

TITLE VII'S CONFLICTING "TWIN PILLARS" IN
Ricci v. DeStefano, 129 S. Ct. 2658 (2009)

Since 1971, when the Supreme Court created the disparate impact doctrine in *Griggs v. Duke Power Co.*,¹ the judiciary and Congress have disagreed on how to define and apply the doctrine. In *Griggs*, the Court extended Title VII of the Civil Rights Act of 1964 to prohibit not only disparate treatment of employees but also practices that are "fair in form, but discriminatory in operation."² Two years later, the Court further developed the doctrine in *McDonnell Douglas Corp. v. Green*,³ where it set out a three-part test for plaintiffs alleging disparate impact. A plaintiff must first show that an employer's specific action resulted in disparate impact. Upon this showing, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."⁴ If the employer meets its burden, then the plaintiff has a final opportunity to prevail if he can "show that [the employer's] stated reason for [the employee's] rejection was in fact pretext."⁵ After almost two decades under this regime, the Supreme Court denied the disparate impact claims of minority plaintiffs in *Watson v. Fort Worth Bank & Trust*⁶ and *Wards Cove Packing Co. v. Atonio*,⁷ clarifying that "[t]he burden of persuasion [always] remains with the . . . plaintiff"; only the burden of production shifts to the employer.⁸ Just two

1. 401 U.S. 424 (1971).

2. *Id.* at 431.

3. 411 U.S. 792 (1973).

4. *Id.* at 802. After *Griggs*, the Court modified the precise language used to describe the justification an employer must furnish for a suspect business practice. In *Griggs*, though, the Court determined that "[t]he touchstone is business necessity" in determining whether a practice resulting in disparate impact is permissible. *Griggs*, 401 U.S. at 431.

5. *McDonnell Douglas*, 411 U.S. at 804.

6. 487 U.S. 977 (1988). The Court assessed the case of a black female bank teller who had been passed over numerous times for promotion. *Id.* at 982. A plurality recognized the applicability of disparate impact analysis to subjective employment criteria, *id.* at 989–91, and the case was remanded to the court of appeals for further findings. *Id.* at 999–1000.

7. 490 U.S. 642 (1989).

8. *Id.* at 659–60. The Court maintained that previous cases allocated the burdens the same way. *Id.* *Watson* likewise found, though in dicta, that the burden that

years after the Court decided *Wards Cove*, Congress responded to what it perceived as undue judicial limits on disparate impact doctrine.⁹ Amending the Civil Rights Act of 1964,¹⁰ the Civil Rights Act of 1991¹¹ expressly elevated the disparate impact doctrine to equal status with disparate treatment.¹²

Last Term, in *Ricci v. DeStefano*,¹³ the Supreme Court constrained the applicability of the disparate impact doctrine to cases of immediate discrimination and attempted to reconcile the disparate impact and disparate treatment doctrines. Al-

shifts to the employer to show business justification is one of production and not persuasion and that this formulation is the correct interpretation of *Griggs*. 487 U.S. at 997. Commentators, however, have asserted that *Wards Cove* represents a significant break from the *Griggs* doctrine, see KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION* 83–84 (1993), or that confusion over the proper allocation preceded *Wards Cove*, see HENRY H. PERRITT, JR., *CIVIL RIGHTS IN THE WORKPLACE* 272–73 (3d. ed. 2001).

9. See *infra* note 62 and accompanying text. Arguments that *Wards Cove* is a retreat from *Griggs* largely take one of two forms: that the Court changed the allocation of the burdens of production and persuasion in *Wards Cove*, see KARST, *supra* note 8, or that *Wards Cove* lessened the degree to which a suspect business practice must be “necessary,” 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, 240–41 (1990) (arguing that *Wards Cove* and cases leading up to it relaxed the standard by which employers had to defend suspect practices from business “necessity” to business “justification”). See also RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 233 (1992) (arguing that *Watson’s* recharacterization of business “necessity” with “legitimate business reasons” was a “conscious retreat” from *Griggs*).

10. Pub. L. No. 88-352, 78 Stat. 241.

11. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.). The 1991 Civil Rights Act codified the prohibition on employers from engaging in practices that resulted in a disparate impact in addition to the prohibition on disparate treatment embodied in the original Act.

12. In her *Ricci* dissent, Justice Ginsburg referred to disparate treatment and disparate impact as the “twin pillars of Title VII.” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2699 (2009) (Ginsburg, J., dissenting). Justice Ginsburg also asserted that Congress intended to restore the understanding of disparate impact enunciated in *Griggs*. See *id.* at 2698. This reading of the statute is supported by Congress’s decision to provide for compensatory and punitive damages for plaintiffs who prevail in disparate treatment claims, but not those who prevail in disparate impact claims. See 42 U.S.C. § 1981a (2006). Such an approach is consistent with a lack of assignment of fault to employers found liable for disparate impact; if Congress intended for disparate impact to apply only to cases of impossible-to-prove disparate treatment, there would be no justification for a discrepancy in the available damages. But see Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 *FORDHAM L. REV.* 523, 540–46 (1991) (determining that Title VII can be conclusively read neither to embody liability based purely on effects regardless of fault, nor to preclude such liability).

13. 129 S. Ct. 2658 (2009).

though the Court's holding did not go beyond striking a tenuous balance between the two doctrines, the majority's reasoning reflected an ultimate interest in protecting individuals from exclusion from employment opportunities because of race. This interest is in line with the original intent of the Civil Rights Act of 1964 as well as the Fourteenth Amendment's Equal Protection Clause. Unfortunately, although the Court signaled that the independent disparate impact doctrine is incompatible with the Equal Protection Clause, the Court failed to address explicitly the plaintiffs' constitutional claims, thus ensuring that the debate over the disparate impact doctrine will continue in the courts, and perhaps in Congress, until the Supreme Court takes up a more ambiguous case than *Ricci*.

In 2003, the City of New Haven, Connecticut, hired Industrial/Organizational Solutions, Inc. (IOS)—an independent, out-of-state consulting firm—to develop exams for determining promotions within the City's fire department.¹⁴ While developing the tests for lieutenant and captain positions, the firm made deliberate efforts “to ensure that the results . . . would not unintentionally favor white candidates.”¹⁵ For example, IOS oversampled minority firefighters and also organized the candidate evaluation panels to guarantee two minorities would sit on every three-person panel.¹⁶ Despite IOS's efforts, however, a much lower percentage of blacks and Hispanics achieved passing scores than their white counterparts.¹⁷ In response to the exam results, the City conducted a series of hearings before the Civil Service Board (CSB) at which examinees and experts spoke

14. *Id.* at 2665.

15. *Id.*

16. *Id.* at 2665–66.

17. *Id.* Specifically, seventy-seven candidates took the exam for Lieutenant, forty-three of whom were white, nineteen of whom were black, and fifteen of whom were Hispanic. Thirty-four examinees passed, twenty-five of whom were white, six of whom were black, and three of whom were Hispanic. Forty-one candidates took the exam for Captain, twenty-five of whom were white, eight of whom were black, and eight of whom were Hispanic. Twenty-two passed, sixteen of whom were white, three of whom were black, and three of whom were Hispanic. Beyond the disparity in passing scores, the results of the exams ensured that no black firefighters and only two Hispanic firefighters were eligible for immediate promotion, owing to the number of vacant positions and the City's “rule of three,” which dictated that an opening must go to one of the top three scorers on the relevant exam. *Id.*

both in favor of and against certification of the exams.¹⁸ During the heated debates, the influential community leader Reverend Boise Kimber threatened the CSB with “political ramification[s]” if the results were certified.¹⁹ On March 18, 2004, the CSB deadlocked in its vote on whether to certify the examinations, resulting in an automatic decision not to certify the results.²⁰

Firefighter Frank Ricci—along with sixteen other white candidates and one Hispanic candidate who had passed one of the promotional exams—filed suit against the City in the United States District Court for the District of Connecticut, alleging violations of Title VII and the Equal Protection Clause of the Fourteenth Amendment.²¹ The opposing parties subsequently moved for summary judgment. Granting the City’s motion for summary judgment and denying the plaintiffs’, the district court reasoned that the City’s decision to discard the examination results was legitimately grounded in a fear of disparate impact liability if it had certified the exams.²² The court concluded that black and Hispanic candidates easily could have made a *prima facie* showing of discrimination by pointing to the failure of the exam pass rates to meet the EEOC’s four-fifths guidelines for relative passage rates of different races.²³ Further, the court noted, the City’s refusal to certify the results was affirmatively race-neutral because “[t]he intent to remedy the

18. *Id.* at 2667–71. The CSB held a total of five meetings between January 22, 2004 and March 18, 2004. *Id.* The director of the City’s Department of Human Resources opened the first of these by passing out a list of passage rates by race and characterizing the results as demonstrating “a [very] significant disparate impact.” *Id.* at 2667. Frank Ricci spoke in support of certification, though he did not yet know whether he had passed. *Id.* At subsequent meetings, IOS supported its development of the exams, *id.* at 2668, but other “experts,” notably Christopher Hornick, whose consulting business competed with IOS, disparaged the exams for their severe adverse impact after a cursory review of the exam materials, *id.* at 2668–69.

19. 129 S. Ct. at 2686 (Alito, J., concurring) (quoting the Reverend as saying “I look at three whites and one Hispanic and no blacks . . . I would hope that you would not put yourself in this type of position, a *political ramification that may come back upon you* as you sit on this [Board] and decide the future of a department and the future of those who are being promoted”).

20. 129 S. Ct. at 2671 (majority opinion).

21. U.S. CONST. amend. XIV, § 1.

22. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 158 (D. Conn. 2006).

23. *Id.* at 153 (citing 29 C.F.R. § 1607.4(D)) (“[T]he EEOC ‘four-fifths rule’ provides that a selection tool that yields ‘[a] selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact . . .’”).

disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.”²⁴

On appeal, the Second Circuit issued a summary order affirming the decision below, then later vacated the order and issued in its place an identical per curiam opinion.²⁵ The six-sentence opinion affirmed “for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below.”²⁶ Notably, the court determined that the City’s decision not to certify the results was rooted in a desire to comply with Title VII and was therefore protected.²⁷

The Supreme Court reversed. Writing for a majority of five,²⁸ Justice Kennedy first discussed the intentional steps IOS took in developing the examinations to ensure that they were unbiased.²⁹ The Court further found that the failure to certify the exams was explicitly based on race, particularly the racial imbalance in the passage rates, and as such, “[w]ithout some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.”³⁰ The Court developed a standard, balancing the conflicting doctrines of disparate impact and disparate treatment, intended to comport with Title VII’s intent to remove race-based barriers to opportunity:³¹

[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action.³²

24. *Id.* at 158–59 (quoting *Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)).

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

26. *Id.* at 87 (citing *Ricci*, 554 F. Supp. 2d 142).

27. *Id.*

28. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined in the opinion of the Court.

29. *See supra* notes 14–16 and accompanying text.

30. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

31. *Id.* at 2674 (“[O]ur decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.”).

32. *Id.* at 2677. Notably, even in its concession of the types of cases where failure to certify an exam would be permissible, the Court carefully described such actions as “race-conscious” and “discriminatory.” *Id.*

The Court held that the City's decision not to certify the exam results violated Title VII of the Civil Rights Act under this standard because there was no strong basis in evidence that the City would have been liable under disparate impact theory.³³ Able to reach its conclusion without extending the inquiry beyond Title VII, the Court declined to address the plaintiffs' Equal Protection claim.³⁴

Justice Scalia filed a concurring opinion in which he predicted that the majority's refusal to address the Equal Protection Clause "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"³⁵ Justice Scalia opined that perhaps the doctrine could be compatible with the Equal Protection clause if used only to help "smoke out" the more sinister and hard to prove disparate treatment, but that the City's conduct in the present case constituted intentional discrimination, "just one step up the chain."³⁶ Justice Scalia noted his particular agreement with the majority's finding that the City's decision making was "discriminatory."³⁷

Justice Alito³⁸ also filed a concurring opinion. He described two questions the Court had to address regarding alleged disparate treatment: whether the reason the City gave for its decision was legitimate under the statute, and whether that was in fact the reason the City engaged in the action that it did.³⁹ Justice Alito noted that because the majority had held that the City's action was unjustified regardless of whether it had acted out of a bona fide desire to avoid disparate impact liability, the Court had no need to address the City's subjective intent.⁴⁰ Justice Alito nevertheless closely examined the CSB's deliberation process, ultimately determining that "a reasonable jury could

33. *Id.* ("Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate . . .").

34. *Id.* at 2681.

35. *Id.* at 2682 (Scalia, J., concurring).

36. *Id.*

37. *Id.*

38. Justices Scalia and Thomas joined Justice Alito.

39. *Id.* at 2683 (Alito, J., concurring).

40. *Id.*

easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate impact provision of Title VII but a simple desire to please a politically important racial constituency."⁴¹ Stressing that the district court had expressly acknowledged that "a jury could rationally infer" improper motives,⁴² Justice Alito questioned how it was possible for the lower courts and the dissent to find summary judgment for the City appropriate.⁴³

Justice Ginsburg dissented.⁴⁴ She stated that the Court should have considered the widespread legacy of racial discrimination in firefighting and in the New Haven department particularly.⁴⁵ "It is against this backdrop of entrenched inequality," she maintained, "that the promotion process at issue in this litigation should be assessed."⁴⁶ With this legacy as her focus, Justice Ginsburg offered a softer standard for employers making a race-based decision to avoid disparate impact liability: "The employer must have *good cause to believe* the device would not withstand examination for business necessity."⁴⁷ This standard, Justice Ginsburg declared, would be in line with the purpose of Title VII and allow the disparate impact and disparate treatment doctrines to work together to remove the race-based barriers that impede equal opportunity in employment.⁴⁸ Lamenting that groups long denied equal opportunity would once again be vulnerable under the Court's decision, Justice Ginsburg deplored the majority's break from precedent and its failure to square its decision with the holding in *Griggs*.⁴⁹ Justice Ginsburg also criti-

41. *Id.* at 2688. Specifically, Justice Alito pointed to the significant influence of community leader Reverend Boise Kimber, *see supra* note 19, as well as e-mail messages between the mayor and his staff indicating that the City was determined to discard the results on any grounds. 129 S. Ct. at 2685–86. Justice Alito also noted that city employees had admitted that the expert witness who testified against certification was rewarded with a contract to develop and administer the alternative test. *Id.* at 2687.

42. *Id.* at 2684 (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162 (D. Conn. 2006)).

43. *See id.* at 2688.

44. Justices Stevens, Souter, and Breyer joined Justice Ginsburg.

45. *See id.* at 2690–91 (Ginsburg, J., dissenting).

46. *Id.* at 2691.

47. *Id.* at 2699 (emphasis added).

48. *Id.*

49. *Id.* at 2710 (arguing that the Court's opinion "breaks the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests 'fair in

cized the majority's new standard as "enigmatic" and predicted that it would lead to confusion in future cases.⁵⁰

Although the majority opinion in *Ricci* ostensibly does nothing more than balance the competing provisions of Title VII, the Court's decision is rooted in constitutional concerns and reaches further than its reasoning would suggest. The primary divergence between the majority and the dissent rests on the different roles to which they assign the disparate impact doctrine. Whereas Justice Ginsburg's dissent aligns with the 1991 amendments to the Civil Rights Act, the majority better reflects precedent and prevailing trends in jurisprudence. Specifically, the Court signaled that disparate impact doctrine applies only in cases of disparate treatment where motive is difficult or impossible to prove. This view of the doctrine is the only one that does not violate the Equal Protection Clause, as Justice Scalia noted in his concurrence,⁵¹ but the Court's refusal to address the constitutional question leaves lower courts trapped between the restricted role for the disparate impact doctrine announced in *Ricci* and the more expansive role embodied in the Civil Rights Act of 1991.

Ricci is consistent with the body of disparate impact jurisprudence developed over the last thirty-eight years. When creating the doctrine in *Griggs*,⁵² the Court intended to respond to employers' veiled discriminatory actions following the passage of the Civil Rights Act of 1964.⁵³ *Griggs* dealt with

form, but discriminatory in operation.'" (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971))).

50. *Id.* at 2700.

51. *Id.* at 2682–83 (Scalia, J., concurring).

52. In *Griggs*, the Court created the disparate impact doctrine by determining that "[t]he [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 401 U.S. at 431. Disparate impact doctrine was not included in the Civil Rights Act of 1964; in fact, the *Congressional Record* makes clear that Congress intended to ban only intentional disparate treatment and nothing else. 110 CONG. REC. 7246–47 (1964) ("Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color But it expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications.") For a thorough discussion of the intent of the Civil Rights Act of 1964, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 184–92 (1992).

53. See Stuart Taylor, *Sotomayor and 'Disparate Impact'*, NAT'L J., May 30, 2009 ("The problems addressed by the 1971 decision were the difficulty of proving intent to discriminate and the fact that many companies—especially those em-

a power company that discriminated openly before the passage of the Act and began requiring satisfactory exam performance for certain positions the very day the Act took effect.⁵⁴ The framework announced later in *McDonnell Douglas*⁵⁵ aimed to prohibit similarly invidious employment decisions, allowing recovery only if an employer did not act out of business necessity or when another equally valid action was available that would have resulted in less of a disparate impact.⁵⁶ The Court assumed any rational employer with no intent to discriminate would always base employment decisions on business necessity. Consequently, the *McDonnell Douglas* framework allows recovery absent open discrimination only in cases where the employer passed over a readily available option with less disparate impact.

Though seen as a curtailment of the doctrine announced in *Griggs*,⁵⁷ the Court's decision in *Wards Cove*⁵⁸ did not contradict precedent. Rather, the Court held only that an allegedly adverse impact was to be measured by the pool of equally qualified applicants, and could not be shown by the racial disparity between two groups of employees with different skill sets.⁵⁹ In

ploying blue-collar workers without college educations—were evading the 1964 act's ban on overt discrimination by using written tests designed less to measure job-related skills than to screen out blacks." *But see* Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972) (arguing that *Griggs* effectively interpreted the Civil Rights Act of 1964 to "protect[] the interests of minority groups and their members in securing and *improving* employment opportunities" (emphasis added)).

54. *Griggs*, 401 U.S. at 427–28. The Court in *Griggs* noted that neither of the two requisite exams was "directed or intended to measure the ability to learn to perform a particular job or category of jobs." *Id.* at 428.

55. 411 U.S. 792 (1973).

56. *Id.* at 802–04.

57. *See* Belton, *supra* note 9, at 241–44 (discussing the change in the analytic scheme of the disparate impact doctrine after *Watson* and *Wards Cove*); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2020 (1995) (describing the changes in disparate impact doctrine embodied in *Wards Cove*).

58. 490 U.S. 642 (1989).

59. *See Wards Cove*, 490 U.S. at 650–51. The Court held that plaintiffs failed to establish a prima facie case though they showed a disparity between the racial makeup of cannery and non-cannery workers. *Id.* The Court explicitly accepted the use of statistics in making a prima facie showing of a disparate impact violation, in line with relevant precedent, but clarified that those statistics must relate

this way, *Wards Cove* did not so much restrict disparate impact doctrine as it defined an upper limit for its applicability.

Ricci too carves out a place for disparate impact that is subrogated to disparate treatment. The doctrine is limited, as it was in *Griggs*, to cases where disparate treatment is present but difficult or impossible to prove. Two aspects of the Court's decision signal this intention. First, the Court discussed in detail the City and testing developer's commitment to create examinations that were as fair and balanced as possible.⁶⁰ Second, the Court's explicit adoption of the *McDonnell Douglas* framework relieves employers of disparate impact liability so long as they act in the best interest of their business.⁶¹

As the dissent pointed out, *Ricci* is incompatible with the intent of the Civil Rights Act of 1991, but it must be so. Congress passed the 1991 Act "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."⁶² In declaring a definitive break with the Court's decisions in *Watson* and *Wards Cove*, Congress effectively elevated the disparate impact doctrine to independent status. As Justice Ginsburg recognized in her dissent, Congress acted through the 1991 Act to restore the "twin pillars of Title VII."⁶³ Either the disparate impact doctrine is subordinate to the disparate treatment doctrine and the two work in tandem to root out discriminatory acts, or the disparate impact doctrine has independent status and the two must conflict.⁶⁴ Recogniz-

to the pool of otherwise qualified applicants and not simply any other set of the employer's employees. *Id.*

60. *Ricci*, 129 S. Ct. at 2665-66.

61. Under the *McDonnell Douglas* framework, employers escape liability if they can show that the disputed practice served a "legitimate, non-discriminatory" purpose and if plaintiffs fail to show that the proffered reason is a pretext. 411 U.S. at 802-04.

62. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. at 1071.

63. *Ricci*, 129 S. Ct. at 2698-99 (Ginsburg, J., dissenting).

64. Paradoxically, the dissent asserts that Equal Protection analysis is unconcerned with disparate impact doctrine. *Id.* at 2700. But this is only possible if disparate impact doctrine is used in fact to "smoke out" disparate treatment; otherwise, remedial actions like the one that was before the Court are not remedial in fact but rather constitute disparate treatment. Therefore, the dissent is mistaken to characterize disparate impact as an independent doctrine that breeds liability when no discrimination has occurred and prompts employers to make discriminatory race-based decisions while arguing nonetheless that Equal Protection does not enter the equation.

ing this conflict, *Ricci* adopted a standard designed to ensure that disparate impact doctrine would continue to work alongside disparate treatment doctrine.

By framing its holding as a standard by which to balance the competing doctrines, the Court salvaged the Civil Rights Act of 1991; however, it also did a disservice to lower courts, which will struggle to apply the doctrine. Courts are now left to determine in each case whether there is a “strong basis in evidence” that the employer would have been liable for disparate impact. But they have very little guidance from *Ricci* by which to judge cases where the evidence is less overwhelming.

The Court’s decision parallels a shift in Equal Protection Clause jurisprudence, and given the inherent ambiguity of the strong-basis-in-evidence standard, the Court would have done better to settle the looming constitutional question it avoided. Three recent decisions define the shift in the Court’s treatment of Equal Protection guarantees. In *Grutter v. Bollinger*⁶⁵ and *Gratz v. Bollinger*,⁶⁶ the Court narrowly defined the government’s interest in diversity to allow the University of Michigan to consider the unique backgrounds of its applicants—but not solely their race—in its admissions decisions.⁶⁷ *Parents Involved in Community Schools v. Seattle School District No. 1*,⁶⁸ decided four years later, recognized only two interests sufficiently compelling to justify race-conscious decisions in determining school placements: *Grutter*’s “interest in diversity in higher education,”⁶⁹ and the “compelling interest of remedying the effects of past intentional discrimination.”⁷⁰ The review of the pol-

65. 539 U.S. 306 (2003).

66. 539 U.S. 244 (2003).

67. *Id.* at 276–77 (O’Connor, J., concurring) (explaining that the discrepancy between the Court’s rulings in *Grutter* and *Gratz* arose from the difference between the University of Michigan’s undergraduate admissions policy—which awarded automatic points to underrepresented minorities—and the law school admissions policy—which considered a more holistic view of each applicant’s diverse background and experiences).

68. 551 U.S. 701 (2007).

69. *Id.* at 722 (citing *Grutter*, 539 U.S. at 328).

70. *Id.* at 720. The Court noted that the Seattle schools had never been segregated, so the program about which petitioners complained could not have been tailored to correct past discrimination. *Parents Involved* is distinguishable from the dissent’s standard in *Ricci* because the former requires that past policies of intentional discrimination have not been adequately remedied, whereas the latter would authorize

icy in each of these three cases turned on how individuals were treated,⁷¹ and, though the Court struck down pure race-based decision making,⁷² it allowed a policy that “provide[d] for a meaningful individualized review of applicants”⁷³ to stand.

Faced with an opportunity to build on these decisions, the Court in *Ricci* instead allowed the strong-basis-in-evidence standard to stand in for an implicit, but still present, concern for the individual. Refusing to address the constitutional question head on,⁷⁴ the Court nevertheless revealed its equal protection concerns by acknowledging in dicta that race-based action absent the strong-basis-in-evidence standard was “antithetical to the notion of a workplace where *individuals* are guaranteed equal opportunity regardless of race.”⁷⁵ The Court analogized to *City of Richmond v. J. A. Croson Co.*,⁷⁶ a case that struck down a race-based government subcontracting plan as violative of

disparate treatment due to a vague “backdrop of entrenched inequality.” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009) (Ginsburg, J., dissenting).

71. *Parents Involved* recognized the unconstitutionality of implementing racial quotas or any policy that treats people as products of their racial classification instead of as individuals. In rejecting racial balancing as a compelling state interest, the Court quoted its own precedent: “At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Parents Involved*, 551 U.S. at 730 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)); see also Katherine C. Naff, *From Bakke to Grutter and Gratz: The Supreme Court as a Policymaking Institution*, 21 REV. POL’Y RES. 405, 419–21 (2004).

72. *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003). *Parents Involved* recognized that *Grutter’s* assessment was aimed at true diversity as opposed to a simple attempt to create racial balance. See *Parents Involved*, 551 U.S. at 723 (“The point of the narrow tailoring analysis in which the Court in *Grutter* engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance.”). By contrast, the Court maintained in *Grutter* that a program aimed at creating racial balance alone would be “patently unconstitutional.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

73. *Gratz*, 539 U.S. at 276 (O’Connor, J., concurring).

74. Despite its express refusal to consider the constitutional issue, the Court in *Ricci* declared that its decision did not equate to “hold[ing] that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.” 129 S. Ct. at 2676.

75. *Id.* at 2677 (emphasis added). The Court did not, however, take issue with the City’s race-conscious actions taken before the administration of the exams, characterizing those actions as aimed at ensuring equal opportunities for individuals. *Id.* at 2681.

76. 488 U.S. 469 (1989).

the Equal Protection Clause.⁷⁷ Adopting the same strong-basis-in-evidence standard that it had created in *Richmond*, the Court reasoned in *Ricci* that Equal Protection case law could inform its assessment of statutory claims because of the common issue of relieving tension between correcting past discrimination and forbidding the government from engaging in any discriminatory acts.⁷⁸ Thus, the Court employed this constitutional analysis to inform its reconciliation of disparate treatment and disparate impact doctrines, while simultaneously maintaining that it had no need to address the constitutional question. The Court decided *Ricci* on statutory grounds alone, but the adopted standard—identical to the one that the Court has determined satisfies the requirements of the Equal Protection Clause—reflects an overarching intent to guarantee the equal protection of individuals.⁷⁹

The Court can succeed in bringing the disparate impact doctrine in line with the Equal Protection Clause if—and only if—the standard it espouses makes disparate impact subservient to disparate treatment.⁸⁰ A fully independent disparate impact doctrine sanctions disparate treatment under the mask of “remedial” action.⁸¹ The majority and the dissent diverge on this point. The majority recognizes the CSB’s failure to certify as disparate treatment, addressing in its decision only whether such disparate treatment was warranted by potential liability under the disparate impact doctrine.⁸² Conversely, the dissent

77. *Id.* at 477–78 (“The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises.”).

78. *See Ricci*, 129 S. Ct. at 2675.

79. The Court stated that the City’s decision effectively “reli[ed] on race to the detriment of individuals.” *Id.* at 2681.

80. *Id.* at 2682 (Scalia, J., concurring) (finding that disparate impact doctrine might be defensible *if* used as an “evidentiary tool” in cases of disparate treatment). The idea that disparate impact doctrine might conflict with Equal Protection was not addressed until recently and remains unresolved. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) (discussing the possibility that Equal Protection prohibits statutes that sanction race-based action by government employers and noting that Courts and commentators had yet to address the question).

81. *But see* Primus, *supra* note 80, at 563–65 (arguing that these remedial actions—such as altering cutoff points or other criteria from exams—do not constitute disparate treatment because they treat each candidate exactly the same).

82. *Ricci*, 129 S. Ct. at 2674 (“Whatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment

mistakenly concludes that the CSB's failure to certify was race-neutral, suggesting that all the examinees had their results disregarded equally and no one was promoted.⁸³

Because the Court limited its decision to the statutory question, the short-term fate of the disparate impact doctrine lies with the legislature. Basing *Ricci* on reconciling the provisions of Title VII impacts both public and private employers, but does nothing to prevent Congress from passing legislation sharpening the teeth of the doctrine, as it did in the early 1990s. If Congress does strengthen the disparate impact doctrine, how constrained must the doctrine—and with it, the Equal Protection Clause—become before the Court will be forced, as Justice Scalia aptly contended, to address head on the constitutional question that it took such pains to avoid?⁸⁴ The logic of the Court's decision makes clear that the disparate impact doctrine must be restricted to “smok[ing] out” cases of disparate treatment or else violate the protections afforded individuals by the Equal Protection Clause. Unfortunately, its aversion to addressing the constitutional issue leaves lower courts with little guidance, invites Congress to push the doctrine further from alignment with the Constitution, and ensures that judicial wrangling over disparate impact will continue.

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decision because of race The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.”).

83. *Id.* at 2696 (Ginsburg, J., dissenting) (“New Haven’s action, which gave no individual a preference, was simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race, are not treated uniformly.” (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 157 (D. Conn. 2006) (internal quotation marks omitted))).

84. See *Ricci*, 129 S. Ct. at 2681–83 (Scalia, J., concurring).