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## Does *Ricci* Herald a New Disparate Impact?

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# ARTICLES

## DOES *RICCI* HERALD A NEW DISPARATE IMPACT?

JOSEPH A. SEINER\* AND BENJAMIN N. GUTMAN\*\*

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*Federal law has long prohibited not just intentional discrimination by employers, but also practices that have an unintentional disparate impact on minorities. A cryptic passage at the end of the Supreme Court's recent decision in Ricci v. DeStefano may signal a sea change for this disparate-impact doctrine. Ricci, a lawsuit about a civil-service exam for firefighters, received widespread attention as a case about intentional discrimination. We show that the opinion also can be read to suggest a new affirmative defense for employers facing claims of disparate impact. Before Ricci, disparate impact was a purely no-fault doctrine. An employer was liable if its employment practice had an unlawful disparate impact, even if the employer did not know about the impact or did not intend to subject its employees to an unlawful*

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*practice. The focus of litigation was not on the employer's state of mind, but rather on the aspects of the employment practice. If the defense suggested by a careful reading of Ricci is taken seriously, however, a broad category of disparate-impact cases may turn on what the employer knew when it took the challenged action. If the employer uncovered no reason to think that the practice would have an unlawful disparate impact, it may be immune from liability for its past actions.*

*This would be a dramatic development, and if accepted it would open up an entirely new direction for this area of law. This Article parses the language of Ricci to show how it points to the new affirmative defense. We explain the significance such a defense would have for employers, employees, and disparate-impact theory more generally. We also examine and critique alternative readings of Ricci that do not entail the new defense discussed here. Ultimately, we conclude that while Ricci may foreshadow a new view of disparate impact, the Supreme Court's confusing decision can be given varying interpretations that will take further litigation to sort out.*

What you're saying is that the department can engage in intentional discrimination to avoid concern that they will be sued under disparate impact. Why doesn't it work the other way around as well? Why don't they say, well, we've got to tolerate the disparate impact because otherwise, if we took steps to avoid it, we would be sued for intentional discrimination? This idea that there is this great dilemma – I mean, it cuts both ways.

– Chief Justice John Roberts<sup>1</sup>

## INTRODUCTION

For nearly forty years, there have been two basic kinds of employment-discrimination claims: disparate-treatment and disparate-impact. *Ricci v. DeStefano*,<sup>2</sup> one of 2009's most-discussed Supreme Court decisions, was a disparate-treatment case,<sup>3</sup> and it may take years to sort out all of the decision's repercussions for claims of intentional employment discrimination. But a careful analysis of the case reveals that it may also have sweeping consequences for claims of *unintentional* – or disparate-impact – discrimination. This Article examines the contours of the new approach to disparate impact suggested by *Ricci* and considers whether courts should take it seriously.

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<sup>1</sup> Transcript of Oral Argument at 28-29, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-1428.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1428.pdf).

<sup>2</sup> 129 S. Ct. 2658 (2009).

<sup>3</sup> *Id.* at 2673.

In *Ricci*, a group of white and Hispanic firefighters sued the City of New Haven, Connecticut for failing to certify the results of an examination given to determine who should be promoted to several open lieutenant and captain positions.<sup>4</sup> The City had refused to certify the test results for fear of being sued by minority firefighters who had failed the exam in disproportionately high numbers.<sup>5</sup> The case attracted widespread attention because of the application of Title VII of the Civil Rights Act of 1964 to these so-called reverse discrimination claims.<sup>6</sup> The Court issued the decision in the midst of now-Justice Sotomayor's confirmation hearings, and it became a catalyst for criticism of the nominee as she had been a member of the Second Circuit panel that issued the decision vacated by the Supreme Court.<sup>7</sup>

In *Ricci*, a closely divided Supreme Court concluded that an employer's "fear of litigation" for unintentional (disparate-impact) discrimination does not give it an absolute defense to a claim of intentional (disparate-treatment) discrimination. Rather, the employer has such a defense only where it has a strong basis in evidence to believe that it will be subject to disparate-impact liability. Thus, the Supreme Court recognized a limited defense for employers administering performance examinations that face disparate-treatment suits.<sup>8</sup> Legal scholars have already written about this defense as well as the potential conflict – highlighted by Justice Scalia's concurring opinion – between disparate-impact claims and the Equal Protection Clause of the U.S. Constitution.<sup>9</sup>

But as this Article explains, a cryptic passage at the end of the *Ricci* majority's opinion also hints at a sweeping new affirmative defense for unintentional, disparate-impact claims brought under Title VII.<sup>10</sup> The Court suggests that employers may have immunity from unintentional discrimination

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<sup>4</sup> *Id.* at 2664.

<sup>5</sup> *Id.*

<sup>6</sup> See Joan Biskupic, *Firefighter Case May Keep Sotomayor in Hot Seat: How She Viewed 'Reverse Bias' Has Critics' Attention*, USA TODAY, June 1, 2009, at 2A.

<sup>7</sup> *Id.*; see also John Christoffersen, *14 Promoted After Court Ruling*, DESERET MORNING NEWS (Salt Lake City), Dec. 11, 2009, at A02; *Supreme Countdown: Sotomayor on Verge of Becoming First Hispanic Justice on High Court*, CHI. TRIB., Aug. 6, 2009, at 6. The earlier Second Circuit case was *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

<sup>8</sup> See *infra* Part II (discussing the holding of the *Ricci* case).

<sup>9</sup> See, e.g., Cheryl I. Harris & Kimberley West-Faulcon, *Reading Ricci: White(ning) Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010); Helen Norton, *The Supreme Court's Post-Racial Turn Towards A Zero-Sum Understanding Of Equality*, 52 WM. & MARY L. REV. 197 (2010); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) [hereinafter Primus, *The Future of Disparate Impact*]; Michael J. Zimmer, *Ricci's "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, available at <http://ssrn.com/abstract=1529438>.

<sup>10</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009).

claims if they were not aware that their actions were discriminatory at the time they took them.<sup>11</sup>

This portion of the Supreme Court's opinion has largely escaped scholars' attention to date. When the passage has been mentioned, it has largely been ignored as unintelligible; one of the leading employment-discrimination scholars calls it "obtuse" and "inscrutable."<sup>12</sup> This Article seeks to fill this void in the scholarship, explaining how the Court's language, if taken seriously, can be translated into a new affirmative defense to claims of unintentional discrimination.<sup>13</sup> Whether this new defense exists and, if it does, what its contours are will undoubtedly generate contentious litigation for years to come. This Article lays the groundwork for that debate.

Part I of this Article provides an overview of the history of disparate-impact law, examines the need for this theory as part of employment-discrimination jurisprudence, and discusses its justifications and codification into Title VII. Despite its long history, disparate impact's very existence remains controversial, as demonstrated by the starkly contrasting visions of disparate impact expressed in the *Ricci* opinions.<sup>14</sup> Part II of this Article examines the Supreme Court's *Ricci* case, exploring the Court's justification for – and the dissent's criticism of – the decision, and addresses critical language at the end of the majority opinion that suggests a new affirmative defense.

Part III of this Article examines possible narrow interpretations of this critical concluding language. It explores both a case-specific reading of the language and an interpretation that views the language simply as nonsensical. We conclude that neither of these alternatives is completely satisfactory, as each raises its own difficulties. Part IV of this Article shows that the Supreme Court's concluding language could instead be read more broadly to suggest a new affirmative defense to disparate-impact claims. As there are two primary theories under which employment discrimination cases can proceed – disparate treatment and disparate impact – this reading would have dramatic consequences for a significant category of workplace claims.

We then explain what this new affirmative defense might look like. If it were adopted by the courts, it would protect employers that are unaware of their actions' unlawful disparate impact. More precisely, it would protect an employer that, before using a workplace test, (1) reasonably examined the test for potential disparate impact; (2) uncovered evidence that the test results might disproportionately affect a minority protected group; and yet (3) did not uncover evidence calling into question the test's validity. We also examine alternative formulations of this defense that are both broader and narrower than this one.

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<sup>11</sup> See *infra* Part IV (setting forth the possible *Ricci* affirmative defense to disparate-impact discrimination).

<sup>12</sup> Zimmer, *supra* note 9, at 27-28.

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part IV.

Part V of this Article concludes by critiquing the affirmative-defense reading of *Ricci*. The defense would mark a sharp theoretical departure from the accepted framework for disparate-impact claims. Given the time and expense associated with the complex statistical evidence that must be developed in most disparate-impact cases, the new defense would provide a strong disincentive to employees considering bringing such claims. We also compare the new defense to other non-textual affirmative defenses the Supreme Court has read into Title VII, and situate our analysis within the other scholarship on the *Ricci* decision.

## I. THE ORIGINS OF DISPARATE IMPACT

For a full understanding of the *Ricci* decision and its significance for disparate-impact analysis, we must initially trace the history of disparate-impact liability under Title VII. The statute prohibits two primary forms of employment discrimination: disparate treatment and disparate impact.<sup>15</sup>

### A. *The Two Theories of Employment Discrimination*

Disparate treatment – or intentional discrimination – has long been a recognized theory of discrimination under Title VII.<sup>16</sup> Disparate-treatment theory is often thought to reflect most directly the text of Title VII, which prohibits an employer from taking an adverse action against an employee “because of such individual’s race, color, religion, sex, or national origin.”<sup>17</sup>

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<sup>15</sup> Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) (“Few propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only disparate treatment and disparate impact theories of employment discrimination.” (internal quotation marks omitted)). See also Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL’Y REV. 95, 98-117 (2006).

<sup>16</sup> See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 874 (2007) (“With its focus on intent, disparate treatment theory has long been understood to present the paradigmatic picture of discrimination as the product of animus against or conscious reliance on irrational stereotypes concerning members of particular groups.”); Harry F. Tepker, Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047, 1050 (1983) (“Simply, disparate treatment is intentional discrimination.”).

<sup>17</sup> 42 U.S.C. § 2000e-2(a)(1) (2006); see also *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (noting that disparate treatment is “the most easily understood type of discrimination” and “[u]ndoubtedly . . . the most obvious evil Congress had in mind when it enacted Title VII”); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 112 (2003) (“Traditional disparate treatment theory conceptualizes discrimination as individual, measurable, and static, looking into the state of mind of a particular decisionmaker at a discrete point in time.”).

The key to asserting a claim of disparate-treatment discrimination is establishing that the employer *intended* to discriminate.<sup>18</sup>

Intent can be the most difficult element to satisfy when alleging a Title VII disparate-treatment violation.<sup>19</sup> In the seminal case of *McDonnell Douglas Corp. v. Green*,<sup>20</sup> the Supreme Court helped plaintiffs establish this element by setting up a burden-shifting evidentiary framework for proving intent circumstantially. Under this framework, a plaintiff can establish a prima facie case of discriminatory intent merely by negating some of the most obvious alternative explanations for the employer's action – for example, that the plaintiff was not qualified for the position or that no position was available.<sup>21</sup> The burden then shifts to the employer to give a nondiscriminatory explanation for its actions.<sup>22</sup> Finally, a plaintiff who can show that this explanation is false may be able to convince the fact-finder that it is a mere pretext for unlawful discrimination.<sup>23</sup> While disparate-treatment cases need not proceed under the *McDonnell Douglas* framework,<sup>24</sup> in practice nearly all do so, and this framework has become the dominant mode of analysis under Title VII and other antidiscrimination laws.<sup>25</sup>

Disparate impact, or unintentional discrimination, addresses facially neutral policies or practices that have an adverse impact on a group protected by Title

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<sup>18</sup> See *Teamsters*, 431 U.S. at 335 n.15 (“Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168 (1995) (“Under existing law, the disparate treatment plaintiff . . . must prove not only that she was treated differently, but that such treatment was caused by purposeful or intentional discrimination.”).

<sup>19</sup> Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 768 (2006) (“Intentional discrimination is difficult to prove not because the evidence of intent is lacking, but because the evidence that exists, chiefly circumstantial in nature, is inconsistent with our societal vision of discrimination. Absent the smoking gun, racial epithets, or other explicit exclusionary practices, it has been, and remains, hard to convince courts that intentional discrimination exists.”).

<sup>20</sup> 411 U.S. 792 (1973).

<sup>21</sup> *Id.* at 802; see also Tepker, *supra* note 16, at 1051-52.

<sup>22</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>23</sup> *Id.* at 802-04.

<sup>24</sup> See *id.* at 802 n.13 (“The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”).

<sup>25</sup> See Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 114 (2007) (“[M]ost courts of law (even some that criticize it) continue to mandate [the *McDonnell Douglas* test’s] use – paying little heed to its detractors. Virtually all courts continue to require unwilling plaintiffs to use *McDonnell Douglas*.”); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1145 (2007).

VII.<sup>26</sup> The primary distinction, then, between disparate-impact and disparate-treatment claims is that disparate impact does not require a plaintiff to establish the employer's discriminatory intent.<sup>27</sup>

It is this lack of an intent requirement that makes disparate impact so controversial.<sup>28</sup> Courts and commentators have debated – and continue to debate – whether an employer can be said to act “because of” an employee's race or other protected trait when the employer does not subjectively rely on that trait.<sup>29</sup> As originally enacted, Title VII's text did not expressly state whether it covered claims of unintentional discrimination or, if it did, what the parameters of those claims might be.<sup>30</sup> Unlike for disparate treatment, which is often thought to follow straightforwardly from Title VII's “because of” language, the question for disparate impact has been more foundational. The question has not been how to develop an evidentiary framework to establish theoretically uncontroversial, if practically difficult to prove, statutory

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<sup>26</sup> See Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 599-600 (2001) (“The major conceptual distinction between the two theories is that disparate treatment requires proof of discriminatory intent or motivation, while disparate impact reaches unintentional discrimination that stems from neutral policies or practices that have a disproportionate [effect] . . . .”); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“[Disparate impact discrimination] involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”).

<sup>27</sup> See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1513 (2004) [hereinafter Sullivan, *The World Turned Upside Down?*].

<sup>28</sup> See Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1141 (2002) (“Although there is a broad consensus favoring the use of the disparate treatment model to eliminate purposeful discrimination in all arenas, the use of the disparate impact model to curtail practices that are not intentionally discriminatory remains controversial and is, therefore, limited in scope and reach.” (footnotes omitted)); Selmi, *supra* note 19, at 702.

<sup>29</sup> See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring); *Washington v. Davis*, 426 U.S. 229, 245 (1976) (“[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory . . . .”); L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1, 3-4 (1990); Charles Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 953-54 (2005) [hereinafter Sullivan, *Looking Past the Desert Palace Mirage*] (discussing the “enormous controversy” over the passage of the Civil Rights Act of 1991, which codified disparate impact); *infra* Part I.B. (discussing the *Wards Cove* decision and the divisive split on the Supreme Court over the breadth of disparate impact); *infra* Part II (discussing the *Ricci* decision and the divisive split on the Supreme Court over the contours of disparate impact).

<sup>30</sup> See Seiner, *supra* note 15, at 101.



elements but rather how to establish and justify those elements themselves, as the next section addresses.

### B. *Acceptance of Disparate Impact*

Disparate impact was initially introduced into employment-discrimination jurisprudence in the context of seniority systems.<sup>31</sup> After Title VII was passed in 1964, there was concern that minorities would still face discrimination from the use of seniority ladders and employment tests that appeared neutral on their face but locked in the results of past discrimination.<sup>32</sup> In the early cases addressing these issues, the lower courts struggled with how to deal with the evidence of statistical disparities that resulted from these seemingly neutral practices.<sup>33</sup> The U.S. Equal Employment Opportunity Commission (EEOC) first proposed disparate impact as an alternative theory of discrimination that did not require proof of intent to discriminate.<sup>34</sup> The lack of blame associated with unintentional discrimination made it an attractive theory to the EEOC, and a liability finding would still allow the agency to correct the effects of the employer's discriminatory policies.<sup>35</sup>

A litigation strategy soon developed among disparate-impact advocates in an attempt to convince courts to recognize this theory of discrimination.<sup>36</sup> The strategy was largely patterned after the approach used in pursuing the case of *Brown v. Board of Education*,<sup>37</sup> and it consisted of filing a substantial number of disparate-impact claims under Title VII and 42 U.S.C. § 1981, developing a monitoring system to identify appropriate cases, and making strategic choices about the most promising cases to pursue.<sup>38</sup>

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<sup>31</sup> See Selmi, *supra* note 19, at 708-14.

<sup>32</sup> See *id.* at 710-11; see also Hébert, *supra* note 29, at 88 ("As long as minority group members continue to suffer the disadvantages imposed on them by centuries of societal discrimination, the equal treatment notion of equality underlying the disparate treatment theory of employment discrimination will continue to fall short of the promise of true equality for minority group members.").

<sup>33</sup> See Selmi, *supra* note 19, at 708-15; Tepker, *supra* note 16, at 1071-72 ("In the early years of [T]itle VII's existence, plaintiffs' attorneys were faced with an enormous challenge: to escape the strait jacket of disparate treatment theory under which the plaintiff was obligated to prove the employer's biased state of mind.").

<sup>34</sup> See Selmi, *supra* note 19, at 715-16.

<sup>35</sup> *Id.* ("[N]egotiations with employers would be smoother if they could move away from a focus on intentional discrimination, which carried with it an implicit label of blame the employers were expected to resist. To the EEOC, and to plaintiffs more generally, it mattered little how a particular act was defined so long as the power to remedy the effects were available." (citation omitted)).

<sup>36</sup> See ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW* 196 (7th ed. 2004).

<sup>37</sup> 347 U.S. 483 (1954).

<sup>38</sup> See BELTON ET AL., *supra* note 36, at 196-97.

This strategy culminated with the Supreme Court deciding *Griggs v. Duke Power Co.*<sup>39</sup> in 1971, just seven years after Title VII's enactment.<sup>40</sup> Before Title VII's enactment, the Duke Power Company had "openly discriminated" against black workers at a particular plant in North Carolina.<sup>41</sup> Black workers had been permitted to work only in the plant's labor department, which paid less than the other departments at the facility.<sup>42</sup> On July 2, 1965 – the effective date of Title VII – the company instituted a requirement that to be placed in any department other than labor, an employee would have to pass an aptitude test.<sup>43</sup> It also decided to start requiring a high-school diploma for transfer from labor to another position.<sup>44</sup> But the company exempted the existing (white) non-labor employees from these new requirements, allowing those who lacked high-school diplomas to remain in their positions and those who had diplomas to transfer to the more desirable departments without taking the aptitude test.<sup>45</sup>

These facts may make it seem obvious that Duke Power's actions, although facially neutral, were merely a pretext for continuing a policy of deliberate discrimination against blacks.<sup>46</sup> But the case did not proceed on this theory in the Supreme Court – instead, it became a test of the emerging theory of disparate impact.

Several black plaintiffs sued Duke Power, maintaining that the diploma and standardized-test requirements were not job-related, that the new policies had the effect of disproportionately disadvantaging black workers, and that the company had a practice of favoring white employees.<sup>47</sup> The district court acknowledged the company's prior practice of "overt racial discrimination," but found that this behavior had ceased following Title VII's implementation.<sup>48</sup> The lower court further found that "the impact of prior inequities was beyond the reach" of the statute.<sup>49</sup> The court of appeals agreed with the district court and concluded that without evidence of "a racial purpose or invidious intent" in establishing the new requirements at Duke Power, these policies were permissible under the statute.<sup>50</sup> The appellate court reached this conclusion

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<sup>39</sup> 401 U.S. 424 (1971).

<sup>40</sup> See ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 212 (7th ed. 2008); BELTON ET AL., *supra* note 36, at 204.

<sup>41</sup> *Griggs*, 401 U.S. at 426-27.

<sup>42</sup> *Id.* at 427.

<sup>43</sup> *Id.* at 427-28.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 428.

<sup>46</sup> See GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, EMPLOYMENT DISCRIMINATION: LAW AND THEORY 145 (2005).

<sup>47</sup> *Griggs*, 401 U.S. at 425-26.

<sup>48</sup> *Id.* at 428.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 429.

while acknowledging that the requirements disproportionately affected black workers at the plant.<sup>51</sup>

The U.S. Supreme Court granted certiorari in the case to address whether Title VII ever prohibits a facially neutral policy or practice that has an adverse impact on a protected group.<sup>52</sup> Chief Justice Burger, writing for a unanimous Supreme Court, concluded that disparate impact is a viable theory under the statute.<sup>53</sup> The Court thus concluded that “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>54</sup> The Court was equally clear that Title VII was not meant to operate as a quota system for employment:

[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.<sup>55</sup>

The Court further clarified that not all facially neutral policies are prohibited, even where those practices result in an adverse impact on a protected group. Rather, the “touchstone is business necessity,” and a job-related criterion may be used by an employer if it is facially neutral and not used as a means of intentional discrimination.<sup>56</sup> Thus, the statute prohibits the use of tests, such as the one at issue in *Griggs*, “unless they are demonstrably a reasonable measure of job performance.”<sup>57</sup> According to the Court “Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract.”<sup>58</sup> The Court put the burden of proof for showing that the policy is job-related and consistent with business necessity on the employer.<sup>59</sup> In thus reversing the lower courts’ dismissal of the plaintiffs’ claims, the Court established the availability of disparate impact for employment-discrimination plaintiffs.<sup>60</sup>

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<sup>51</sup> *Id.* The appellate court did reverse some of the lower court opinion, “rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.” *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 430.

<sup>55</sup> *Id.* at 430-31.

<sup>56</sup> *Id.* at 431.

<sup>57</sup> *Id.* at 436.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 432.

<sup>60</sup> *Id.* at 436.

Notably absent from the Court's decision, however, was any substantive analysis of the statutory provisions that formed the basis for the decision.<sup>61</sup> The Court did include a footnote quoting the statute's language making it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."<sup>62</sup> This provision of the statute may have provided the basis for the Court's decision,<sup>63</sup> but without a clear statutory underpinning for the theory of disparate impact or the elements of job-relatedness and business necessity, the contours of the theory would remain fluid.<sup>64</sup> This would make it particularly vulnerable as the makeup of the Court changed in later years.<sup>65</sup>

Although *Griggs* brought about a major expansion of civil rights law, the Supreme Court restricted the breadth of the theory in its later decisions.<sup>66</sup>

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<sup>61</sup> See BELTON ET AL., *supra* note 36, at 204 ("Scholars have criticized the Supreme Court on its failure in *Griggs* to explain the theoretical underpinnings of the disparate impact theory."); ZIMMER ET AL., *supra* note 40, at 228; Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2019-20 n.41 (1995); see generally George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (discussing basis for disparate-impact theory).

<sup>62</sup> *Griggs*, 401 U.S. at 426 n.1 (quoting 42 U.S.C. § 2000e-2). See RUTHERGLEN & DONOHUE, *supra* note 46, at 145 ("*Griggs* was decided under the original version of Title VII, which contained no provisions specifically addressed to the theory of disparate impact. At most, isolated clauses in the main prohibitions and defenses in the statute obliquely address the issues . . .").

<sup>63</sup> See *Connecticut v. Teal*, 457 U.S. 440, 445-46 (1982); ZIMMER ET AL., *supra* note 40, at 228 ("To the extent the *Griggs* principle can be found in the provisions of § 703, it is in the language of paragraph (a)(2) . . .").

<sup>64</sup> See Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 223 (1990) (observing that Title VII "remain[ed] silent about whether it [was] also concerned with facially neutral employment practices, adopted without a discriminatory motive, that adversely affect the employment opportunities of racial minorities and women"); Seiner, *supra* note 15, at 97; Sullivan, *Looking Past the Desert Palace Mirage*, *supra* note 29, at 964.

<sup>65</sup> See Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1479-80 (1995) ("In 1971, when *Griggs* was decided, the Court was in a very real sense still the Warren Court. . . . By 1989, however, when *Wards Cove* was decided, Justices Black, Douglas, Harlan, and Stewart had been replaced by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. The 1989 Court was much more conservative on racial issues than the immediate post-Warren Court had been." (citations omitted)); Amos N. Jones & D. Alexander Ewing, *The Ghost of Wards Cove: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 164 (2005).

<sup>66</sup> See Selmi, *supra* note 19, at 733 ("By the end of the theory's first decade, the Court had rejected more challenges than it had accepted, and it had largely limited the [disparate

Most notably, in *Wards Cove Packing Co., Inc. v. Atonio*,<sup>67</sup> a more conservative Supreme Court placed several stringent limitations on the scope of disparate impact.<sup>68</sup> *Wards Cove* involved a disparate-impact claim brought by a class of nonwhite employees at an Alaskan cannery facility.<sup>69</sup> The workers alleged that their employer's hiring and promotion practices resulted in a disproportionate number of the more skilled (and higher paying) positions at the cannery being filled by white workers.<sup>70</sup> The court of appeals held that the workers' evidence established a prima facie case of disparate impact and that the burden then shifted to the employer to prove its business-necessity defense.<sup>71</sup> The Supreme Court found multiple flaws in this analysis and remanded the case for further proceedings.<sup>72</sup>

Among other things, the Court diluted the job-related and consistent-with-business-necessity requirements to a standard requiring only "a reasoned review of the employer's justification for his use of the challenged practice."<sup>73</sup> The employer's burden under this watered-down "reasoned review" was only one of production; the burden of persuasion "must remain with the plaintiff" throughout the case.<sup>74</sup>

In *Wards Cove*, then, the Supreme Court transformed disparate-impact law.<sup>75</sup> The four-Justice dissent accused the majority of engaging in "judicial activism," arguing that it had "[t]urn[ed] a blind eye to the meaning and purpose of Title VII" while "perfunctorily reject[ing] a longstanding rule of law and underestimat[ing] the probative value of evidence of a racially stratified work force."<sup>76</sup>

The changes made by the *Wards Cove* majority reflected parallel developments in disparate-treatment law. Earlier in the decade, for example, the Court had clarified that the *McDonnell Douglas* framework merely shifted – temporarily – the parties' burdens of production, but that the ultimate burden of persuasion remained with the plaintiff.<sup>77</sup> A few years later, the Court held

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impact] theory to its origins – namely testing claims and perhaps some other objective procedures capable of formal validation."); *Seiner*, *supra* note 15, at 101 ("Because disparate impact is a creature of case law rather than statute, the Supreme Court has been able to chip away at its protections more easily when so inclined.").

<sup>67</sup> 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

<sup>68</sup> *Id.* at 657-59. See Belton, *supra* note 64, at 225.

<sup>69</sup> *Wards Cove*, 490 U.S. at 645-48.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 649.

<sup>72</sup> *Id.* at 651-52.

<sup>73</sup> *Id.* at 659.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.* at 657-59; Belton, *supra* note 64, at 240.

<sup>76</sup> *Wards Cove*, 490 U.S. at 662-63 (Stevens, J., dissenting).

<sup>77</sup> *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

that a plaintiff must prove not only that the employer's proffered explanation is false, but also that the true reason is discriminatory.<sup>78</sup> In addition to making it harder for plaintiffs to prevail in disparate-treatment cases, this development shifted the focus from the justification for the employer's action to the question of "discrimination *vel non*."<sup>79</sup>

The changes announced in *Wards Cove* therefore brought disparate-impact analysis closer to disparate-treatment analysis. The parallels suggest that the Court might have been heading in a direction that would have largely collapsed the two theories into mere burden-of-production-shifting frameworks that focused on the question of discrimination rather than on the justification for the employer's actions. Had Congress not stepped in, it is conceivable that the Court would have continued along this path. Eventually, the Court might have made disparate impact merely an alternative evidentiary framework, not fundamentally different from *McDonnell Douglas*. Disparate impact, under this approach, would have been nothing more than a tool for smoking out hidden intentional discrimination.<sup>80</sup> As the facts of cases like *Griggs* suggested, employers that imposed requirements that could not be justified as job-related and that tended to screen out minorities might well be doing so as part of a deliberate effort to keep minorities out of the workplace.<sup>81</sup>

But even if the Court was thinking along these lines in *Wards Cove*, it was not able to pursue its approach any further at that time. Congressional action in response to *Wards Cove* changed the basis for, and rules governing, disparate-impact cases.<sup>82</sup>

### C. *The Civil Rights Act of 1991*

Congress responded to the Supreme Court's attempt to limit disparate-impact theory – as well as other decisions in the employment context – through the Civil Rights Act of 1991.<sup>83</sup> This amendment to Title VII at least partly overturned the *Wards Cove* decision, and in some measure it returned the law

<sup>78</sup> *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515-20 (1993).

<sup>79</sup> *Id.* at 518 (internal quotation marks and citation omitted).

<sup>80</sup> *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652 (2001) (stating that "[a] leading gloss on the conception of disparate impact liability arising from [*Griggs*] is that disparate impact functions as a means of smoking out subtle or underlying forms of intentional discrimination on the basis of group membership"); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520 (2003) [hereinafter Primus, *Round Three*]; *see also In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321-23 (11th Cir. 1999) (discussing the role of disparate impact in employment discrimination law); *infra* Part V (discussing the view that disparate impact theory targets intentional discrimination hidden by employers).

<sup>81</sup> *See* Primus, *Round Three*, *supra* note 80, at 520.

<sup>82</sup> *See infra* Part I.C. (addressing the impact of Civil Rights Act of 1991 on disparate-impact claims).

<sup>83</sup> Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). *See* Sullivan, *The World Turned Upside Down?*, *supra* note 27, at 1520.

to how it had been interpreted before that opinion was issued.<sup>84</sup> For the first time, Congress also provided an unassailable textual basis for disparate-impact claims, incorporating the theory into Title VII.<sup>85</sup>

The statute now codifies a three-step analysis for disparate-impact cases.<sup>86</sup> First, the plaintiff must establish that an identified employment practice results in a disparate impact on a protected group.<sup>87</sup> Second, the employer must prove that the employment practice is “job related for the position in question and consistent with business necessity.”<sup>88</sup> Finally, even if the employer satisfies its burden on the job-relatedness question, the plaintiff can still prevail by establishing that there is an alternative employment practice available with less discriminatory impact that still satisfies the employer’s business needs.<sup>89</sup>

Plaintiffs pursuing disparate-impact claims, however, have limited relief available to them. Most notably, prevailing plaintiffs in disparate-impact suits are not entitled to compensatory or punitive damages, although a new provision added by the 1991 law provides these damages to disparate-treatment plaintiffs.<sup>90</sup>

With the passage of the Civil Rights Act of 1991, then, disparate impact finally gained the clear analytic framework it had lacked since its inception in *Griggs*.<sup>91</sup> But it remains controversial whether it is appropriate – or even

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<sup>84</sup> See Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071 (including among the Act’s purposes “to codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*” (citations omitted)); Julia Lamber, *And Promises to Keep: The Future in Employment Discrimination*, 68 IND. L.J. 857, 861 (1993). Indeed, the fact that portions of *Wards Cove* are no longer good law was made explicit as to the showing of alternative employment practices, for the statute now requires that the law should be interpreted “as it existed on June 4, 1989 [the day before the *Wards Cove* decision], with respect to [this] concept.” Civil Rights Act of 1991, § 105(a)(C), 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(C) (2006)).

<sup>85</sup> See 42 U.S.C. § 2000e-2(k); Seiner, *supra* note 15, at 96-97, 102-04.

<sup>86</sup> 42 U.S.C. § 2000e-2(k); see ZIMMER ET AL., *supra* note 40, at 231-75; Peter Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 422-24 (1998).

<sup>87</sup> 42 U.S.C. § 2000e-2(k)(1)(A). A plaintiff must show that “each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” 42 U.S.C. § 2000e-2(k)(1)(B).

<sup>88</sup> 42 U.S.C. § 2000e-2(k)(1)(A); 42 U.S.C. § 2000e-2(m); see RUTHERGLEN & DONOHUE, *supra* note 46, at 148.

<sup>89</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(ii); 42 U.S.C. § 2000e-2(k)(1)(C); see Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH & LEE L. REV. 3, 38 (2005).

<sup>90</sup> 42 U.S.C. § 1981a; see Primus, *Round Three*, *supra* note 80, at 521 n.118.

<sup>91</sup> See RUTHERGLEN & DONOHUE, *supra* note 46, at 145; Seiner, *supra* note 15, at 103 (recognizing that with the passage of the Civil Rights Act of 1991 “disparate impact had

constitutional – to hold employers liable when they have not engaged in intentional discrimination.<sup>92</sup>

## II. *RICCI V. DEStEFANO*

In 2003, the City of New Haven, Connecticut administered a test to 118 of its firefighters for possible promotions to lieutenant and captain positions within the department.<sup>93</sup> The City planned to use the test to determine who would be eligible for these upcoming promotions for the next two years, and many candidates studied extensively for the exam “at considerable personal and financial cost.”<sup>94</sup>

The City hired a consulting group, at a cost of one hundred thousand dollars, to help prepare and administer the tests.<sup>95</sup> The consultants selected by the City specialized in promotional tests administered to public-safety officials, and the group performed an extensive analysis to make certain that the exam would measure the knowledge and skills necessary for the vacant positions.<sup>96</sup> As part of this process, the group observed the officers’ daily tasks and conducted interviews with people in the department.<sup>97</sup> Minority firefighters were “oversampled” as part of this analytical process to make certain that the test ultimately developed would not be biased against minority candidates.<sup>98</sup> Based on this information and other departmental sources such as training manuals and departmental procedures, the consulting group developed a multiple-choice exam and a separate oral test.<sup>99</sup>

To grade the oral examinations, the group selected thirty assessors, all of whom held a higher rank than the positions that were being filled.<sup>100</sup> Two-thirds of these assessors were minorities, and all of these individuals received several hours of training on how to evaluate candidate responses.<sup>101</sup> The candidates sat for the test at the end of 2003, and the results revealed that a disproportionate number of white exam-takers had passed the exam:

Seventy-seven candidates completed the lieutenant examination – 43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed – 25

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clear statutory backing”); Sullivan, *The World Turned Upside Down?*, *supra* note 27, at 1534.

<sup>92</sup> See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682-83 (2009) (Scalia, J., concurring) (questioning the constitutional validity of the disparate-impact provisions of Title VII).

<sup>93</sup> *Id.* at 2664-65 (2009) (majority opinion).

<sup>94</sup> *Id.* at 2664.

<sup>95</sup> *Id.* at 2665.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 2665-66.

<sup>100</sup> *Id.* at 2666.

<sup>101</sup> *Id.*



whites, 6 blacks, and 3 Hispanics. . . . [T]he top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. . . .

Forty-one candidates completed the captain examination – 25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed – 16 whites, 3 blacks, and 3 Hispanics. . . . [Nine] candidates were eligible for an immediate promotion to captain – 7 whites and 2 Hispanics.<sup>102</sup>

Though City officials questioned whether these results suggested that the examination was discriminatory, the consulting group maintained that the test was valid and that the poor performance of minority candidates “was likely due to various external factors.”<sup>103</sup> The consulting group also indicated that these results were consistent with other departmental tests.<sup>104</sup> At hearings on whether to certify the examination results, the New Haven Civil Service Board heard from firefighters who argued strenuously on both sides of the issue.<sup>105</sup> The validity of the test was vigorously debated, and the leader of the consulting-group team that had prepared the examination explained how the test was job-related and “facially neutral.”<sup>106</sup> The Board also heard from an industrial psychologist who expressed concerns about the methodology of the examination but concluded that the test was “reasonably good.”<sup>107</sup> A retired minority fire captain from another state further indicated that the test questions were job-related.<sup>108</sup> And a university professor told the Board that the results were consistent with testing in other areas.<sup>109</sup>

At the final Board meeting on the issue, New Haven’s city counsel nonetheless argued that the results should *not* be certified because of the City’s potential liability under Title VII of the Civil Rights Act of 1964.<sup>110</sup> Some described the written test as having had “severe adverse impacts.”<sup>111</sup> The chief administrative officer, who appeared on behalf of New Haven’s mayor, also argued that the test should be discarded because the results “created a situation in which black and Hispanic candidates were disproportionately excluded from opportunity.”<sup>112</sup> At the end of the meeting, the Board was deadlocked in a vote on whether to certify the test results, meaning that they would *not* be certified.<sup>113</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2667.

<sup>106</sup> *Id.* at 2667-68 (citation omitted).

<sup>107</sup> *Id.* at 2669 (citation omitted).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2669-70.

<sup>111</sup> *Id.* at 2670.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2671.

A group of white firefighters and one Hispanic firefighter who passed the test sued the City, alleging violations of the Equal Protection Clause of the Fourteenth Amendment, Title VII, and other statutory provisions.<sup>114</sup> The district court entered summary judgment for the City, concluding that the City's "'motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent' under Title VII."<sup>115</sup> The Second Circuit affirmed in a short per curiam opinion, and the Supreme Court granted certiorari.<sup>116</sup>

In a 5-4 vote the Supreme Court reversed and entered judgment for the plaintiff firefighters.<sup>117</sup> Writing for the majority, Justice Kennedy recounted the plaintiffs' argument that by failing to certify the test results, the City "discriminated against them in violation of Title VII's *disparate-treatment* provision."<sup>118</sup> In contrast, the City maintained that its refusal to certify the examination results did not violate the statute because "the tests appear[ed] to violate Title VII's *disparate impact* provisions."<sup>119</sup> The Supreme Court therefore saw its task as resolving this apparent conflict between the *disparate-treatment* and *disparate-impact* provisions of the statute.<sup>120</sup>

The Court began its analysis by making it clear that the City's decision to discard the test "would violate the *disparate-treatment* prohibition of Title VII absent some valid defense."<sup>121</sup> Even though the City's actions may have been "well intentioned" and "benevolent," the decision was still made on the basis of race in violation of Title VII, as the examination was discarded "because the higher scoring candidates were white."<sup>122</sup> The City's "express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."<sup>123</sup> Thus, the Court determined that the City would be liable under Title VII unless an employer's attempt to avoid a *disparate-impact* suit creates a defense that would "excuse[] what otherwise would be prohibited" conduct.<sup>124</sup>

In considering the contours of such a defense, the Court adopted a "strong-basis-in-evidence standard" for Title VII claims "to resolve any conflict between the *disparate-treatment* and *disparate impact* provisions."<sup>125</sup> Thus, an employer may "engage in intentional discrimination for the asserted purpose of

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006)).

<sup>116</sup> *Id.* at 2672.

<sup>117</sup> *Id.* at 2663-64.

<sup>118</sup> *Id.* at 2673 (emphasis added).

<sup>119</sup> *Id.* (emphasis added) (internal quotation marks omitted).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2673.

<sup>122</sup> *Id.* at 2674.

<sup>123</sup> *Id.* at 2673.

<sup>124</sup> *Id.* at 2674.

<sup>125</sup> *Id.* at 2676.

avoiding or remedying an unintentional disparate impact” only if 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>126</sup> Applying this standard, the Court concluded that the statistical disparity reflected in the test results failed to create a strong basis in evidence justifying the City’s belief that it would have been liable for disparate impact if it had certified these results.<sup>127</sup> Even with this statistical disparity, the City would still have been able to avoid liability if it could have demonstrated that the tests were job-related and consistent with business necessity.<sup>128</sup> If the City had satisfied this job-related standard, minority firefighters challenging the test would not have been able to prevail unless they established that “there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt.”<sup>129</sup>

Given the extensive measures taken by the consulting group in creating and administering the tests – and taking into account the statements of the witnesses who appeared before the Civil Service Board – the Court found no factual dispute as to whether the tests were job-related and consistent with business necessity.<sup>130</sup> Indeed, the majority concluded that the City had “turned a blind eye to evidence that supported the exams’ validity.”<sup>131</sup> Thus, the City had not shown a strong basis in evidence for its belief that the tests were *not* job-related and consistent with business necessity.<sup>132</sup> Similarly, the Court failed to find a strong basis in evidence for a less discriminatory alternative to the testing procedures used by the City.<sup>133</sup> In this regard, the City’s failure to implement another selection procedure immediately may have proven fatal to this part of its case, because its inaction suggested that an equally effective alternative was not readily at hand.<sup>134</sup> Taking all of these facts into account, the Court held that the City’s attempt to “create a genuine issue of fact based on a few stray (and contradictory) statements in the record” failed to rise to the strong-basis-in-evidence standard.<sup>135</sup>

In sum, the Court found “no evidence – let alone the required strong basis in evidence – that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City.”<sup>136</sup> The Court emphasized that “[f]ear of litigation alone cannot justify

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<sup>126</sup> *Id.* at 2677.

<sup>127</sup> *Id.* at 2678.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2678-79.

<sup>131</sup> *Id.* at 2679.

<sup>132</sup> *Id.* at 2678-79.

<sup>133</sup> *Id.* at 2679.

<sup>134</sup> *See id.* at 2679-81.

<sup>135</sup> *Id.* at 2680.

<sup>136</sup> *Id.* at 2681.

an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."<sup>137</sup> The process used by the City in developing and administering the tests was "open and fair," the City had been careful to craft a neutral exam, and it had encouraged "broad racial participation."<sup>138</sup> The Court thus concluded that the City's refusal to certify the examination results violated Title VII's disparate-treatment provisions and ruled that summary judgment should have been entered for the firefighters.<sup>139</sup>

More importantly for purposes of this Article, in concluding the opinion the Court also addressed the possibility that the City might face a disparate-impact claim brought by minority firefighters once the test results were certified.<sup>140</sup> Though no such suit had been filed, and the issue was not presently before the Court, the majority opined that the minority firefighters could not prevail:

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, had it not certified the results, it would have been subject to disparate-treatment liability.<sup>141</sup>

Because the Court concluded that the white and Hispanic plaintiffs succeeded on their Title VII claim, it also determined that it was unnecessary to address the potential Equal Protection Clause issue.<sup>142</sup>

Justice Scalia, concurring in full in the Court's opinion, addressed the equal protection issue that the majority avoided.<sup>143</sup> Justice Scalia questioned the constitutional validity of the disparate-impact provisions of Title VII, noting that if the government cannot discriminate against an individual because of race, "then surely [the government] is also prohibited from enacting laws mandating that third parties – *e.g.*, employers, whether private, State, or municipal – discriminate on the basis of race."<sup>144</sup> In Justice Scalia's view, disparate impact puts "a racial thumb on the scales," frequently forcing companies "to evaluate the racial outcomes of their policies."<sup>145</sup> Though acknowledging that the issue need not be resolved in this case, he opined that "it behooves us to begin thinking about how – and on what terms – to make peace between" disparate impact and equal protection.<sup>146</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2681-83 (Scalia, J., concurring).

<sup>144</sup> *Id.* at 2682.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 2683. Justice Alito, joined by Justices Scalia and Thomas, wrote a separate concurrence as well, addressing the dissent's concerns that "the Court's recitation of the facts leaves out important parts of the story." *Id.* at 2683-90 (Alito, J., concurring).

Writing for the dissent, Justice Ginsburg (joined by Justices Stevens, Souter, and Breyer) argued that the majority's holding "ignores substantial evidence of multiple flaws in the tests New Haven used," and noted that other cities have utilized better examinations that resulted in smaller racial disparities.<sup>147</sup> The dissent also noted that the majority had failed to paint a complete picture of the situation in New Haven, highlighting the racial disparity in the composition of the City's firefighters that had persisted for years (and that the majority's opinion had omitted).<sup>148</sup> The dissent accused the majority of breaking a longstanding promise of civil rights law "that groups long denied equal opportunity would not be held back by tests 'fair in form, but discriminatory in operation.'"<sup>149</sup>

As the dissent's vehemence reflects, *Ricci* represents a significant development in disparate-treatment doctrine that may profoundly influence that area of the law, especially so-called reverse-discrimination lawsuits alleging a bias in favor of minorities.<sup>150</sup> Other scholarship is focusing on this aspect of the decision, including potential limitations on the Court's analysis and its implications for traditional Title VII (as opposed to reverse-discrimination) cases.<sup>151</sup>

*Ricci* will also have a strong influence on the future of disparate-impact law. The Court's extended analysis of the evidence on job-relatedness and alternatives is likely to affect how lower courts approach those issues in other cases.<sup>152</sup> Justice Scalia's concurrence also raises questions about the constitutionality of Title VII's prohibition on disparate impact.<sup>153</sup> Other scholarship is examining these constitutional questions, and what they may signal about the future of the whole disparate-impact framework.<sup>154</sup>

All of these issues merit further exploration. Here, however, we will focus on a separate issue: What does the cryptic passage at the end of the majority opinion about a hypothetical disparate-impact case against the City mean for

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<sup>147</sup> *Id.* at 2690-91 (Ginsburg, J., dissenting).

<sup>148</sup> *Id.* at 2691.

<sup>149</sup> *Id.* at 2710 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

<sup>150</sup> *See id.* at 2689-2710.

<sup>151</sup> *See, e.g.,* Zimmer, *supra* note 9, at 4.

<sup>152</sup> Scholars have already questioned the validity of the statistical approach taken by the lower courts, however. *See* Joseph L. Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences than the U.S. Government's 'Four-Fifths' Rule: An Examination of the Statistical Evidence in Ricci v. DeStefano*, 8 LAW, PROBABILITY & RISK 171, 173 (2009) (arguing that, under the framework used by the lower court, there is a 60% chance that even a perfectly fair test will be found to have a disparate impact).

<sup>153</sup> *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

<sup>154</sup> *See, e.g.,* Primus, *The Future of Disparate Impact*, *supra* note 9, at 1342-45 (arguing that there are three ways to read *Ricci*, only one of which is fatal to disparate-impact doctrine).

disparate-impact's doctrinal framework? We discuss possible interpretations of this passage below.

### III. POSSIBLE INTERPRETATIONS OF *RICCI*

Broadly speaking, there are three kinds of interpretations one could give to *Ricci*'s coda, which states that the City – should it face a disparate-impact suit by minority firefighters who failed the exam – “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>155</sup> First, one could look at this as the Court's commentary on the particular facts of the case before it rather than an articulation of a general principle of law. Second, one could try to understand it as a general doctrinal principle for disparate-impact cases rather than a mere commentary on the particular facts presented. And third, one could treat it as confused and ultimately meaningless dicta that has no forward-looking significance whatsoever. We examine the first and third possibilities in this part of the Article; after explaining their shortcomings, we examine the second possibility in Part IV.

#### A. *The Case-Specific Reading*

The case-specific reading understands the cryptic passage as merely observing that no disparate-impact claim could be successfully brought against New Haven, because the evidence before the Court had shown conclusively that the test was job-related and that there was no available alternative with less discriminatory impact that would equally suit the City's needs. On this reading, the Court was stating that as a matter of fact, no suit against New Haven could possibly succeed even if plaintiffs were to adduce more evidence. Perhaps the Court was signaling to plaintiffs that it would not be plausible even to allege that the test has a disparate impact, thereby inviting the lower courts to dismiss such a claim at the threshold stage.<sup>156</sup>

This reading is attractive to those who find the affirmative defense described below problematic, because it offers an alternative interpretation that does not treat the passage as completely meaningless. But the fact-specific reading is hard to square with the precise language the Court used in *Ricci*. The Court phrased its observation in probabilistic terms: New Haven “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>157</sup> The term “strong basis in evidence” implies a prediction about the likely outcome of a suit that has not happened. But here New Haven did refuse to certify the results and was held liable, which makes the “strong basis in

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<sup>155</sup> *Ricci*, 129 S. Ct. at 2681.

<sup>156</sup> See Howard Wasserman, *When Ricci Met Iqbal*, PRAWFSBLAWG (Oct. 16, 2009, 12:17 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/10/when-ricci-met-iqbal.html>.

<sup>157</sup> *Ricci*, 129 S. Ct. at 2681 (emphasis added).

evidence” language puzzling if it were meant just as an observation about the particular facts of this case. If the Court had intended to limit its statement to the facts of this specific case, it likely would have said that New Haven “would avoid disparate-impact liability because, when it refused to certify the results, it was subject to disparate-treatment liability.” The Court’s use of predictive language makes sense only if it were intending to say something that could apply beyond the facts of this case.

The case-specific reading also poses doctrinal difficulties. Ordinarily, nonparties are not bound by the outcome of lawsuits in which they did not participate and over which they had no control.<sup>158</sup> That generally applies even when the nonparty’s interests are aligned with those of a party to the case, so long as the two do not have a special legal relationship, as when the party is the nonparty’s fiduciary or a class representative.<sup>159</sup> For the Court to suggest otherwise here would be a remarkable departure.

As some scholars have noted in trying to understand this part of *Ricci*, there is a controversial provision of the Civil Rights Act of 1991 that purports to abrogate the general principle of non-preclusion in some Title VII cases.<sup>160</sup> Under that provision, an employment practice that implements a court order in an employment-discrimination suit may not be challenged by a person whose interests were adequately represented in the prior lawsuit, except in limited circumstances such as collusion.<sup>161</sup> But the Supreme Court has never addressed this provision, and it raises constitutional questions about the due process rights of nonparties to the first lawsuit.<sup>162</sup> If the Court in *Ricci* meant to say that the Civil Rights Act of 1991 would bar future disparate-impact claims against New Haven brought by nonparties to the *Ricci* litigation, and that it would do so constitutionally, it picked a rather obscure way to announce this conclusion. At the very least, the case-specific reading is not preferable to the

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<sup>158</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 892-95 (2008) (explaining the general rule and the limited exceptions).

<sup>159</sup> See *id.* (reviewing six categories of recognized exceptions to the rule against nonparty preclusion).

<sup>160</sup> See 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, 214 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/40/LRColl2009n40Sullivan.pdf> [hereinafter Sullivan, *End of the Line*] (“Congress provided that a prior decree in a civil rights suit can bind nonparties if they either (1) had notice and the opportunity to intervene or (2) were adequately represented in the earlier suit. Assuming that this statute comports with due process, it seems likely that at least one prong will be met, which would allow the white fire-fighters to retain the gains they made in *Ricci*.” (footnotes omitted)); Zimmer, *supra* note 9, at 28 & n.73 (“Generally, only parties to an action are bound by a judgment in that action but, nevertheless, there is an argument that the Civil Rights Act of 1991 provides for preclusion.”).

<sup>161</sup> See 42 U.S.C. § 2000e-2(n) (2006).

<sup>162</sup> See Sullivan, *End of the Line*, *supra* note 160, at 214.

alternatives on the ground that it easily fits into existing doctrinal frameworks.<sup>163</sup>

The clearest test of this case-specific reading is already in court. A disparate-impact suit has already been filed against the City by a minority firefighter who did poorly on the test.<sup>164</sup> The district court dismissed the complaint, citing *Ricci*'s language, and that decision has been appealed.<sup>165</sup>

### B. *The Confused-Dicta Reading*

Because of the shortcomings of the case-specific readings, some scholars have dismissed the Court's language as meaningless dicta.<sup>166</sup> Perhaps, for example, the Court merely intended to convey again that the evidence of disparate impact presented to it was insufficient. Thus, if a future disparate-impact lawsuit by minority firefighters presented exactly the same evidence, the City would prevail. Or maybe the Court meant only to predict that the City likely would win any disparate-impact suit it might face, not to lay down a holding that the City absolutely would win.

The language the Court actually used does not reflect any such interpretation, and for that reason alone one might reject it. Of course, it remains possible that the Court's language was merely sloppy. But because the lower courts take seriously even dicta from the Supreme Court,<sup>167</sup> we set aside this possibility for the moment and try to accept the Court's language at face value. And as we explain below, one can construct a plausible interpretation of *Ricci* as establishing an affirmative defense similar to other policy-driven defenses that the Court has created under Title VII.<sup>168</sup>

In doing so, we do not mean to imply that the affirmative-defense interpretation is the best reading of *Ricci*. It may be, as others have suggested, that the passage is merely ill-considered dictum that suggests nothing

<sup>163</sup> See *id.* (“[F]rom a civil procedure perspective, the normal rule is that the black firefighters may not be bound by a judgment in a case in which they are not parties.”).

<sup>164</sup> See Complaint for Damages and Injunctive Relief at 2, *Briscoe v. New Haven*, No. 3:09-cv-01642 (CSH) (D. Conn. Oct. 15, 2009) (alleging that the written examination used by the New Haven Fire Department had a “disparate impact on African-American candidates”).

<sup>165</sup> *Briscoe v. New Haven*, No. 3:09-cv-01642 (CSH), 2010 WL 2794231, at \*2 (D. Conn. July 12, 2010), *appeal docketed*, No. 10-1975 (2d Cir. Sept. 27, 2010).

<sup>166</sup> See, e.g., Zimmer, *supra* note 9, at 28, 30 (calling this passage “obscure” and “inscrutable”).

<sup>167</sup> See, e.g., *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” (quoting *Doughty v. Underwriters at Lloyd’s, London*, 6 F.3d 856, 861 n.3 (1st Cir. 1993))). See generally Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 *DRAKE L. REV.* 75 (2008) (discussing the use of Supreme Court dicta by the lower courts).

<sup>168</sup> See *infra* Part V (discussing the analogy between the *Ricci* affirmative defense and affirmative defenses in other areas of employment-discrimination law).



significant about the future of disparate-impact law. But we focus on the possibility of a new affirmative defense because, as explained below, it is both the most interesting reading of *Ricci* and facially no less plausible than the alternatives, each of which suffers from linguistic or doctrinal shortcomings. If the Court is heading down the path we identify here, it is important to understand the profound changes that may be coming. And if, on the other hand, the consequences of the affirmative-defense reading that we identify are unacceptable, it is important to clarify that now in order to steer the courts in another direction. Ultimately, we do not aim to answer the normative question of whether the courts *should* adopt the affirmative-defense reading; we merely try to describe what such a defense would look like and what it would mean for the future of disparate-impact law.

#### IV. THE AFFIRMATIVE-DEFENSE READING

We explain here how the Court's language could be understood to create a new affirmative defense for employers in disparate-impact cases. Under this reading, an employer would be able to defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it was not aware that the test had an unlawful disparate impact. In other words, if after investigating the matter the employer found evidence that its test had a disproportionate effect on a protected group but concluded that the test was job-related and consistent with business necessity, and that there were no alternative tests available with less discriminatory impact that would similarly serve its business needs, it would be irrelevant whether the employer's conclusions were *correct*. Even if a court ultimately concluded that the test was not job-related, or that there was an equally effective alternative that had less disparity, the employer would be insulated from liability because it did not know this *at the time the employment decision was made*.

Our analysis proceeds in two steps. First, we show how *Ricci* can be read to suggest a new affirmative defense for employers that took reasonable steps to investigate and mitigate the adverse impacts of a challenged employment practice before implementing it.<sup>169</sup> Second, we offer a possible structure for this affirmative defense, including a limited safe harbor for employers that conduct validation studies.<sup>170</sup>

Some final preliminary notes: throughout our analysis, we will assume that the employment practice at issue is a workplace examination. Doing so makes our discussion less abstract, and it makes the comparison to *Ricci* itself – which involved an employment examination – clearer. To the extent that *Ricci*'s holding may apply to other employment practices, such as the diploma requirement in *Griggs v. Duke Power Co.*,<sup>171</sup> much of what we say would apply equally to those practices.

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<sup>169</sup> See *infra* Part IV.A.

<sup>170</sup> See *infra* Part IV.B.

<sup>171</sup> 401 U.S. 424, 429-36 (1971).

Similarly, we examine the Court's language from the perspective of a lawsuit filed after the policy or test was actually implemented by the employer. As another scholar has noted, lawsuits brought before implementation (during the design-phase of the test) may involve additional considerations that *Ricci* (and therefore our analysis here) does not contemplate.<sup>172</sup>

#### A. *The New Affirmative Defense to Disparate Impact*

In describing how New Haven would defend against a hypothetical disparate-impact lawsuit, the Court stated that "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>173</sup> This corollary to *Ricci*'s primary holding may indicate that Title VII is symmetric. The Court's principal holding is that potential disparate-impact liability does not automatically trump disparate-treatment liability; it does so only if the employer shows a strong basis in evidence to fear disparate-impact liability.<sup>174</sup> Conversely, the statement at the end of the majority opinion suggests that potential disparate-treatment liability does not automatically trump disparate-impact liability; it does so only if the employer shows a strong basis in evidence for the fear.<sup>175</sup> To generalize, an employer's fear of one form of liability under Title VII is a defense to another form of liability if and only if the employer has a strong basis in evidence for the fear.

If this approach is correct, in addition to the express defense announced by the Court for intentional discrimination claims, an employer that bases an employment decision on workplace test results would have a defense to a claim of *disparate impact* if it can show:

- (1) a strong basis in evidence that
- (2) it would have been liable for disparate treatment if it had discarded the test results.<sup>176</sup>

Together with *Ricci*'s primary holding on disparate-treatment liability, these two elements would establish an affirmative defense to *disparate-impact* liability for an employer that thought its actions were lawful at the time it took them.

Element (1) of the defense requires the employer to make an evidentiary showing.<sup>177</sup> This signals that the legal principle at issue is an affirmative defense – a matter as to which the defendant, rather than the plaintiff, bears the

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<sup>172</sup> See Zimmer, *supra* note 9, at 24-28.

<sup>173</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009).

<sup>174</sup> See *id.* at 2664-65.

<sup>175</sup> *Id.* at 2681

<sup>176</sup> See *id.*

<sup>177</sup> *Id.*

burden of proof – and thus suggests that the employer may not rely on the mere *absence* of evidence.<sup>178</sup>

Element (2) of the defense – that the employer would have been liable for disparate treatment had it discarded the test results – is the heart of the affirmative defense. *Ricci*'s primary holding explains what this element requires. An employer is subject to disparate-treatment liability if it discarded a test based on concerns about its disparate impact without having a strong basis in evidence to believe that the test had an *unlawful* disparate impact.<sup>179</sup> By *unlawful* disparate impact, we mean not only that the test disproportionately disadvantages minorities, but also that either it is not job-related or there is a less discriminatory alternative. Thus, element (2) requires that the employer show that it was aware of the statistical disparity but lacked a strong basis in evidence to believe that the test had an unlawful disparate impact.<sup>180</sup>

Although at first blush this formulation may appear circular – that the employer must disprove disparate impact to defend against a disparate-impact claim – the requirements are compatible if the two showings refer to *different times*. Disparate treatment is a doctrine about intent, and to determine whether an employer's intent in taking an action was proper, one must examine what the employer knew at that time. In the context of element (2), therefore, the employer would be showing that *at the time it took the challenged action*, it knew about the statistical disparity but lacked a strong basis in evidence to believe that the test had an unlawful disparate impact.

Under this approach, for a plaintiff to prevail on a claim of disparate impact it would not be enough that a test *in fact* had an unlawful disparate impact. It also would have to be that the employer knew about the unlawful disparate impact when it accepted the test's results. If the employer did not know about the test's unlawful impact, then it would not have had a strong basis in evidence to think that the test had an unlawful impact.<sup>181</sup>

One more element must be considered to round out the affirmative defense. It would not be enough for an employer to rely on ignorance as the basis for the defense; rather an employer should have to have undertaken some sort of inquiry as to the test's validity before it used it. First, as the formulations above suggest, the employer had to know about the statistical disparity that affects a minority group before using the test. If the employer did not know

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<sup>178</sup> See Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 327 (1980) ("An affirmative defense is defined as an issue upon which the defendant bears the burden of persuasion, usually by the standard of a preponderance of the evidence." (footnote omitted)); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1214-15 (1981).

<sup>179</sup> See *Ricci*, 129 S. Ct. at 2677.

<sup>180</sup> See *id.*

<sup>181</sup> See *id.* at 2681.

about the disparity, its decision to discard the test could not be disparate treatment because it could not have had a racial (or other group-based) motivation for acting. Second, having uncovered evidence of the disparity, the employer had to make a reasonable effort to determine if the test was nonetheless valid. If mere good-faith ignorance were enough, *Ricci* would be discarding some of the most important language in *Griggs*, which emphasized that “good intent or absence of discriminatory intent” is not enough to defend against a claim of disparate impact,<sup>182</sup> and it would essentially be jettisoning the entire concept of disparate impact, which addresses unintentional discrimination.<sup>183</sup> But the *Ricci* majority reaffirmed the basic approach of *Griggs*,<sup>184</sup> and Justice Scalia’s concurrence noted the lack of a general good-faith defense to claims of disparate impact.<sup>185</sup> Requiring that the employer affirmatively establish the sound basis of its workplace decision would preserve the possibility of liability for unintentional discrimination while still giving content to the defense.

Putting all of this together, the affirmative-defense reading of *Ricci* would allow an employer to defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it did not believe that the test had an unlawful disparate impact. To avail itself of the defense, an employer would have to have undertaken some sort of fact-finding to establish evidence of a statistical disparity and to justify its belief in the test’s validity before using the test.

If this formulation is correct, an employer might be able to establish the affirmative defense for past actions but – because of new information it has become aware of – not be able to invoke it prospectively. For example, if in the course of a disparate-impact suit the plaintiff were to submit a new validation study calling an employment test into question, the protection conferred by the *Ricci* affirmative defense would be only retrospective. The employer might avoid any liability for the actions challenged in that lawsuit, but it also would have received evidence calling the test’s validity into question during the course of the litigation. That evidence – the plaintiff’s new study – would give the employer a factual basis to discard the test prospectively based on its disparate impact. If the employer refused to do so and was sued again for workplace decisions taken after the first lawsuit, the affirmative defense would no longer protect its use of the employment test.

In this respect, a *Ricci* affirmative defense would resemble the doctrine of qualified immunity, which protects government officials sued under 42 U.S.C.

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<sup>182</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

<sup>183</sup> See *supra* Part I (discussing the background and theoretical basis for disparate-impact claims).

<sup>184</sup> *Ricci*, 129 S. Ct. at 2672-73.

<sup>185</sup> *Id.* at 2682 (Scalia, J., concurring) (“[T]he disparate-impact provisions . . . fail to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable.”).

§ 1983 for violating a defendant's federal rights.<sup>186</sup> Qualified immunity shields these officials from personal liability for damages unless their conduct violates the defendant's "clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>187</sup> As the Supreme Court has explained "[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, 'a mistake of fact, or a mistake based on mixed questions of law and fact.'"<sup>188</sup> But even if the officials are ultimately immune from damages, the court adjudicating the dispute can clarify the law, thereby ensuring that in future cases officials will not be able to continue to rely on qualified immunity.<sup>189</sup> And qualified immunity does not bar claims for prospective injunctive relief, which again allows the court to prevent further violations without imposing retrospective liability for past conduct.<sup>190</sup>

A *Ricci* affirmative defense likewise might prevent a court from awarding retrospective relief, but it should not prevent the court from determining prospectively that a test has an unlawful disparate impact. While compensatory or punitive damages are not available in disparate-impact cases,<sup>191</sup> plaintiffs typically can obtain reinstatement to the jobs they should have received and back pay to cover the period during which they were denied their rightful positions.<sup>192</sup> When plaintiffs show that a test has an unlawful disparate impact, the analogy to qualified immunity suggests that even if these traditional remedies were unavailable to plaintiffs because of the *Ricci* affirmative defense, the court could still enjoin the employer from continuing to use the test as a basis for future employment decisions.

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<sup>186</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

<sup>187</sup> *Id.* at 818; see John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 264 (2000) ("Doctrinally, therefore, qualified immunity applies comprehensively to all damages actions brought against state and local officers under § 1983, as well as to analogous actions against federal officers under *Bivens* . . . . In all such cases, the defendant is immune from award of money damages 'if a reasonable officer could have believed' in the legality of the act that caused the plaintiff's injury." (citation omitted)).

<sup>188</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

<sup>189</sup> See *id.* at 818 (affirming that this procedure "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable").

<sup>190</sup> See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (noting that "in a suit to enjoin further conduct," qualified immunity would not be "available to block a determination of law").

<sup>191</sup> See 42 U.S.C. § 1981a(a)(1) (2006); *supra* note 90 and accompanying text (discussing damages in disparate-impact cases).

<sup>192</sup> See § 2000e-5(g)(1); Cheryl L. Anderson, *Damages for Intentional Discrimination by Public Entities Under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, But Are the Remedies the Same?*, 9 BYU J. PUB. L. 235, 240 n.19 (1995); Primus, *Round Three*, *supra* note 80, at 521 n.118.

The analogy between the *Ricci* affirmative defense – assuming it exists – and qualified immunity is far from perfect. Qualified immunity is an objective standard – the question is what an official reasonably should have known, not what he or she in fact knew – whereas the affirmative defense as we have described it is subjective, turning on what the employer in fact knew rather than what it should have known. And although neither doctrine has a clear textual basis in the statute, qualified immunity is driven by policy concerns about preventing “unwarranted timidity” by government officials who are supposed to be protecting the public interest.<sup>193</sup> As the Supreme Court has recognized, this concern – and therefore the protection of qualified immunity – generally does not carry over to the realm of private, profit-making activities.<sup>194</sup> Most employers, of course, operate within that realm. And qualified immunity generally protects only individuals; their employers – such as municipalities like New Haven – are not themselves entitled to qualified immunity.<sup>195</sup> Whatever the shortcomings of the analogy, however, qualified immunity offers a way to understand the temporal character of a *Ricci* defense that required courts to look at the facts as they were understood at the time of the relevant decision rather than during the course of the litigation.

#### B. *Validation Studies as a Limited Safe Harbor*

The *Ricci* affirmative defense described above would allow an employer to defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it did not believe that the test had an unlawful disparate impact despite having investigated the matter.<sup>196</sup> There might be several ways to satisfy such an affirmative defense at this high level of abstraction. One would be a formal validation study. As we explain below, under the affirmative defense as we have described it, an employer that relied on a properly conducted formal validation study would probably not be liable for disparate impact. Although employers might sometimes be able to satisfy the affirmative defense even without formal validation studies, those studies might offer employers a safe harbor from disparate-impact liability. But this safe harbor would apply only when the employer did not also have independent evidence calling the test’s validity into question. Once the employer had reason to doubt the test’s validity – for example, because a plaintiff in a suit proffered evidence that the test was in fact invalid – the employer could not continue to rely on a validation study to avoid disparate-impact liability. For this reason, we refer to validation studies as a *limited* safe harbor.

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<sup>193</sup> *Richardson v. McKnight*, 521 U.S. 399, 408 (1997).

<sup>194</sup> *Id.*; *Wyatt v. Cole*, 504 U.S. 158, 168 (1992) (“In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.”).

<sup>195</sup> *See Lewis*, 523 U.S. at 841 n.5.

<sup>196</sup> *See supra* Part IV.A.

Validation studies are a familiar concept under Title VII and in the field of test development more generally. *Griggs* itself criticized an employer for adopting a test “without meaningful study” of its job-relatedness.<sup>197</sup> While an employer may not always need to conduct a formal validation study to win a disparate-impact suit,<sup>198</sup> the federal government encourages employers to do so whenever it is technically feasible.<sup>199</sup> Federal enforcement agencies, including the Department of Justice and the EEOC, have adopted the *Uniform Guidelines on Employee Selection Procedures*<sup>200</sup> to explain in detail how to validate tests and other selection procedures. These guidelines walk employers through the steps they need to take to conduct proper validation studies, including gathering information about job requirements, investigating potential unfairness for minority groups, and examining less-discriminatory alternatives.<sup>201</sup> Above all, the guidelines emphasize that the methods should be consistent with “generally accepted professional standards for evaluating standardized tests and other selection procedures.”<sup>202</sup>

Under *Ricci*’s affirmative defense as we have explained it, an employer that examined a test’s impact in advance of its employment decision and found no reason to conclude that the test had an unlawful disparate impact would not be liable even if plaintiffs were later to prove that the test did in fact have an unlawful disparate impact.<sup>203</sup> If a validation study showed that the test was job-related, consistent with business necessity, and had no more disparate impact than any equally effective alternatives, then – without more – the employer would not have had a strong basis in evidence to conclude that the test has an unlawful disparate impact. *Ricci* suggests that such an employer could not discard the test results based on the disparate impact without opening itself to liability for disparate treatment.<sup>204</sup> Under the affirmative-defense

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<sup>197</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>198</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion) (“Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal ‘validation studies’ showing that particular criteria predict actual on-the-job performance.”); Sullivan, *Looking Past the Desert Palace Mirage*, *supra* note 29, at 994 (“[F]ormal validation, as it is employed in disparate impact cases challenging testing regimes, will not be required across the spectrum of disparate impact cases. . . . [M]any cases have always approached business necessity from a more qualitative, less empirical, perspective.” (footnotes omitted)).

<sup>199</sup> See *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. §§ 1607.1(B), 1607.5-1607.6 (2009).

<sup>200</sup> *Id.* pt. 1607.

<sup>201</sup> *Id.* §§ 1607.1-1607.16.

<sup>202</sup> *Id.* § 1607.5(C).

<sup>203</sup> See *supra* Part IV.A (identifying the affirmative defense to disparate-impact claims potentially created by the Supreme Court in the *Ricci* decision and explaining the contours of that defense).

<sup>204</sup> See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009).

reading, therefore, an employer that relied on a formal validation study ordinarily would not be liable for disparate impact.

In this respect, the defense would go beyond what pre-*Ricci* law provided. Before *Ricci*, a validation study presumably would satisfy the employer's burden of producing evidence of job-relatedness, and often that would be enough to prevail on a motion for summary judgment.<sup>205</sup> But the plaintiffs could have produced competing studies of their own demonstrating that the test was not job related or that there were alternatives that would have had less of a disparate impact.<sup>206</sup> That would have created a question of fact for the court to resolve at trial.<sup>207</sup> In this situation, a *Ricci* affirmative defense would insulate an employer from the risk of an adverse factual finding. Even if the plaintiffs produced a conflicting validation study during the litigation, the court could grant summary judgment to the employer – at least as to damages – on the ground that there is no dispute that *at the time of the employment action* the employer did not have a basis to question the validity of the test.<sup>208</sup>

This alone would be a significant development in disparate-impact law, but the affirmative-defense reading of *Ricci* may suggest an even broader rule. While formal validation studies would provide a safe harbor with relatively clear contours, the *Ricci* affirmative defense might not invariably require a formal validation study of the sort prescribed by the *Uniform Guidelines*.<sup>209</sup> Any serious effort to gauge the fairness and job-relatedness of a test, including examining its alternatives, could give an employer a basis to believe that the test did not have an unlawful disparate impact. In *Ricci* itself, for example, the Supreme Court did not characterize New Haven's test-validation efforts as amounting to a formal validation study, and it is not clear that such a study had

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<sup>205</sup> See Belton, *supra* note 64, at 232; David Yellen, *The Bottom Line Defense in Title VII Actions: Supreme Court Rejection in Connecticut v. Teal and a Modified Approach*, 68 CORNELL L. REV. 735, 749 (1983).

<sup>206</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988); Peter Siegelman, *Contributory Disparate Impacts in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515, 550-51 (2007).

<sup>207</sup> See Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 374 n.329 (1983) ("It is often difficult to predict the outcome of a challenge to the validity of a selection device because judicial assessments of the adequacy of validation studies may be very complex."); cf. Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 905 (1985) ("[A] court should consider the facts then before it in terms of the disparate impact theory. A contrary action would exalt the form of the cause of action over the substance of the complaint." (footnote omitted)).

<sup>208</sup> See FED. R. CIV. P. 56(c)(2) (stating that a motion for summary judgment is to be granted when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law").

<sup>209</sup> See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-1607.14 (2009).



been done.<sup>210</sup> Under the affirmative-defense reading, however, the Court suggested that New Haven would be entitled to the benefit of the defense, emphasizing the extent to which the test designer tried to ensure that the test would reasonably measure the skills needed by firefighters in New Haven.<sup>211</sup> Thus, employers might no longer even need a validation study to overcome a showing of disparate impact. This development, which is inconsistent with at least the tenor of the *Uniform Guidelines*,<sup>212</sup> would be a profound change for disparate-impact litigation.<sup>213</sup> And this change would be particularly beneficial to employers, which often expend a great deal of time and money in procuring these formal studies.<sup>214</sup>

### C. *Variations on the Affirmative Defense*

The premise in this part of the Article has been that *Ricci*'s coda suggests a doctrinally meaningful affirmative defense for disparate-impact cases. Therefore, in deriving its elements, we have aimed to avoid terms that would make the defense either trivial or render superfluous Title VII's provisions on disparate-impact liability. Those choices led to how we defined the contours of the possible defense described above.

But it certainly would be possible to make other choices that would either strengthen or weaken the defense. For example, we have described the defense as essentially subjective – about what the employer in fact knew, not what it should have known. Alternatively, the defense could be purely objective. This would require the employer to show that at the time it used the test, it could not have known about the test's unlawful disparate impact.

This objective variation would render the affirmative defense largely trivial. Except in very unusual cases, asking what the employer could have known about unlawful disparate impact at the time it used the test will be the same as asking whether the test in fact has an unlawful disparate impact. That is because normally when a test has an unlawful disparate impact, careful enough study of the test would reveal that impact, and the impact does not change over time. Thus, this variation would require the employer to prove that the test did

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<sup>210</sup> See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 154-56 (D. Conn. 2006) (assuming that no formal validation study had been done), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

<sup>211</sup> *Ricci*, 129 S. Ct. at 2678 (“IOS devised the written examinations, which were the focus of the CSB’s inquiry, after painstaking analyses of the captain and lieutenant positions – analyses in which IOS made sure that minorities were overrepresented.”).

<sup>212</sup> See, e.g., 29 C.F.R. § 1607.1(B) (stating that employers need not “conduct validity studies of selection procedures where no adverse impact results,” suggesting that they must do so where there is an adverse impact (emphasis added)).

<sup>213</sup> See Belton, *supra* note 64, at 232 (discussing the use of validation studies in disparate-impact cases); Yellen, *supra* note 205, at 749 (observing that in deciding questions of job-relatedness, courts usually look to validation studies).

<sup>214</sup> See Belton, *supra* note 64, at 232; Yellen, *supra* note 205, at 749-50.

not have unlawful disparate impact – not much of an affirmative defense, as it simply amounts to disproving the plaintiff's case.

Another variation that has the opposite effect would drop our requirement that the employer make some sort of inquiry into the test's validity. In this variation, good-faith ignorance by the employer would be enough. But as we noted earlier, this would essentially eviscerate disparate impact as a separate theory of discrimination, because the doctrine's foundational principle is that an employer can be liable for discriminatory results despite its good faith.

Similarly, one could try to drop the requirement that the employer have had evidence of the test's statistical disparity on a minority group before using the test. But this variation is less firmly moored to the concerns that prompted the *Ricci* Court to make the observation that led to the affirmative defense.<sup>215</sup> The defense ultimately seeks to capture whether the employer would have been liable as a matter of disparate treatment for discarding the test, and it is unlikely that the employer could have intended to engage in racial (or similar group-based) discrimination if it had not been aware of the racial consequences of discarding the exam.

Ultimately, we reject these variations not because they are impossible or even implausible, but because they do not offer a reading of *Ricci* that gives real meaning both to the cryptic passage at the end and to the statutory provisions governing disparate impact.

## V. IMPLICATIONS OF THE AFFIRMATIVE DEFENSE

If accepted by the courts, the *Ricci* affirmative defense would represent a profound change for disparate-impact theory. An employer would now be able to defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it knew that the test adversely affected a protected minority group but nonetheless did not believe that the test had an unlawful disparate impact.<sup>216</sup> Thus, for the first time in disparate-impact law, the employer's state of mind would be relevant to the analysis.<sup>217</sup> Before *Ricci*, disparate-impact claims turned solely on objective circumstances: whether there was a disparity in pass rates, whether the test in fact predicted job performance, and whether there was an equally effective alternative with less impact.<sup>218</sup> Now the claims would also turn on what the employer knew and what conclusions it drew.<sup>219</sup>

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<sup>215</sup> See *Ricci*, 129 S. Ct. at 2681 (addressing the inherent tension between the “competing expectations under the disparate-treatment and disparate-impact provisions” of Title VII).

<sup>216</sup> See *supra* Part IV (discussing the *Ricci* affirmative defense).

<sup>217</sup> See *supra* Part I (discussing the role of disparate impact as a theory of *unintentional* discrimination).

<sup>218</sup> See *supra* Part I.

<sup>219</sup> See *supra* Part IV.

This would bring disparate-impact analysis closer to disparate-treatment analysis, which always has turned on the employer's subjective motivation.<sup>220</sup> In theory, an employer could fail to establish the affirmative defense even if it harbored no discriminatory motive. But perhaps in practice, absent a discriminatory motive, few employers large enough to be covered by Title VII<sup>221</sup> would choose to use a test that they know to have a disparate impact on minorities without also having some basis to believe that the test is job-related. An employer that uses a test it knows not to be job-related, and that has a disparate impact on a minority group may well be using the test as a pretext to mask intentional discrimination, because it is difficult to imagine another reason that the employer would stick with a discriminatory examination.

Some have long seen disparate impact's primary purpose as smoking out intentional discrimination where it would be hard to prove motive through other means.<sup>222</sup> As noted earlier, this approach conceives of disparate-impact analysis as primarily an evidentiary framework, akin to the *McDonnell Douglas* framework for ordinary disparate-treatment claims, rather than a separate substantive theory of liability.<sup>223</sup> Justice Scalia's concurrence in *Ricci* alluded to this view, although he discounted it because employers cannot defend a disparate-impact claim simply by disproving a discriminatory

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<sup>220</sup> See Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 333 (2006) ("Cases proceeding on a disparate treatment theory require proof of motive. Cases proceeding on a disparate impact theory do not . . . ." (citation omitted)); Braceras, *supra* note 28, at 1140; George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2328 (2006).

<sup>221</sup> See 42 U.S.C. § 12111(5)(A) (2006) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ."); Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1047-77 (2005).

<sup>222</sup> Braceras, *supra* note 28, at 1167 ("Claims that the disparate impact model should be applied to high-stakes educational assessments in order to smoke out covert intentional discrimination have their roots in Professor George Rutherglen's 'objective theory of discrimination.' According to this theory, the disparate impact model serves as a mechanism for identifying intentional discrimination in the absence of direct evidence of racial or ethnic animus." (footnote omitted)); Jolls, *supra* note 80, at 652; Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 779 (2009) (citing Primus, *Round Three*, *supra* note 80, at 518)); see also *In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1321-23 (11th Cir. 1999).

<sup>223</sup> See *supra* Part I.A-B; see also Seicshnaydre, *supra* note 25, at 1163-64 (observing that some "theorists consider the proposition that disparate impact exists primarily to help litigants uncover discriminatory motive that is lurking below the surface . . . . As previously noted, this basis is framed by Professor Primus as 'evidentiary dragnet.' . . . Disparate impact is thus conceived as a method of proof through which intent can be proven indirectly." (citation omitted)).

motive.<sup>224</sup> And the Eleventh Circuit relied on this view to uphold the abrogation of States' sovereign immunity from disparate-impact claims.<sup>225</sup>

A *Ricci* affirmative defense that protected everyone but the improperly motivated or unreasonably ignorant employer could signal that the Supreme Court subscribes to the smoking-out view of disparate impact. If the employer has no reason to question a test's validity, then the employer likely has a nondiscriminatory motive for using the test even if it disproportionately harmed a protected minority. By contrast, the employer that sticks with a test that has an adverse impact on minorities – even in the face of evidence questioning the test's validity – is more likely to harbor a discriminatory motive. This latest development, then, brings us back to the path the Supreme Court seemed to be pursuing before the Civil Rights Act of 1991, when it appeared poised to collapse the distinction between disparate treatment and disparate impact.<sup>226</sup>

The *Ricci* affirmative defense also might be the final blow to disparate impact as a viable litigation strategy for plaintiffs. The academic scholarship has long lamented that disparate impact is an “underutilized” theory.<sup>227</sup> Even before *Ricci*, it was hard for plaintiffs to develop meritorious disparate-impact claims.<sup>228</sup> Plaintiffs needed to collect a great deal of data and subject that data to rigorous statistical analysis just to determine if they had a *prima facie* case.<sup>229</sup> They then needed to do their own analysis of job-relatedness and alternatives that would rebut whatever the employer might be expected to proffer.<sup>230</sup> Few plaintiffs were eager to take on these daunting tasks.<sup>231</sup>

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<sup>224</sup> See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682-83 (2009) (Scalia, J., concurring).

<sup>225</sup> *In re Emp't Discrimination Litig.*, 198 F.3d at 1321 (“Though the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer’s motive since a racial ‘imbalance is often a telltale sign of purposeful discrimination.’” (citation omitted)).

<sup>226</sup> See *supra* Part I.B.

<sup>227</sup> Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good for? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004); Sullivan, *Looking Past the Desert Palace Mirage*, *supra* note 29, at 912-13.

<sup>228</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1162 n.3 (1995) (“Because most individual employment decisions do not implicate identifiable practices that can be shown to have a statistically significant disparate impact on members of a protected group, very few Title VII cases are actually amenable to disparate impact treatment.”); see also Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 376 (2007); Sullivan, *Looking Past the Desert Palace Mirage*, *supra* note 29, at 912-13.

<sup>229</sup> Seiner, *supra* note 15, at 116; Sullivan, *Looking Past the Desert Palace Mirage*, *supra* note 29, at 993.

<sup>230</sup> See *supra* Part I.

<sup>231</sup> See Shoben, *supra* note 227, at 600.

The affirmative defense would add a whole new layer of analysis to what was already a complicated back-and-forth burden-shifting framework.<sup>232</sup> And even though injunctive relief may remain available to plaintiffs who prove the rest of their case, defendants that successfully availed themselves of the affirmative defense would have taken away the retrospective remedies plaintiffs are likely to want most – reinstatement to the position and back pay.<sup>233</sup> By further increasing the complication of proving a disparate-impact claim and reducing the potential payoff for success, the *Ricci* affirmative defense could make it even less likely that plaintiffs will consider bringing disparate-impact claims.

But the new affirmative defense would not necessarily mean that there would be more discrimination by employers. Even if fewer disparate-impact claims are brought in court, the affirmative defense could in theory create positive incentives that encourage employers to avoid committing disparate-impact discrimination in the first place. In this respect, a *Ricci* defense would resemble two other nontextual affirmative defenses for employers that the Court has created under Title VII – one for employers facing claims of unlawful harassment and the other for employers facing liability for punitive damages. In both instances the Court has tried to shape parties' incentives by developing rules based on the policies behind Title VII rather than the statutory language itself.

The Court created the harassment defense first. Title VII outlaws discrimination that creates a hostile work environment, such as severe or pervasive sexual harassment.<sup>234</sup> In *Burlington Indus. v. Ellerth*<sup>235</sup> and *Faragher v. City of Boca Raton*,<sup>236</sup> the Supreme Court created a standard for determining when an employer is liable for harassment of an employee by a supervisor.<sup>237</sup> When the harassment culminates in a tangible employment action such as a firing or demotion, the Court held, the employer is vicariously liable for the acts of its supervisor.<sup>238</sup> But when the pattern of harassment does not involve any tangible employment actions, the Court created an *affirmative defense* to the employer's vicarious liability.<sup>239</sup> The employer must show that (1) it exercised reasonable care to prevent or correct supervisory harassment,

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<sup>232</sup> See *supra* Part I.

<sup>233</sup> See *supra* Part I.C.

<sup>234</sup> E.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>235</sup> 524 U.S. 742, 754-65 (1998).

<sup>236</sup> 524 U.S. 775, 790-808 (1998).

<sup>237</sup> Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *FORDHAM L. REV.* 981, 987-88 (2007); see also Stephen F. Befort & Sarah J. Gorajski, *When Quitting Is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of Pennsylvania State Police v. Suders*, 67 *OHIO ST. L.J.* 593, 609 (2006).

<sup>238</sup> See *Ellerth*, 524 U.S. at 753-54; *Faragher*, 524 U.S. at 790.

<sup>239</sup> See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

such as by developing a workplace harassment policy, and (2) the employee unreasonably failed to take advantage of opportunities to avoid the harm by, for example, failing to report it to higher-up supervisors.<sup>240</sup> This defense was intended to encourage both employers and employees to resolve workplace harassment promptly and as an internal matter, without requiring the courts to intervene.<sup>241</sup> And it provides employers that take reasonable measures to prevent harassment with some protection against liability even if the measures prove inadequate: an employee who unreasonably bypasses those measures will be unable to collect damages.<sup>242</sup>

The Court relied on similar policies to create an affirmative defense to employers' liability for punitive damages.<sup>243</sup> The Civil Rights Act of 1991 added damages as a possible remedy for a Title VII violation.<sup>244</sup> The statute allows punitive damages when the plaintiff shows that the employer engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."<sup>245</sup> But in *Kolstad v. American Dental Ass'n*,<sup>246</sup> the Court held that even when the plaintiff has met this standard, the employer may avoid liability if it shows that it engaged in "good faith efforts at Title VII compliance," such as taking steps to implement

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<sup>240</sup> See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

<sup>241</sup> See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The defense may not have achieved its intended effect, however. See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 885 (2008) ("Far from solving the problems created by Title VII's prompt complaint requirements, the added layer of internal processes creates additional risks for employees."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 537-38 (2001) ("[U]ncritical acceptance of internal dispute resolution processes legitimates purely formalistic solutions, and it will often leave underlying patterns and conditions unchanged.").

<sup>242</sup> See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806-07; Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 108 (1999); Moss, *supra* note 237, at 987.

<sup>243</sup> See, e.g., Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 4 n.2 (2003) ("In *Kolstad v. American Dental Ass'n*, the Court supplemented the rules in *Faragher* and *Ellerth* by deciding that punitive damages could not be imposed against employers that have made good-faith efforts to comply with Title VII."); Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the 'Rational Actor'*, 51 WM. & MARY L. REV. 183, 247 (2009) ("Although technically distinct, 'in practice' there is substantial overlap between what does and does not suffice for the *Faragher*/*Ellerth* defense to harassment liability (based on an effective antiharassment program) and the *Kolstad* defense to punitive damages (based on good faith Title VII compliance)." (citing Bettina B. Plevan, *Training and Other Techniques to Address Complaints of Harassment*, 682 PLI/LIT 675, 755 (2002))).

<sup>244</sup> See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 533-34 (1999).

<sup>245</sup> 42 U.S.C. § 1981a(b)(1) (2006).

<sup>246</sup> 527 U.S. 526 (1999).

an antidiscrimination policy.<sup>247</sup> Without this affirmative defense, according to the Court, the fear of punitive damages would discourage employers from educating themselves and their managers about Title VII's requirements so as to avoid the risk of deliberately disregarding those requirements.<sup>248</sup> To neutralize these "perverse incentives," the Court created an affirmative defense that would do the opposite by encouraging employers to educate themselves and their managers about Title VII's requirements.<sup>249</sup> This policy was designed to head off some employment-discrimination problems before they reach litigation.<sup>250</sup>

The *Ricci* affirmative defense similarly would encourage employers to take reasonable steps in advance of litigation to head off possible Title VII violations – by, for example, carefully examining the validity of an employment test for unlawful disparate impact before using it.<sup>251</sup> If that examination reveals flaws in the test, the employer will be able to fix them before any employee is harmed, and thus the affirmative defense could prevent some instances of unlawful disparate impact. And if the examination does not reveal flaws, the employer may be protected from liability for decisions that rely on that test until contrary information is brought to the employer's attention.<sup>252</sup>

To a large extent, employers already had this incentive, because under pre-*Ricci* law they would have been strictly liable for flawed tests that ultimately were shown to have a disparate impact.<sup>253</sup> A prudent employer would have carefully examined its tests even without the availability of an additional affirmative defense that depended on its having done so.

But apart from the incentive to examine a test's validity, the defense as we have described it would give employers an additional incentive to collect and examine the statistical effects of its tests on minority groups before using them. While an employer would not necessarily have to abandon a test that adversely affected a group – indeed, under *Ricci*'s primary holding, the employer might not be able to do so – this inquiry would at least make the effects transparent to the employer. Over the long run, inquiries like this might encourage employers to replace practices that have an unnecessarily large impact on some with practices that ensure a more even playing field.

The *Ricci* defense also would shape the incentives of employees. Employees who have concerns about a test's validity would need to bring

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<sup>247</sup> *Id.* at 544-45.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 545.

<sup>250</sup> See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 15 (2001).

<sup>251</sup> See *supra* Part IV.

<sup>252</sup> See *supra* Part IV.

<sup>253</sup> See *supra* Part I.

those concerns to the employer's attention before it is used as a selection device for an employment decision. If they failed to do so, their potential remedies might be severely curtailed – they may be able to obtain an injunction barring continued use of the test, but they may not be able to obtain back pay, reinstatement, or any other retrospective remedy.<sup>254</sup> Like sexual harassment law, then, in certain circumstances the *Ricci* affirmative defense would place an obligation on the employee to make the employer aware of the problem.<sup>255</sup>

But the analogy goes only so far. In the context of sexual harassment, employees on the ground are likely to have better information than management about what is happening in the workplace, and therefore encouraging reporting by employees is likely to reduce discrimination. Here, by contrast, it seems unlikely that employees will be in a better position than the employer to evaluate the disparate impact of the employer's tests. One therefore would not expect to see a *Ricci* affirmative defense reduce workplace discrimination nearly to the extent that the *Ellerth-Faragher* one might, and by immunizing more employer conduct it in fact might have the opposite effect.

Moreover, the *Ellerth-Faragher* and *Kolstad* defenses arise in the context of an employer's vicarious liability for the acts of its agents, and the Supreme Court expressly grounded its analysis in background principles of agency law.<sup>256</sup> The *Ricci* defense, by contrast, does not appear to stem from any general principle of common law or statutory interpretation. There is no general rule immunizing civil defendants from liability when they reasonably but mistakenly believed their actions were legal. To the contrary, although statutes occasionally provide an express defense for bona fide errors,<sup>257</sup> defendants generally are liable for statutory violations even when they had good reason to think their conduct was lawful.<sup>258</sup> The *Ricci* defense, however,

<sup>254</sup> See *supra* Part IV.

<sup>255</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998); *supra* Part IV.

<sup>256</sup> *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999) (“Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages . . . .”); *Ellerth*, 524 U.S. at 754 (“We turn to principles of agency law, for the term ‘employer’ is defined under Title VII to include ‘agents.’”); *Faragher*, 524 U.S. at 802 (“We therefore agree with Faragher that in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.”).

<sup>257</sup> See, e.g., Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c) (2006) (“A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error . . .”).

<sup>258</sup> See, e.g., *Kolstad*, 527 U.S. at 537 (recognizing that there may be instances where an



would immunize employers merely because they thought their conduct was lawful, even though disparate impact is a doctrine primarily aimed at unintentional conduct.<sup>259</sup> This is a reason to question whether the affirmative-defense reading of *Ricci* is the best one.

Although we are not addressing *Ricci*'s constitutional implications here, one further consequence of the affirmative-defense reading deserves attention. A defense of this sort would narrow the doctrine of disparate impact and might thereby bolster arguments for the doctrine's constitutionality. Justice Scalia's chief concern about disparate impact's constitutionality in *Ricci* was that it goes far beyond merely smoking out evidence of hidden intentional discrimination.<sup>260</sup> But the defense as we have described it would make it easier to characterize the doctrine in such a fashion. Of course, the fact that Justice Scalia continued to see serious constitutional issues in *Ricci* is another reason to question the affirmative-defense reading of the majority's opinion.

By focusing on *Ricci*'s doctrinal implications for disparate-impact analysis as a statutory matter, this Article fills a gap in the emerging academic literature on *Ricci*, which so far has focused on other noteworthy aspects of the case. For example, Richard Primus's article *The Future of Disparate Impact*<sup>261</sup> examines *Ricci*'s constitutional implications. Professor Primus argues that the Court's ruling appears to treat disparate impact as an inherently race-conscious theory that therefore is vulnerable to constitutional challenge under the Equal Protection Clause.<sup>262</sup> He also offers narrower ways to read *Ricci* that would help disparate impact survive constitutional challenge at least in the majority of cases.<sup>263</sup> But because his focus is on the constitutional questions, Professor Primus does not address *Ricci*'s statement that New Haven would have had a defense to a disparate-impact lawsuit, and he does not consider what effect this statement may have on disparate-impact analysis. We complement his approach by putting the constitutional questions to the side and focusing on the doctrinal implications.

We also complement Michael Zimmer's approach in his recent article *Ricci's Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*<sup>264</sup> Professor Zimmer primarily looks at *Ricci*'s implications for future disparate-treatment claims, focusing on the Court's

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employer unlawfully discriminates "with the distinct belief that its discrimination is lawful").

<sup>259</sup> See, e.g., 42 U.S.C. § 1981a (2006) (contrasting "unlawful intentional discrimination" with "an employment practice that is unlawful because of its disparate impact"); § 2000e-2(k)(2) (clarifying that the business-necessity defense for disparate-impact claims "may not be used as a defense against a claim of intentional discrimination"); *supra* Part I.

<sup>260</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

<sup>261</sup> Primus, *The Future of Disparate Impact*, *supra* note 9, at 1342-43.

<sup>262</sup> *Id.* at 1344.

<sup>263</sup> *Id.*

<sup>264</sup> See Zimmer, *supra* note 9.

analysis of intent.<sup>265</sup> He argues that the Court has lowered the bar considerably for plaintiffs by allowing them to rely merely on proof that the employer knew the racial consequences of its actions, except during the design phase of an employment practice.<sup>266</sup> While Professor Zimmer notes in passing the part of the Court's opinion that we analyze here, he does not seek to make sense of it in detail, stating only that it is "inscrutable" and "obscure."<sup>267</sup>

Charles Sullivan has also recently written on the impact of the *Ricci* decision on employment discrimination cases.<sup>268</sup> In his article, Professor Sullivan discusses the intersection between disparate-impact and disparate-treatment theory after *Ricci*.<sup>269</sup> While his focus is on several other interesting aspects of the case, he notes the language that we identify as constituting an affirmative defense in this article, and he correctly suggests that this language "confus[es] things" and "makes sense only when read in the context of the rest of the opinion."<sup>270</sup> But because his article primarily deals with other questions raised by *Ricci*, Professor Sullivan does not offer a full account of what this language might mean doctrinally for future disparate-impact litigation. This Article takes that additional step, explaining that the confusing language, in the context of the entire opinion, can be read as a broad-based affirmative defense that is now available to all employers.<sup>271</sup> Professors Zimmer and Sullivan also correctly identify the difficulty of applying this language to the facts of the disparate impact case that was recently brought by the black firefighters against the City (and was subsequently dismissed by the district court).<sup>272</sup> As we discuss above, these issues may extend beyond the facts of that case, and could be implicated in most future disparate-impact claims.

### CONCLUSION

The *Ricci* case has been a source of significant controversy and is sure to generate even greater debate as the lower courts struggle with how to apply it. This Article provides a look at one aspect of the case that has thus far not been examined by the scholarship – the possibility that *Ricci* created a new affirmative defense to disparate-impact liability. This possible affirmative

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<sup>265</sup> *Id.* at 9.

<sup>266</sup> *Id.* at 24.

<sup>267</sup> *Id.* at 28, 30.

<sup>268</sup> See generally Sullivan, *End of the Line*, *supra* note 160.

<sup>269</sup> *Id.* at 212-13.

<sup>270</sup> *Id.*

<sup>271</sup> See *supra* Part V.

<sup>272</sup> Zimmer, *supra* note 9, at 23-27; Sullivan, *End of the Line*, *supra* note 160, at 213-14. Professor Sullivan notes the implications of the disparate impact suit brought by the black firefighters, discusses the civil procedure concerns, and addresses the possible impact of the Civil Rights Act of 1991. *Id.* See also *Briscoe v. New Haven*, No. 3:09-cv-01642 (CSH), 2010 WL 2794231, at \*2 (D. Conn. July 12, 2010), *appeal docketed*, No. 10-1975 (2d Cir. Sept. 27, 2010).

defense would provide a form of qualified immunity for employers and, if accepted by the courts, could prove to be the end of disparate impact as a viable litigation strategy for plaintiffs. Although there are other ways to read *Ricci* that do not involve such a dramatic change to existing doctrine, all of them have weaknesses as well. Ultimately, the courts will have to decide how seriously to take the cryptic language from *Ricci*.