Ricci v. DeStefano: Declaring Civil War within Title VII

By William Yeomans [*]

It is the height of folly to make hard and fast predictions about the impact of freshly minted Supreme Court decisions, especially when the Court announces a new standard. Yet it is safe to predict that *Ricci v. DeStefano,*[1] while not as devastating as some advocates have feared, will discourage some employers from voluntarily eliminating practices that disadvantage minority applicants, and could inflict far broader damage on efforts to ensure equal opportunity.

The disheartening core of *Ricci* is that five members of the Court view the twin prohibitions against discriminatory impacts and intentional discrimination contained in Title VII of the Civil Rights Act of 1964 as being at odds with each other.[2] They have signaled that they will treat efforts to comply with the disparate impact prohibition as a form of race-conscious decision making.[3] The Court imported a standard from inapposite cases involving challenges to race-conscious remedies pursuant to the Equal Protection Clause, requiring that an employer must have a "strong basis in evidence" before taking voluntary action to eliminate a disparate impact.[4] Although the precise content of the standard remains unclear, the decision certainly makes it more difficult for employers to voluntarily avoid practices that disproportionately disadvantage minority applicants. In the process of applying the standard, the Court appears to have lowered the bar for validation of employment tests, thus making it easier for employers to justify the use of tests that disadvantage minority applicants, and diminishing their ability to challenge employment practices successfully.

The decision could have been worse. Notably, it did not reach the significant question expressly left open by the majority and discussed by Justice Scalia in concurrence: whether Title VII's disparate impact standard is inherently inconsistent with the Equal Protection Clause.[5] In addition, on a practical level, the opinion leaves open the possibility that well-intentioned employers and determined plaintiffs may still find room to advance equal opportunity.

The basic outline of the facts of the case is well known. New Haven, which has a long history of racial exclusion in firefighter jobs, administered written and oral portions of a test for promotion to lieutenant and captain positions. The ranking of applicants depended on the composite score

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[1] 129 S. Ct. 2658 (2009).

[2] *See id.* at 2674.

[3] *See id.* at 2673–74.

[4] *See id*. at 2675–76 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

[5] *See id.* at 2681–82 (Scalia, J., concurring).

of the two parts, weighted 60% to 40% in favor of the written test.[6] According to the City's rank-ordering process, no African Americans were among the ten candidates who qualified for immediate promotion to lieutenant or the nine candidates who qualified for immediate promotion to captain. Similarly, no Hispanic applicants qualified for promotion to lieutenant, though two qualified for promotion to captain.[7] Upon learning of the severe racially disparate impact of the test, the Civil Service Board (CSB) held several meetings to consider whether to certify the test results. Applicants and members of the community testified for and against certifying the results of the test. The Board also heard from several interested parties, including: the test developer; an industrial/organizational psychologist versed in test development; an employee of the Department of Homeland Security; an academic specializing in race and testing; city officials; and the president of the firefighters' union. At the close of these meetings, the four CSB members split evenly on a motion to certify the test results, which meant that the results were not certified.[8] Beyond this bare outline, the majority and the four dissenting Justices saw the facts very differently, including the details of the proceedings and the strengths and flaws of the written test. The dispute over the facts reflected the very different approaches of the majority and dissent. The majority focused generally on the plight of the white firefighters and their claims of individual intentional discrimination,[9] while the dissent viewed the case against the backdrop of the history of entrenched exclusion of minorities from firefighter positions and the important role that Title VII's disparate impact standard has played in overcoming that legacy.[10]

The decision is significant for its enshrinement of the tension between the prohibitions of disparate impact and intentional discrimination, its attempt to reconcile this tension by creating a new standard to evaluate voluntary attempts to comply with the disparate impact standard, and the damage this new standard may have inflicted on plaintiffs' abilities to challenge the validity of employment tests. Each of these factors is troubling for practitioners, but the Court's opinion seems sufficiently flawed in concept and subject to narrowing interpretation to have warranted Justice Ginsburg's saying in dissent that, "The Court's order and opinion, I anticipate, will not have staying power."[11]

The Battle Between Title VII's Twin Prohibitions

The majority in *Ricci* bifurcates Title VII, putting the Court's own past precedents in conflict with one another. In *Griggs v. Duke Power Co.,* the Court invalidated the use of written tests and a high school diploma requirement that produced racially disparate hiring.[12] The Court held that Title VII did not require a showing of discriminatory purpose, stating:

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[6] *Id.* at 2665.
[7] *Id.* at 2666.
[8] *Id.* at 2666–71.
[9] *See id.* at 2676.
[10] *Id.* at 2690–95 (Ginsburg, J., dissenting).
[11] *Id.* at 2690.
[12] 401 U.S. 424 (1971).

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, 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 practices.[13]

The Court explained that "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[14] The court emphasized that the employer bears the burden of showing that an employment requirement has a "manifest relationship to the employment in question."[15]

While barely acknowledging *Griggs*, the majority in *Ricci* propounded the unsupported notion that "the original, foundational prohibition of Title VII bars employers from taking adverse action 'because of . . . race,'" which it correlated with intentional discrimination.[16] The *Ricci* majority thereby bifurcated the statute, setting the two methods of proving a violation of Title VII at odds with each other,[17] implicitly consigning disparate impact to a secondary role.

Ricci, of course, is not the Court's first attempt to weaken the disparate impact standard. In *Wards Cove Packing Co. v. Atonio*,[18] the Court undermined the disparate impact standard by, among other things, watering down the business necessity and job relatedness requirements.[19] Congress responded by codifying the *Griggs* standard.[20] But *Ricci* used even this unequivocal endorsement of *Griggs* to weaken Title VII. It noted that Congress "made no exception to disparate-treatment liability for actions taken in a good faith effort to comply with the new, disparate-impact provision" in the Civil Rights Act of 1991.[21] From that assertion, the Court reasoned that an even more stringent standard than good faith should prevail,[22] thereby turning Congress's inaction on its head. Congressional failure to address the tensions the Court saw between the complementary provisions of Title VII is best read as a statement that Congress did not regard them as being in tension. Congress codified the disparate impact standard to restore Title VII to full strength. Its failure to address the supposed tension indicates congressional intent to give effect to both standards as fully as possible.

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[13] *Id.* at 429–30.
[14] *Id.* at 431.
[15] *Id.* at 432.
[16] *Ricci*, 129 S. Ct. at 2675.
[17] *Id.* at 2675–76.
[18] 490 U.S. 642 (1989).
[19] *See id.* at 652–53, 669–73.
[20] 42 U.S.C. 2000e-2(k) (2006).
[21] *Ricci*, 129 S. Ct. at 2675.
[22] *Id.*

Strong Basis in Evidence

After misconstruing the Civil Rights Act of 1991 and warning that a standard that allowed employers to remedy disparate impacts too easily could lead to "a de facto quota system," the Court announced that an employer would need a "strong basis in evidence" to justify action to avoid a discriminatory impact.[23] It imported this standard from Equal Protection cases addressing race-conscious remedial action, notably *Wygant v. Jackson Board of Education*[24] and *Richmond v. J.A. Croson Co.*[25] *Wygant* addressed the evidence needed to justify layoffs of school teachers where race was taken into account in an effort to preserve the diversity of the teaching staff.[26] *Croson* addressed the evidence necessary to justify the City of Richmond's program to set aside a percentage of city contracts for minority contractors.[27]

In each of the above situations, the race-based remedy was subject to strict scrutiny.[28] By contrast, the City of New Haven's refusal to certify the results of its firefighter test to avoid disparate racial impact was an attempt to avoid creating Title VII liability and not to create a race-based remedy. Nonetheless, the Court in *Ricci* deemed the "strong basis in evidence" standard to be the appropriate test.

Efforts to Avoid Discrimination Become Race-Conscious Affirmative Action

By applying the same standard to a voluntary effort to avoid disparate impact liability that it had to Equal Protection challenges to overtly race-based remedies, the Court made action to avoid disparate impact a race-based decision, with all of the attendant pitfalls. The Court thus fashioned the avoidance of a possible Title VII violation into a form of affirmative action.[29]

By converting voluntary action to avoid discrimination into race-conscious decision making, the Court threatened to open Pandora's Box. It has long been accepted that a variety of strategies and programs that do not result in selection explicitly on the basis of race escape strict scrutiny, even though the goal is to avoid discrimination or enhance diversity. A broad reading of *Ricci* could jeopardize actions such as dedicating resources to reaching out to minority communities to encourage applications to educational institutions, targeting minority communities for job recruitment, giving special notice to minority contractors of bid solicitations, creating class-based preferences that are designed to serve as surrogates for race-conscious selection in education, and pursuing creative efforts such as Texas's program to achieve diversity by

[23] *See id.* at 2675–76.
[24] 476 U.S. 267 (1986).
[25] 488 U.S. 469 (1989).
[26] 476 U.S. at 270–71.
[27] 488 U.S. at 477–79.
[28] *See Croson.* at 493–94; *see also Wygant*, 476 U.S. at 279.
[29] The Court pointedly stated that its holding addressed only the statutory claim and that it was not deciding "whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2676 (2009). Unfortunately, this limitation gives credence to the notion that the Court will one day take up that issue. *See id.* at 2681–82 (Scalia, J., concurring).

admitting all students in the top 10% of their high school classes to the University of Texas. In each of these examples, jurisdictions employ what have traditionally been considered race-neutral strategies with the specific purpose of affecting racial outcomes. If, following the logic of *Ricci*, they become race-based actions, the consequences will be disastrous for efforts to expand opportunity.

Searching for Limits

Several factors, however, could limit *Ricci*'s impact. The Court emphasized repeatedly that its decision was influenced by the "high, and justified, expectations of the candidates who had participated in the testing."[30] It recounted in detail the sacrifices that the dyslexic Frank Ricci, among others, had made to hire readers and study long hours to prepare for the test, only to have success snatched away after the fact.[31] The timing of the City's decision — after the test had been administered and the results were known and after the creation of high expectations and substantial reliance interests — made the case a particularly sympathetic vehicle for the plaintiffs and increased the likelihood that a hard case would make bad law.[32]

Indeed, the court suggested the importance of the timing of New Haven's decision, stating:

> [We do not] question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.[33]

The Court provided some comfort to employers, stating that:

> Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.[34]

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[30] *Id.*
[31] *Id.* at 2667, 2689.
[32] Of course, the applicants' expectations and reliance were only legitimate if the test predicted successful job performance. The Court took scant note of the legitimate expectations of minority firefighters who believed that they would be evaluated for promotion according to a selection process that fairly tested for the skills necessary for the job. The Court's focus on the harm suffered by the disappointed white firefighters and its disregard for the history of entrenched racism that harmed far more minority firefighters in New Haven and elsewhere explains much about the outcome of the case. As the dissent began, "In assessing claims of race discrimination, '[c]ontext matters.'" *Id.* at 2689 (Ginsburg, J., dissenting) (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).
[33] *Id.* at 2677.
[34] *Id.*

Therefore, expectations and reliance, which increase at each stage of the selection process, are important. While it is not entirely clear at what point consideration of racial outcomes becomes intentional racial discrimination,[35] the lesson to employers is to take action early in the process — before the results are in — to establish confidence that a selection device will not have a disparate impact.

Application of the Strong Basis in Evidence Test: How Strong? Very Strong

The Court left considerable uncertainty regarding the content of the "strong basis in evidence" standard. It acknowledged that the racial impact of New Haven's test created a prima facie case of unlawful disparate impact discrimination.[36] And it stated that satisfying the standard did not require that an employer prove a violation against itself.[37] By refusing to send the case to the lower courts for initial application of the standard and instead applying the standard to the under-developed record, the Court provided inadequate guidance in identifying the limit for permissible voluntary action to avoid a disparate impact.

In applying the "strong basis in evidence" test, the Court analyzed the evidence as if it were determining the ultimate question of the validity of the City's test.[38] Here, the Court may have inflicted its most immediate and unnecessary damage on disparate impact law. Having announced the governing standard, the Court's task was to determine whether the evidence before the CSB at the time it voted not to certify the test results amounted to a strong basis in evidence that the City faced disparate impact liability. Rather than limit its analysis to that question, the Court announced flatly that there was "no genuine dispute that the examinations were job-related and consistent with business necessity."[39] In apparently concluding that the evidence established that the City's test was valid, the Court appeared to lower the threshold for validating a written test.[40] The evidence before the CSB raised fundamental questions whether

[35] For example, because of the test's racial impact, could the City expressly decline to administer this same test for the next round of promotions without engaging in race-conscious decision making?

[36] *Id.* Notably, the plurality that first announced the "strong basis in evidence" standard in *Wygant* did not discuss application of the standard because the plaintiffs established that the remedial program was not narrowly tailored. 476 U.S. 267, 279–84 (1986). It therefore did not discuss what quantum of evidence would provide a compelling interest for considering race. *Croson* provides little guidance about the content of the standard, since it concluded that "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." 488 U.S. 469, 500 (1989).

[37] According to the Court, its standard limits employers' discretion to avoid disparate impact liability "to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation." *Ricci*, 129 S. Ct. at 2675.

[38] Because the Court jumped to a determination that the test was job related, it gave no guidance as to whether anything short of an employer proving that it had violated Title VII's disparate impact prohibition would satisfy the "strong basis in evidence" standard. *See id.*at 2677–81.

[39] *Id.* at 2677.

[40] The Court implicitly confirmed the breadth of its holding by stating that "[i]f 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." *Id.* at 2681. In other words, it would be impossible to establish disparate impact liability against the City based on the test, insomuch as the test has been sufficiently validated to

the written test and the weighting of the oral and written portions of the test satisfied professionally accepted standards for test validation.

The Court based its finding of test validity on four factors, including: statements of the vice president for the test developer and city officials regarding the test developer's "painstaking analyses of the captain and lieutenant positions" and its reliance on "source material approved by the [Fire] Department"[41]; testimony by an outside witness with firefighting experience that the "questions were relevant for both exams"[42]; a comment from another witness with testing expertise that "the exams 'appear to be . . . reasonably good'" [43]; and the City's failure to ask the test developer — as permitted by its contract with the City — for "a technical report consistent with EEOC guidelines for examination-validity studies."[44]

The Court was not persuaded by arguments addressing the general unsuitability of pencil and paper tests for evaluating the skills essential to commanding firefighters, such as command presence, the ability to make decisions under pressure, and interpersonal skills.[45] It also skated over apparent problems in the assessment of the City's test, including the 60%–40% weighting of the written and oral portions of the test. There was simply no evidence addressing how these percentages bore a manifest relationship to the qualities required of supervisory firefighters. The Court could only state that "because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason."[46] It is palpably insufficient to suggest that an element of a selection device is lawful pursuant to Title VII simply because it was negotiated in collective bargaining.[47] It seems unlikely that the negotiators based their decision on a professionally grounded calculation that the 60%-40% ratio was most likely to predict job performance. Even if they had, the Court would have needed to examine the evidence supporting that calculation.

The Court glossed over significant issues raised before the City regarding the validity of the test, including allegations of racially unequal access to study material,[48] the failure of anyone in the

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permit the City to rely on it. Presumably, employers should feel confident that they can avoid disparate impact liability by following the same steps New Haven did in developing a test.

[41] *Id.* at 2678.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 2679.

[45] *Id.* at 2691 (Ginsburg, J., dissenting).

[46] *Id.* at 2679.

[47] The Court's rationale would effectively rewrite Title VII to give decisions about selection devices the same protection afforded seniority systems by section 703(h) of the Civil Rights Act of 1964. *See* 42 U.S.C. 2000e-2(h) (2006). The Court also offered the equally unconvincing explanation that "[changing] the weighting formula, moreover, could well have violated Title VII's prohibition of altering test scores on the basis of race." *Ricci*, 129 S. Ct. at 2679. That injunction, however, can only apply if selections are to be made on the basis of altered scores. Here, if the test results were not certified, the test scores would not have been used, much less altered. Moreover, the score weighting goes to the validity of the test. If the weighting rendered the test invalid, the test results could not have been used.

[48] *Id.* at 2693.

New Haven Fire Department to review the exam questions,[49] allegations that some of the questions were not relevant to New Haven or may have overemphasized material that was less relevant to New Haven,[50] the admitted failure of the test developer to attempt to assess command presence,[51] the failure to demonstrate that the test was sufficiently precise to warrant its use for the rank-ordering of candidates,[52] and the failure to establish that the pass/fail line was sufficiently related to job performance. [53]

The Court also rejected suggestions that equally valid alternatives with less discriminatory impact existed. Most notably, it refused to credit assessment centers as a legitimate alternative. According to a study cited by Justice Ginsburg,[54] by 1996, some two-thirds of fire departments used assessment centers in which candidates for command positions were confronted with simulations of situations they might confront on the job.[55] These centers produced dramatically lower racial disparities.[56] Despite this, the Court refused to consider these as a viable alternative thereby undermining the business necessity requirement announced by the Court in *Griggs* and subsequently codified by Congress.[57]

The EEOC Guidelines — a Casualty?

The Court's treatment of the test's validity threatens serious damage to the Equal Employment Opportunity Commission's ("EEOC") Uniform Guidelines on Employee Selection Procedures.[58] Courts have paid deference to the Guidelines ever since *Griggs* noted that they were the "administrative interpretation of the Act by the enforcing agency" and "entitled to great deference."[59] *Ricci*, however, ignores the Guidelines' provisions governing validation of employment tests, and its discussion of the validity of New Haven's test is inconsistent with the Guidelines. The Guidelines state that any selection device that has an adverse impact must be validated in accordance with the Guidelines,[60] which require a validation study based on "generally accepted professional standards for evaluating standardized tests."[61] The evidence before the Court did not include a generally accepted professional validation study regarding

[49] *Id.* at 2706 (Ginsburg, J., dissenting).
[50] *Id.* at 2667
[51] *Id.* at 2706 (Ginsburg, J., dissenting).
[52] *Id.* at 2706 n.16 (Ginsburg, J., dissenting).
[53] *Id.*
[54] *Id.* at 2705 (Ginsburg, J., dissenting).
[55] *Id.* (citing Phillip E. Lowry, *A Survey of the Assessment Center Process in the Public Sector*, 25 PUB. PERSONNEL MGMT. 307, 315 (1996)).
[56] *Id.*
[57] *Id.*
[58] EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (2009); Posting of David A. Drachsler to ACS Blog, http://www.acslaw.org/node/13829 (July, 27, 2009, 13:57 EST).
[59] Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971). *See also* Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 384 (2d Cir. 2006) ("[T]hirty-five years of using these Guidelines makes them the primary yardstick by which we measure defendants' attempt to validate the [employment test for New York teachers].").
[60] 29 C.F.R. § 1607.3(A) (2009). 29 C.F.R. § 1607.6 also provides that where validation methods are infeasible, test administrators may proceed by instead eliminate adverse impacts.
[61] 29 C.F.R. § 1607.5(C) (2009).

New Haven's test,[62] yet the Court had no trouble holding that there was no genuine issue of material fact regarding its validity. As a result, the Court has lowered the bar for employers seeking to avoid disparate impact claims for use of selection devices with disparate impact.

Conclusion

It remains to be seen whether *Ricci* is limited by its peculiar facts to affect only voluntary efforts by employers undertaken late in a selection process to avoid disparate impacts, or whether it will affect the standard for evaluating a test's validity when it is challenged by disappointed applicants.[63] At the very least, *Ricci* will likely chill voluntary efforts by employers to avoid disparate impacts in their selection procedures. The Court has long recognized the importance of voluntary compliance as the preferred method of satisfying Title VII's mandates.[64] Yet, its reliance on the "strong basis in evidence" standard, combined with its willingness to validate New Haven's test, severely restricts the discretion of an employer to take voluntary action. Indeed, the Court's application in *Ricci* of the "strong basis in evidence" standard suggests that nothing less than a finding of a disparate impact violation will permit voluntary action. The Court's protestation that employers will not have to prove violations against themselves rings hollow.

To the extent possible, however, the Court should be held to its word. It is incumbent on the EEOC to issue guidance promptly regarding the meaning of the "strong basis in evidence" standard for employers and the effect of *Ricci* on the Uniform Guidelines for Employee Selection. The EEOC should define the area between a prima facie case and proof of a violation against itself in which an employer can take voluntary action to avoid a racially disparate impact. The EEOC should also reassert the validity of its Guidelines and take the position that *Ricci* is properly read only as analyzing the evidence before the CSB when it decided not to certify the results of a test that had already been administered and does not affect the standard that governs affirmative disparate impact challenges to selection devices. Quick action by the EEOC will maximize employers' flexibility to avoid discrimination and give courts a basis for continuing to hold racially disparate selection vehicles to a high standard of justification.

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[62] The Court criticized the City for failing to request a validation study from the test developer. *Ricci*, 129 S. Ct. at 2679. Regardless of the City's failure to request one, the Court should not have opined on the validity of the test without such a study.

[63] *See* United States v. City of New York, No. 07-CV-2067, 2009 WL 2180836, at *3 (E.D.N.Y. July 22, 2009) (concluding that *Ricci* dealt with a situation in which the employer sought to avoid a finding of disparate treatment discrimination by asserting that its actions were necessary to avoid disparate impact liability but not addressing the question of whether the use of firefighter examinations has had a disparate impact on black and Hispanic firefighter applicants).

[64] *See* Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987); Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986).