Civil Rights

Two Civil Rights Decisions Close Out Supreme Court's 2008 Term

*By Christian J. Ward & Edward C. Dawson**

The Supreme Court's 2008 Term concluded with opinions in two closely followed civil rights cases, *Northwest Austin Municipal Utility District No. 1 v. Holder* (*Northwest Austin MUD)*, and *Ricci v. DeStefano* (*Ricci*). Both cases were anticipated as presenting possibilities for sweeping constitutional holdings—in *Northwest Austin MUD*, the invalidation of the Voting Rights Act, and in *Ricci*, the application of Equal Protection analysis to workplace claims of "reverse" discrimination under Title VII. In fact, neither case produced a constitutional seachange, but instead both were decided on grounds of statutory interpretation, consistent perhaps with Chief Justice Roberts's articulated preference for a "minimalist" jurisprudential approach. Nonetheless, both cases achieved significant, incremental change—in recognizing the Nation's significant advances in guaranteeing equal voting rights to all, and in advancing the vision of antidiscrimination employment law as a vehicle for ensuring equal, race-neutral employment opportunities. This article summarizes and analyzes each of the two decisions, and offers some thoughts about the respective implications of each for future developments in voting-rights and employment-discrimination law.

I. Northwest Austin Municipal Utility District No. 1 v. Holder: A Time to Move Forward

In *Northwest Austin MUD*,[1] the U.S. Supreme Court signaled that it is time to reevaluate four-decade-old presumptions underlying enforcement of the Voting Rights Act, unanimously requiring the Department of Justice and the U.S. District Court for the District of Columbia to significantly broaden the availability of "bailout"—i.e., exemption from Section 5 of the Act–and expressing skepticism regarding whether Section 5 remains a constitutional exercise of Congress's enforcement power.

Congress enacted the landmark Voting Rights Act of 1965 "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century."[2] Previous statutory attempts to enforce the guarantees of voting rights enshrined in the Constitution had met with little success in overcoming deep-rooted intransigence in certain parts of the country, notably–and unsurprisingly–in the Civil Rights Era South.

At a time when a Southern governor might stand in a schoolhouse doorway attempting to stave off court-ordered integration, case-by-case litigation of voting rights abuses proved largely ineffective at substantially increasing voter registration and participation by African Americans. The Justice Department might have received an order from a court declaring, say, a literacy test for voter registration unconstitutional only to have a recalcitrant state change its registration requirements enough to evade the court order while retaining their discriminatory purpose and effect. That type of gamesmanship—which has been compared to a game of Whac-A-Mole[3]—is what prompted inclusion of Section 5 in the 1965 Act. As the Supreme Court later explained, "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."[4]

The Section 5 response was an unprecedented, and still unparalleled, feature in American law—a literal federal veto power over certain laws and policy choices made by state and local governmental entities. Basically, a state or political subdivision that is covered by Section 5 must get federal preapproval—known as preclearance—for any change affecting voting, either by seeking a declaratory judgment from the U.S. District Court for the District of Columbia or by submitting the change for vetting by the Attorney General.[5] The district court or the Justice Department must reject the change if it finds that the change has the purpose or effect of abridging the right to vote.[6] It almost goes without saying that the administrative route of submitting changes to the Justice Department is used far more often than the more cumbersome option of litigating in the district court. Because the Supreme Court has made clear that laws subject to Section 5 preclearance "are not now and will not be effective as laws until and unless cleared pursuant to § 5,"[7] the Justice Department's role essentially places the federal Executive Branch in the position of a sort of super-governor, with the power to overrule a state's legislature and its governor. Section 5 was originally set to expire in five years, viewed as a temporary, emergency measure, but has been extended repeatedly, most recently in 2006 until 2031.[8]

States and certain localities (counties, parishes, and other entities if they register voters) were subjected to Section 5 coverage by a formula that takes into account the existence of a "test or device" and voter registration and turnout rates for specified presidential election years.[9] The original 1965 formula was reverse-engineered to capture well-known offenders against the voting rights of African Americans, including the states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. It relied on registration and turnout rates from the 1964 presidential election.[10] In 1975, Section 5 was extended for the second time and the coverage formula amended to capture jurisdictions believed to have discriminated against language minorities, bringing into the fold the states of Alaska, Arizona, and Texas and counties in states including California and New York.[11] The 1975 formula uses data through the 1972 presidential election, and subsequent reenactments of Section 5 have involved no further changes to the coverage formula,

** Christian J. Ward and Edward C. Dawson are partners in the Austin, Texas office of Yetter, Warden & Coleman, L.L.P. Ward represented the plaintiff utility district in Northwest Austin Municipal Utility District No. 1, and is president of the Austin Lawyers Chapter of the Federalist Society. Dawson represented the petitioning firefighters in Ricci v. DeStefano. Both cases were argued by their partner, Gregory S. Coleman.*

meaning that all jurisdictions covered today are covered based on registration and election data from no later than 1972.[12]

The Supreme Court also made clear early on that the VRA takes a very broad view of what constitutes a change affecting voting, meaning Section 5's preclearance requirement extends to tiny alterations or those that have even the remotest effect on voting,[13] which might include personnel policies adopted by a school board that did not conduct elections,[14] annexation of unpopulated land, or moving a utility district's polling place from a residential garage to a public school a short distance away. Additionally, and importantly to the outcome of *Northwest Austin MUD*, the Court, in the 1978 case *United States v. Board of Commissioners of Sheffield*,[15] interpreted Section 5 to require that *any* political subunit within the territory of a covered state submit its changes for preclearance, notwithstanding a more restrictive definition of "political subdivision" elsewhere in the Act that appeared to limit the term's application to counties, parishes, and other entities only if they registered voters.[16]

The Supreme Court upheld the constitutionality of Section 5 in 1966 but cautioned even then that the 1965 enactment had been supported specifically by evidence of "exceptional conditions" that could "justify legislative measures not otherwise appropriate."[17] As early as the 1982 extension of Section 5, Congress had begun to recognize that the original emergency may have passed and Section 5 outlived its usefulness. Its extension included a newly expansive "bailout" provision for "political subdivisions," intended to allow localities that could demonstrate a decade of compliance with the Constitution and the VRA an exemption from Section 5.[18]

Northwest Austin Utility District Number One, the utility district for an Austin, Texas neighborhood of about 3,500 residents known as Canyon Creek, sought to take advantage of the bailout provision. In 2004, members of the district's board learned that they had to get federal preclearance before moving the district's polling place from a private garage to the nearby public elementary school where the other local elections were held on the same day. They regarded this as a ridiculous federal intrusion into local affairs, especially given that Canyon Creek did not exist until the late 1980s, long after the turbulent civil rights struggles of the 1960s, and that it has absolutely no history of voting discrimination. The district filed a bailout suit, as required, in the D.C. federal district court. Recognizing, however, that the Justice Department and others had long interpreted the bailout provision restrictively—specifically, applying the statutory definition of "political subdivision" to conclude that governmental units smaller than counties were ineligible to seek bailout—the district's suit included an alternative claim that the 2006 reenactment of Section 5 exceeded Congress's constitutional authority.

The district argued, based on the statutory language and the Supreme Court's holding in *Sheffield*, that it must be regarded as a "political subdivision" eligible to bail out. Its alternative argument was that, under cases including *South Carolina v. Katzenbach* and *City of Boerne v. Flores*,[19] Congress could not reenact Section 5 as a prophylactic measure in 2006 because, so long after the original emergency ended, it was far too broad to be regarded as simply enforcing guarantees in the Fourteenth and Fifteenth Amendments. The fact that less than a tenth of a percent of proposed voting changes now draw objections from the Justice Department demonstrates that Section 5 is an outmoded federal intrusion into local government.

The district court rejected both of the district's arguments, but the Supreme Court reversed, holding that the district correctly interpreted the bailout statute to make the district eligible to pursue a bailout.[20] The Court agreed with the district's reasoning that the prior holdings in *Sheffield* and *Dougherty County* compelled the conclusion that "political subdivision" must be given its ordinary meaning, which obviously includes entities like utility districts.[21]

Tellingly, the entire Court signed onto language suggesting that they find the 2006 extension of Section 5 at least constitutionally suspect. The majority noted, for example, that "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.," that "the Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty,'" and that "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."[22] Chief Justice Roberts wrote the majority opinion, with which seven other justices (six of whom remain on the Court today) concurred. Justice Thomas concurred in the judgment in part and dissented in part only to express his view that the Court should have gone further, reaching the constitutional challenge and striking Section 5 down.[23]

The Court has indicated that it wants to see bailout become a frequently-used, effective mechanism for reducing the scope of Section 5 coverage. The Court as a whole is at least skeptical whether Section 5 remains a constitutional remedy at all. Through the expansion of bailout and, perhaps soon, the eventual ending of Section 5, the nation is ready to move forward with voting rights enforcement that is no longer based on the presumption that race relations remain mired in the 1960s.

II. Ricci v. DeStefano–Walking the Line Between Discrimination and "Reverse" Discrimination in Employment Testing

In *Ricci v. DeStefano*,[24] decided June 29, 2009, the Supreme Court clarified the law governing the interaction of disparate-impact and disparate-treatment discrimination claims under Title VII. The decision will have wide-ranging implications for employment practices and litigation under Title VII in both the public and private sectors and may also signal a deeper tension between the commands of the Constitution and the dictates of disparate-impact law under Title VII. In addition, the case is notable for the prominent role it played in the confirmation hearings of the newest Associate Justice, Sonia Sotomayor.

Title VII prohibits intentional acts of discrimination based on race, color, religion, sex, and national origin.[25] It also prohibits policies that do not intentionally discriminate but have a disproportionate adverse effect on minorities.[26] However,

disparate-impact discrimination only violates Title VII when an employer is unable to show that a challenged practice is job-related, or the employee-plaintiff can show that there are less discriminatory alternative practices that equally serve the same legitimate business need. In the public-employment context, moreover, the constitutional guarantee of equal protection requires that any race-based action by a government actor must be subjected to strict scrutiny and invalidated in all but the rarest of circumstances.[27] The thorny question the Court faced in *Ricci* was how to resolve these competing commands when a governmental employer administers a promotion test that produces racially disparate results and has to decide whether to use or reject the test based only on the skewed racial distribution of the scorers.

Ricci arose out of a dispute over firefighter promotions in New Haven, Connecticut. The New Haven Fire Department uses objective oral and written examinations to decide who should be considered to fill vacant lieutenant and captain positions, which are meant to determine the most qualified individuals for command positions. This examination system for promotions within the classified civil-service industries is governed by the city's charter, in addition to federal and state law. The promotion process also has separate requirements through a contract between the city and its firefighter union, which specifies that a promotion candidate's composite examination score must be determined through an examination process that is sixty percent written and forty percent oral. Normally, the city administers the test, and then, once it receives the results, the New Haven Civil Service Board (CSB) is asked to certify the ranked list of applicants who passed by achieving a composite score of seventy or higher. After the list is certified, the city charter requires that a "rule of three" is used by the hiring authority to fill the vacancy. This rule allows the hiring authority (here, the NHFD) to promote any one candidate from among the top three scorers on the list.

New Haven had previously experienced racial disparities in the number of eligible candidates for promotion selected through its tests. Therefore, before administering its 2003 tests, it undertook extensive efforts to ensure that the tests were fair and free of any non-job-related tendency to produce racially disparate results. After reviewing various consultants, the City hired Industrial/Organizational Solutions, Inc. (IOS) to create and administer the promotional examinations at a cost of $100,000. To begin the test-design process, IOS performed job analyses for the captain and lieutenant positions. IOS also went through an extensive interview process with incumbent captains and lieutenants and their supervisors in order to determine the knowledge, skills, and abilities that are essential for the positions. Throughout the research for the test design, IOS intentionally oversampled minority firefighters to prevent the tests from favoring white applicants. IOS compiled a list of reading materials approved by the fire chief and assistant fire chief and disseminated that list to the candidates, including the specific chapters that were used in the development of the examination. In addition, IOS took painstaking measures to make sure that the scoring of the oral portion did not favor any race.

The examinations were given in November and December of 2003. Seventy-seven candidates completed the lieutenant examination—forty-three whites, nineteen blacks, and fifteen Hispanics. Of those, thirty-four candidates scored high enough to qualify for the eligibility list—twenty-five whites, six blacks, and three Hispanics. Based on these results and the "rule of three," only the top ten scorers could be considered for the eight lieutenant positions open at that time. All ten were white. Forty-one candidates completed the captain examination—twenty-five whites, eight blacks, and eight Hispanics. Of those, twenty-two candidates passed—sixteen whites, three blacks, and three Hispanics. Seven of the top scorers were white and two were Hispanic. There were seven open captain positions, which, together with the rule of three, meant that the top nine scorers could be considered for the immediately-available promotions. In addition, further vacancies at both the captain and lieutenant level were anticipated to arise during the two years the eligibility list would remain in effect.

After receiving these results, city officials became worried that the examinations unintentionally discriminated against minorities. Some firefighters were upset by the results and threatened to sue the city if it promoted from eligibility lists based on the tests, claiming that because the test results had racial disparities, the tests violated the disparate-impact provision of Title VII. In addition, city officials came under political pressure from local activists not to certify the results. There was evidence in the record that, once the racial distributions of the test scores were known, city officials orchestrated a campaign designed, for a mixture of political and racial reasons, to result in the rejection of the test results. The CSB then held several hearings at which it heard testimony from persons interested in the certification issue. During these hearings, some witnesses raised questions about the tests that had been given, but at no point were the tests shown to have been impermissibly biased or unrelated to the jobs for which the applicants were applying. The CSB also heard testimony from an expert employed by a competitor of IOS who speculated that it might be possible to design an equally job-related test that would have less racial numerical disparity; however, he did not identify any actual alternatives and moreover advised the CSB that the best thing for it to do would be to certify the test results.

Ultimately, the CSB deadlocked by tie vote, which meant that the eligibility list was not certified, and no promotions were made. A group of white and Hispanic firefighters who believed they had done well on the tests and had been wrongly denied their chance at promotion sued the city and its officials, claiming the city had intentionally discriminated against them because of their race in violation of Title VII and the U.S. Constitution's Equal Protection Clause. Discovery later confirmed that most of the plaintiffs indeed were on the rejected promotion-eligibility lists. The plaintiff firefighters argued that the defendants' decision to throw out the test results because of the racial distribution of the successful candidates was intentional, impermissible racial discrimination that was not and could not be justified by the defendants' claimed concerns that certifying the test results would result in impermissible unintentional disparate-impact discrimination.[28] The defendants countered that the decision not to certify the test results was justified because they had a good-faith belief

that certifying the test results could have exposed the City to litigation and potential liability under Title VII's disparate-impact provisions. The defendants did not argue that the test as given was actually flawed or that they had concrete evidence of superior alternatives. Nor did they argue that their actions had been justified on the basis of achieving diversity—they limited themselves to the Title-VII-compliance rationale.

After discovery and briefing, the district court granted summary judgment to the defendants. On the equal protection point, the district court reasoned that there had been no racial classification at all because the test results were thrown out for all test takers, without regard to race. On the Title VII issue, the district court concluded that the defendants were immune from liability as a matter of law because they had a subjective good-faith belief that certifying the test results could result in exposure to disparate-impact litigation or liability. The Second Circuit affirmed in a per curiam, one-paragraph opinion that merely adopted the district court's opinion. Judge Sotomayor was one member of the Second Circuit panel. Subsequently, the appellate court sua sponte considered whether to rehear the case en banc, and voted 7-6 against rehearing over a strenuous and compelling dissent by Judge Jose Cabranes.

After the firefighters petitioned for review, the Supreme Court granted certiorari. The central questions before the Court were whether and when under Title VII an employer may engage in intentional racially disparate treatment in order to avoid or forestall potential, unintentional racial disparities, and how in the public-employer context this analysis is informed by the constitutional guarantee of equal protection.

The petitioning firefighters argued that the defendants' refusal to certify the test results was a race-based action subject to strict scrutiny under the Equal Protection Clause, and that it could not survive that scrutiny because it was neither justified by any compelling state interest nor narrowly tailored to achieve any such interest. They noted, in particular, the absurdity of the district court's conclusion that refusing to certify test results based on the racial distribution of the successful candidates was "race-neutral" because the officials had canceled all the candidates' scores. On the statutory question, the petitioners maintained as their lead position that it is *never* permissible to engage in race-based disparate treatment in order to avoid a potential disparate-impact violation, because, for public employers, such disparate treatment violates the Constitution. As their fallback position, petitioners argued that if it is ever permissible for a public employer to engage in disparate treatment in order to avoid disparate impact, it can only be when the employer has a "strong basis in evidence" to believe that a disparate-impact violation will otherwise result. The petitioners' suggested "strong basis in evidence" standard was drawn from the Court's equal protection cases, such as *Richmond v. J.A. Croson Co.*,[29] which have held that a governmental actor wishing to take race-based action in order to remedy past racial wrongs must have a strong basis in evidence to support its belief that remedial action is required. Underpinning the petitioners' arguments, and that of many of their amici, was the compelling theme that it is an insult to individual dignity and the fundamental principle of equality for an employer to allow candidates to sacrifice mightily to perform well on a test and then throw out the test merely because of the raw racial numbers produced.[30]

The respondents continued to maintain that the Equal Protection Clause was not implicated at all because the cancellation of the results had been race-neutral, and also argued that even if the cancellation were race-based, Title VII compliance was necessarily a compelling state interest that could justify race-based action. On the statutory question, the respondents changed tack, abandoning their position that a mere good-faith fear of possible disparate-impact liability was sufficient to justify scuttling the promotions and arguing instead that the evidentiary record objectively demonstrated that the tests were flawed and that there were better, available alternatives. This was a difficult position to maintain, however, since the city had expressly conceded in the lower courts that it did not have an objective case either that the tests were flawed or that there were known, demonstrably better alternatives, and moreover because on summary judgment the petitioners were entitled to have the evidentiary record read in the light most to their favor. Underpinning all of the city's arguments, and also prominently figuring in the briefs of several of its amici, was the persuasive theme that adopting the petitioners' position would put employers into an impossible position where, having given a test that produced racially disparate results, they would be sued and exposed to liability no matter what action they took.

The Supreme Court reversed the Second Circuit in a 5-4 opinion written by Justice Kennedy, holding that New Haven had violated Title VII by discarding the test results and denying lieutenant and captain promotions to the highest-scoring candidates based on the test results' racial distributions. The majority opinion adopted the petitioners' proposed "strong basis in evidence" standard to resolve the conflict between Title VII's provisions. That standard, according to the majority, "limits... discretion 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."[31] The majority reasoned that this standard best reconciled the various provisions of Title VII with one another, as well as with the background concerns of constitutional equal protection. The Court did not, however, reach the constitutional question, finding the statutory ground sufficient to resolve the case.

In light of this statutory standard, the Court held that the respondents' actions had, in fact, violated Title VII because the record conclusively failed to demonstrate a strong basis in evidence to believe that certifying the test results would have led to a disparate-impact violation. The city could have been liable for a disparate-impact violation only if the tests were not job-related and consistent with business necessity, or if plaintiffs had shown an equally valid, less discriminatory alternative. Here, however, the record showed that the city had hired an expert employment test consultant, IOS, which took extensive steps to develop and administer race-neutral examinations. Vincent Lewis, a witness at the CSB hearings who examined the tests and had firefighting experience (and who was himself African-American), testified that the questions were relevant

for both exams. Even the expert witness from IOS's competitor recommended that the CSB certify the examination results. Moreover, there was no record evidence of an equally valid and less-discriminatory testing alternative; the vague statements in the CSB hearings about possible alternatives were insufficient, and proposed alternatives suggested by the respondents (for the first time) in their Supreme Court briefing would have themselves violated Title VII and were thus not equally valid.

Justice Alito supplemented the majority opinion with a concurrence, in which he walked through the record evidence to tell the story of how race and politics impermissibly influenced and determined the respondents' decision not to certify the eligibility list, and rebutted the dissent's selective presentation of the evidentiary record.[32] Justice Scalia wrote a short concurrence "to observe that [the Court's] resolution of this dispute 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?"[33] The dissenters, in an opinion written by Justice Ginsburg, criticized the Court for "leaving out important parts of the story," such as the history of discrimination in firefighting.[34] The dissent also argued that the purported conflict between disparate-impact and disparate-treatment liability was illusory and criticized the majority for not remanding the case to the lower courts for application of the strong-basis-in-evidence standard.

In the short term, the *Ricci* decision became notable for the attention it received during the confirmation hearings of Judge Sotomayor. Several Senators asked Judge Sotomayor pointed questions about the Second Circuit's decision in the case, as well as the panel's handling of the case in an unpublished, per curiam, one-paragraph opinion. Moreover, two of the *Ricci* petitioners, Frank Ricci and Ben Vargas, testified in the confirmation hearings held by the Senate Judiciary Committee. It will be interesting to see whether this augurs a trend towards litigants who had a case before a Supreme Court nominee being called to testify during that nominee's confirmation hearings. In any event, however, Ricci's and Vargas's testimony was largely uncontroversial, and Justice Sotomayor was confirmed by a comfortable margin.

In the longer term, and more importantly, *Ricci* will have significant effects on employment-discrimination law, and it also leaves open important statutory and constitutional questions to potentially be resolved in some future case. Importantly, because the decision is grounded entirely in statutory construction, its effect extends to both public and private employers. In terms of employment practices and litigation, employers will have a lower liability risk when using appropriate pre-employment and promotional examinations. Raw racial-disparity statistics will not be sufficient to allow employers to act to avoid disparate impact, and the Court's opinion at least implies that they similarly will not be sufficient to prove disparate impact in any lawsuit brought by complaining minorities. As long as the employer can show that the employment examinations were a business necessity and job-related in their content and design, the employer will be able to effectively fight a lawsuit even if there is a racial disparity in the test results or business policies. The employers' lower liability risk acts as a security for the applicants who take a hiring or promotional examination. Applicants will not have to fear that the employers will discard the tests, studying for which requires considerable financial and personal expenses, whenever the results fail to satisfy a racial quota or provide the desired diverse outcome.

The ruling will also strongly encourage employers to take the necessary steps to ensure its examinations for hiring or promoting decisions are racially neutral *before* administering them. The Court specifically stated 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."[35] This preparation and thoughtfulness before the examination is administered could eventually become the employer's defense in a disparate-impact suit. Indeed, the extensive precautions taken by the City of New Haven, the NHFD, and IOS in the test-making process were weighed heavily in the Court's decision.

Additionally, certain practices that are currently prevalent in employment may come into serious question after *Ricci*. While employers may face less risk of liability for disparate impact, many affirmative action practices that have been accepted to increase diversity will face a higher risk of disparate-treatment liability. One such practice, identified by Roger Clegg, is colleges' rejection of finalist pools for hiring decisions when the pool lacks the racial diversity that the employers were seeking.[36]

A contrary consequence of *Ricci* may be that employers who simply wish to achieve raw racial balance in their employment and promotion numbers, whether to avoid being sued or to promote diversity, will have a significant incentive to avoid giving objective examinations altogether. Once a test is developed and given, under *Ricci*, an employer will need to have a very solid evidentiary record that the test is discriminatory before it can decide to throw it out. "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."[37]

Finally, and more broadly, the Court's decision in *Ricci* endorses the principle that intentional employment discrimination is a greater injustice than unintentional racial employment inequality, and that the law must incline towards preventing the former instead of the latter. This principle is certainly consistent with the Court's pronouncement in equal protection cases such as *Croson*, *Adarand Constructors, Inc. v. Pena*,[38] and *Parents Involved In Community Schools v. Seattle Sch. Dist. No.1*,[39] but *Ricci* takes a step forward in carrying this principle into the context of statutory, employment law.

Beyond these implications, *Ricci* raises several intriguing, unanswered questions. One is whether, and when, the Court will have to confront the lurking conflict between the disparate-impact provision of Title VII and the Constitution's promise of equal protection. Justice Scalia's concurrence was devoted solely to this point. As he notes, when an employer can ascertain with

certainty that certifying a test (or, more broadly, taking any given employment action) will have impermissible, unintentional disparate impact, then Title VII allows and indeed requires the employer to engage in intentional race-based action to avoid that disparate impact. Yet that action is, by definition, disparate racial treatment mandated by the government, which seemingly violates the Equal Protection Clause. As Justice Scalia aptly put it, "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[40]

Another important, unanswered question is whether diversity can be a compelling state interest in public employment. In *Grutter v. Bollinger*,[41] the Court held that diversity can be a compelling state interest in public higher education, and in *Parents Involved*, five justices (including Justice Kennedy) indicated their belief that diversity can be a compelling interest in elementary and secondary education. But the Court has never held that diversity is a compelling interest in public employment. The *Ricci* petitioners argued, albeit briefly, that public employment is materially different from education since the primary consideration should be effectiveness at doing the required job. Since the *Ricci* defendants did not assert diversity as a compelling interest to justify their throwing out the test results, and since the Court did not reach the equal-protection question, it remains to be settled whether diversity in employment is a compelling state interest that can justify race-based action by a government employer. The *Ricci* decision, however, may lead some to hope that the five justices in the *Ricci* majority would decline to so hold.

Ricci has shifted the field in employment law away from raw racial numbers, and toward a system that focuses on merit and qualifications to do the job. How far this trend will go, and whether the Court may in the future explicitly ground it not just in Title VII, but in the Constitution itself, remains to be seen, as the Court works through these questions in future cases and also as the composition of the Court changes in years to come.

Endnotes

1 129 S. Ct. 2504 (2009).

2 *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

3 *E.g.*, Riley v. Kennedy, 128 S.Ct. 1970 (2008) (No. 07-77) (argument by Pamela S. Karlan).

4 Beer v. United States, 425 U.S. 130, 140 (1976).

5 42 U.S.C. § 1973c(a).

6 *Id.*

7 Connor v. Waller, 421 U.S. 656, 656 (1975) (per curiam).

8 *See* 42 U.S.C. §1973 b(a)(8).

9 42 U.S.C. §1973 b(b).

10 *See id.*

11 *See id.* The 1975 changes brought residents of Manhattan, Brooklyn, and the Bronx under Section 5. A complete list of covered jurisdictions is available at http://www.usdoj.gov/crt/voting/sec_5/covered.php.

12 *See* 42 U.S.C. §1973 b(b).

13 *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969) ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'").

14 Dougherty County, Ga., Board of Educ. v. White, 439 U.S. 32, 44 (1978).

15 435 U.S. 110 (1978).

16 *Id.* at 128-29 & n.15, 130-31 & n.18; *see also* Dougherty County, 439 U.S. at 43-44.

17 South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

18 42 U.S.C. §1973 b(b).

19 521 U.S. 507 (1997).

20 Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504, 2508 (2009).

21 *Id.* at 2513-15.

22 *Id.* at 2511-12.

23 *Id.* at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part).

24 129 S.Ct. 2658 (2009).

25 42 U.S.C. §2000e-2(a)(1).

26 42 U.S.C. §2000e-2(k)(1)(A)(i).

27 *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality op.).

28 The group called themselves "the New Haven 20," and set up a website, www.NewHaven20.com, to gain support and explain their cause.

29 488 U.S. 469, 500 (1989).

30 Several of the petitioners—including lead petitioner Frank Ricci, who is dyslexic—had gone to extraordinary lengths and expense to prepare for the tests.

31 129 S.Ct. at 2676.

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

33 *Id.* at 2681 (Scalia, J, concurring).

34 *Id.* at 2689 (Ginsburg, J, dissenting).

35 *Id.* at 2676.

36 *See* Roger Clegg, "Dousing the Fires of Racial Discrimination," July 28, 2009, available at http://www.popecenter.org/clarion_call/article.html?id=2209.

37 129 S.Ct. at 2676.

38 515 U.S. 200 (1995).

39 127 S.Ct. 2738 (2006).

40 129 S.Ct. at 2683 (Scalia, J, concurring).

41 539 U.S. 306 (2003).