoed last month, they will live to regret it,” he said. “The American people do not want a quota bill . . . and when the president says it's a quota bill, it's a quota bill, notwithstanding what Ted [Sen. Edward M.] Kennedy [D-Mass.] may say about it,” Quayle declared.”); George H.W. Bush, Remarks at a Meeting With the Commission on Civil Rights, 1 PUB. PAPERS 675, 676 (May 17, 1990) (“I want to sign a civil rights bill, but I will not sign a quota bill.”); George H.W. Bush, Remarks to the National Council of La Raza, 2 PUB. PAPERS 1022, 1023 (July 18, 1990) (“I wanted to sign the civil rights bill of 1990 and not a quota bill of 1990.”).

circulate.<sup>161</sup> Finally, critics of strong civil rights laws challenged disparity analyses as empirically meaningless.<sup>162</sup>

This redefinition of disparate impact as virtual affirmative action and as a form of disparate treatment is part of the conservative project of redefining discrimination more broadly. Heretofore, this has been particularly evident in the arena of equal protection doctrine where, in cases involving race-based remediation, conservative majorities on the Court have reshaped the terrain. It initially seemed that the conservative consensus under the Rehnquist Court—where Justices Powell and then O'Connor were the moderate voices—was mainly concerned about the proper constitutional framework for affirmative action. Yet the Court assailed the idea of race attentiveness when affirmative action in schools and government contracting were placed under heightened scrutiny.<sup>163</sup> The line of assault on affirmative action was just the opening gambit on the revision of the entire body of civil rights law that extended the claim of reverse discrimination to cover voting rights, school desegregation and now, disparate impact theory in *Ricci*.

The mechanism for redefining discrimination was the extension and application of affirmative action precedent and analysis to other areas of law. The most recent example is *Parents Involved in Community Schools v. Seattle School District*,<sup>164</sup> where the Roberts majority opinion relied almost exclusively on affirmative action case law—specifically *Grutter v. Bollinger*<sup>165</sup>—rather than the

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161. See, e.g., *Rothe Dev. Corp. v. Dep't of Defense*, 545 F.3d 1023 (Fed. Cir. 2008) (holding that DOD's small disadvantaged business program awarding benefits to minority businesses in bidding for DOD contracts was unconstitutional because Congress lacked a strong basis in evidence for concluding that race-conscious contracting was necessary to remedy discrimination in the contracting industry despite congressional reliance on six state and local disparity studies measuring the difference between the number of contracts or contract dollars awarded to minority-owned businesses in a particular market and the number one would expect to be awarded given the minority presence in that market); Charles L. Gesheker, *The Effects of Proposition 209 on California Higher Education, Public Employment and Contracting*, 21 ACAD. QUESTIONS 296, 308 (2008) (arguing that “[a] simple disparity does not prove discrimination, and no ‘group’ is ever likely to own any particular kind of business in the same proportion as its share of the state’s population”).

162. We do not mean to suggest that the only skeptics about disparate impact doctrine are race conservatives who espouse colorblindness; there are those who hold views across the ideological spectrum who have questioned its utility. See, e.g., Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006). Rather, our point is that race conservatives have frequently espoused a particular viewpoint that conflates disparate impact and affirmative action.

163. In each case, racial attentiveness in and of itself was viewed as automatically suspect, even if the classification was benign. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–29 (2003) (applying strict scrutiny to a law school admission program that included race as one of several factors to be considered); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–38 (1995) (applying strict scrutiny to racial classifications used to increase the percentage of minority participation in federal contracting).

164. 551 U.S. 701 (2007).

165. 539 U.S. at 306.

body of school desegregation law, to strike down school integration plans.<sup>166</sup> *Ricci* similarly relies on affirmative action cases rather than disparate treatment cases, importing strict scrutiny into Title VII doctrine. Analogizing to affirmative action cases in the context of equal protection jurisprudence, the Court in *Ricci* found that, just as strict scrutiny requires the government to justify its race-conscious remedial measures by evidence of a compelling interest and the lack of viable alternatives, so too does Title VII require that before an employer can take a race-conscious action like canceling test results that favor whites—a per se disparate treatment violation—it must have a strong basis in evidence that the remedial actions are necessary. The majority declined Justice Scalia’s invitation to directly apply equal protection analysis to disparate impact—that is, to assess whether disparate impact analysis itself violates the Fourteenth Amendment’s Equal Protection Clause<sup>167</sup>—but, in effect, it imports the substance of strict scrutiny review into the doctrinal regime.

In a sense, *Ricci* represents an effort to operationalize Justice Roberts’s admonition in *Parents Involved* that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>168</sup> This tautology reconstitutes the very concept of discrimination as any antidiscrimination remedy that displaces the expectations of whites with regard to the racial status quo. Just as *Parents Involved* took a race-conscious remedy—school desegregation—and turned it into an injury that could only be justified under strict scrutiny review, so too does *Ricci* turn disparate impact itself—a cause of action under federal law—into a racial injury: a violation of disparate treatment that can only be excused by meeting the strong basis in evidence standard.<sup>169</sup>

The chief justice’s entanglement in this logical fallacy reflects why he concluded in *Parents Involved* that race-conscious student assignment policies to maintain integration are a form of race discrimination.<sup>170</sup> In *Ricci*, like *Parents Involved*, the distinction between the remedy and the harm is further blurred and erased. This was evident during the *Ricci* oral argument, where Chief Justice Roberts repeatedly expressed confusion about the distinction between race-conscious remedial action and race discrimination, while Justice Souter, on the other hand, chastised the plaintiffs’ counsel for erroneously making “no

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166. *Parents Involved*, 551 U.S. at 720–22 (applying affirmative action case law to school integration plans).

167. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

168. *Parents Involved*, 551 U.S. at 748.

169. *Ricci*, 129 S. Ct. at 2681 (“The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process.”).

170. *Parents Involved*, 551 U.S. at 747–48.

distinction between race as an animating discriminating object on the one hand and race consciousness on the other.”<sup>171</sup>

In recalibrating what it means for race to be a motivating factor in an employment decision, *Ricci* provides a revisionist account of race discrimination in which the primary danger is that whites have become racial victims whose rights are threatened by any remedy that seeks to address minority inequality, even those based in federal statutory law. We do not mean to suggest that discrimination has ever been imbued with a transcendent, stable meaning: Like many deeply normative concepts, the concept of discrimination has always been subject to heated contestation. Rather, our point is that *Ricci* involves defining discrimination in ways that make disparate impact a form of affirmative action. Antidiscrimination law is transformed into race discrimination because a law that presumed minorities should receive outcomes in similar proportions to whites constitutes making nonwhites “special favorites of the law”—virtual affirmative action.

#### E. Repositioning Whites as Racially Subordinated and Disempowered

From the outset, the *Ricci* plaintiffs and their lawyers projected their case as a fight for racial equality that implicated important civil rights principles. That litigants involved in a hotly contested suit sought to narrate a sympathetic story is unsurprising. What is striking in this instance is that the *Ricci* plaintiffs projected—and later the majority of the Court accepted—the framing of the case as one in which whites were racial victims,<sup>172</sup> even though no minorities—indeed no one—got the jobs at issue.

Thus, while the vignette we present at the outset of this Article originally imagines the stories of minority and white women firefighters who had been excluded from predominantly white male fire departments, *Ricci* recast himself as

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171. Transcript of Oral Argument at 9, *Ricci*, 129 S. Ct. 2658 (No. 07-1428).

172. Richard Primus makes the interesting point that one way to rescue disparate impact from the threat of constitutional infirmity implicated in Scalia’s concurrence in *Ricci*, which places the doctrine in tension with equal protection, is to adopt a “visible-victims reading” of disparate impact law. Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1368–74 (2010). By this he means that as long as a race-conscious measure does not “visibly burden specific innocent parties,” it is less likely to produce a divisive social meaning. *Id.* at 1369. What is curious about *Ricci* is the Court’s racially selective vision, as it sees whites as the victims of discrimination in a scenario in which they currently, and have historically, almost exclusively occupied all the jobs. The fact that Blacks and Latinos have been shut out is not visible to the Court. See Zimmer, *supra* note 132, at n.56–61 and accompanying text (noting that the Court in *Ricci* may have inadvertently relaxed the standard of proof for disparate treatment such that liability is established if there is evidence that the decisionmaker was aware of the racial consequence of its decision but further noting that the application of this standard may inure to the benefit of white rather than minority plaintiffs).

the protagonist in this classic antidiscrimination tale. Ricci claimed that the denial of equal opportunity that he and his fellow litigants faced was emblematic of a nationwide trend: Because “firefighters across the nation have had to resort to the federal courts to vindicate their civil rights,” the story he related represented not only Ricci and his colleagues but “[m]any others [who] have a similar story.”<sup>173</sup>

This image of white firefighters under siege was highly influential in various media accounts of the case, which almost exclusively focused on Ricci and the New Haven 20 as sympathetic, hardworking firefighters whose rights to promotion had been abridged by the City’s pursuit of affirmative action on behalf of unqualified minority applicants.<sup>174</sup> Drawing on the racial framing of affirmative action as a form of racial discrimination, Ricci then became the protagonist in a familiar narrative in which individuals victimized by an agenda of racial exclusion have to seek the protection of civil rights laws.<sup>175</sup>

Less evident is that while race conservatives have valorized and appropriated civil rights discourse, they have been less enamored of actual civil rights law. Foundational concepts like disparate impact have been excoriated by race conservatives as misguided and deleterious to true equality. In some accounts of the case sympathetic to the *Ricci* plaintiffs, the City’s assertion that it was seeking to comply with federal antidiscrimination mandates when it declined to certify the test results was derided not only as pretextual but as based on normatively problematic “civil rights laws.”<sup>176</sup> That these same civil rights laws are portrayed in Ricci’s narrative as a refuge from discrimination reveals that,

173. Testimony of Ricci, *supra* note 1.

174. See, e.g., Will, *supra* note 90. See also *supra* note 151.

175. This conflation of Ricci’s claim with affirmative action and “reverse discrimination” was also in evidence during the hearings on the nomination of Justice Sonia Sotomayor, as several senators failed to understand the basic legal distinction. A prime example was Senator Jeff Sessions (R-AL), who questioned her as follows:

In 1997 when you came before the Senate . . . I asked you this. In a suit challenging a government racial preference, quota or set-aside, will you follow the Supreme Court decision in *Adarand* and subject racial preferences to the strictest judicial scrutiny . . . You made a commitment . . . to follow *Adarand*. In view of this commitment . . . why are the words “Adarand,” “[e]qual protection,” and “strict scrutiny” [sic] completely missing from any of your panel’s discussion of this decision? SOTOMAYOR: Because those cases are not what was at issue in this decision. The Supreme Court parties were not arguing the level of scrutiny that would apply with respect to intentional discrimination . . .

CQ Transcription, *Senator Jeff Sessions Holds a Hearing on Nomination of Judge Sonia Sotomayor to Be an Associate Judge on the U.S. Supreme Court*, WASH. POST, June 14, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071401155.html>.

176. See Taylor, *supra* note 90, at 10 (noting that “the stark facts of [the Ricci case] illustrate how racial politics sometimes combine with little-known judicial precedents and ‘civil rights’ laws to violate the civil rights of working-class and middle-class white, Asian, and (at least in this case) Hispanic Americans”).

in their view, the legitimacy of antidiscrimination law seems to be contingent on the identity of the litigant. Minority claims of discrimination are treated as fictive or exaggerated. Real discrimination claims are the property of whites.

### III. RACING TEST FAIRNESS

Title VII employment discrimination law proscribes the use of any criterion or practice, such as use of a promotional exam, that operates to exclude a particular racial or gender<sup>177</sup> group unless an employer can demonstrate that the practice or criterion is both job related and a business necessity.<sup>178</sup> More specifically, an employment “testing system with a racially discriminatory impact” is impermissible under Title VII unless the employer can demonstrate that the employment test assesses “job-specific ability.”<sup>179</sup> The origins of this doctrine lie in *Griggs v. Duke Power Co.*, a case in which the Court unanimously held that the absence of intentional discrimination did not insulate an employer from liability for using selection criteria that have a racially (or gender) exclusionary effect.<sup>180</sup> Because Congress’s objective in passing Title VII was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees,” the statute forbids the use of “tests neutral on their face, and even neutral in terms of their intent . . . if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>181</sup> In short, Title VII’s disparate impact provisions serve as a mechanism to eliminate unnecessary racial disparity by requiring that racially (or gender) skewed test results be demonstrable measures of job-related merit.

Kennedy’s opinion for the Court in *Ricci* imports the “strong basis in evidence” standard applicable previously to a defendant’s explicit use of race as part

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177. As we have noted above, Title VII protects individuals from gender-based employment discrimination as well—obviously of great significance in the context of the hiring and promotion of firefighters. While our analysis may, in many respects, be equally applicable to gender, we do not discuss that explicitly because the facts in *Ricci* and the Court’s analysis do not mention gender. That said, however, women firefighters have been subject to severe patterns of exclusion that warrant deeper study and analysis.

178. Though the terms “business necessity” and “job related” appear to have semantic differences, courts have used them interchangeably. See *United States v. City of New York*, No. 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, at \*63 (E.D.N.Y. July 22, 2009).

179. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (observing that when “the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicant,” it becomes the employer’s burden to prove that its tests are “job related”) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)); *City of New York*, 2009 U.S. Dist. LEXIS 63153, at \*89.

180. 401 U.S. 424 (1971).

181. *Id.* at 430.



of a voluntary affirmative action policy.<sup>182</sup> In addition to requiring that employers have very substantial evidence of a racially skewed test's lack of job-relatedness, the majority dramatically misrepresents the type of evidence appropriate for consideration in assessing an employer's Title VII disparate impact liability.<sup>183</sup> Virtually ignoring the component of the Title VII disparate impact analysis that applies race-neutral testing standards, the opinion misapprehends and effectively "races" the technical features of the assessment of a test's job-relatedness and overall scientific "validity."<sup>184</sup> In so doing, *Ricci* lessens an employer's burden of justification when test results are racially skewed in favor of whites. Because of the Court's failure to accurately incorporate professional validation standards into its analysis of whether New Haven had a strong basis in evidence for rejecting the 2003 exam results, employers may presume they are bound to rely on racially skewed test results despite the employer's good faith belief that using the test will unfairly exclude qualified minorities. In this sense, *Ricci* seems to afford the higher-scoring racial group—whites—a positive right to the use of the test. *Ricci* purports to "resolve competing expectations" under Title VII's disparate treatment and disparate impact provisions by stating: "If, after it certifies test results, the City faces a disparate-impact lawsuit, . . . the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate treatment liability."<sup>185</sup> Although the meaning and implications of this statement are far from clear, it could be interpreted by lower courts to articulate a new rule that statistical evidence of adverse impact has been transformed by the *Ricci* case into requiring evidence of intentional discrimination (Title VII disparate treatment) against the higher-scoring racial group.

To the extent that disparate impact law pushes employers to make actual merit-based employment decisions, all racial groups, individual applicants, and society as a whole benefit. However, instead of recognizing Title VII disparate impact theory and doctrine for what it is—a requirement that places the onus on employers to demonstrate that the tests they have used are "merit-selecting," the discourse surrounding the *Ricci* litigation and the *Ricci* majority opinion implements an agenda we label the "racing of test fairness." The salient feature of racing test fairness is the weakening of Title VII's test validation, job-relatedness, and less discriminatory alternative requirements—its test fairness

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182. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675–77 (2009).

183. *Id.* at 2678.

184. See *infra* Part III.B.1.

185. See *Ricci*, 129 S. Ct. at 2681.

requirements—because of either the view that it is tied to a racial agenda to favor minorities or in order to protect a test-score-based entitlement to white overrepresentation.

In this Part, we illustrate these flaws in *Ricci*'s analysis by closely examining the exam results. We detail the race and test scores of each firefighter-applicant who passed the lieutenant and captain examinations, the racial adverse impact analysis of exam passing rates, and how many firefighters of each race were eligible for promotion (promotable)<sup>186</sup> as well as the highest ranking firefighter-applicant of each race for the 2003 exams compared to the prior exam administration. Based on the actual data and promotion practices of the city of New Haven, we create the 2003 promotional lists using the City's policy of giving 60 percent weight to a multiple-choice test and 40 percent to a structured oral exam. As an initial counterpoint to the Court's skepticism that the City's concern that reliance on the exams would violate the civil rights of Black and Latino firefighters, we reverse the weight of the multiple-choice test and structured oral exam subscores to construct hypothetical alternative firefighter lieutenant and captain promotion lists. In doing so, we find that Black firefighters as a group would have ranked higher and that different Black, Latino, and white firefighters, of those who passed the promotional exams but were nevertheless ineligible for promotion because they were not ranked among the top scorers, would have been eligible under the alternative scenario we produce.

We go beyond observing that the Court erred in its analysis and in treating professional validation of employment tests as expendable. This Part articulates the Title VII disparate impact analysis that should have driven the Court's conclusion as to whether the *Ricci* plaintiffs presented sufficient evidence to support their disparate treatment claim. It also highlights the factual assessments that should, under Title VII precedent before *Ricci*, have been central to assessing a potential disparate impact claim like the one the city of New Haven correctly anticipated.

#### A. A Tale of Two Lawsuits

In one way, the story of Frank Ricci and the rest of the New Haven 20 plaintiffs in *Ricci v. DeStefano* is easily subsumed within a well-established "reverse discrimination" narrative. This version of *Ricci* is a "sympathetic"<sup>187</sup> tale of studious and dedicated white male (and one Latino) firefighters who earned

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186. Unless designated as female, the gender of the firefighter is male.

187. The Second Circuit was "not unsympathetic" to the *Ricci* plaintiffs. *Ricci v. DeStefano*, 530 F.3d 88, 96 (2d Cir. 2008) ("We are not unsympathetic to the plaintiffs' expression of frustration.").

high test scores but were nevertheless denied promotions because the city of New Haven “preferred” to promote lower-scoring minority candidates over higher-scoring white ones.<sup>188</sup> Yet, there is another *Ricci* story that is also worthy of “empathy.”<sup>189</sup> This is the story of Black and Latino firefighters who assert that they were shut out of promotions by the City’s use of promotional tests not in compliance with professional scientific standards for proper test construction and test usage.<sup>190</sup> Whereas the *Ricci* plaintiffs allege that New Haven discriminated against them when it failed to base promotions on the 2003 lieutenant and captain exams, in this Subpart, we explicate these nonwhite firefighters’ equally or possibly more viable claim that the City’s reliance on a test unrelated to job performance was both unfair and illegal under Title VII because it disproportionately excluded qualified African American and Latino firefighters.

We illustrate the circumstances that put the city of New Haven in the difficult position of deciding what action to take in light of at least two potential lawsuits and the competing narratives that the City’s actions discriminated against whites or discriminated against minorities.<sup>191</sup> Upon discovering that the 2003 promotional exams had a racially disparate impact on Black and Latino firefighters, it was the City’s judgment that nonwhite firefighters had grounds to file a disparate impact lawsuit against the city of New Haven,<sup>192</sup> not unlike lawsuits that they and their predecessors had filed in the past in order to integrate the overwhelmingly white fire department and command structure in New Haven, a city with a significant Black and Latino population. Contrary to *Ricci*’s

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188. We think it is significant to note again that parts of the “tale” of *Ricci* differ from the reality of *Ricci*. Specifically, we are aware of no media, political, or legal account that recognizes the fact that the *Ricci* plaintiffs were not all “high scoring,” as compared to either the Black firefighters who passed the exams but were nevertheless ineligible for promotion, or as compared to other white firefighters who were not plaintiffs in the *Ricci* litigation. See *infra* tbl.2 and tbl.3; see also *infra* Part III.A.2.a.

189. This is a reference to President Obama’s description of “empathy” as a qualification for his preferred Supreme Court justice. See Janet Hook & Christi Parsons, *Obama Calls ‘Empathy’ Key to Supreme Court Pick*, L.A. TIMES, May 2, 2009, at A1.

190. Note here the difference between these design and usage flaws and whether a user has conducted a formal “validation study.” If a test maker or test user fails to comply with a set of threshold psychological testing best practices, it is virtually impossible for that user to “validate” the test in a formal study. See Industrial-Organizational Psychologists Amicus Brief, *supra* note 37 (referring to such flaws as “fatal” because of their impact on the validity of the test in question); see also Dan A. Biddle, *Ricci v. DeStefano: An Opinion*, SIOP EXCHANGE, June 24, 2009, [http://siopexchange.typepad.com/the\\_siop\\_exchange/2009/06/ricci-v-destefano-an-opinion-.html](http://siopexchange.typepad.com/the_siop_exchange/2009/06/ricci-v-destefano-an-opinion-.html); DrinkerBiddle, Labor & Employment Alert, U.S. Supreme Court Raises Bar for Employers When Considering Adverse Impact, July 7, 2009, <http://www.drinkerbiddle.com/publications/Detail.aspx?pub=1893&servicesearch=323>.

191. See Kaempffer, *Fire Exams Pose Problems*, *supra* note 9.

192. See *supra* Part I.A. In addition to prohibiting intentional discrimination—“disparate treatment”—Title VII prohibits “disparate impact”—employment practices that have an unjustified discriminatory effect on the basis of race, gender, or national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 703 (2006).

claim that the City's actions were undertaken with an illegitimate racial motive, the City asserted that it feared that if it did not halt its promotions, it would have violated the federal civil rights of minority firefighters. This was consistent with existing law, as no court had held that "racially attentive"<sup>193</sup> action to avoid Title VII disparate impact liability constituted a racial preference or a disparate treatment violation under Title VII. Nevertheless, the crux of the Court's decision in *Ricci*, and indeed the critical contention of the predominately white group of *Ricci* firefighter-plaintiffs, was that the City's fear of such litigation was unfounded and, actually, was nothing more than a smokescreen for antiwhite racial discrimination.

In order to assess New Haven's contention that it had a "good faith" belief it would be held liable had Blacks and Latinos sued, our primary focus is evaluation of the merits of minority firefighters' Title VII disparate impact claims. This alternative narrative—the tale of the other lawsuit—discloses that under Title VII precedent, certainly as it existed before the Court's decision in *Ricci*, New Haven had good reason to fear legal liability for use of the tests.

#### 1. The Genesis of the 2003 Lieutenant and Captain Lists

New Haven's charter provides that fire lieutenants and captains, like numerous other civil service positions, must be promoted "according to merit and fitness to be ascertained as far as practicable by competitive examinations."<sup>194</sup> New Haven's "merit-based system" of hiring and promotion as set forth in the city charter provides that the City has discretion to choose from a variety of testing methods in devising such competitive exams—including written and oral tests as well as "[p]erformance tests to demonstrate skill and ability in performing actual work."<sup>195</sup> Like many other city charters, the New Haven charter also requires that promotions be made according to a requirement referred to as the "rule of three." The City's rule of three provides that open civil service positions may only be filled by one of the three highest-ranked candidates on the certified promotional list of candidates.<sup>196</sup>

Although not required by the city charter and civil service rules, the New Haven firefighter promotion criteria was predetermined by a two-decade-old contract with the City's firefighters' union. This collective bargaining agreement dictated that the promotion exam's written component would be weighted at

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193. See *supra* Part I.

194. NEW HAVEN CHARTER art. XXX, § 167 (1992).

195. *Id.*

196. The rule of three only applies to applicants who passed the competitive exam with a score of least 70 percent. See *id.* art. XXX, § 160.

60 percent and the oral component given 40 percent, and that the resulting scores would be the sole basis for promoting fire lieutenants and captains. The City and the New Haven firefighter Local 825 (the union) negotiated this limitation on promotion criteria for lieutenant and captain positions—as well as the proportional weight of the exam components—without consulting professional testing experts as to the validity of the exams or the 60–40 weighting for measuring the ability to perform the jobs of fire lieutenant and captain. This contract provision, which had been in place since 1986, was apparently predicated on white firefighters' belief that the oral exam favored minorities, and accordingly should be discounted or perhaps even discarded.<sup>197</sup> Even though its membership was deeply divided and on opposing sides of the issue, the union did not take a neutral position with respect to the controversy over the 60–40 weighting.<sup>198</sup> As it had many times in the past, the union aligned with the white firefighters and specifically the *Ricci* plaintiffs, filing its own action against the City notwithstanding the fact that it was obligated to represent all members.<sup>199</sup> Thus, the union, like many others, could be seen to have failed to represent minority members and instead opted to protect white expectations of ongoing systemic benefits.

Significantly, in soliciting bids for the contract to develop the 2003 promotional exams, the City made it clear that it would not accept bids for tests that failed to comply with the union-negotiated limitations on content and weighting. The winning bidder, Industrial/Organizational Solutions, Inc. (IOS),

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197. The contract between the City and the union had called for this weighting since 1986. See excerpts from transcript of New Haven Civil Service Commission meeting on March 18, 2004, in Joint Appendix, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 454249; see also Kaempffer, *supra* note 66 (reporting on views of white firefighters regarding the oral exam).

198. The union tried to get the City to discard the oral exam in contract negotiations sometime prior to the contract at issue in *Ricci*. Kaempffer, *supra* note 66.

199. The case *Local 825 v. City of New Haven*, like the *Ricci* litigation, sought to compel the City to certify the exams and make promotions. *New Haven Firefighters Local 825 v. City of New Haven*, No. Civ.3:04CV1169(MRK), 2005 WL 3531464 (D. Conn. Dec. 22, 2005). The court dismissed the case in 2005, holding that the union had failed to demonstrate that there was no conflict of interest or diversity of views that would prevent the organization from effectively representing its membership. *Id.* In fact, the union consistently intervened in favor of its white members in virtually all civil rights actions brought against the City by Black firefighters. See *New Haven Firebird Soc'y v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn. 1975) (union attorney filed motion to intervene in suit on behalf of seventeen white captains following settlement negotiations between the City and minority firefighters); *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, No. 288183, 1992 WL 134440 (Conn. Super. Ct. June 9, 1992) (union intervened and filed defenses to protect the practice of promoting white firefighters before eligibility lists expired even though there were no vacancies). The union was the only party to appeal the ruling against the practice. See *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs of City of New Haven*, 630 A.2d 131 (Conn. App. Ct. 1993). The union again intervened in *Broadnax v. City of New Haven*, 851 A.2d 113 (Conn. 2004), where minority firefighters challenged the practice of underfilling positions—whereby lower-ranked white firefighters were placed into positions budgeted for a higher rank. The union once again sought to defend the practice. *Id.*

one of numerous companies specializing in designing exams for fire and police departments across the country, agreed to create a written, multiple-choice test and a structured oral interview test to be weighted according to the City's 60–40 percent specification.<sup>200</sup>

IOS went to great lengths to customize the written and oral components of the 2003 exams for New Haven's use, and was paid \$100,000 by the City for its services. Specifically, IOS conducted "job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions"<sup>201</sup> based on interviews, ride-alongs with fire officers, and questionnaires of incumbent lieutenants, captains, and their supervisors to create the 100-question multiple-choice and oral portions of the exams. IOS also trained oral examiners to ensure consistency in scoring of candidate answers to the oral exam questions.<sup>202</sup> Moreover, IOS made a conscious effort to solicit input from minority firefighters in its job analysis and to include them as panel members for the oral portion of the exams.<sup>203</sup>

However, there were critical omissions of steps central to ensuring that the tests at issue adequately measured the candidates' ability to perform the jobs in question. First, despite conducting job analyses, IOS failed to identify "leadership skills" and "command presence" as knowledge, skills, and abilities that supervisory fire officers must possess to perform well on the job, and, thus, no component of the 2003 promotional exams even attempted to assess candidates' abilities with regard to these job-critical skills.<sup>204</sup> Second, the City never asked—nor did the test designer consider—whether, as compared to a 100-question multiple-choice test and a standardized oral interview test, alternative methods, such as

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200. A representative of IOS, Chad Legal, testified during his deposition that the City did not inquire whether alternative test components or alternative weightings of the written and oral components might better measure which candidates were most qualified to be fire lieutenants and captains. See *Ricci*, 129 S. Ct. at 2691–92 (Ginsburg, J., dissenting) (citing Legal's deposition testimony at A522).

201. *Id.* at 2664.

202. *Id.* at 2666.

203. *Id.* Although Justice Kennedy's opinion suggests that the fact that IOS did job analysis at all and included nonwhites in the tests' design and as interviewers indicates that the test was especially racially sensitive, conducting job analysis to ensure the participation of fair representation of the racial demographics of the workforce for which the test is being designed is actually a requirement. See discussion *infra* Part III.B.

204. See Industrial-Organizational Psychologists Amicus Brief, *supra* note 37, at 11 ("Leadership in emergency-response crises requires expertise in fire-management techniques and sound judgment about life-and-death decisions."); see also *id.* ("Simply put, command presence is a hallmark of a successful fire officer. . . . Virtually all studies of fire management emphasize that command presence is vital to the safety of firefighters at the scene and to the successful accomplishment of the firefighting mission and the safety of the public.") (citing CHASE SARGENT, FROM BUDDY TO BOSS: EFFECTIVE FIRE SERVICE LEADERSHIP 21 (2006); JOHN F. COLEMAN, INCIDENT MANAGEMENT FOR THE STREET-SMART FIRE OFFICER 21–26 (2d ed. 2008); VINCENT DUNN, COMMAND AND CONTROL OF FIRES AND EMERGENCIES 1–6 (1999)).

performance-based firefighter assessment evaluating candidates' responses to simulated, job-based tasks and real-world conditions that are used by other fire departments, could better measure the qualities of a fire officer.<sup>205</sup> Third, the relative weighting of the multiple-choice and oral parts of the exam as 60 percent and 40 percent respectively, was based not on any objective determination of the numerical score that reflected minimum competence but, instead, was arbitrarily set based on the union-negotiated agreement.<sup>206</sup>

Despite these substantial design and usage flaws, the written multiple-choice and oral portions of the IOS-developed tests were administered to over one hundred firefighters in November and December 2003. When the candidates were ranked by their composite scores, only two Latino firefighters and none of the African American firefighters who passed the exams (scores of seventy or higher) ranked high enough on the promotional lists to fill any of the fifteen vacant fire officer positions. These results proved to be deeply problematic.

## 2. The Potential Case of the New Haven 13+

In this Subpart, we look at the *Ricci* exams in a pre-*Ricci* Title VII context to consider whether the City was justified in its fear of losing a Title VII claim brought by Black and Latino firefighters. We do so by analyzing the results of the *Ricci* exams to evaluate their disparate impact, considering the question of the exams' business necessity, and examining whether less discriminatory alternatives to the existing exams were available. In addition, we use this Subpart to point out that, contrary to the typical framing of *Ricci* as a case that pits whites' interests against the interests of nonwhites, there were whites who had an interest in the City cancelling the tests and replacing them with exams that better measured job-related merit. Among them were white residents of New Haven with an interest in being served by the most qualified fire officers as well as white firefighters who would have scored higher and thus been promoted had the City used more job-relevant examinations.

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205. See Industrial-Organizational Psychologists Amicus Brief, *supra* note 37, at 15 ("It is well-recognized by I/O psychologists and firefighters alike that written, pencil-and-paper tests, while able to measure certain cognitive abilities (e.g., reading and memorization) and factual knowledge, do not measure other skills and abilities critical to being an effective fire officer as well as alternative methods of testing do.") (citing MICHAEL A. TERPAK, ASSESSMENT CENTER: STRATEGY AND TACTICS 1 (2008) (asserting that multiple-choice exams are "known to be poor at measuring the knowledge and abilities of the candidate, most notably that of a fire officer"). The term "fire officer" is used in contrast to the term "firefighter" to refer to higher-ranking firefighters with supervisory responsibilities over entry-level firefighters. See generally Industrial-Organizational Psychologists Amicus Brief, *supra* note 37.

206. See *supra* text accompanying notes 197–199.

The Black, Latino, and white firefighters we are labeling the hypothetical “New Haven 13+”<sup>207</sup> plaintiffs, like the New Haven 20, would have described themselves in their lawsuit as “hardworking and dedicated” firefighters who were excluded because the 2003 test measured characteristics unrelated to performing the job of fire officer. The New Haven 13+ plaintiffs might claim that the 2003 tests included job-irrelevant test components that measured test takers’ ability to answer “fire buff”-type multiple-choice test questions unrelated to the real-world tasks required of fire lieutenants and captains.<sup>208</sup> The central claim of the New Haven 13+ would thus be a classic disparate impact claim that the tests and the way they were deployed produced a negative racial impact that unnecessarily screened out qualified candidates.<sup>209</sup>

a. Black and Latino Plaintiffs

We speculate that the lead plaintiff for the New Haven 13+ lawsuit against the City—the counterpart to Frank Ricci—might have been someone like African American firefighter James Watkins. Watkins is a twelve-year veteran of the New Haven fire department who, like Frank Ricci, testified at the January 22, 2004 Civil Service Board public hearing on the issue of the certification of the 2003 exams. Based on the City’s “cutoff score” of seventy, Watkins passed the lieutenant exam but, because he ranked below 10th place on the list, could

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207. See Part III.A.2 for a discussion of the potential claims of the other white plaintiffs and why we include them in the New Haven 13+.

208. Minority firefighters in New Haven have noted that white firefighters are much more likely to have grown up with fathers and brothers who are New Haven firefighters and, as a consequence, have more access to supportive networks in advancing their careers. See Allan & Bazelon, *supra* note 43. This mattered because unlike minority firefighters who were “first-generation,” whites could get help and materials from relatives in the fire department. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2692 (2009) (Ginsburg, J., dissenting). A “fire buff” is a loose term for someone who knows substantial amounts of firefighting-relevant terminology but who does not necessarily have “street smarts”—the ability to perform the actual tasks critical to being a successful firefighter in the real world. Cf. Industrial-Organizational Psychologists Amicus Brief, *supra* note 37, at 15 (citing INT’L ASS’N OF FIRE CHIEFS & NAT’L FIRE PROTECTION ASS’N, FIRE OFFICER: PRINCIPLES AND PRACTICE 28 (2006) (describing the criticism of written tests as producing firefighters who are “[b]ook smart, street dumb”).

209. As noted above, such disparate impact plaintiffs would not have had to prove that New Haven intentionally discriminated against them on the basis of race in order to win their Title VII lawsuit against the City. See *supra* text accompanying notes 180–181. Before the Supreme Court’s ruling in *Ricci*, minority firefighters in New Haven said that they still might sue. Bass, *supra* note 8 (“Gary Tinney and James Rawlings insisted that the Firebirds and NAACP won’t give up. They will file suit to challenge the test results if indeed the lower court ends up certifying the 2003 promotional exams, Tinney said.”). Michael Briscoe filed a disparate impact lawsuit that has since been dismissed as barred by the *Ricci* opinion. See *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2010 WL 2794212 (D. Conn. July 12, 2010). After the Court’s ruling in *Ricci*, other minority firefighters filed Title VII complaints with the Equal Employment Opportunity Commission (EEOC). See Kaempffer, *Fire Exams Pose Problems*, *supra* note 9.



not be considered for one of the eight vacant lieutenant positions.<sup>210</sup> Watkins was close enough to being eligible for promotion that he was invited to join the Ricci litigation, although he declined to do so.<sup>211</sup> Like Frank Ricci, newspapers report Watkins as having said that he studied very hard for the 2003 lieutenant exam, sacrificing time with loved ones and spending \$1300 on study materials.<sup>212</sup> Although he earned a high score as compared to the Black, Latino, and white firefighters who passed but ranked lower on the lieutenant list and those who did not score high enough to be placed on the list at all, Watkins questioned the fairness of the promotional tests.<sup>213</sup>

Tables 1 and 2 are reconstructions of the 2003 Lieutenant and Captain Lists that show the applicants who took and “passed” the 2003 New Haven promotional exams (thirty-four lieutenant applicants and twenty-two captain applicants) in numerical rank order according to their race and their combined score comprised of a 60–40 percent weighting of each individual’s written and oral exam subscores (the practice of the City in assigning positions on promotional lists). They also show Frank Ricci, the other Ricci plaintiffs, James Watkins, African American firefighter, Michael Briscoe, who filed a disparate impact lawsuit against New Haven after the Supreme Court issued its ruling in Ricci,<sup>214</sup> and the two female applicants for captain’s positions on the promotional lists. We have constructed Table 1 and Table 2 based on a combination of the facts provided in published court opinions in the Ricci and Briscoe litigation, newspaper articles, the promotional lists now certified and publicly released by the city of New Haven, and other publicly available information.<sup>215</sup> Consistent

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210. Watkins was positioned fifteenth on the lieutenant list of seventy-seven candidates and has since been promoted to lieutenant contingent on his agreement to forfeit any potential backpay claims based on future allegations of discrimination. See William Kaempffer, *10 More Firefighters Receive Promotions*, NEW HAVEN REG., Dec. 5, 2009, available at [http://www.nhregister.com/articles/2009/12/05/news/a3-nfirepromotions\\_art.txt](http://www.nhregister.com/articles/2009/12/05/news/a3-nfirepromotions_art.txt); CIVIL SERV. BD., CITY OF NEW HAVEN, ELIGIBLE LIST ROSTER FOR FIRE LIEUTENANT 1–3 [hereinafter ELIGIBLE LIST ROSTER FOR FIRE LIEUTENANT] (on file with authors).

211. See Bass, *supra* note 8.

212. William Kaempffer, *Group Says Blacks Will Fight if City Certifies the Exam*, NEW HAVEN REG., July 1, 2009, available at [http://www.nhregister.com/articles/2009/07/01/news/new\\_haven/a1-firebirdsrespond.txt](http://www.nhregister.com/articles/2009/07/01/news/new_haven/a1-firebirdsrespond.txt).

213. Kaempffer, *Fire Exams Pose Problems*, *supra* note 9.

214. See Briscoe Complaint, *supra* note 36.

215. See Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 n.3 (D. Conn. 2006); Briscoe Complaint, *supra* note 36, at 6; Bass, *supra* note 8; Adam Liptak, *Justices to Hear White Firefighters’ Bias Claim*, N.Y. TIMES, Apr. 9, 2009, at A1; ELIGIBLE LIST ROSTER FOR FIRE LIEUTENANT, *supra* note 210, at 1–3. While those sources included rank, position, race, and combined score, they did not include written and oral components. The oral score and written score data in this table is taken from publicly available, unofficial data available at a website expressing support for the position of the Ricci plaintiffs—Adversity.net, which is designated as a website “For Victims of Reverse Discrimination.” See Adversity.net, Case 50: New Haven Refused to Promote Firefighters Who Scored Highest on Exam! (June 29, 2009), <http://www.adversity.net/newhavenfd/default.htm>; see also Ricci, 554 F. Supp. 2d at 145 n.2; Sulzberger, *supra* note 151;

with New Haven's actual promotional lists, each firefighter's "combined score" is the sum of his or her written (multiple-choice exam) score weighted at 60 percent and oral (structured interview) score weighted at 40 percent. Also, to conform with the actual New Haven promotional lists, Tables 1 and 2 include only those firefighters who scored at or above the score the City designated as the cutoff score for "passing" the lieutenant and captain examinations—a "combined score" of seventy. The "list position" in our tables reflects each firefighter's position on the list in numerical order from highest to lowest combined score. The "list rank" is the official rank designation New Haven gave firefighters based on their position on the list.<sup>216</sup>

The unshaded portion of Tables 1 and 2 demarcates the ranks and positions from which the City would have promoted to fill the vacant lieutenant and captain positions if the 2003 exam results had been certified. It is visibly apparent from Table 1 and Table 2 why the City concluded that some nonwhites would likely file a Title VII disparate impact case if promotions were made from the 2003 lists. The "promotable" candidates ranked from 1st to 10th on the lieutenant list (the unshaded portion of Table 1) were all white, and no Black candidates were among the promotable candidates ranked from 1st to 8th on the captain list (the unshaded portion of Table 2).<sup>217</sup> The firefighters who *could have been* plaintiffs in our theorized hypothetical New Haven 13+ lawsuit are the thirteen Black and Latino firefighters (in boldface type and marked by an asterisk (\*))<sup>218</sup> plus white firefighters who passed the lieutenant and captain exams but ranked too low on the list of passing applicants to be eligible for promotion (white firefighters in the shaded portions of Table 1 and Table 2).<sup>219</sup>

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CIVIL SERV. BD., CITY OF NEW HAVEN, ELIGIBLE LIST ROSTER FOR FIRE CAPTAIN 1-2 [hereinafter ELIGIBLE LIST ROSTER FOR FIRE CAPTAIN] (on file with authors).

216. Firefighters with the same combined score are ranked the *same* but assigned different list positions based on civil service rules.

217. "Promotable" for the purposes of our discussion is a function of where the candidates ranked on the lists and the number of available positions. Although six Black firefighters (positioned 13th, 14th, 15th, 16th, 20th, 22nd and 24th on the lieutenant list) and three Latino firefighters (positioned 27th, 28th and 31st) achieved passing scores, only the firefighters in the first through tenth positions on the lieutenant list—all of whom were white—could be promoted to fill the eight existing lieutenant vacancies. See *Ricci*, 554 F. Supp. 2d at 145 n.3.

Three Black lieutenants (positioned 16th, 19th, and 22nd on the captain list) and one Latino lieutenant (positioned 13th) had passing scores on the captain exam but did not rank high enough to be considered for one of the existing captain positions. With seven open captain positions, only the top nine candidates were eligible to be promoted to the position of captain. Seven of the nine individuals in the first through ninth positions on the captain list were white. It was also possible that all of the lieutenants promoted to captain would be white because, under the Rule of Three, two of the candidates eligible for promotion—including the two Latino candidates in the seventh and eighth positions on the captain list—could be passed over without violating the rule. *Id.* at 145 n.2.

218. See *infra* Part III.A.2.b.

219. See *infra* tbl.1 & tbl.2.

TABLE 1. Candidates Passing (Scoring  $\geq 70$ )  
the Ricci Lieutenant Exam<sup>220</sup>

Lieutenant List Position	Racial Identification	Oral Score	Written Score	Combined Score	Lieutenant List Rank
1st	White <sup>† Ricci plaintiff</sup>	88.75	91	90.10	1
2nd	White <sup>†</sup>	87.70	87	87.20	2
3rd	White <sup>†</sup>	77.50	91	85.60	3
4th	White <sup>†</sup>	85.00	84	84.40	4
5th	White <sup>†</sup>	80.00	87	84.20	5
6th	White <sup>† Frank Ricci</sup>	73.75	91	84.10	6
7th	White <sup>† Ricci plaintiff</sup>	80.83	84	82.73	7
8th	White <sup>† Ricci plaintiff</sup>	73.33	89	82.73	7
9th	White <sup>† Ricci plaintiff</sup>	63.75	95	82.50	8
10th	White <sup>† Ricci plaintiff</sup>	68.33	91	81.93	9
11th	White <sup>Ricci plaintiff</sup>	69.58	86	79.43	10
12th	White	73.75	81	78.10	11
13th	White <sup>Ricci plaintiff</sup>	58.75	89	76.90	12
14th	Black*	77.50	76	76.60	13
15th	Black* <sup>James Watkins</sup>	61.25	86	76.10	14
16th	Black*	80.42	73	75.97	15
17th	White	74.17	77	75.87	16
18th	White	63.33	83	75.13	17
19th	White	87.50	66	74.60	18
20th	Black*	65.83	80	74.33	19
21st	White <sup>Ricci plaintiff</sup>	78.33	70	73.33	20
22nd	Black*	70.83	74	72.73	21
23rd	White	66.67	76	72.27	22

220. As explained above, we have constructed this table based on a combination of the facts provided in published court opinions in the Ricci and Briscoe litigation, newspaper articles, and the promotional lists now certified and publicly released by the city of New Haven. See Ricci, 554 F. Supp. 2d at 145 n.3; Briscoe Complaint, supra note 36, at 6; Liptak, supra note 215, at A1; Bass, supra note 8; ELIGIBLE LIST ROSTER FOR FIRE LIEUTENANT, supra note 210, at 1–3. While those sources included rank, position, race, and combined score, they did not include written and oral components. The oral score and written score data in this table is taken from publicly available, unofficial data available at a website expressing support for the position of the Ricci plaintiffs and designated as a website “For Victims of Reverse Discrimination.” See Adversity.net, supra note 215.

24th	Black* <sup>Michael Briscoe</sup>	92.08	59	72.23	23
25th	White	72.50	72	72.20	24
26th	White	73.33	71	71.93	25
27th	Latino*	55.00	82	71.20	26
28th	Latino*	69.17	72	70.87	27
29th	White	65.83	74	70.73	28
30th	White	58.33	79	70.73	28
31st	Latino*	53.75	82	70.70	29
32nd	White	77.50	66	70.60	30
33rd	White	73.75	68	70.30	31
34th	White	71.67	69	70.07	32

†“promotable” candidates eligible for eight existing lieutenant vacancies

\*nonwhite candidates with passing scores

TABLE 2. Candidates Passing (Scoring  $\geq 70$ )  
the Ricci Captain Exam<sup>221</sup>

Captain List Position	Racial Identification	Oral Score	Written Score	Combined Score	Captain List Rank
1st	White <sup>† Ricci plaintiff</sup>	89.52	95	92.81	1
2nd	White <sup>† Ricci plaintiff</sup>	80.00	95	89.00	2
3rd	White <sup>† Ricci plaintiff</sup>	82.38	87	85.15	3
4th	White <sup>†</sup>	88.57	76	81.03	4
5th	White <sup>† Ricci plaintiff</sup>	76.19	84	80.88	5
6th	White <sup>† Ricci plaintiff</sup>	76.19	82	79.68	6
7th	Latino <sup>† Ricci plaintiff</sup>	76.19	82	79.68	6
8th	Latino <sup>†</sup>	70.00	84	78.40	7
9th	White <sup>†</sup>	73.81	81	78.12	8
10th	White <sup>Ricci plaintiff</sup>	84.29	72	76.91	9
11th	White <sup>Ricci plaintiff</sup>	87.62	69	76.45	10
12th	White	80.00	74	76.40	11
13th	Latino*	79.05	74	76.02	12

221. See *supra* note 220; see also *Ricci*, 554 F. Supp. 2d at 145 n.2; Sulzberger, *supra* note 151, at A20; ELIGIBLE LIST ROSTER FOR FIRE CAPTAIN, *supra* note 215.

14th	White	73.81	77	75.72	13
15th	White	76.67	74	75.07	14
16th	Black*	82.38	70	74.95	15
17th	White (Female)	73.33	74	73.73	16
18th	White	70.00	76	73.60	17
19th	Black* (Female)	68.57	74	71.83	18
20th	White <sup>Ricci plaintiff</sup>	82.38	64	71.35	19
21st	White	56.67	81	71.27	20
22nd	Black*	70.95	70	70.38	21

†“promotable” candidates eligible for seven existing captain vacancies

\*nonwhite candidates with passing scores

Of the seventy-seven firefighters—forty-three white, nineteen African American, and fifteen Latino—who took the 2003 lieutenant exam, six Black and three Latino firefighters achieved passing scores as compared to twenty-five white firefighters. Of the forty-one firefighters—twenty-five white, eight African American, and eight Latino—who took the 2003 captain exam, three Black and three Latino candidates had passing scores as compared to sixteen white candidates.

The exclusionary effects of the 2003 promotional exams would have exposed New Haven to Title VII disparate impact liability unless it could demonstrate that the IOS-designed tests were “job related” and that no less discriminatory alternatives existed. Basic principles of proper test design and test usage suggest New Haven could not meet this burden for reasons we explicate below. Under the *Griggs* standard, now codified in Title VII,<sup>222</sup> the New Haven 13+ plaintiffs’ likelihood of success would turn, first, on whether the City could meet its burden to prove that the employment tests at issue in *Ricci* were “job related” and, second, on whether—even if the City satisfied the job-relatedness burden—the plaintiffs could demonstrate the existence of less discriminatory alternatives to the 2003 exams.

#### b. Different White Plaintiffs

It is our contention that New Haven could have been sued by white as well as minority firefighters had it certified the 2003 exams. Some of the white

222. 42 U.S.C. § 703 (k)(1)(A)(ii) (2006).

firefighters who did not become *Ricci* plaintiffs could assert that they too were injured by the discriminatory practice that Black and Latino firefighters would have challenged under Title VII disparate impact law; they could have joined a lawsuit like the hypothetical one involving James Watkins that we described above, thereby becoming the “plus” in the New Haven 13+.<sup>223</sup> It is significant to note that this different group of white firefighters—individuals who questioned the promotional exams’ fairness as a measurement of job-related merit—suffered an injury because of New Haven’s failure to use “the best test.”

In other words, whites have the same factual basis for opposing the use of a flawed employment test as nonwhites—its failure to measure their skills and abilities to do the job for which they have applied. Some scholars have argued that whites might have third-party standing to file a Title VII discrimination claim.<sup>224</sup> Under such a theory, the white firefighters joining in the New Haven 13+ lawsuit would be asserting that they were the indirect victims of the City’s race-based discrimination against Black and Latino firefighters. However, our argument is not predicated on this claim. Our point is that in the same lawsuit in which minority plaintiffs asserted their Title VII claims, a legal claim on behalf of white firefighters could have been filed against the City for promoting based on the 2003 tests by alleging that the white plaintiffs were injured under state and local laws that required the City to base civil service promotions on true and accurate assessments of individual, job-related merit.<sup>225</sup>

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223. Because several of the white *Ricci* plaintiffs scored too low on their exams to be promoted, their personal interests might have been better served in a hypothetical suit brought by New Haven 13+ plaintiffs challenging the fairness of the test. Specifically, lower-scoring *Ricci* plaintiffs were not promoted when the City certified the 2003 exams pursuant to the Court’s ruling. These white firefighters might have been ranked higher and been promoted had the City originally used an alternative weighting of the multiple-choice and oral test components or used an alternative performance-based test such as a firefighter assessment center.

224. See, e.g., Noah D. Zatz, *Beyond the Zero Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002). Their pecuniary injury—not being promoted to a higher-paying position because of the City’s use of a test that is less job related than available alternatives—would be their basis for standing. The Third Circuit has found standing based on a similar rationale in the context of a gender discrimination claim: “Because the male appellants here have pled specific facts to demonstrate a concrete injury as well as a nexus between the alleged injury and the sex-based discrimination, even though that discrimination was aimed in the first instance at others, we conclude that they have established standing.” *Anjelino v. New York Times Co.*, 200 F.3d 73, 92 (3d Cir. 2000) (finding that male employees who were the “indirect victims of sex-based discrimination have standing to assert claims under Title VII if they allege colorable claims of injury-in-fact that are fairly traceable to acts or omissions by defendants that are unlawful under the statute”).

225. See *Bridgman v. Kern*, 13 N.Y.S.2d 249, 256 (App. Div. 1939) (“An examination cannot be classed as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed . . . .”); see also *Lenert v. Wilson*, 206 N.E.2d 294, 296 (Ill. Ct. App. 1965) (case filed by a lieutenant on the Chicago Police Force alleging that “the procedures by which his efficiency was rated for the purposes of promotion violated an Illinois statute requiring all examinations for promotion to be competitive”). We do not suggest that such a claim is as strong as the Black and

Looking beyond the “raced” perspective that test fairness only inures to the benefit of minorities, it becomes possible to see that New Haven faced potential legal and—probably more significantly—political challenges from white officers ranked lower on the list. Like the thirteen Black and Latino officers who performed well on the promotional tests but whose relative ranking was too low for them to be promoted, the white officers ranked lower on the list could have challenged the City’s failure, for example, to use alternative tests or an alternative weighting of the test components that would provide a better basis for judging their job-related merit.

This analysis illustrates what we term the “cross-racial” implications of employment testing that fails to measure important aspects of job performance or that is based on arbitrary weightings of test components. Whether an employment test is job related has an individual impact on firefighters who would have scored higher had the test been comprised of performance-based components that more accurately assessed job-related characteristics. All firefighters, white and nonwhite, who took the 2003 exams have an interest in being assessed according to a job-related examination—a test that measures that individual’s ability to perform the job of a fire officer.<sup>226</sup> Yet this was a matter of interest not only to the firefighters, but also to those concerned about public safety.

### 3. Evaluating Adverse Impact

To implement Title VII’s disparate impact provisions, the Equal Employment Opportunity Commission (EEOC), in conjunction with several other federal agencies, has promulgated regulations requiring employers to apply the “four-fifths rule” to determine whether their use of a particular employment test has an “adverse impact” on particular racial or gender groups.<sup>227</sup> While the Court considers a variety of statistical tests in evaluating whether racial disparities in candidate selection constitute Title VII adverse impact,<sup>228</sup> the Uniform Guidelines for Employee Selection Procedures (the Uniform

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Latino plaintiffs’ Title VII disparate impact claims. Nevertheless, we note that such a case could have been filed to illustrate the cross-racial impact of the City’s failure to use the most job-related test available. These other white firefighters could also have exerted their displeasure at being denied promotion in the political arena—an alternative rationale for the City’s decision to refuse to certify the 2003 promotional exams.

226. See, e.g., *United States v. City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009).

227. See 29 C.F.R. § 1607.4(D) (2010) (explaining the “four-fifths rule” for adverse impact).

228. Proving unlawful race discrimination under a disparate impact theory requires presenting statistical evidence that the questioned employment policy or practice affects persons of a particular race or gender more harshly than persons of a different race or gender. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). While there is no rigid formula for establishing disparate impact, “statistical disparities must be sufficiently substantial.” *Id.* at 995.

Guidelines) define adverse impact as existing when selection criteria select one racial group at less than four-fifths (80 percent) of the rate of selection for the race selected at a higher rate.<sup>229</sup>

The Court has held that Title VII disparate impact plaintiffs may make a prima facie case by presenting statistical evidence of racially adverse impact.<sup>230</sup> Accordingly, the fact that the 2003 lieutenant and captain exams generated racially skewed results raised the specter of legal liability under Title VII's disparate impact provisions. When the director of New Haven's Department of Human Resources analyzed the 2003 lieutenant and captain exam results, she concluded that the racial disparities in the tests' outcomes violated the four-fifths rule.<sup>231</sup> The City's subsequent conclusion that the racial disparities in the 2003 exams met the Title VII standard for adverse impact on Black and Latino firefighters was and remains uncontested.<sup>232</sup>

In Table 3, we have conducted our own statistical analysis to evaluate the strength of New Haven's claim that its use of the 2003 lieutenant and captain exams to fill vacant positions would have had a racially adverse impact sufficient to establish a prima facie case under Title VII's disparate impact provisions.<sup>233</sup>

229. See 29 C.F.R. § 1607.4(D) (explaining the "four-fifths rule" for adverse impact); see also *Connecticut v. Teal*, 457 U.S. 440, 443 n.4 (1982) (describing the Uniform Guidelines on Employment Selection Procedures). Racially adverse impact exists under the four-fifths rule "when the rate of selection of applicants of a particular race is less than eighty percent (four-fifths) of the rate of selection of applicants of other races." *West-Faulcon*, *supra* note 104, at 1129.

230. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination.").

231. See Joint Appendix at 220–228, 223, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 454249 (Marcano Affidavit) ("My initial concerns were based on the fact that under Section 4D: Adverse Impact and the "four-fifths rule" of the Uniform Guidelines on Employee Selection Procedures, the tests at issue in this litigation revealed considerable adverse impact.").

232. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009).

233. Statistical analysis is useful in assessing whether discrimination has occurred because it is assumed that, absent other legitimate explanation, "non-discriminatory hiring practices will produce a work force that is more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977). Accordingly, a comparison of the expected number of hires yields an indication of whether the difference is likely the product of chance or whether it is not random. Where the differences between the actual and expected numbers are greater than two to three standard deviations, the statistical disparity constitutes evidence of a Title VII violation. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977). The standard deviation is the measure of the fluctuation between the actual number of candidates of a particular race selected compared to the number statistically "expected" in absence of racial discrimination. *Id.* ("[A] fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race . . ."). If an employment selection process is free of discrimination, then the number of nonwhite candidates selected could be modeled on a binomial distribution. RAMONA L. PAETZOLD & STEVEN L. WILLBORN, *THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES*, 33 (1994). "The measure of the predicted fluctuations from the expected value is the standard deviation,



Table 3 compares white exam passing rates to Black, white passing rates to Latino, and white passing rates to nonwhite (Black and Latino combined) passing rates and applies the four-fifths “rule of thumb”<sup>234</sup> test as well as a more sophisticated test of statistical significance, the Fisher Exact Test<sup>235</sup>—the statistical test for significance appropriate for small sample sizes.<sup>236</sup> A sufficiently small “significance probability” (the *p*-value) under the Fisher Exact Test is considered evidence of racially adverse impact.<sup>237</sup>

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defined for the binomial distribution as the square root of the product of the total sample . . . times the probability of selecting a [nonwhite candidate] times the probability of selecting a [white candidate].” *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). The hypothesis being tested by this statistical methodology is an assessment of how likely the observed disparity in the actual and the expected number of nonwhites selected would be if in fact that employer is selecting at random with regard to race. See, e.g., PAETZOLD & WILLBORN, *supra*, at 36.

234. Courts have referred to the four-fifths rule as a “rule of thumb” for determining whether a rebuttable presumption of race discrimination is appropriate. See, e.g., *West-Faulcon*, *supra* note 104, at 1121. See also *supra* text accompanying notes 227–229.

235. The Fisher Exact Test is the preferable statistical analysis in this instance. The two-tailed Fisher Exact Test is a statistical test for significance designed to be more accurate than chi-square analysis when the sample size for the numbers analyzed (*n*) is small. See, e.g., STALTON A. GLANTZ, *PRIMER ON BIostatISTICS* 158 (6th ed. 2005) (“In small studies, when the expected frequency is smaller than 5, the Fisher Exact Test is the appropriate procedure. The test turns the liability of the small sample size into a benefit.”).

236. “A number of more sophisticated statistical analyses may also be employed to demonstrate that the racial impact of a particular selection criterion is sufficiently adverse to be considered *prima facie* evidence of racial discrimination.” *West-Faulcon*, *supra* note 104, at 1130 (“Courts rely on the results of such statistical analyses to determine whether the success rates for racial groups differ by a statistically significant degree; if such *prima facie* disparate impact is established, discriminatory animus should be presumed and the burden is placed on the entity making the selections to demonstrate that its policies are not racially discriminatory.”).

237. The *p*-value is the chance or likelihood—“significance probability”—that the observed racial disparity happened by chance (without regard to race). See, e.g., ALAN AGRESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 224–25 (3d ed. 1999); PAETZOLD & WILLBORN, *supra* note 233, at 36. The smaller the *p*-value, the stronger the evidence that the selection was not random with regard to race, such that smaller *p*-values are labeled more “statistically significant.” *Id.* at 37; AGRESTI & FINLAY, *supra*, at 225.

TABLE 3. Adverse Impact Analysis of Passing Rates  
for the Ricci Exams by Race/Ethnicity<sup>238</sup>

		Pass (score ≥ 70)	Fail (< 70)	Percent Passing	4/5th Rule (< 80%)	Fisher Exact Test (p)
Lieutenant	White	25	18	58.1	.54	0.0971 <sup>†</sup>
	Afr Amer	6	13	31.6	(Yes)	
	White	25	18	58.1	.34	0.0159*
	Latino	3	12	20.0	(Yes)	
	White	25	18	58.1	.46	0.006**
	Nonwhite	9	25	26.5	(Yes)	
Captain	White	16	9	64.0	.59	0.238
	Afr Amer	3	5	37.5	(Yes)	
	White	16	9	64.0	.59	0.238
	Latino	3	5	37.5	(Yes)	
	White	16	9	64.0	.59	0.120
	Nonwhite	6	10	37.5	(Yes)	

Black, Latino, and nonwhite passing rates for the 2003 lieutenant exam were 31.6 percent, 20 percent, and 26.5 percent, respectively, compared to a white passing rate of 58.1 percent. For the 2003 captain exam, the Black, Latino, and nonwhite passing rates were the same, 37.5 percent, compared to a white passing rate of 64 percent. Our analysis confirms that both the lieutenant and captain exam passing rates violated the four-fifths rule—the Black, Latino, and nonwhite passing rates were less than eighty percent (four-fifths) of the white passing rate.

While, under our analysis, the racial differences in passing rates on the lieutenant exam were also statistically significant or marginally significant under the Fisher Exact Test, we did not find that to be the case for the captain exam rates. Yet, we also note that zero Black and zero Latinos were promotable from

238. We applied the four-fifths rule and the Fisher Exact Test to information described in published court opinions in the Ricci litigation and documents produced by the City. See Ricci v. DeStefano, 554 F. Supp. 2d 142, 145–47 (D. Conn. 2006); Joint Appendix at 215–19, Ricci 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 454249. The category “Nonwhite” refers to Black and Latino candidates, and “p” refers to the two-tailed p-value, the probability that the variation between the actual and expected passing rates for the racial groups happened due to chance alone. The superscripts indicate whether variation is statistically significant: †≥ 0.1 indicates “marginal statistical significance,” \*≥ 0.05 indicates “statistical significance,” \*\*≥ 0.01 indicates “strong statistical significance.” We note, as did the Ricci district court opinion, that the passing rate and the promotion rate are not identical. See Ricci, 554 F. Supp. 2d at 145–47.

the 2003 lieutenant list, and zero Blacks were promotable from the 2003 captain list.<sup>239</sup> This “inexorable zero”<sup>240</sup> made it all the more likely that excluded minorities would file suit and be successful in demonstrating adverse impact, particularly given the long-standing pattern of Black and Latino underrepresentation in the fire officer ranks.<sup>241</sup>

Despite earning a passing combined score of seventy or higher, the thirteen Black and Latino candidates we have labeled the New Haven 13 were not promotable. Thus, in addition to the substantial adverse impact our analysis of the lieutenant and captain exam pass/fail rates illustrates in Table 3, New Haven also knew that minority candidates who passed the exams but were nevertheless denied promotion would point to racial disparities in the list positions of firefighters who passed the exam to make a prima facie case of Title VII disparate impact.

Table 4 illustrates the differences in racial groups’ positioning on the promotional lists at issue in *Ricci*. Firefighter-applicants were “promotable” to lieutenant if ranked in one of the ten highest list positions and to captain if ranked in one of the nine highest list positions. The first column shows the inexorable zero previously described; virtually all vacant lieutenant and captain positions would go to white firefighters. The second column of Table 4 tallies the number of Black, Latino, and white firefighters who “passed [each] exam but [were] not promotable”—did not rank high enough on the lists to be eligible for one of the vacant positions—because of their position (rank) on the list, and the third column includes the number of Black, Latino, and white firefighters with passing and failing exam scores who were not promotable. The fourth column of Table 4 compares each “racial group’s highest rank/list position” for the 2003 exams to that for the previous fire lieutenant and captain exams administered by the city of New Haven, while the fifth (last) column of Table 4 lists the

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239. They would likely make this argument irrespective of whether the racial differences in candidates’ passing rates were statistically significant. William Kaempffer, *Accusations of Racial Discrimination Polarize Fire Department*, NEW HAVEN REG., June 9, 2004, available at <http://www.nhregister.com/articles/2004/06/09/import/11907304.txt> (“A group of black firefighters has retained attorney John Williams of New Haven, who has pledged to file his own CHRO complaints against the fire union for its position in the promotional flap.”).

240. As the Court noted in its decision in *International Brotherhood of Teamsters v. United States*, the glaring absence of minority drivers—“the inexorable zero” was powerful evidence of a pattern and practice of discrimination. 431 U.S. 324, 342 n.23 (1977). This does not mean that statistical significance is always established where zero minorities or women are hired or promoted; instead, statistical significance is a function of the difference between the expected number of hires and the actual number hired. See PAETZOLD & WILLBORN, *supra* note 233, at 35 n.8. This underscores the point that statistical evidence is important evidence of whether there is disparate impact, but it is neither conclusive evidence of disparate impact, nor determinative of that question.

241. *Teamsters*, 431 U.S. at 324 (noting stark evidence of class-wide discrimination given the nearly complete absence of Blacks and Latinos in the line driver positions).

difference between each racial group's highest list position for the 2003 promotional exams and the highest list position for that racial group on the prior administration of that exam.

TABLE 4. Analysis of Racial Differences  
in "Promotable" Rank for the Ricci Exams<sup>242</sup>

		Promotable (vacancies +2)	Passed but Not Promotable	Not Promotable (Passing and Failing)	Racial Group's Highest Rank/List Pos'n (Prior Exam Admin. <sup>243</sup> )	Diff. in Highest List Position Comparing Ricci Lists and Prior Lists
Lieutenant	White	10	15	33	1st (1st)	0 Positions
	Afr Amer	0	6	19	14th (5th)	-9 Positions
	White	10	15	33	1st (1st (tie))	0 Positions
	Latino	0	3	15	27th (1st (tie))	-26 Positions
	White	10	15	33	1st (1st (tie))	0 Positions
	Nonwhite	0	9	34	14th (1st (tie))	-13 Positions
Captain	White	7	9	18	1st (1st)	0 Positions
	Afr Amer	0	3	8	16th (5th)	-9 Positions
	White	7	9	18	1st (1st)	0 Positions
	Latino	2	1	6	6th (4th)	-2 Positions
	White	7	9	18	1st (1st)	0 Positions
	Nonwhite	2	4	14	6th (4th)	-2 Positions

Table 4 shows the racial disparities in candidates' positions on the list—white firefighters are disproportionately located at the highest rank positions on the promotional lists, while Black and Latino firefighters rank lower. For the

242. We have constructed this table based on a combination of the facts provided in published court opinions in the Ricci litigation. See Ricci, 554 F. Supp. 2d at 145 nn.2 & 3. "Nonwhite" refers to African American and Latino candidates. "Not promotable" refers to candidates ineligible for consideration for promotion at the time the New Haven Civil Service Board voted on whether to certify the 2003 promotional lists.

243. On the 1999 lieutenant exam, the highest-ranking white firefighter was in the first position on the list, the highest-ranking African American firefighter was in the fifth position on the list, and the highest-ranking Latino firefighter was tied for the first position. See Joint Appendix at 218, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328) (Marcano Affidavit). On the 1998 captain exam, the highest-ranking white firefighter was in the first position on the list, the highest-ranking African American firefighter was in the fifth position on the list, and the highest-ranking Latino firefighter was in the fourth position. *Id.* at 219. The first number is the ranking under the exams at issue in Ricci; the second is ranking under the previous exams.

2003 exams, the highest ranked Black and Latino firefighters were in the 14th and 27th list positions, respectively, on the lieutenant promotional list and at 16th and 6th on the captain promotional list. On the prior administration of the promotional exams, Black and Latino firefighters had ranked as high as 5th and 1st, respectively, on the lieutenant exam, and 5th and 4th, respectively, on the captain exam.<sup>244</sup> Thus, whereas minority candidates who passed the firefighter promotional exams in prior years had ranked high enough to be eligible for promotion, the 2003 examinations had not only resulted in racially skewed pass/fail rates, they also resulted in promotional lists where all but two of the fifteen nonwhites who passed the exams would be ineligible for promotion.<sup>245</sup> As a result, in order to prevail if sued by Black and Latino candidates for violating Title VII's disparate impact provision, the city of New Haven would have to do more than demonstrate that the 2003 exams were job related. The City would also have the daunting obligation to demonstrate that "rank-order use" of the 2003 examination scores—promoting candidates in numerical order according to relatively small differences in test scores—was also a job-related necessity; this would require that New Haven demonstrate that the *order* in which firefighters were ranked on the promotional list correlated directly to the comparative job-related merit of each firefighter to become a fire lieutenant or captain.

Our analyses in Tables 1–4 demonstrate the reasonableness of New Haven's conclusion that it had reason to fear that nonwhite firefighters would file a Title VII disparate impact lawsuit if the City based promotions on the results of the 2003 examinations.<sup>246</sup> Perhaps because statistical significance is not legally required to establish Title VII liability,<sup>247</sup> and because no Black candidates could

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244. See Joint Appendix at 215–19, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 454249 (Marcano Affidavit).

245. See *infra* tbl.4.

246. Once the New Haven 13+ had filed suit, the City would have had the opportunity to present expert testimony rebutting the plaintiffs' adverse impact evidence. The fact that the Fisher Exact Test yields different conclusions than the four-fifths rule about adverse impact for the captain exam could mean the City had less reason to fear liability for use of the 2003 captain exam than the 2003 lieutenant exam. However, there is an equally strong and, possibly, better argument that the potential New Haven 13+ disparate impact plaintiffs could make—that the *promotion* rate is the "effective pass rate." Table 4 includes our statistical analysis of the promotion rates.

247. The Court has held that statistical significance is relevant to a determination that the disparate results did not occur by chance. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (observing that when expected results and actual results differ by more than two or three standard deviations, the statistical disparities in selection rates constitute evidence of disparate impact).

Racial disparate impact under the four-fifths rule exists when the rate of selection of applicants of a particular race is *less than eighty percent* (four-fifths) of the rate of selection of applicants of other races. A number of more sophisticated statistical analyses may also be employed to demonstrate that the racial impact of a particular selection criterion is sufficiently adverse to be

be considered for any of the ten vacant lieutenant and captain positions due to ranking and the “rule of three,”<sup>248</sup> the *Ricci* majority held—and the *Ricci* plaintiffs did not dispute—that “the racial impact here was significant.”<sup>249</sup>

#### B. *Ricci*’s Abandonment of Title VII Test Fairness Requirements

The essential logic of Title VII disparate impact law is that employers should be prohibited from excluding racial (or gender) groups by using tests unrelated to job performance. In *Ricci*, there were substantial facts to suggest that it would have been virtually impossible for New Haven to properly “validate”<sup>250</sup> the job-relatedness of the tests, leaving the City only the race-neutral remedy of using a different test to make promotions or the race-conscious remedy of adopting an affirmative action policy.<sup>251</sup> Without discussion of the psychometric principles that courts typically invoke to determine job-relatedness, the Court ignored undisputed evidence that it would have been fruitless for New Haven to try to validate its 2003 exams.

Although commentators and the *Ricci* plaintiffs have likened Title VII’s disparate impact provisions to an “implicit quota system,”<sup>252</sup> Title VII as originally interpreted by the Court in *Griggs*, and as amended in the Civil Rights Act of 1991, does not require racial proportionality in test results.<sup>253</sup> In fact, Title VII permits employers to use racially disproportionate tests if two conditions are met, both of which require psychometric expertise to identify: If the employment test satisfies the technical requirements consistent with the measurement of an applicant’s job performance ability, and if the plaintiff fails to present less discriminatory alternative options for assessing job performance, the employer’s use of racially skewed test results does not constitute race discrimination under

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considered prima facie evidence of racial discrimination. In addition to the four-fifths rule, chi-square analysis, confidence-interval analysis, and probability distribution analysis are statistical tests used to demonstrate the adverse impact of selection decisions. Courts rely on the results of such statistical analyses to determine whether the success rates for racial groups differ by a statistically significant degree; if such prima facie disparate impact is established, discriminatory animus should be presumed and the burden is placed on the entity making selections to demonstrate that its policies are not racially discriminatory. In other words, courts rely on evidence of statistical significance to determine whether a rebuttable presumption of race discrimination is appropriate.

West-Faulcon, *supra* note 104, at 1129–30.

248. *Ricci*, 129 S. Ct. at 2678.

249. *Id.*

250. *See infra* Part III.B.1.

251. *See infra* text accompanying note 270.

252. *See Will*, *supra* note 90.

253. *See infra* text accompanying notes 293–294.

Title VII.<sup>254</sup> Moreover, Title VII restricts employers from adjusting scores on already-administered tests and from using different cutoff scores on the basis of race.<sup>255</sup>

The majority in *Ricci* assumed that the Title VII job-relatedness inquiry was resolved by relying on testimonial evidence that would be largely irrelevant in an actual Title VII disparate impact lawsuit.<sup>256</sup> The lay witness and test-taker opinions and observations as to the facial fairness of standardized tests and test scores outlined in Kennedy's opinion would have been insufficient to meet New Haven's burden to prove the 2003 tests were job related. Without any acknowledgement of the central role that the testimony of professional employment testing experts, professional testing standards, and the Uniform Guidelines have typically played in Title VII disparate impact lawsuits, the *Ricci* majority essentially presumed the scientific validity of the 2003 exam results because the test designer had made efforts at facial fairness—involving minorities in the test design process and scrubbing test questions of visible racial discrimination or undertones.<sup>257</sup> This racing of test fairness replaced the stronger scientific and substantive professional standards that should be applied when tests have skewed results.

In addition to the actual criticisms of the tests' fairness articulated by Watkins and others before the *Ricci* plaintiffs filed suit,<sup>258</sup> we posit that Watkins and his fellow New Haven 13+ plaintiffs could have argued that there were at least four fundamental flaws with the design and usage of the 2003 promotional exams: (1) the tests' failure to test major aspects of what the jobs of fire lieutenant and fire captain require; (2) the arbitrary, unscientific 60–40 weighting of the multiple-choice and oral exam components; (3) the practice of requiring that promotions be made in essentially numerical rank order by combined exam score; and (4) the arbitrary designation of the passing score as seventy.<sup>259</sup> The New

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254. See 42 U.S.C. §§ 2000e-2(1) (2006).

255. *Id.*

256. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009). This mistaken view was foreshadowed by the *Wards Cove* majority of which Kennedy was a part. In *Wards Cove v. Atonio*, 490 U.S. 642 (1989), a case prompting Congress's 1991 Amendments to Title VII, disparate impact was treated as valid only to the extent that it was a mechanism for smoking out discriminatory intent. Under that logic, the good faith of the test designers would be relevant even though, as a matter of current law under disparate impact, it is compliance with professional testing standards, not good faith intent, that determines employer compliance with Title VII. *Id.*

257. *Ricci*, 129 S. Ct. at 2665, 2681 (noting that “[a]t every stage of the job analyses, IOS, by deliberate choice, oversampled minority firefighters to ensure that the results . . . would not unintentionally favor white candidates”).

258. Kaempffer, *Fire Exams Pose Problems*, *supra* note 9.

259. The Department of Justice and the Vulcan Society, a New York African American firefighters association, made similar claims in a Title VII disparate impact lawsuit filed against the city of New York. See *United States v. City of New York*, 637 F. Supp. 2d 77, 80 (E.D.N.Y. 2009). After the Supreme

Haven 13+ plaintiffs could have retained experts such as the five industrial psychologists who filed an amicus brief in the *Ricci* case identifying these as “fatal flaws” in the 2003 exams. Included in the experts’ observations was their conclusion that the critical job attribute of “command presence” was not tested by the exams, thus rendering it quite likely impossible to validate them as job related.<sup>260</sup>

While scholars like Michael Zimmer have observed that there has been a “judicial abandonment of the professional test validation standards,”<sup>261</sup> the city of New Haven should not have been expected to count on such judicial failings in deciding whether or not to certify test results its attorney advised did not comply with federal law. Moreover, even if federal courts generally have ruled in favor of defendants on the fact-driven issues of “job relatedness” and “less discriminatory alternatives,” New Haven committed several blatant test design and test usage errors that have been insufficiently acknowledged by commentators on the *Ricci* case. In this Subpart, we examine *Ricci*’s misapplication of the Title VII disparate impact doctrine that requires “test fairness” and the implications of this misapplication.

### 1. Validating Job-Relatedness of Employment Tests

Since *Griggs*, the Court has made it clear that the legal determination as to whether a particular employment test is “job related” intersects with the Uniform Guidelines<sup>262</sup> and the criteria that employment testing experts apply to evaluate the design, use, and validity of tests.<sup>263</sup> The mechanism by which employers using tests with a disparate racial impact may justify the test’s racially skewed results is by presenting proof of a professional, scientific “validation study” as prescribed by the federal Uniform Guidelines. The Guidelines describe such a

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Court’s ruling in *Ricci*, Michael Briscoe, an African American firefighter who took the 2003 lieutenant examination, filed a lawsuit alleging that the weighting of the multiple-choice portion of the exam at 60 percent constituted unjustified racially adverse impact in violation of Title VII disparate impact law. See *Briscoe Complaint*, *supra* note 36.

260. See Industrial-Organizational Psychologists Amicus Brief, *supra* note 37, at 5 (“In this case, for the reasons set forth below, at least four aspects of the NHFD [New Haven Fire Department] promotional tests were flawed or arbitrary, and thus made it all but impossible for the City to show that the tests were valid.”).

261. See Michael Zimmer, *Ricci and Briscoe as Disparate Impact Cases*, CONCURRING OPINIONS BLOG (Nov. 17, 2009), <http://www.concurringopinions.com/archives/2009/11/ricci-and-briscoe-as-disparate-impact-cases.html> (concluding that “if business necessity and job relatedness were the only issues, the City would have prevailed on its affirmative defense” and that the City would have also likely prevailed on the “available alternatives” question but observing that the disparate impact claim of Black firefighters focused on City liability for “events that all occurred before the test was administered” may succeed).

262. See *infra* text accompanying notes 269–270.

263. *City of New York*, 637 F. Supp. 2d at 108.



study as empirical data showing the employment test that has resulted in adverse impact is “predictive of or significantly correlated with important elements of job performance.”<sup>264</sup> Under the *Griggs* standard, the primary issue in *Ricci* should have been whether the City could prove that the 2003 exams measured candidates’ ability to perform the job of fire lieutenant and captain.<sup>265</sup>

The basic rule has always been that “discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.” This rule operates as both a limitation and a license for employers: employers have been given explicit permission to use job related tests that have a disparate impact, but those tests must be “demonstrably a reasonable measure of job performance.”<sup>266</sup>

Whether an employer has proven a test is “job related” has been based on whether the test was developed and implemented in a manner consistent with existing professional standards.<sup>267</sup> Knowing that it had substantial statistical evidence that the 2003 exams had a disparate impact on Black and Latino firefighters, the salient question for the City, as it contemplated whether to certify the 2003 exam results, was whether it could mount a viable defense to a Title VII disparate impact lawsuit. Based on Title VII disparate impact law as it existed prior to *Ricci*, New Haven had grounds to doubt that it could do so.

Because of their far-reaching implications, we think it critical to note that the problems the City faced that led to its predicament were in part the result of the City’s own actions prior to the administration of the 2003 exams.<sup>268</sup>

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264. 29 C.F.R. § 1607.5(B) (2010).

265. The *Griggs* job-related merit analysis of employment criteria requires an employer to demonstrate that the test in question accords with generally accepted professional standards for test design and test use. See *supra* text accompanying notes 178–181.

266. *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 383 (2d Cir. 2006) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)).

267. The Second Circuit Court of Appeals explained the rationale for this standard in *Guardians Association v. Civil Service Commission*:

A job-related examination is one that accurately tests the capacity of the applicant to do the job for which he is applying, or is “reasonably constructed to measure what it purports to measure.”

Although this notion is a simple one, the task of determining whether an examination is in fact job-related involves issues and problems which are outside the experience of most laymen.

Consequently, courts confronted with litigation of this kind have placed considerable reliance upon generally accepted principles of psychological testing . . . .

633 F.2d 232, 242 (2d Cir. 1980) (citing *Vulcan Soc’y v. Civil Serv. Comm’n*, 360 F. Supp. 1265, 1272–73 (S.D.N.Y. 1973)); see also *Blake v. City of Los Angeles*, 595 F.2d 1367, 1377–79 (9th Cir. 1979).

268. Cf. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2710 (2009) (Ginsburg, J., dissenting) (“This case presents an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place. But what this case does not present is race-based discrimination in violation of Title VII.”).

Rather than relying on the advice of testing professionals as to the most scientifically valid measurement of the job skills relevant to the position of fire lieutenant and captain, the City permitted key aspects of the tests' design, such as the cutoff score used to determine which candidates were designated as passing, and allocating positions based on rank ordering of candidates' position on the promotional list, to be dictated by union contract provisions and civil service rules. In doing so, New Haven increased the possibility that the tests would produce significant disparate impact. At the same time, the City hindered its future ability to meet its Title VII obligation to validate the job-relatedness of the 2003 exams upon concluding that they resulted in adverse impact and made it substantially easier for Black and Latino firefighters to present evidence of alternatives to the 2003 tests that would have had less racially adverse impact. Had New Haven complied with basic professional test design and test use standards, it might have avoided the "damned-if-you-do-damned-if-you-don't" situation it faced in *Ricci*.<sup>269</sup>

The Uniform Guidelines require that employers keep sufficient data to assess racial differences on test scores under the four-fifths rule, and—if the disparities are large enough to violate the rule—the employer should conduct a validation study like those described above to determine whether the test meets the scientific requirements for psychometric validity. The Guidelines provide three options to employers upon the determination that the use of a particular employment test has an adverse impact on the basis of race or gender: An employer can avoid Title VII liability even after finding a test has an adverse impact if (1) the employer demonstrates the test is job related; (2) if the employer utilizes "alternative selection criteria"; or (3) if the employer utilizes "affirmative action programs."<sup>270</sup> In deciding not to certify the 2003 exam results, New Haven was essentially deciding to exert its second option as recommended by federal guidelines for complying with Title VII—utilizing alternative selection criteria. The City's decision not to use the 2003 lieutenant and captain exam scores was based on its assessment that it was unlikely that the City could validate the exams as job related according to professional testing standards.

To meet their burden of proving an employment test with racially skewed results is job related in a Title VII disparate impact case, employers must defend the construction and use of the test as consistent with professional standards—an assessment that is strongly influenced by the federal Uniform Guidelines and the

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269. See Transcript of Oral Argument at 8, *Ricci*, 129 S. Ct. 2658 (No. 07-1428) (Justice Souter stating, "And the problem that I have with—with using cases like that and—and essentially the problem I—I have with your argument is that it leaves a—a municipality or a governmental body like New Haven in a—in a damned if you do, damned if you don't situation.").

270. 41 C.F.R. § 60-3.3A (2010).

Standards for Educational and Psychological Testing developed by the American Educational Research Association (AERA), the American Psychological Association (APA), and the National Council on Measurement in Education (NCME)—referred to as the “APA Standards.”<sup>271</sup>

Contrary to the approach the Court took in *Ricci*, courts applying Title VII jurisprudence typically consider scientific principles developed by employment testing experts—not simple lay opinion and common sense judgment—to assess whether employment tests are job related.<sup>272</sup> As the Court has observed, “there is no single method for appropriately validating employment tests for their relationship to job performance.”<sup>273</sup> Nevertheless, the Court has judicially noted three types of scientific test validation recognized by the Uniform Guidelines and the APA Standards as permissible methods of proving a test’s Title VII job-relatedness.<sup>274</sup> These three basic methods of professional test validation are: criterion, content, and construct validity.<sup>275</sup> Criterion validity is a method of validation that involves identifying criteria that indicate successful job performance and demonstrating that higher or lower test scores correlate statistically with those criteria.<sup>276</sup> Content validation involves demonstrating that the content of an employment test closely approximates tasks performed on the job for which the individual is applying.<sup>277</sup> Finally, construct validation assesses the degree to which the employment tests are structured to measure whether the test taker has identifiable characteristics that have been determined to be

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271. See AM. EDUC. RESEARCH ASS’N, AM. PSYCHOLOGICAL ASS’N, & NAT’L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999). The Uniform Guidelines explicitly require that validation studies conducted by employers demonstrate a test’s job-relatedness based on empirical data. See 41 C.F.R. § 60-3.5B. The APA Standards set forth the consensus among the professional organizations whose members constitute the experts in the field of the design, use, and interpretation of tests and test scores, including uses as the basis for employment decisions. See *id.* § 60-3.5B (stating that criterion-related, content, and construct validity studies should consist of empirical data).

272. See, e.g., *Isabel v. City of Memphis*, 404 F. 3d 404 (6th Cir. 2005) (holding that the City failed to meet its burden of producing evidence demonstrating business justification by content validity for the police lieutenants’ exam in light of evidence that scores from the written test did not approximate candidates’ potential job performance, and the industrial psychologist who developed the test offered testimony that he never attempted to validate the cutoff score and only tested one component of job performance); *Williams v. Ford Motor Co.*, 187 F. 3d 533, 540–41 (6th Cir. 1999) (noting that the Uniform Guidelines require that validation studies conform to several technical requirements, and provide that “[u]nder no circumstances will the general reputation of a test . . . its author . . . or casual reports of its [sic] validity be accepted in lieu of evidence of its validity. Specifically ruled out are . . . nonempirical or anecdotal accounts of selection practices or selection outcomes”) (citing 29 C.F.R. §§ 1607.14, 1607.9(A) (2010)).

273. See *Washington v. Davis*, 426 U.S. 229, 247 n.13 (1976).

274. See, e.g., *id.*

275. *Id.*

276. *Id.*

277. *Id.*

important to successful job performance.<sup>278</sup> Also, subsumed within this validation for job-relatedness inquiry is a requirement that particular test usages be validated—that employers have scientific evidence that supports specific test uses, such as the use of test scores on a “rank-order” versus a “pass/fail” basis,<sup>279</sup> the use of a particular passing score or “cutoff score,”<sup>280</sup> and the use of particular proportions or the “weighting” of individual components or subparts of tests.

Had the city of New Haven attempted to conduct a formal validation study, it is reasonable to conclude that it would have been difficult for the City to prove that the 2003 exams were job related. The fact that New Haven inhibited the test developer, IOS, from identifying the optimal types of assessment (whether multiple-choice, oral, or performance-based exam components) and the optimal weighting of candidates’ scores on those test components to measure whether firefighters who take the test possess the characteristics important to performing the job of supervisory firefighter—the exam’s “construct”—suggests that one of the major impediments to validation of the 2003 exams’ was “construct underrepresentation,” that is, when a test “fails to adequately capture the characteristic that it is intended to measure.”<sup>281</sup>

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278. *Id.* To use a concrete example, a fire department’s decision to use typing test scores as the basis for ranking candidates on a lieutenant promotional list would be presumed legal under Title VII so long as the test did not result in racial or gender disparate impact—if men and women, whites and nonwhites are represented among the high scorers on the typing test in relatively equal proportion to their representation in the applicant pool. But, if, for example, women performed disproportionately well on the typing test compared to men—sufficient to constitute a prima facie case of disparate impact against men—the burden would be on the City to demonstrate that its use of the typing test meets the legal standard of job-relatedness. To conduct a criterion-validation of a finger dexterity test for a job involving typing, such as administrative assistant, finger dexterity would be identified as a criterion that would indicate successful performance of the job, and a validation expert would analyze empirical data to determine whether high scores on the finger dexterity test correlate to high levels of success in the job of administrative assistant. See CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & RICHARD F. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 113–14 (1980) (presenting this example). Content validation of a typing test for the job of typist would be easily accomplished by the fact that the typing task performed by test takers is the same kind of typing they perform on the typist job (for example, the material test takers type during the test is a draft legal brief, and the typist job involves typing legal briefs). *Id.* Construct validation is a more complex endeavor. To conduct construct validation, the validation expert would first identify traits associated with typing, such as “the ability to withstand boredom,” and analyze data to determine whether the employment test in question measures that trait. *Id.*

279. 41 C.F.R. § 60-3.5G (2010).

280. *Id.* (stating, without referencing weighting explicitly, that “[t]he evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use”).

281. See, e.g., AM. EDUC. RESEARCH ASS’N, *supra* note 271, at 5, 174 (“We use the term construct more broadly as the concept or characteristic that a test is designed to measure. Rarely, if ever, is there a single possible measure that can be attached to a test score or a pattern of test responses. Thus, it is always incumbent on the testing professional to specify the construct interpretation that will be made on the basis of the score or response pattern.”).

In New Haven's case, neither the composite cutoff score of seventy nor the weighting of the respective portions of the exams had been validated to job performance. To the extent that the Guidelines can also be read to mean that the manner in which an employment test is designed or used by the employer can be so fundamentally flawed that the test is per se invalid (irrespective of whether the employer conducts a validation study<sup>282</sup>), New Haven's use of the *Ricci* promotional exams provides an example of test design and usage so flawed as to be impossible to validate. Accordingly, these flaws made New Haven particularly vulnerable if sued by Black and Latino officers.

To further support our conclusion that New Haven was unlikely to win if sued by Black and Latino officers—and to explain why white as well as nonwhite officers had an interest in challenging the 2003 promotional lists—we have produced an alternative version of the 2003 lieutenant and captain lists. We do not offer these alternative lists as a scientifically valid basis for selecting fire lieutenants and captains. Instead, our analysis reverses the relative 60–40 proportion weighting of the written and oral portions of the 2003 exams, respectively, to illustrate both the practical consequences—different officers move up and down in the promotional rankings (even improving minority rankings in some instances)—and the arbitrariness of allocations that are disconnected from considerations of “whether the weighting was likely to identify the most qualified fire-officer candidates.”<sup>283</sup> To demonstrate this point, in Tables 5 and 6, we have constructed new promotional lists ranking the 2003 lieutenant and captain candidates based on a reversed weighting, from 60–40 to 40–60, of the written and oral portions, respectively. As shown in Tables 5 and 6, reversing the weightings of the test components moves the highest scoring Black firefighters upward on the lists and results in a re-sorting of the Latino and white firefighters.

Table 5 shows that, under the 40–60 weighting, Black firefighters were re-sorted with some ranking higher on the lieutenant promotion lists. For example, African American firefighter Michael Briscoe, who filed a disparate impact lawsuit against New Haven after the *Ricci* decision, would rank tenth on the list based on the reversed weighting.<sup>284</sup> On the other hand, two Black applicants to

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282. Indeed, the Brief of the Industrial Psychologists points out that the exams could not have been validated under accepted principles. This is in part because the test designer conceded it did not attempt to measure command presence. See Industrial-Organizational Psychologists Amicus Brief, *supra* note 37.

283. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2703–04 (2009) (Ginsburg, J., dissenting) (“Relying heavily on written tests to select fire officers is a questionable practice, to say the least.”).

284. Briscoe's central contention is that New Haven's weighting of the multiple-choice component of the lieutenant exam at 60 percent and the written component at 40 percent resulted in an unjustified racially disparate impact. See *Briscoe Complaint*, *supra* note 36. Because the top ten candidates were

lieutenant who were ranked 15th and 20th would have ranked lower on the list, at 26th and 23rd, respectively, under this weighting. As was true under the 60–40 weighting, no Latino firefighters would have been promotable—eligible to be selected for one of the vacant lieutenant positions—under the new 40–60 weighting. However, our analysis shows that the white firefighter ranked 18th under the actual 60–40 weighting would have been ranked 9th under the hypothetical weighting and thus would have been promotable. We are not suggesting that New Haven would have complied with Title VII had it adopted a 40–60 weighting. To the contrary, our point is that the relative weight assigned to each component was arbitrary and yet had non-trivial effects on how candidates were ranked.<sup>285</sup> Therefore, the weighting here was fatally flawed because it was not scientifically validated as “job related”—likely to select the most qualified candidates for the job.<sup>286</sup>

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promotable (eligible) for the eight lieutenant positions available at the time of the filing of the *Ricci* lawsuit, Briscoe’s ranking in 10th place under the 40–60 weighting would make him promotable.

285. The reweighting shows that different white and Latino firefighters would have passed the lieutenant exam. Several other white firefighters also moved up in the rankings under 40–60 weighting, including two who did not pass the lieutenant exam when the composite score was based on a 60–40 ranking but scored above seventy under the reweighting—ranking 27th and 29th. See tbl.5.

286. The shifting of individuals under the alternative weighting goes specifically to the question of the arbitrariness of the 60–40 weighting and illustrates the fact that it had a significant effect. However, we note that the fact that Blacks were moved both up and down on the list under this alternative weighting does not negate the fact that, as a group, Black firefighters would be able to demonstrate adverse impact on their racial group within the meaning of Title VII.

TABLE 5. Comparison of Candidates Passing (Scoring  $\geq 70$ )  
the Ricci Lieutenant Exam With Reversed (60–40)  
Weighting of Written and Oral Portions of Exam

Alt. List Position	Racial Identification	Oral Score	Written Score	Written/Oral Score 40/60	Original Lt. List Position	Original Composite Score
1st	White <sup>Ricci plaintiff</sup>	88.75	91	89.65	1st	90.1
2nd	White	87.7	87	87.42	2nd	87.2
3rd	White	85	84	84.60	4th	84.4
4th	White	77.5	91	82.90	3rd	85.6
5th	White	80	87	82.80	5th	84.2
6th	White <sup>Ricci plaintiff</sup>	80.83	84	82.10	7th	82.73
7th	White <sup>Ricci plaintiff</sup>	73.75	91	80.65	6th	84.1
8th	White <sup>Ricci plaintiff</sup>	73.33	89	79.60	8th	82.73
9th	White <sup>†</sup>	87.5	66	78.90	19th	74.6
10th	<b>Black*</b> <sup>Michael Briscoe</sup>	<b>92.08</b>	<b>59</b>	<b>78.85</b>	<b>24th</b>	<b>72.23</b>
11th	<b>Black</b>	<b>80.42</b>	<b>73</b>	<b>77.45</b>	<b>16th</b>	<b>75.97</b>
12th	White <sup>Ricci plaintiff</sup>	68.33	91	77.40	10th	81.93
13th	<b>Black</b>	<b>77.5</b>	<b>76</b>	<b>76.90</b>	<b>14th</b>	<b>76.6</b>
14th	White	73.75	81	76.65	12th	78.1
15th	White <sup>Ricci plaintiff</sup>	63.75	95	76.25	9th	82.5
16th	White	69.58	86	76.15	11th	79.43
17th	White	74.17	77	75.30	17th	75.87
18th	White <sup>Ricci plaintiff</sup>	78.33	70	75.00	21st	73.33
19th	White	77.5	66	72.90	32nd	70.6
20th	White	73.33	71	72.40	26th	71.93
21st	White	72.5	72	72.30	25th	72.2
22nd	<b>Black</b>	<b>70.83</b>	<b>74</b>	<b>72.10</b>	<b>22nd</b>	<b>72.73</b>
23rd	<b>Black</b>	<b>65.83</b>	<b>80</b>	<b>71.50</b>	<b>20th</b>	<b>74.33</b>
24th	White	73.75	68	71.45	33rd	70.3
25th	White	63.33	83	71.20	18th	75.13
26th	<b>Black</b>	<b>61.25</b>	<b>86</b>	<b>71.15</b>	<b>15th</b>	<b>76.1</b>
27th	White**	79.17	59	71.10	44th	67.07
28th	White <sup>Ricci plaintiff</sup>	58.75	89	70.85	13th	76.9

Alt. List Position	Racial Identification	Oral Score	Written Score	Written/Oral Score 40/60	Original Lt. List Position	Original Composite Score
29th	White**	73.75	66	70.65	37th	69.1
30th	White	71.67	69	70.60	34th	70.07
31st	White	66.67	76	70.40	23rd	72.27
32nd	Latino	69.17	72	70.30	28th	70.87
33rd	Latino	70.83	68	69.70	36th	69.13

\*nonwhite candidates who would have been promotable if oral portion had been weighted at 60 percent and written portion had been weighted 40 percent

†white candidate who would have been promotable if oral portion had been weighted at 60 percent and written portion had been weighted 40 percent

\*\*white candidates who would have had passing scores ( $\geq 70$ ) if oral portion had been weighted at 60 percent and written portion had been weighted 40 percent

As shown in Table 6 (a reversed weighting of the oral and written components of the captain exam results), Latino firefighters no longer rank within the first eight positions, and the two female firefighters moved one and two positions lower, respectively. However, the Latino candidate ranked 13th on the original captain list moves up to the 12th position. Likewise, the highest-ranking Black firefighter moves up from the 16th position on the 60–40 weighted list to the 11th position on the reweighted list. There were three white firefighters seeking positions as captains who failed the exam under the actual 60–40 weighting but who would have passed if the weighting were reversed.



TABLE 6. Comparison of Candidates Passing (Scoring  $\geq 70$ )  
 Ricci Captain Exam With Reversed (60–40)  
 Weighting of Written and Oral Portions of Exam<sup>287</sup>

Alt. List Position	Racial Identification	Oral Score	Written Score	Oral/Written Score 60/40	Original Capt. List Position	Original Composite Score
1st	White <sup>Ricci plaintiff</sup>	89.52	95	91.71	1st	92.81
2nd	White <sup>Ricci plaintiff</sup>	80.00	95	86.00	2nd	89.00
3rd	White <sup>Ricci plaintiff</sup>	82.38	87	84.23	3rd	85.15
4th	White	88.57	76	83.54	4th	81.03
5th	White <sup>Ricci plaintiff</sup>	87.62	69	80.17	11th	76.45
6th	White <sup>Ricci plaintiff</sup>	84.29	72	79.37	10th	76.92
7th	White <sup>Ricci plaintiff</sup>	76.19	84	79.31	5th	80.88
8th	White <sup>Ricci plaintiff</sup>	76.19	82	78.51	6th	79.68
<b>9th</b>	<b>Latino<sup>†</sup></b> <sup>Ricci plaintiff</sup>	<b>76.19</b>	<b>82</b>	<b>78.51</b>	<b>7th</b>	<b>79.68</b>
10th	White	80.00	74	77.60	12th	76.40
<b>11th</b>	<b>Black*</b>	<b>82.38</b>	<b>70</b>	<b>77.43</b>	<b>16th</b>	<b>74.95</b>
<b>12th</b>	<b>Latino</b>	<b>79.05</b>	<b>74</b>	<b>77.03</b>	<b>13th</b>	<b>76.02</b>
13th	White <sup>Ricci plaintiff</sup>	73.81	81	76.69	9th	78.12
14th	White	76.67	74	75.60	15th	75.07
<b>15th</b>	<b>Latino<sup>†</sup></b>	<b>70.00</b>	<b>84</b>	<b>75.60</b>	<b>8th</b>	<b>78.40</b>
16th	White	73.81	77	75.09	14th	75.72
17th	White <sup>Ricci plaintiff</sup>	82.38	64	75.03	20th	71.35
<b>18th</b>	<b>White (Female)</b>	<b>73.33</b>	<b>74</b>	<b>73.60</b>	<b>17th</b>	<b>73.73</b>
19th	White**	78.57	64	72.74	24th	69.83
20th	White	70.00	76	72.40	18th	73.60

287. This table produces the alternative rankings following a reversal of the weightings of oral and written components on the lieutenant exam from Table 2. Table 2 was constructed in the same manner as Table 1, relying on the same sources. Additionally, we relied on specific references to the captains' list. See Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 n.2 (D. Conn. 2006); Sulzberger, *supra* note 151; ELIGIBLE LIST ROSTER FOR FIRE CAPTAIN, *supra* note 215, at 1–2.

21st	Black (Female)	68.57	74	70.74	19th	71.83
22nd	Black	70.95	70	70.57	22nd	70.38
23rd	White**	71.43	68	70.06	25th	69.37
24th	White**	71.43	68	70.06	26th	69.37

\*nonwhite candidates who would have been promotable if oral portion had been weighted at 60 percent and written portion had been weighted 40 percent

†nonwhite candidates who were promotable under actual weighting but not under 60–40 oral-written weighting

\*\*white candidates who would have had passing scores ( $\geq 70$ ) if oral portion had been weighted at 60 percent and written portion had been weighted 40 percent

Again, in the absence of a scientific validation study to assess the “job-relatedness” of the multiple-choice portion of the captain exam, we do not assert that 40 percent is the proper weight to use to identify the candidates most qualified to be captain. We simply observe that, without scientific proof that the 60 percent weighting used by New Haven identified those most qualified to be captains, Black, Latino, and white candidates could argue they would have ranked higher on the promotion list if the City had decided the weight of the multiple-choice portion of the test based on scientific standards of job-relatedness.

## 2. Less Discriminatory Alternatives

Essentially, Title VII permits employers to use racially exclusionary tests *if* they are merit-based and job related. However, an employer that uses an exclusionary test but cannot demonstrate the test’s job-relatedness and the absence of less discriminatory alternatives to that test violates Title VII’s disparate impact provision. On this point, the employment testing experts’ amicus brief filed in *Ricci* attested to the existence of less discriminatory testing practices and tests, such as giving more job-relevant weighting to the oral and multiple-choice components of the exams or augmenting the 2003 exam scores with performance-based assessments of firefighters, that would have selected equally effective fire lieutenants and captains without racially adverse impact on Black

and Latino candidates.<sup>288</sup> As a technical doctrinal matter, irrespective of whether the City could prove that the 2003 exams were job related, New Haven could lose a Title VII disparate impact lawsuit filed by a group like our hypothetical New Haven 13+ if the plaintiffs' testing experts convinced the district court that less discriminatory promotional criteria and practices were available to the City. Because many fire departments across the nation weigh an oral exam component more than a written multiple-choice portion<sup>289</sup> and because other fire departments augment written and oral scores with scores on performance-based exams that firefighters take at standardized "assessment centers,"<sup>290</sup> New Haven could have quite reasonably concluded that its likelihood of ultimate success was low if it had certified the 2003 exams and then been sued by Black and Latino candidates seeking to enforce Title VII's disparate impact provisions. In fact, during the hearings conducted by the New Haven Civil Service Commission, the governing body responsible for deciding whether or not to certify the 2003 exams, the Commission members heard testimony that using different types of tests would have resulted in less racially adverse impact and, hence, been a viable less discriminatory alternative.<sup>291</sup>

In his final statement urging the Civil Service Commission not to certify the 2003 exams, New Haven Corporation Counsel, Thomas Ude, stated:

The initial data first identified led us to closer scrutiny of the exam and the exam process. That scrutiny triggered questioning of whether other testing procedures exist that are equally valid but with less disparate impact. Finally, upon closer review of these two exams, their content has raised, rather than answered, questions about how valid these tests are for the purposes intended. We believe that equally valid, less discriminatory alternatives to this test exist. And it would be

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288. See Industrial-Organizational Psychologists Amicus Brief, *supra* note 37, at 5–23.

289. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2703 (2009) (Ginsburg, J., dissenting) ("Among municipalities still relying in part on written exams, the median weight assigned to them was 30%—half the weight given to New Haven's written exam.").

290. *Id.* ("Although comprehensive statistics are scarce, a 1996 study found that nearly two-thirds of surveyed municipalities used assessment centers ('simulations of the real world of work') as part of their promotion processes . . . . [T]he percentage today may well be even higher.").

291. An employment expert who specializes in firefighter assessment testified that he believed there were less discriminatory alternatives to both components of the 2003 exams:

There are other alternatives to just the written job knowledge that you used in that initial stage and to the oral interview process that I believe would have demonstrated less adverse impacts, that I believe would have increased the likelihood of getting the best candidates at the top of the list so you would have identified the best possible people and you would not have had artifacts in the development of the test that contributed to the adverse impact that you received.

Joint Appendix at 102, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 454249 (testimony of Dr. Christopher Hornick at New Haven Civil Service Commission meeting on March 11, 2004 identifying firefighter assessment centers and situational judgment tests as less discriminatory alternatives).

irresponsible of me not to urge you to pursue such alternatives. And that is the heart of the question before us. Merit-based testing must ensure not only a fair job-related test for all applicants without resulting in disparate impact but, also, that the most qualified candidates are selected. We do not have such results in these two exams. I urge you not to certify.<sup>292</sup>

To make their case, the New Haven 13+ most certainly would have relied on this testimony. They would argue that New Haven's non-scientific weighting and failure to consider augmentation with performance-based assessment call into question the degree to which the 2003 promotional exams were actually good markers of job performance or diagnostics of job skills. Although given short shrift by the *Ricci* majority opinion, the argument that New Haven violated Title VII because it failed to avail itself of less discriminatory alternatives would likely have been the New Haven 13+'s strongest claim. As the amici experts and the experts who testified before the New Haven Civil Service Commission made clear, there was substantial reason to question whether the 2003 lieutenant and captain were the best available measures of candidates' leadership and supervisory skills.

The practical effect of Title VII's disparate impact provision intended by Congress is that the law holds employers to scientifically sound and professionally accepted standards for test use in circumstances where employment tests operate to exclude applicants of a particular racial (or gender) group. If groups score similarly on average—if there is no racial (or gender) disparity in test scores—then Title VII's disparate impact provision places no restrictions on the employer's use of the test results. Title VII does not automatically prohibit employers from using tests that have a racially disparate impact. Instead, it requires employers to demonstrate a merit-based, job-related justification for using the racially skewed test results.<sup>293</sup> In essence, Title VII's disparate impact provision codifies a "test fairness" requirement, which the *Ricci* decision seems to have erased, once an employer administers a test and sees its racially skewed results.

Title VII does not prohibit employers from using tests that have adverse impact on minorities when the tests measure job-irrelevant performance, nor does it require that employers only use tests that have substantively equal test outcomes across races. Title VII's job-relatedness and less discriminatory alternative requirements are designed to smoke out inaccurate and job-irrelevant racial differences in test scores. As a consequence, Title VII promotes selection that is

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292. Joint Appendix at 156–57, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328), 2009 WL 454249 (testimony of Thomas Ude at New Haven Civil Service Commission meeting on March 18, 2004).

293. See *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 383 (2d Cir. 2006) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)).

more merit-based and thus is not a mechanism to enact racial preferences. Ironically, Ricci's failure to apply Title VII's requirements regarding test validation actually enacts a presumption that white overrepresentation is the natural product of merit selection; Title IV's requirement that employers justify a racially skewed status quo, even in the pursuit of a fair test that actually measures job performance, is portrayed as making nonwhites "the special favorite[s] of the law."<sup>294</sup>

#### IV. RIGHTING RICCI'S WRONGS

##### A. Ricci's Erroneous Presumption of Validity

Assessing both the immediate and long-term impact of the Ricci decision is complex. Like all Supreme Court cases that deal with important and contentious topics, Ricci can be read in multiple ways. Reading Ricci narrowly, one could say that its holding that the City discriminated against the plaintiffs on the basis of race by refusing to certify racially disparate test results that disfavored minorities is limited to the relatively unusual circumstance where an employer discards the tests even though the testing formally complied with preset rules for civil service promotion. Under this reading, Ricci's reach might be circumscribed.<sup>295</sup> While we think that such a reading is plausible and defensible, our aim is to situate the Ricci case and the Court's opinion in the larger context of the contestation in law and politics over the significance of race and the meaning of racial discrimination. Here, we examine both the doctrinal and theoretical implications of the decision in order to determine how to right Ricci's wrongs.

While we believe the imposition of the "strong basis in evidence" standard is contrary to Congress's intent, we observe that, had the Court properly applied

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294. Civil Rights Cases, 109 U.S. 3, 25 (1883).

295. Even though the Court majority granted summary judgment for the Ricci plaintiffs, and the City was ordered to certify the results and make promotions, minority firefighters still asserted a disparate impact case challenging the 60–40 weighting of the exam to favor the written segments where it was foreseeable that the written component had a disparate impact on Black test takers. See *Briscoe* Complaint, *supra* note 36. Briscoe claimed that the City was well aware that this weighting would disfavor Blacks and proceeded even absent any evidence that the weighting was job related and justified by business necessity. *Id.* at 6. Arguably, this claim is not precluded by Ricci since it goes to the City's actions and knowledge before the tests were given. See *Zimmer*, *supra* note 132. However, the court has dismissed Briscoe's case on the grounds that Ricci's ruling that the City could avoid disparate impact liability based on what it called the strong basis in evidence that it would be subject to disparate treatment liability had it not certified the tests. *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2010 WL 2794212, at \*8 (D. Conn. July 12, 2010). There are other pre-test administration design flaws that Ricci does not address. See discussion *infra* Part III. Whether they would be dismissed on the same grounds as the *Briscoe* litigation is unclear.

Title VII precedent regarding the standards for scientific validation of employment tests, it would have concluded that New Haven *did* have a strong basis in evidence for refusing to base promotions on the 2003 exams. The exams' fatal flaws, such as lack of construct validity, arbitrary weighting of test components, scientifically unsupported rank-order use of exam scores, and passing score, were each independent factual bases for concluding that New Haven could not demonstrate that its tests were designed or used consistent with professional testing standards. After *Ricci*, employers could be of the view that they have wider license to engage in irresponsible and unfair test use and design than prior to the Court's decision, and employers might argue, based on *Ricci*, when faced with Title VII disparate impact claims filed by minorities, that they need only demonstrate what amounts to a good faith showing that they thought their tests were professionally designed. Prior to *Ricci*, it was clear that employers were obligated to demonstrate more substantive compliance with professional standards for fair testing upon a showing that tests had a racially disparate impact.

Before *Ricci*, employers' liability to plaintiffs would depend on the Court's consideration of each side's expert evaluation of whether the test was designed, used, and could be validated as a proper measure of job performance. After *Ricci*, Kennedy asserts that defendants are no longer liable to minority plaintiffs like the potential New Haven 13+; he bases this assertion on the very circular logic that, after the Court's decision in *Ricci*, failing to certify test results will be deemed intentional race discrimination. However, we wonder how broadly Justice Kennedy's *Ricci* defense applies to disparate impact liability. We offer a post-*Ricci* hypothetical: If somehow the number of Asian American firefighters increased dramatically, and they were, during some future exam administration, to be disproportionately represented among the high scorers on lieutenant or captain exams that failed to measure candidates' command presence and supervisory skills, would the City have a *Ricci*-type defense to a Title VII disparate impact claim filed by white firefighters? Based on Kennedy's terse observation, arguably the City would not be liable because it would have a "strong basis in evidence" that failure to certify the results would constitute disparate treatment against Asian American officers. Such a rule undermines Title VII's protection against unjustified disparate impact on the basis of race and completely erodes Congress's intent in codifying the Title VII disparate impact provisions.<sup>296</sup>

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296. Under Kennedy's re-articulation of the burden on defendants, the City would not be liable to white firefighters under Title VII disparate impact law even if leading psychometric experts would testify that "there is no good pen and paper test for evaluating supervisory skills." See *Ricci*, 129 S. Ct. at 2703 n.12 (Ginsburg, J., dissenting) (quoting *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 512 (8th Cir. 1977)). We are left to wonder whether *Ricci*'s reasoning will be applied in contexts where nonwhites are the high scorers. We suspect that—in line with the majority's reification of positive rights for whites to

Strikingly, *Ricci* could be interpreted to create a new Title VII rule that gives special legal protection to employers who use tests that result in substantial racial differences in scores: a “racial skew” defense to disparate impact liability. Thus, Kennedy’s opinion, without articulating a Title VII statutory basis, is an improper court-created amendment to Title VII that confers on white job applicants a test-score-based entitlement interest in being promoted from civil service lists that have an adverse impact on racial minorities.<sup>297</sup> This effectively protects white expectations that assessments that favor them are presumptively valid. Little could be more inconsistent with Congress’s purpose in passing Title VII’s disparate impact provision. As Congress made clear in the 1991 amendments to Title VII, tests that operate to exclude a racial and gender group may only be used if they can be scientifically justified as a valid measure of job ability, and no alternative tests or criteria exist that can validly measure a candidate’s ability to do the job with less racial or gender disparity.

#### B. Doctrinal Implications

At the level of doctrine, *Ricci* required that New Haven have a “strong basis in evidence” that its tests were not “job related” and that alternative, less discriminatory tests existed—in addition to the threshold evidence of adverse impact (significant statistical disparities)—before the City took action to reduce or avoid disparate impact. Thus, the *Ricci* decision increases the evidentiary burden on employers that deem themselves unable to defend an employment test’s racially adverse impact after administering it. While stopping short of requiring an employer to prove a case against itself before eliminating tests that are needlessly exclusionary—something that the law has not heretofore required—the decision muddies the water for employers with respect to their liability under Title VII by making it more difficult for them to assess when they can take prophylactic action to avert disparate impact. Moreover, by imposing this heightened proof requirement—the “strong basis in evidence”—*Ricci* places heavier constraints on employers who try not to discriminate by examining the

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enjoy the most beneficial outcomes—evidence suggesting the exams’ failure to test a key attribute of job performance would be given greater consideration.

297. We do not mean to suggest that this language is unambiguous. For example, Charles Sullivan has argued that Kennedy’s opinion states that Title VII does not prevent an employer from considering how to design a test such that it is fair to all regardless of race *before* the administration of that test: “*Ricci* does not mandate a strong basis in evidence for every employer action designed to avoid disparate impact. Rather it applies only to actions taken at the back-end of a selection process when employer or applicant expectations have crystallized and reliance on the process has begun.” Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUY 201, 211 (2009).

racial effects of neutral policies as compared to employers who are oblivious to such effects. In disincentivizing voluntary compliance, *Ricci* arguably reverses one of Title VII's central policy preferences.<sup>298</sup>

A second doctrinal dimension of *Ricci* concerns the decision's recalibration of the standard for defending employment tests. Recall that *Ricci* not only reversed the finding of summary judgment for the city of New Haven; it ordered summary judgment for the plaintiffs. This holding was predicated on the view that the tests were self-evidently job related and that no less discriminatory, equally valid alternative existed. Yet, there was virtually no relevant evidence that supported this conclusion. The majority opinion focused instead on a kind of racial aesthetics inquiry, noting as evidence of the City's good intentions that minorities played a role in the test design and test administration process.<sup>299</sup> But the core question prior to *Ricci* was not the test designers' nor the employers' good faith, but rather whether the tests were valid: Did they actually assess merit and measure skills necessary for the jobs?

The amicus brief filed by leading industrial psychologists explained why the City could not have met the prevailing standard: Crucial criteria—such as command presence—were omitted, and the City did not have evidence supporting the cutoff score, rank ordering, or the weighting of the oral and written segments.<sup>300</sup> That the test developer averred that the tests and scoring procedures were justified and spent considerable time and money in developing the tests was not scientific evidence of validity. While courts prior to *Ricci* had shown great deference to employers in assessing whether professionally

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298. As one recent case illustrates, the effect of *Ricci*'s strong basis in evidence standard undermines even lawsuits that appear to be solid disparate impact cases. In *NAACP v. North Hudson Regional Fire & Rescue*, No. 07-1683 (DRD), 2010 WL 1641016 (D.N.J. Apr. 23, 2010), Black firefighter candidates challenged the fire department's use of residency requirements for excluding qualified candidates. Prior to the Supreme Court's decision in *Ricci*, the district court had issued a preliminary injunction barring the City from hiring until it expanded the residency requirement to include additional nearby counties. *Id.* at \*1. The case went up on appeal. *Id.* Following the *Ricci* decision, the case was remanded for consideration in light of *Ricci*. *Id.* The district court found that while this case differed from *Ricci* on its facts in that it did not involve an exam, it read *Ricci* to apply to any and all conflicts between the disparate treatment and disparate impact provisions of Title VII. *Id.* at \*8. Accordingly, the strong basis in evidence standard applied even though the action—the hiring freeze—was taken pursuant to a court order and not voluntarily imposed by the employer. *Id.* Under this standard, the City's justifications—that it avoided suit by Latino candidates and allowed for the City to attract more Latino candidates as required by a prior settlement agreement—were sufficient to establish business necessity. *Id.* at \*16–17.

299. *Ricci*, 129 S. Ct. at 2677 (noting that the test developer “made sure that minorities were overrepresented” in the test development and administration phase); *id.* at 2680 (asserting that the City and the test developer were “careful to ensure broad racial participation in the design of the test itself and its administration”).

300. See discussion *supra* Part III.A.1.



developed test validation standards had been met,<sup>301</sup> *Ricci* does not purport to apply them. In the Court's view, it was unnecessary to do so given other evidence in the record. Because these standards played no role in *Ricci*'s analysis of job-relatedness, business necessity, or the availability of less discriminatory alternatives, the implication of the decision is that the employer's good faith (and, by extension, the test designer's) is sufficient to establish test validity. Although *Ricci* did not inaugurate this trend away from professional standards, in a sense it represents its logical conclusion: Arguably, good faith belief has supplanted empirical assessments.<sup>302</sup>

*Ricci*'s ambiguities have been further compounded by the Court's recent decision in *Lewis v. Chicago*,<sup>303</sup> another case concerning the disparate impact of civil service exams administered to applicants for positions in the fire department. The minority plaintiffs challenged the City's practice of selecting for further consideration only those applicants who scored 89 or higher, and excluding qualified candidates who had otherwise passed the exam.<sup>304</sup> While the City stipulated that the use of the cutoff score had produced a severe disparate impact on minority firefighters, it defended the case on the grounds that the plaintiffs had failed to file EEOC charges within the 300 days after their claims accrued. In the course of issuing a unanimous opinion for the firefighter-plaintiffs, Justice Scalia's opinion expressly rejected the City's argument that the ruling would produce many practical problems because the City would be forced to defend claims ad infinitum since each time it relied on the disputed exam results would create a new cause of action.<sup>305</sup> While not specifically addressing the question of what must be proven to meet the *Ricci* standard of "strong basis in evidence" for disparate liability to attach, it is worth noting that *Lewis* effectively expands the window within which an employer might be liable for disparate impact even as *Ricci* raised the bar for employers who might seek to avoid disparate impact liability by ceasing to rely on racially or gender skewed tests. *Ricci* thus tends to compel employers to use tests that produce racially disparate

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301. See, e.g., *Adams v. City of Chicago*, 469 F.3d 609 (7th Cir. 2006) (finding that officers failed to demonstrate that the City had an opportunity to adopt a less discriminatory alternative merit-based promotion system in lieu of promotions based on racially disparate promotional exams); *Allen v. City of Chicago*, 351 F.3d 306 (7th Cir. 2003) (holding that minority police officers who challenged racially disparate promotional exams failed to demonstrate less discriminatory alternatives to written tests). Notably, however, authority in the Second Circuit seemed to more closely adhere to the standards. See, e.g., *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361 (2d Cir. 2006).

302. This is largely a result of the way in which *Ricci* appears to relieve the employer of any burden of validation. See David A. Drachler, *Assessing the Practical Repercussions of Ricci*, AMERICAN CONSTITUTION SOCIETY BLOG (July 27, 2009), <http://www.acslaw.org/node/13829>.

303. 130 S. Ct. 2191, 2193 (2010).

304. *Id.*

305. *Id.* at 2200.

impact, while *Lewis* suggests that each time it does, it will be subject to yet another lawsuit. While we agree with the basic holding of *Lewis* that the plaintiffs' cause of action should not be time-barred under the 300-day rule, we note the tension created by the holdings of these two cases.

### C. Theoretical Implications

At the theoretical level, *Ricci* reflects a particular view of racially attentive action as suspect and nearly always unjustified, even when undertaken to *avoid* race discrimination. Under such a regime, racial disadvantage can hardly ever be addressed. Though there has not yet been a stable majority willing to fully endorse this approach, the long march towards redefining discrimination and radically realigning employment discrimination law and equal protection doctrine is underway. Not surprisingly, Justice Scalia is the most overt in identifying this objective and Justice Kennedy the most nuanced. While Scalia's separate opinion suggests that Title VII's disparate impact doctrine is itself constitutionally infirm, Kennedy's majority opinion acknowledges that Title VII prohibits both intentional discrimination—disparate treatment—and unjustified disproportionate exclusion on the basis of race and gender—disparate impact. However, just as *Parents Involved in Community Schools v. Seattle School District* subjects voluntarily adopted student desegregation assignment policies to the same heightened standard as affirmative action, the *Ricci* ruling subjects an employer's voluntary action to eliminate exclusionary employment tests to heightened review, while seeming to lessen an employer's obligation to scientifically demonstrate that the tests in question are job related as required by Title VII. Put another way, in each instance, Kennedy saw no significant distinction between race-attentive action undertaken to avoid discrimination and intentional discriminatory conduct: Both must pass heightened evidentiary standards. In Kennedy's view, neither voluntary school desegregation nor an employer's efforts to avoid racial exclusion satisfied heightened review; both were unlawful. Thus, while Kennedy and Scalia may differ in their interpretation of the appropriate response to the asserted tension between equal protection and disparate impact law, they join in the view that race-consciousness is inherently suspect and thus must be justified by "a strong basis in evidence." As much as *Ricci*'s holding may be specific to its facts, its presuppositions underwrite a dangerous conflation of racially attentive action with discrimination itself.

If central tenets of antidiscrimination law are themselves flawed and violate either constitutional or other statutory norms simply because they attend to the issue of race, as *Parents Involved* and now *Ricci* suggest, then the entire structure of antidiscrimination doctrine is subject to this form of destabilization. Traditional

means/ends analysis collapses on this view since both the means—the utilization of some process or mechanism that looks at or attends to race—and the ends—to avoid or ameliorate further racial inequality or disparity—are fatally infected by racial considerations. Even when the means do not specifically deploy race, as in *Ricci* where the employer cancelled the test for everyone, the ends—achieving greater racial equality—are read back to reconstitute the means as racially discriminatory against whites. Thus, whether under formal equal protection analysis or statutory construction, interventions designed to reduce minority inequality are themselves subject to being reframed as racial discrimination itself.<sup>306</sup> In this sense *Ricci* represents another assault in the war against antidiscrimination law.

#### D. Responding to *Ricci*

Disparate impact doctrine under Title VII requires that employers evaluate the effects of their selection policies—that they be racially attentive—not to achieve racial proportionality but to achieve merit. *Ricci* has occluded this core principle. While relaxing the evidentiary burden on employers' use of selection processes that produce racial impact, *Ricci* heightens the standard for those who seek to avoid it. This is neither racially neutral nor does it serve society's larger interest in using selection procedures that actually identify the best person for the job. Congress needs to clarify that, in order to properly assess merit, one needs to be both racially attentive and evaluate test validity according to clearly defined expert standards, not lay opinion. We consider here several ways in which policymakers might correct *Ricci*'s errors. Though these are doctrinal interventions that cannot shift the theoretical terrain standing alone, these changes would go some way towards making important conceptual distinctions between discrimination and what we have termed racial attentiveness. Thus, we believe these changes might well have implications beyond the immediate terrain of Title VII doctrine.

The first and most obvious change comes from Justice Ginsburg's dissent. By explaining how "Congress formally codified the disparate impact component

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306. This is not to say that disparate impact theory has been definitively buried by *Ricci*'s majority, despite Scalia's aspirations in this regard as expressed in his concurring opinion: "[T]he war between disparate impact and equal protection will be waged sooner or later and it behooves us to begin thinking about how and on what terms to make peace between them." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring). There are arguments to be made about why disparate impact is consistent with equal protection. See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010). More substantively, the contortions of doctrine and theory enacted earlier in *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007), and now in *Ricci* do not themselves stand up to serious scrutiny.

of Title VII” after a “bare majority” of the Supreme Court tried to weaken Title VII’s disparate impact provision in *Wards Cove Packing Co. v. Atonio*,<sup>307</sup> Ginsburg clearly calls on Congress to pass legislation codifying the “good cause” standard endorsed by the four dissenters. This would require an employer to show they have “good cause,” in lieu of a “strong basis in evidence,” for its voluntary efforts to remedy the adverse impact the employer suspects is unjustified. To the extent that *Ricci* changes the evidentiary threshold for voluntary compliance that takes account of race, such an amendment could effectively clarify for employers how to meet their obligations with regard to Title VII’s disparate impact provision without violating its disparate treatment provision.

Congress can clarify the Title VII disparate treatment standard by specifically refuting any implication from the Court’s language in *Ricci* that failure to use tests that skew in favor of a racial group constitutes intentional discrimination against the high-scoring race. Amending Title VII to make it clear that “racially attentive” compliance with the law’s disparate impact provision does not constitute evidence of disparate treatment in and of itself would be the best way for Congress to ensure that these “twin pillars”<sup>308</sup> of Title VII remain intact. In other words, a codification of the standard applied by the Second Circuit in *Hayden v. County of Nassau*<sup>309</sup> would give Courts a clear indication of how Title VII applies to claims filed by whites alleging that *not relying on a particular test* is intentional racial discrimination on the basis of their race.

It is equally essential that Congress take action to ensure that *Ricci* does not introduce a new judicially created defense to Title VII disparate impact claims. The great danger, as we have outlined in this Article, of a potential *Ricci*-type defense to disparate impact claims is that it relieves employers of the obligation to justify using tests that have an adverse impact when “better, less racially skewed tests” are available and being used in similar employment contexts. Congress should amend Title VII to specifically incorporate the psychometric principles the Court has long treated as an essential component of Title VII disparate impact analysis—the Uniform Guidelines. In particular, an amended Title VII should reject *Ricci*’s suggestion that employers can limit their potential liability by administering and publicizing the results of a job-irrelevant employment test. The potential confusion *Ricci* has caused employers can be obviated by a clear statement from Congress that *unjustified* adverse impact—racial or gender differences in test scores that are not related to *valid* and *relevant* group differences—are prohibited by Title VII. And that, accordingly, the

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307. *Ricci*, 129 S. Ct. at 2697–98.

308. *Id.* at 2699 (Ginsburg, J., dissenting).

309. 180 F.3d 42, 48–49 (2d Cir. 1999).

burden remains with employers to present sound, psychometric evidence that a test resulting in adverse impact has been designed, used, and validated to measure candidates' abilities to perform the job.

In addition to taking concrete action to correct the doctrine, *Ricci* also provides another opportunity for the civil rights community to resist efforts to eviscerate antidiscrimination law. The broad coalition that advocated for the Civil Rights Act of 1991 in response to the Court's earlier misdirection in *Wards Cove* and other decisions of the 1989 term limiting antidiscrimination law offers some lessons for the present. A more recent and similar example of congressional response was the organizational effort that successfully pushed for the enactment of the Lilly Ledbetter Fair Pay Act of 2009, which rejected the Court's decision that a female worker was time-barred from recovering gender-based pay differential because she filed after the statutory period, even though she filed upon becoming aware of the difference.<sup>310</sup> We do not in the least underestimate the degree of difficulty attendant to building such efforts, particularly in a moment when multiple crises seem to command the attention of policymakers and the broader public. Nevertheless, it is crucial to engage the discussion over merit, race, and discrimination beyond its current juridical and colorblind boundaries. The Court's internal divisions mean that each case will be hard fought and the outcome difficult to predict. But understanding *Ricci* as an important site of contestation over the meaning of racial equality is crucial to the struggle for racial justice.

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310. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).