

RICCI V. DESTEFANO: THE NEW HAVEN FIREFIGHTERS CASE & THE TRIUMPH OF WHITE PRIVILEGE

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*By order of this Court, New Haven, a city in which African Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions. In arriving at its order, the Court barely acknowledges the pathmarking decision in *Griggs v. Duke Power Co.*, 401 U.S. 42 (1971), which explained the centrality of the disparate-impact concept to effective enforcement of Title VII. The Court's order and opinion, I anticipate, will not have staying power.¹*

I. INTRODUCTION

Seated in a front row at the confirmation hearing for Judge Sonia Sotomayor in the summer of 2009 were several New Haven firefighters in dress uniform, present at the behest of Republicans actively opposing the appointment of the first Latina to the Supreme Court.² Frank Ricci, lead plaintiff in the reverse discrimination case bearing his name decided just weeks before, would be the opponents' star witness.³ He had quickly be-

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¹ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting).

² Melissa Bailey, *Ricci Takes the Stand*, NEW HAVEN INDEP., July 16, 2009, available at http://www.newhavenindependent.org/index.php/archives/entry/ricci_takes_the_stand/.

³ Ronald Dworkin, *Justice Sotomayor: The Unjust Hearings*, N.Y. REV. BOOKS, Sept. 24, 2009, at 37, 38; Melissa Bailey, *Ricci Takes the Stand*, NEW HAVEN INDEP., July 16, 2009, available at http://www.newhavenindependent.org/index.php/archives/entry/ricci_takes_the_stand/.

come a “folk hero for white men everywhere,”⁴ much like Brian Weber⁵ and Allan Bakke⁶ had years before when they challenged race-conscious efforts to bring minorities into the factory workplace and medical school.⁷

The firefighters opposed Judge Sotomayor’s confirmation because she had participated on the Second Circuit Court of Appeals panel that unanimously affirmed a district court ruling against Ricci and his fellow firefighters (seventeen white and one Hispanic).⁸ Their presence, including Ricci’s testimony, was central to the ultimately unsuccessful fight against Sotomayor’s confirmation, as it sought to demonstrate her bias against (or at least insensitivity to) white males.⁹

The Supreme Court overturned the Second Circuit by deciding in *Ricci v. DeStefano* that the white firefighters who topped the civil service list by virtue of their multiple-choice test scores were entitled to promotion, notwithstanding New Haven’s concern that the exams failed to meaningfully identify supervisory skills and excluded all the black candidates from consideration.¹⁰ The five-to-four decision, authored by Justice Anthony Kennedy, potentially guts Title VII’s¹¹ disparate-impact prohibition,¹² which in the past decades has been the engine driving real progress in equal employment opportunity.¹³ As the NAACP Legal Defense Fund feared, the Court established a rule “that avoidance of discrimination against African Americans necessarily amounts to intentional discrimination against whites,” and thus “require[s] employers to maintain employ-

⁴ Dahlia Lithwick, *The New Haven Firefighter Is No Stranger to Employment Disputes*, SLATE MAG. (July 10, 2009), <http://www.slate.com/id/2222087/>. In 1995, Ricci sued New Haven arguing violation of the Americans with Disabilities Act, alleging that he was not hired as a firefighter because he was dyslexic. *Id.* The case was settled two years later when the City agreed to appoint him. *Id.* The next year, Ricci threatened a lawsuit against the Middletown Fire Department, where he was briefly employed, claiming his dismissal was in retaliation for his role in an investigation of a controversial fire. *Id.*

⁵ See *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979); see also *What the Weber Ruling Does*, TIME, July 9, 1979, at 48.

⁶ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Bakke Wins, Quotas Lose*, TIME, July 10, 1978, at 8–16 (analyzing the Supreme Court’s decision).

⁷ See *supra* notes 5 and 6.

⁸ *Ricci v. DeStefano*, 264 Fed. Appx. 106 (2d Cir. 2008), *superceded and aff’d* 530 F.3d 87.

⁹ Dworkin, *supra* note 3, at 38.

¹⁰ *Ricci*, 129 S. Ct. at 2664–65.

¹¹ Title VII of the Civil Rights Act of 1964, as amended in 1991. 42 U.S.C. § 2000e *et seq.*

¹² See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹³ Brief for NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae Supporting Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

ment practices that perpetuate discrimination against minorities.”¹⁴ Going even further, Justice Scalia suggests in a concurring opinion that the disparate-impact provisions are unconstitutional in violation of the Equal Protection Clause.¹⁵

Misrepresented in much of the media as a case pitting merit against affirmative action,¹⁶ *Ricci v. DeStefano*, more accurately, re-defined merit by equating it with success on multiple-choice examinations, as opposed to more reliable methods of personnel selection. Despite the persistent gap between white and minority scores on these devices, as well as the absence of evidence of their predictive validity,¹⁷ employers are now encouraged to continue to rely (at relatively small expense) on such exams as the primary determinant of advancement in the workplace. More sophisticated sorting methods, which do not disproportionately exclude protected groups, such as those used by the military,¹⁸ may be ignored. As two early commentators put it, *Ricci* decided “who gets the good jobs in cities across America.”¹⁹

¹⁴ *Id.* at 2–3 (alteration in original).

¹⁵ *Ricci*, 129 S.Ct. at 2682–83 (Scalia, J., concurring). Justice Scalia’s concern for equal treatment seems to extend primarily to white job seekers, including Republican Presidential candidates. See *Bush v. Gore*, 531 U.S. 98 (2000) (manual recounts of Florida votes for President in the 2000 election did not satisfy requirement for non-arbitrary treatment of voters, and thus violated Equal Protection).

¹⁶ See, e.g., Abigail Thernstrom, *The Supreme Court Says No to Quotas*, WALL ST. J., July 1, 2009; Carole Bass, *Justices Zero in on Race-Based Distinctions*, NEW HAVEN INDEP., Apr. 22, 2009, available at http://www.newhavenindependent.org/index.php/archives/entry/justices_zero_in_on_race-based_distinctions/. The *Ricci* plaintiffs and their attorney invested much time and energy portraying the case as “a symbol for millions of Americans who have grown tired of seeing individual achievement and merit take a back seat to race and ethnicity.” A.G. Sulzberger, *For Hispanic Firefighter in Bias Suit, Awkward Position but Firm Resolve*, N.Y. TIMES, July 3, 2009, at A20. The successful lawyer in another reverse discrimination case involving four white men passed over in favor of minorities on the civil service list for the Boston Fire Department sounded the same note: “I think hopefully we’re just going back to normal, the way it was meant to be, so that now they are just hiring the best person, regardless of race or color.” Shelley Murphy, *Judge Tells City to Hire Four White Firefighters*, BOS. GLOBE, Aug. 26, 2003, at A1.

There is rarely even a hint in the media coverage that the multiple-choice exams from which the civil service lists are generated may not fairly identify “the best person” for the job, a point which Judge Sotomayer repeatedly made during testy exchanges at her confirmation hearings: “This was not a quotas case. This was not an affirmative action case. This was a challenge to a test that everybody agreed had a very wide difference between the pass rate of a variety of different groups.” Melissa Bailey, *Sotomayer Speaks on Ricci*, NEW HAVEN INDEP., July 14, 2009, available at http://newhavenindependent.org/archives/2009/07/sotomayer_leahy.php.

¹⁷ See *infra* Part VI.A.

¹⁸ See *infra* Part VI.C.

¹⁹ Nicole Allan & Emily Bazelon, *The Ladder*, SLATE MAG. (June 25, 2009),

Four of the five justices joining the prevailing opinion are white males, and the fifth is an African American who has become the foremost opponent of any remedial race-conscious efforts at equality, which he views as the legal and moral equivalent of the most egregious forms of discrimination from our past.²⁰ That the five had to contort established rules of procedure to grant summary judgment in favor of the plaintiffs on a wholly inadequate record²¹ raises serious question about the real nature of their enterprise, especially since in federal courts it is defendant employers, not plaintiff employees, who are routinely granted summary judgment at an “alarming rate.”²²

Through the cynical alchemy of the Roberts Court’s decision-making,²³ the landmark statute for advancing the employment prospects of minorities and women has become the vehicle for preserving white privilege.²⁴ The arguments of the *Ricci* plaintiffs, credited by some on the Court,²⁵ raised the dubious specter of employers sacrificing their white employees by “surrender[ing] to organized racial lobbies,”²⁶ a theme not inconsistent with the fear mongering surrounding the election of America’s first black president. Yet white firefighters like the *Ricci* plaintiffs need not fear the loss of their careers to racial minorities, as the percentage of professional black firefighters has declined by nearly half over the past few decades.²⁷

<http://www.slate.com/toolbar.aspx?action=print&id=2221250>.

²⁰ See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 69–112. See also *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Thomas, J., concurring) (“[Allowing] school boards a free hand to make decisions on the basis of race . . . [is] an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education* . . .”).

²¹ See *infra* Part III.A.

²² Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 592 (2000).

²³ See Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court’s Stealth Hard-liner*, THE NEW YORKER, May 25, 2009, at 42 (documenting the Court’s sharp right turn); Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1; Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1; RICHARD A. POSNER, *HOW JUDGES THINK* 81 (2008).

²⁴ Title VII has long been held to protect white victims of discrimination equally with non-whites. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976). But the Court had never ruled that an employer who complies with the disparate impact prohibition thereby violates the Act’s prohibition against disparate treatment. See *infra* Part IV.

²⁵ See *infra* Part II.B.

²⁶ Brief for Petitioner at 30, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) (alteration in original).

²⁷ Brief for International Association of Black Professional Fire Fighters et al. as Amici

Barack Obama's ascendancy, together with the dramatic economic downturn and the evolving demographic shift away from a white majority have stirred up extremist groups on the political right, and created an ominous backlash which first manifested itself in the town meetings held around the proposals for healthcare reform in August 2009.²⁸ A column by former presidential candidate and pervasive cable news personality Patrick Buchanan, entitled *Traditional Americans Are Losing Their Nation*, purports to explain why "white America" has been alienated and radicalized by Obama's election: "America was once their country. They sense they are losing it. And they are right."²⁹ *Ricci v. DeStefano* unfortunately reinforces this narrative.

This article begins (Part II) with a close critique of the *Ricci* decision. It then turns to *Ricci*'s aftermath (Part III), both on remand and in a subsequent disparate impact suit against New Haven by an African American firefighter, drawing attention to the procedural irregularities of the Court's grant of summary judgment for the plaintiffs and the virtually unprecedented preclusion of future litigation by non-party litigants. Part IV assesses the potentially devastating impact of the decision on Title VII's effectiveness, particularly in the historical context of racial discrimination within the Nation's fire departments (Part V). Part VI explores our society's obsession with standardized testing, notwithstanding its many flaws and biases, and the stubborn refusal to get beyond the "gold star" mentality of elementary school days³⁰ to consider alternative means of personnel

Curiae Supporting Respondents at 6, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). See also Danielle Ossher, Courtney Brooks & Walter Robinson, *City Firehouses Still Stuck in a Racial Divide*, BOS. GLOBE, Aug. 1, 2010, at 1 (discussing declining percentage of black firefighters in the Boston Fire Department).

Moreover, the empirical data documents that minorities and women continue to fall far short of white males in the distribution of jobs and material wealth. See THOMAS M. SHAPIRO & MELVIN L. OLIVER, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997); Mario L. Barnes, Erwin Chemerinsky, & Trina Jones, *A Post-Racial Equal Protection?*, 98 GEO L.J. 967, 982-89 (2010); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503 (2009).

²⁸ See Gary Younge, *Obama and the Decline of White America*, *The Nation*, Oct. 26, 2009, at 10; Dep't of Homeland Sec., *Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence on Radicalization and Recruitment* (2009); Frank Rich, *There's A Battle Outside and It Is Still Raging*, *N.Y. Times*, July 24, 2010, at WK8.

²⁹ Patrick J. Buchanan, *Traditional Americans are Losing Their Nation*, *WORLDNETDAILY* (Oct. 20, 2009), <http://www.wnd.com/index.php?pageId=113463>.

³⁰ Tellingly, Justice Scalia referred to the high-scorers (all whites) on New Haven's multiple-choice exams as the "winners," and the others as "losers." See Transcript of Oral Argument, at 10, 42, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) [hereinafter *Tr. Oral Arg.*].

selection.

II. RICCI V. DESTEFANO

A. BACKGROUND

In late 2003, to fill vacancies in the ranks of lieutenant and captain³¹ in its fire department, the City of New Haven set in motion selection procedures pursuant to the City Charter and the collective bargaining agreement.³² The former establishes a “merit system” that requires the City to fill vacancies on the basis of job-related examinations administered by the Civil Service Board (CSB).³³ The CSB then certifies a list of candidates in the order of their scores.³⁴ From there, the “rule of three” requires the hiring authority to choose one candidate from the top three scorers.³⁵ The bargaining agreement between the City and the firefighters’ union requires both written and oral examinations: the written component counting 60% and the oral component counting 40% towards the candidate’s total score.³⁶ To be eligible to sit for the exams, a candidate must meet minimum experience requirements within the Department, have a high school diploma, and have completed specified vocational training courses.³⁷

The City retained a consultant, Industrial/Organizational Solutions, Inc. (IOS), to develop and administer the examinations.³⁸ IOS, which specializes in testing for police and fire departments, performed job analyses to identify the knowledge, skills, and abilities necessary for the lieutenant and captain positions, and then devised tests purportedly to measure these values.³⁹ Accordingly, IOS created two one-hundred-question multiple-

³¹ In order of progression, Lieutenant is the first rank and captain is the second rank. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2665 (2009).

³² *Id.* at 2664–65.

³³ *Id.* at 2665.

³⁴ *Id.* at 2665. The Preamble of the Charter provides that “it is the public policy of the City of New Haven to ensure full and equitable participation of all citizens in all aspects of the life of the city without regard to race” NEW HAVEN, CT., CODE TIT. I (1992), available at <http://library.municode.com/HTML/14668/level1/TITICH.html>. Embedded in this simple and uncontroversial aspiration is the dilemma raised by *Ricci*. Does this provision *forbid* the City from scuttling the exam results, *or require it*?

³⁵ *Ricci*, 129 S. Ct. at 2665.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

choice exams, written below a tenth-grade reading level, derived from training manuals and other materials, which were identified to candidates for their study during a three-month period before the exams were administered.⁴⁰ The written component tested the skills of reading and memorization, as well as factual knowledge.⁴¹

The oral examinations consisted of hypothetical situations designed to measure incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability.⁴² To conduct the oral component, thirty assessors were chosen, all of whom were out-of-state firefighter officials, and divided into nine three-member panels.⁴³ Sixty-six percent of the candidate pool were minorities, and each panel conducting the oral examinations included two minority panelists.⁴⁴ The panelists received training the day before the exam on how to score the candidates' responses on a checklist.⁴⁵

The exams were administered in November and December of 2003.⁴⁶ The lieutenants' exam attracted seventy-seven candidates: forty-three whites, nineteen blacks, and fifteen Hispanics.⁴⁷ The thirty-four passers consisted of twenty-five whites, six blacks, and three Hispanics.⁴⁸ The civil service "rule-of-three" operated to make only the top ten passers eligible for promotion to the eight vacant positions, all of whom were white.⁴⁹ Forty-one applicants completed the captains' exam: twenty-five whites, eight blacks, and eight Hispanics.⁵⁰ Of the twenty-two passers, sixteen were white, three black, and three Hispanic.⁵¹ Those eligible for promotion, seven whites and two Hispanics, included none of the black candidates. Not one of the twenty-seven black applicants would, as a result, be pro-

⁴⁰ *Id.*

⁴¹ *Ricci*, 129 S. Ct. at 2695 (Ginsburg, J., dissenting); Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 26, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) [hereinafter IOP Amicus Br.].

⁴² *Ricci*, 129 S. Ct. at 2666.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

moted to either position.⁵² As openings in supervisory positions usually occur only every few years,⁵³ advancement for black candidates was thus foreclosed for that indefinite period of time.⁵⁴

Although its contract with the City committed IOS to submit a technical report that analyzed the results of the examination, the City opted instead to meet with the IOS team and express its concern that the tests discriminated against minority candidates, which IOS denied.⁵⁵ The City's counsel also raised these apprehensions with the CSB, the independent entity charged with overseeing the selection process.⁵⁶

The CSB convened a series of meetings to consider the significant disparities between the performance of white and non-white candidates on the tests, the validity of the exams as predictors of job performance, and the existence of alternatives, such as utilizing "assessment centers" (where applicants are asked to evaluate and respond to real-world situations) or readjusting the 60% written to 40% percent oral exam scoring ratio.⁵⁷ The CSB heard from firefighters both in favor of and opposed to certifying the test results.⁵⁸ The lead test developer for IOS appeared and assured the CSB: "In my professional opinion, it's facially neutral. There's nothing in those examinations . . . that should cause somebody to think that one group would perform differently than another group."⁵⁹

But other testing experts disagreed and expressed concern about the racial disparities in the scores.⁶⁰ One testified that the exams had "significant adverse impact" on blacks, more dramatic than in comparable situations.⁶¹ A psychology professor from Boston College, Janet Helms, reported that, "regardless of what kind of written test we give in this country

⁵² *Id.*

⁵³ Joint App. at 76, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) [hereinafter Joint App.].

⁵⁴ The racial make-up of the fire department's 336 members was as follows: 53% of the firefighters were white, 30% black, and 16% Hispanic; of lieutenants, 63% white, 22% black, and 16% Hispanic; of captains, 86% were white, 4% black, and 9% Hispanic. *Id.* at 217. There were two black battalion chiefs among the seven, and no Hispanics; among the four deputy chiefs, there was one Hispanic, and no blacks. *Id.* There was clearly a significant underrepresentation of black firefighters at supervisory and upper levels.

⁵⁵ *Ricci*, 129 S. Ct. at 2666.

⁵⁶ *Id.* at 2666-67.

⁵⁷ *Id.* at 2667-69.

⁵⁸ *Id.* at 2667.

⁵⁹ *Id.* at 2668.

⁶⁰ Joint App., *supra* note 53, at 93.

⁶¹ *Id.*

... we can just about predict how many people will pass who are members of under-represented groups. And your data are not that inconsistent with what predictions would say were the case.”⁶² Helms added that written tests, in particular, “would have revealed a disparity between blacks and whites, [and] Hispanics and whites.”⁶³ Several witnesses discussed alternative methods of evaluation.⁶⁴ Evidence indicated that the neighboring city of Bridgeport, for example, was able to achieve considerable diversity in its supervisory firefighter ranks by modifying the relative weights of the components of its process to 30% written and 65% percent oral, with the remaining 5% representing seniority.⁶⁵ This was one of several less discriminatory alternatives identified in the CSB proceedings.⁶⁶

When the CSB finally decided not to certify the examination results,⁶⁷ twenty firefighters, nineteen white and one Hispanic,⁶⁸ dubbed the “New Haven 20” by the local press,⁶⁹ sued under Title VII’s disparate-treatment (intentional discrimination) provisions, and also alleged violation of their constitutional right to equal protection.⁷⁰ The City⁷¹ defended itself by arguing that certifying the examination results would have subjected it to suit by minority firefighters claiming disparate impact, Title VII’s other core prohibition, and that it acted in good faith to avoid that

⁶² *Ricci*, 129 S. Ct. at 2669.

⁶³ *Id.* (alteration in original).

⁶⁴ *Id.* at 2670.

⁶⁵ IOP Amicus Br., *supra* note 41, at 26.

⁶⁶ *Id.* at 26–27.

⁶⁷ The vote at the five-member CSB was split, two for certification and two against. Brief for Respondents at 10, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). The one black member recused herself at the request of the petitioners’ counsel. *Id.* at 6–7. The two members voting against certification expressed concerns about the validity of the test based on the testimony they heard. Joint App., *supra* note 53, at 166–67; Tr. Oral Arg., *supra* note 30, at 34.

⁶⁸ Only fourteen of the group would have been promoted in rank order from the eligibility list; four did not score high enough to be reached, and two failed the test. Telephone Interview with Victor A. Bolden, New Haven Corp. Counsel (Mar. 25, 2010).

⁶⁹ See, e.g., Colin Ross, *Firefighters Move For Promotions*, YALE DAILY NEWS, Nov. 15, 2009, <http://www.yaledailynews.com/news/2009/nov/15/firefighters-move-for-promotions/>.

⁷⁰ See Barbara Jean D’Aquila, *A Management Employment Lawyer’s Perspective on Ricci v. DeStefano*, 25 ABA J. LAB. & EMP. L. 213 (2010). The Supreme Court chose to decide the case under the broader provisions of Title VII, which apply to both public and private employers. *Id.*

⁷¹ Also joined as defendants were the Mayor, members of the CSB, and a city resident who had voiced strong opposition to certification of the results. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009).

consequence.⁷² Plaintiffs derided this “feigned desire to ‘comply’ with Title VII” as a pretext for favoring the interests of black firefighters and political supporters of the mayor in the black community.⁷³

In this “reverse discrimination” context, the usual roles of the parties were indeed reversed.⁷⁴ The defendant employer was in the awkward position of asserting that its own practices produced discriminatory impact.⁷⁵ Conversely, the plaintiffs asserted that the exams were job-related and consistent with business necessity, and thus lawful.⁷⁶ Significantly, no minority firefighters or their representatives appeared as a party in the case.⁷⁷ This deprived the courts of a crucial perspective, most notably one that protested the lack of meaningful correlation between the multiple-choice examinations and likely success as a fire officer.

The parties filed cross motions for summary judgment in the federal district court. Judge Janet Bond Arterton granted summary judgment in the City’s favor: “Notwithstanding the shortcomings in the evidence on existing, effective alternatives, it is not the case that [employers] *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method.”⁷⁸ She ruled that the City’s “motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent” under Title VII.⁷⁹

The district court found no evidence of “discriminatory animus” towards the plaintiffs, and noted that the City acted on concerns that the test was “statistically adverse” against blacks and Hispanics; that “promoting off of this list would undermine [the] goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters”; and that the test would “subject the City to public criticism” and to “Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.”⁸⁰ These concerns, Judge Arterton found,

⁷² Ricci v. DeStefano, 554 F. Supp. 2d 142, 151–53 (D. Conn. 2006).

⁷³ *Id.* at 153.

⁷⁴ *Id.* at 152.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *infra* note 225 for a discussion of whether they were obligated to intervene, or whether the plaintiffs were required to join them.

⁷⁸ *Id.* at 156 (alteration in original).

⁷⁹ *Id.* at 160

⁸⁰ *Id.* at 162.

represented an attempt “to remedy the disparate impact” of the tests and not “to discriminate against non-minority applicants.”⁸¹

The Second Circuit summarily affirmed in a one-paragraph per curiam opinion, adopting the district court’s reasoning.⁸² The Supreme Court, in a five-to-four split, reversed.⁸³

B. THE SUPREME COURT’S DECISION

Justice Kennedy’s opinion for the Court is founded on the dubious premise, particularly given the district court’s explicit factual findings to the contrary,⁸⁴ that since the City refused to certify the results based on its concern for the racial distribution of scores, the City consequently discriminated against the plaintiffs in violation of the disparate-treatment prohibition.⁸⁵ Acting to avoid disparate-impact liability was not, the majority concluded, a defense.⁸⁶

⁸¹ *Id.*

⁸² 264 Fed. Appx. 106. The court voted seven to six against granting a rehearing en banc. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008). Judge Cabranes wrote for the dissenters, who would have reheard the case, posing the question provocatively: “May a municipal employer disregard the results of a qualifying examination, which was carefully crafted to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?” *Id.* at 93–94. In reality, the *Griggs* principle requires more than careful crafting, which is no substitute for *achieving* a selection process that avoids non-job-related barriers to minority advancement. See *infra* Part IV.

⁸³ *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

⁸⁴ A district court’s findings of fact regarding discriminatory intent, or lack thereof, are binding absent a determination that they are “clearly erroneous” under FED. R. CIV. P. 52(a). See *Pullman-Standard v. Swint*, 456 U.S. 273, 284–90 (1982).

While the district court concluded that a “jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted,” and that “the City’s reasons for advocating non-certification were related to the racial distribution of the results,” it found nothing in the transcripts of the hearings before the CSB, the main record before the court, that evidenced a desire or intent to favor blacks at the expense of whites. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006).

⁸⁵ *Ricci*, 129 S. Ct. at 2664–65.

⁸⁶ *Id.* But if the City acted in order to avoid disparately impacting (and thus being sued by) black candidates whose true qualifications may have been misjudged by the exams, then the City was decidedly *not* acting “because of race.” See *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (employer who terminates older employee to prevent his pension benefits from vesting under ten-year rule did not act because of age in violation of the Age Discrimination in Employment Act); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (civil service veterans’ preference was not discriminatory because of gender, but simply a preference for veterans of either sex). It is thus well-settled that disparate treatment occurs where the decision-maker acts because of, not merely in spite of, the adverse consequences upon an identifiable group.

Accordingly, the Government argued that “[a]n employer [like New Haven] that takes ac-

As in several recent decisions,⁸⁷ the Court disingenuously⁸⁸ refused to acknowledge the difference between decisions motivated by racial animus and those in which the actor, be it an employer or educational institution, adopts race-conscious remedies to target the persistent exclusion or underrepresentation of disadvantaged groups:

Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely⁸⁹ because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.⁹⁰

Justice Kennedy rejected the plaintiffs' position that Title VII strictly forbids an employer from *ever* taking race-based action to avoid disparate-impact liability, or that it requires the employer to demonstrate the impact violation *before* it can take corrective action, as these would effectively delete that crucial dimension of the statute recognized in *Griggs v. Duke*

tion in response to a disparate impact of an employment test among candidates generally does not thereby intend to discriminate against any individual non-minority candidate who did well on the test." Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 11, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). And Justice Ginsburg so concludes in her dissent: "When employers endeavor to avoid exposure to disparate-impact liability, they do not thereby encounter liability for disparate treatment." *Ricci*, 129 S. Ct. at 2709 (Ginsburg, J., dissenting).

Even Justice Alito's concurrence inadvertently confirms this point. *Id.* at 2684. If, as he asserts, the City acted "to placate a politically important racial constituency," *id.*, then it was *not* discriminating against the *Ricci* plaintiffs because of race, anymore than *Hazen Paper Co.* was because of age, or the *Personnel Administrator of Massachusetts* because of gender. In short, Justice Kennedy's narrative of intentional discrimination against the white firefighters has little support in either the record or the law.

⁸⁷ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding voluntary student assignment plans designed to achieve racial diversity in public schools are unconstitutional).

⁸⁸ Chief Justice Roberts' question at oral argument, "How do you draw the line between race-conscious that's permitted and racial discrimination that's not?," Tr. Oral Arg., *supra* note 30, at 41, had already been answered by him earlier when he devised his bumper-sticker slogan: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748.

⁸⁹ Justice Kennedy ignores the considerable discussion at the CSB that focused on the absence of any meaningful relation between performance on the exams and likely success as a supervisor in the NHFD, which is what the dissent refers to as "substantial evidence of multiple flaws in the tests New Haven used." *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting). Justice Kennedy later pulled back on this statement that the City acted "*solely* because the higher scoring candidates were white" when he ended his opinion with: "the raw racial results became *the predominant* rationale for the City's refusal to certify the results." *Id.* at 2681 (emphasis added).

⁹⁰ *Id.* at 2674.

Power Co.,⁹¹ and codified in the 1991 amendment.⁹² His resolution of the perceived conflict between Title VII's two mandates, however, leads to a similar result—the de-fanging of the disparate-impact principle.

Justice Kennedy's opinion elevated what he sees as the “original, foundational” prohibition⁹³ against disparate treatment over the later-comer, disparate impact.⁹⁴ Leaving aside the real possibility that the *Griggs* principle was embedded in the very broad language of the original 1964 act and was only explicitly teased out in the 1971 decision,⁹⁵ as well as the perplexing question why Congress would codify the disparate-impact provision if it were in direct contradiction to the core proscription of the statute, Kennedy's resolution imported the unduly strict standard from the affirmative action cases decided under the Equal Protection Clause,⁹⁶ requiring public actors to have a “strong basis in evidence” to believe they will be subject to disparate-impact liability before they may resort to remedial action.⁹⁷ The City's good faith belief that the 2003 selection process unnecessarily harmed minorities was thus not deemed sufficient.⁹⁸ Any more lenient standard, Kennedy asserted, raises the risk of that old reliable boogey-man: a quota system favoring minorities or women.⁹⁹

Justice Kennedy asserts that his “strong basis” standard “leaves am-

⁹¹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁹² Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2006)).

⁹³ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009).

⁹⁴ *Id.*

⁹⁵ The original statute makes it unlawful “to limit, segregate, or classify his employees or applicants for employment *in any way which would deprive or tend to deprive* any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(2) (2006) (emphasis added).

⁹⁶ *Ricci*, 129 S. Ct. at 2662 (citing *Richmond v. J.A. Croson*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *See generally* Robin Stryker, *Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies*, 42 SOC. Q. 13 (2001) (discussing the use of “quota rhetoric” to oppose both affirmative action and disparate impact enforcement). The majority thus adopts the plaintiffs' characterization that the City's actions “are effectively indistinguishable from the imposition of racial quotas.” Brief for Petitioner on the Merits at 20, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). Fear of such quotas seems quite overblown, as the “history of the racial quota is a history of subjugation, not beneficence.” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (citing ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1977)).

ple room for employers' voluntary compliance efforts," which he recognizes "are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination."¹⁰⁰ "[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." Employers are therefore not limited to those situations where there is "a provable, actual violation."¹⁰¹

But it would appear that in the zero-sum world of employment opportunities, virtually *any* effort on the part of an employer to avoid disparate impact on some employees will cause disparate treatment to others, and thus be in presumptive violation of the statute. The strong-basis-in-evidence standard is explicitly designed by the Court to constrain employers' "discretion in making race-based decisions" to "certain, narrow circumstances."¹⁰² Thus the undisputed existence of a *prima facie* case of disparate impact arising from the 2003 NHFD exams was insufficient to constitute a "strong basis in evidence" justifying remedial action.¹⁰³

Justice Kennedy ultimately revealed what may have been his real concern with the City's actions:

Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, *some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.* Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.

¹⁰⁰ *Ricci v. DeStefano*, 129 S. Ct. 2658, at 2676 (2009). The Justice Department had urged the Court to adopt a more flexible "reasonable basis" standard. Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 15–19, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

Chief Justice Roberts cynically began his questioning of the deputy solicitor general at oral argument:

So, can you assure me that the government's position would be the same if this test—black applicants—firefighters scored highest on this test in disproportionate numbers, and the City said we don't like that result, we think there should be more whites on the fire department, and so were going to throw the test out? The government of United States would adopt the same position?

Tr. Oral Arg., *supra* note 30, at 28. Justice Scalia dismissed the Government's affirmative answer. *Id.* at 35–36.

¹⁰¹ *Ricci*, 129 S. Ct. at 2676–77 (alteration in original).

¹⁰² *Id.* at 2676.

¹⁰³ *Id.* at 2662.

....

... [O]nce [the] 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.¹⁰⁴

Thus, in the eyes of the Court, the examination created entitlements¹⁰⁵ for the high scorers that could be overcome *only* if the City had a “strong basis in evidence” that the exam violated the disparate-impact prohibition.¹⁰⁶ To avoid litigation, *Ricci* teaches, employer’s must scrap discriminatory exams *before* they administer them:

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.¹⁰⁷

But has the Court not put employers in a *Catch-22*? They cannot disregard the results of a test unless and until they have “strong” evidence of discrimination. But once the most compelling evidence of disparate-

¹⁰⁴ *Ricci*, 129 S. Ct. at 2676–77 (emphasis added).

¹⁰⁵ Throughout the oral argument, counsel for Ricci et. al. asserted that they “already earned their promotions” by their scores on the tests. See Tr. Oral Arg., *supra* note 30, at 15, 23. Surprisingly, no justice explicitly corrected that statement. See *id.* To the contrary, the civil service process merely results in a list of *eligible* candidates, in order of exam scores, but the “rule of three” allows the appointing authority to choose among the group. See *id.* The person at the top of the list, in other words, is not *entitled* to the appointment. See *id.* And, as the City argued, no one is entitled to promotion on the basis of a “flawed or discriminatory test.” See *id.* at 59.

Moreover, courts have universally rejected the entitlement theory in this context. See, e.g., *Burns v. Sullivan*, 619 F.2d 99, 104 (1st Cir. 1980) (passed-over white male police officer had no right to be promoted despite his rank on eligible list); *Callahan v. Pers. Adm’r*, 400 Mass. 597, 601 (1987) (“Individuals on eligibility list for promotions do not have vested right in their particular positions on eligibility list once it is established.”); *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 252–53 (2006); *Henry v. Civil Serv. Comm’n*, 2001 WL 862658, at *4 (Conn. Super. Ct. 2001).

¹⁰⁶ See *Ricci*, 129 S. Ct. at 2674. Similar entitlements have been held to flow from a seniority system, even if it produces discriminatory results by perpetuating past exclusionary practices. See Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943 (1984) (elevating the “legitimate” expectations of senior white employees over the interests of minorities seeking a level playing field).

¹⁰⁷ *Ricci*, 129 S. Ct. at 2677. Given the majority’s hostility towards the impact prohibition, there is cause for skepticism as to whether earlier tinkering with the selection process would actually escape their condemnation.

impact liability appears, from *actual results*, the beneficiaries of that discrimination become entitled to appointment.¹⁰⁸

Having decided that New Haven could not scuttle the test results without a “strong basis in evidence” of disparate-impact liability, the Court concluded that there was no such basis.¹⁰⁹ Consequently, finding no genuine issue of material fact in dispute and concluding they were entitled to judgment as a matter of law, the Court granted summary judgment for the *Ricci* plaintiffs on their disparate-treatment claim.¹¹⁰

This precipitous rush to judgment is accomplished in the face of the Court’s candid recognition that “the racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a *prima facie* case of disparate-impact liability.”¹¹¹ Indeed, as Justice Kennedy noted:

On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC [(Equal Employment Opportunity Commission)] to implement the disparate-impact provision of Title VII.¹¹²

¹⁰⁸ As Justice Souter described the dilemma,

[If the employer administers a test,] and they then see the disparate results, it’s too late. And it seems to me that the trouble with drawing that distinction is that the city is not in the testing business. They are unlikely to know what the results are going to be. So [petitioners] are saying that the city that is prescient can adjust, the city that doesn’t find out there’s something wrong or at least undesirable from their standpoint until after the test results cannot readjust?

Tr. Oral Arg., *supra* note 30, at 76–77. Kennedy neglects to mention that the EEOC Guidelines explicitly permit (and have for decades) an employer to utilize alternative selection procedures in order to eliminate adverse impact. 29 C.F.R. §§ 1608.3–1608.4 (2011).

As New Haven Corporation Counsel Victor Bolden put it, while people have a sense of finality when the Supreme Court rules on a matter, the *Ricci* decision “created very little finality, and an increase in uncertainty” for the parties. Telephone Interview with Victor A. Bolden, New Haven Corp. Counsel (Mar. 25, 2010).

¹⁰⁹ *Ricci*, 129 S. Ct. at 2677.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2677–78.

¹¹² *Id.* at 2678. In fact, looked at in terms of who was eligible for promotion, the picture was much starker. The highest scoring black candidate on the lieutenants’ exam ranked thirteenth, and on the captains’ fifteenth; the top Hispanic on the former was twenty-sixth. *Id.* Two Hispanics were eligible on the captains’ list. *Id.* at 2692 (Ginsburg, J., dissenting). The prior exams, in 1999, also produced pass rates for minorities that were half that of white test-takers. *Ricci*,

Justice Kennedy properly pointed out that the *prima facie* case is just that—a threshold showing of “statistical disparity.”¹¹³ But then the focus should have moved to whether the adverse impact was nonetheless justified because the exam was job-related and consistent with business necessity, and if so, whether equally valid but less discriminatory alternatives existed.¹¹⁴ Kennedy remarkably found in the record no genuine dispute on either issue, and answered yes on the first, and no on the second.¹¹⁵

The record relied upon by the Court primarily consisted of the statements, all unsworn,¹¹⁶ made during the CSB hearings.¹¹⁷ Because a party moving for summary judgment must set out admissible facts to demonstrate that no reasonable fact-finder could rule for the opposing side, one would expect a remand would have been necessary to develop a more adequate record to properly evaluate the cross motions for summary judgment.¹¹⁸ This is especially true since neither the Supreme Court justices, nor the lower courts, nor the witnesses before the CSB (other than the test developer), ever reviewed the actual exams at issue.¹¹⁹ Nonetheless,

ci v. DeStefano, 554 F. Supp. 2d 142, 154 (D. Conn. 2006).

¹¹³ *Ricci*, 129 S. Ct. at 2678.

¹¹⁴ 42 U.S.C. § 2000e-k(1)(A) (2006).

¹¹⁵ This ruling is particularly perplexing when one recalls that in the usual disparate-impact context, the party asserting job relation—here the plaintiffs—would have the burden of proving it. *See* 42 U.S.C. § 2000e-k(1)(A)(i) (2006). *See also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1368 (2010).

¹¹⁶ The Commission decided it was not necessary to swear witnesses. *See* Joint App., *supra* note 53, at 109.

¹¹⁷ *See Ricci*, 129 S. Ct. at 2678.

¹¹⁸ *See infra* Part III.A.

¹¹⁹ The exam scores and lists were not released until after the Supreme Court decision. *See* *Briscoe v. City of New Haven*, 2010 WL 2794231, at *2 (D. Conn. 2010) (Ruling on Motion for Reconsideration and Motion for Clarification). The transcripts of the CSB hearings include only passing references to particular questions on the exams as remembered by firefighter witnesses. *Id.* In a similar situation, the Eleventh Circuit understandably held that no conclusion as to validity could be drawn where the test questions from the fire department promotional exam had “never made their way into evidence,” nor been reviewed by any of the experts. *Nash v. City of Jacksonville*, 837 F.2d 1534, 1536 (11th Cir. 1988). “Without the test itself and with no testimony presented by the defendant regarding the job-relatedness of the questions,” the district court could not “conclude that the questions were job-related.” *Id.* at 1538. The circuit judges “expressed wonder that any court should attempt to determine whether a written examination was ‘job-related’ and ‘content-valid’ without having before it the questions asked of the applicants.” *Id.* at 1536. In contrast to the *Ricci* majority, the Eleventh Circuit wisely rejected the defendant’s argument that evidence of *how the test was prepared* was legally sufficient to show job-relation. *Id.* at 1537. *See also* *Washington v. Davis*, 426 U.S. 229, 268 (1976) (Brennan, J. dissenting) (“[I]t is particularly inappropriate to decide the question [of validity of the test] on this record [where the examinations are not in the record].”).

Justice Kennedy somehow discerned *conclusive evidence* that the tests were job-related, consistent with business necessity, and that no less discriminatory alternatives existed, thus permitting the Court to take the extraordinary step of ordering summary judgment for the plaintiffs.¹²⁰ Although the assessment of job-relatedness usually involves highly sophisticated analyses of empirical data,¹²¹ Justice Kennedy's "evidence" took the form of the not very surprising and unsworn verbal assurances from the IOS test developer himself.¹²²

Justice Kennedy blamed the City because it "turned a blind eye to evidence that supported the exams' validity,"¹²³ referring to the City's failure to request the technical validation study prepared by the IOS.¹²⁴ But without such a study, how could he claim that the "IOS stood ready to provide [the City] with detailed information to establish the validity of the exams"?¹²⁵ Moreover, whether or not the City should be faulted for the absence of the report,¹²⁶ granting summary judgment in favor of the plaintiffs, based on the speculation that the study *would have* supported the IOS's claim to validity, appears an inappropriate penalty.

To obtain summary judgment, the *Ricci* plaintiffs had the burden to demonstrate the absence of a triable issue on the validity of the tests.¹²⁷ The dissenters argued that "the Court supplies no tenable explanation why the evidence of the tests' multiple deficiencies does not create at least a triable issue under [the new] strong-basis-in-evidence standard."¹²⁸ More-

¹²⁰ *Ricci*, 129 S. Ct. at 2677.

¹²¹ See *infra* Part VI.A.

¹²² *Ricci*, 129 S. Ct. at 2668.

¹²³ *Id.* at 2679.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The City argued that even if the exams were validated, the experts were telling them that there were reasonable less discriminatory alternatives that would still render them liable under Title VII. See Burgett et al. Affidavit, attached to Plaintiff's Partial Motion for Summary Judgment, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) [hereinafter Pl.'s Mot. Summ.].

¹²⁷ *Ricci*, 129 S. Ct. at 2677.

¹²⁸ *Id.* at 2707. Notwithstanding Professor Rutherglen's assertion that the City "steadfastly refused to argue, although it could readily have done so, that discarding the test results would have been in the interests of the community as a whole because the tests failed to measure the leadership necessary in a large, urban fire department," George Rutherglen, *Ricci v. DeStefano: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 84 (2010), New Haven forcefully argued throughout the litigation that the exams were "flawed" and may not have identified the most qualified candidates for the supervisory positions. See Brief for Respondents on the Merits at 28–36, Sec. III (C)(2)(b) *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428)

over, after formulating a new legal rule, as the majority had done regarding Title VII doctrine, the ordinary course would be a remand to apply it.¹²⁹

Similarly, regarding the availability of less discriminatory alternatives, the Court ruled that the City lacked a strong basis in evidence to conclude: (1) that a different weighing of the composite score other than the 60% written to 40% oral formula would have included more black candidates without sacrificing merit; (2) that the “rule of three” could have been modified by rounding off the scores; and (3) that an assessment center would have more accurately evaluated skills pertinent to the jobs.¹³⁰ But again, on the incomplete and unsworn record, it is unclear how the Court could conclude that the plaintiffs negated *all triable issues*.

The most extraordinary part of Justice Kennedy’s opinion concerns the City’s potential future disparate-impact liability:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.¹³¹

Remarkably, in a fit of judicial activism,¹³² the Court purports to rule against future minority plaintiffs should they file their disparate-impact

(“[submitting] evidence that the tests were not job-related or consistent with business necessity”); Tr. Oral Arg., *supra* note 30, at 57–58, 62.

But, as the City rested its defense in the district court primarily on a lack of intent to discriminate—and as Professor Rutherglen acknowledges, “the city was understandably reluctant to submit evidence that the tests were invalid,” Rutherglen, *supra* note 128, at 101—it did not press the job-relation issue, but rather contended that the CSB *could have found* the exams invalid. See Defendants’ Memorandum in Support of Motion for Summary Judgment, *Ricci v. DeStefano*, No:3:04-CV-1109 (MRK), D. Conn., Nov. 4, 2005, at 5–9.

¹²⁹ *Ricci*, 129 S. Ct. at 2702. Having ordered summary judgment for the petitioners, the Court did remand the case, but for the sole purpose of sorting out the remedy questions. *Id.* at 2681. See Part III.A.

¹³⁰ *Id.* at 2663.

¹³¹ *Id.* at 2681.

¹³² These are the same justices who, “on their own initiative, at the request of no party to the suit, declared that corporations and unions have a constitutional right to spend as much as they wish on television election commercials specifically supporting or targeting particular candidates.” Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010 (referring to *Citizens United v. F.E.C.*, 130 S. Ct. 876 (2010)). The Court first ordered the parties to file supplemental briefs addressing the question of whether prior precedent going back decades, which permitted restrictions on campaign spending, should be discarded, see *Citizens United v. F.E.C.*, *Powell v. Kelly*, 129 S. Ct. 2893 (2009), and then proceeded to do just that.

case.¹³³ Such a case, *Briscoe v. City of New Haven*, was filed and subsequently dismissed based on *Ricci*'s mandate.¹³⁴ This preemptive strike against the non-party firefighters adversely impacted by the 2003 examinations underscores the impropriety of finally resolving the *Ricci* case in their absence, as they no doubt would have made a more persuasive case for discarding the exam results than the City, which was constrained by its interest in protecting both its legal position and public image.

C. THE CONCURRING OPINIONS

Justice Scalia filed a concurring opinion that contemplated the ultimate demise of disparate-impact liability, which in his mind the Court "merely postpones."¹³⁵ He suggested that it is unconstitutional, as it "places a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision-making is discriminatory."¹³⁶ Justice Ginsburg's dissent properly characterized this as a radical proposal, as the well-established and now codified *Griggs* principle merely instructs employers to use *race-neutral* and merit-based means in their personnel selections.¹³⁷

Justice Alito,¹³⁸ joined by Scalia and Thomas, filed a separate concurring opinion that responded to the dissent's purportedly "incomplete description of the events that led to New Haven's decision to reject the re-

¹³³ *Ricci*, 129 S. Ct. at 2681. Justice Kennedy would have been well-advised to follow the dictate of Judge Guido Calabresi: "Difficult issues should be decided only when they must be decided, or when they are truly well presented. When they need not be decided . . . it is wise to wait until they come up in a manner that helps, rather than hinders, clarity of thought." *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008).

¹³⁴ 2010 WL 2794212 (D. Conn. 2010); see also *infra* Part III.B, for further discussion.

¹³⁵ *Ricci*, 129 S. Ct. at 2681–82 (Scalia, J., concurring).

¹³⁶ *Id.* at 2682. Scalia asserted at oral argument that the disparate-treatment and disparate-impact provisions "are at war with one another." Tr. Oral Arg., *supra* note 30, at 29. Other less dramatic commentators referred to "the uneasy relationship between the two principal theories of liability under that statute." See Rutherglen, *supra* note 128, at 84.

¹³⁷ *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

¹³⁸ Samuel Alito was a member of Concerned Alumni of Princeton, whose mission was to oppose co-education and affirmative action for minorities, keeping the university a white male enclave. See Chanakya Sethi, *Alito '72 Joined Conservative Alumni Group*, THE DAILY PRINCETONIAN, Nov. 18, 2005, available at <http://www.dailyprincetonian.com/2005/11/18/13876/>. Had this group's views prevailed, Sonia Sotomayor would not have been permitted to attend Princeton, as she would have lacked two requisites for admission.

sults of its exam.”¹³⁹ As he portrays it, the City’s reason for scrapping the test results—concern about potential disparate-impact liability—was a pretext for its real reason: City officials conspired to sabotage the selection process to curry favor with influential leaders in the black community.¹⁴⁰ But if Alito’s tale is accurate, it does not resolve the case, as it makes the City’s decision *not* racially, but politically motivated. As Justice Ginsburg points out, “That political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination.”¹⁴¹

D. THE DISSENTING OPINION

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, expressed sympathy for the white high-scorer plaintiffs, but concluded that “they had no vested right to promotion.”¹⁴² “The legitimacy of an employee’s expectations depends on the legitimacy of the selection method.”¹⁴³ She argued that the City properly concluded that its process failed to identify the most qualified applicants “and needlessly [shut] out a segment of the applicant pool.”¹⁴⁴

The dissenters disputed the factual premise underlying the Court’s decision—that the City rejected the test results *solely* because they produced only white promotions.¹⁴⁵ They argued that this premise, “essential to the Court’s disposition, ignores substantial evidence of multiple flaws in the tests New Haven used.”¹⁴⁶ The dissenters further asserted that the “Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.”¹⁴⁷ An employer who disavows a selection device because it produced discriminatory results and is not a valid predictor of job performance is not, in their view, acting “because of race” in violation of Title VII.¹⁴⁸

¹³⁹ *Ricci*, 129 S. Ct. at 2683 (Alito, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2709 (Ginsburg, J., dissenting).

¹⁴² *Id.* at 2690.

¹⁴³ *Id.* at 2702 (alteration in original).

¹⁴⁴ *Id.* (alteration in original).

¹⁴⁵ *Id.* at 2690.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2699.

Perhaps most significantly, Justice Ginsburg rejected the majority's view that the Civil Rights Act is at war with itself:

Neither Congress' enactments nor this Court's Title VII precedents offer even a hint of "conflict" between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions. Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.¹⁴⁹

The dissenters recognized that the disparate-impact principle must not be cast aside, as it is central to enforcing Title VII.¹⁵⁰ Moreover, voluntary compliance had been a "dominant Title VII theme" since its enactment, and the Court's undefined strong-basis-in-evidence standard renders such compliance a "hazardous venture."¹⁵¹

While the majority begins its *Ricci* narrative in 2003, Justice Ginsburg goes back to the 1970s when fire departments around the country, including New Haven's, "pervasively discriminated against minorities."¹⁵² The story includes numerous cases in which hiring and promotional examinations for firefighters were found to be both discriminatory and not job-related.¹⁵³ She recites the long history of racial exclusion as well as the contemporary underrepresentation of minorities in fire departments, particularly in supervisory ranks, because "[i]t is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed."¹⁵⁴

The City's CSB therefore reacted appropriately to the stark racial disparities in the exam results by questioning whether the tests accurately measured the qualities necessary to successfully perform as captains and lieutenants, and whether there were better alternatives to avoid disparate racial impact.¹⁵⁵ The City's Director of Personnel advised on these points that the exams "appear to test a candidate's ability to memorize textbooks but not necessarily to identify solutions to real problems on the fire ground."¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2690.

¹⁵¹ *Id.* at 2700–01.

¹⁵² *Ricci*, 129 S. Ct. at 2690.

¹⁵³ *Id.* at 2698.

¹⁵⁴ *Id.* at 2691 (alteration in original).

¹⁵⁵ *Id.* at 2692.

¹⁵⁶ *Id.* at 2695.

Ginsburg emphasized that during its hearings, the CSB heard evidence not just of statistical disparities, but of the perpetuation of past exclusionary practices.¹⁵⁷ For example, white candidates were far more likely to have relatives already in the fire service from whom they could obtain materials and assistance, such as informal mentoring, which was unavailable to minorities as they were generally “first-generation firefighters.”¹⁵⁸ The CSB also took account of evidence of the practices in nearby cities that had experienced similar racial disparities, but successfully switched to more performance-predictive devices with less discriminatory effect.¹⁵⁹ There was “cogent testimony [that] raised substantial doubts about the [NHFD] exam’s reliability.”¹⁶⁰

Justice Ginsburg, reading from the bench, concluded:

It is indeed regrettable that the City’s non-certification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers. Yet that is the choice the Court makes today. It is a choice that breaks the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests “fair in form, but discriminatory in operation.”¹⁶¹

III. THE PROCEDURAL IRREGULARITIES AND CONSEQUENT AFTERMATH OF *RICCI*

One need not be a civil procedure teacher to be struck by two stark oddities of the *Ricci* decision: the Court’s order granting, without remand, summary judgment for the plaintiffs, and the anticipatory foreclosure of future cases that may be filed by non-party minority firefighters.

A. THE AWARD OF SUMMARY JUDGMENT

Given the record before it, the Supreme Court’s peremptory resolution of the case in favor of the plaintiffs on a “quintessential question of fact”¹⁶²—namely, the City’s motives in rejecting the civil service list—is

¹⁵⁷ *Id.* at 2692–93.

¹⁵⁸ *Ricci*, 129 S. Ct. at 2693.

¹⁵⁹ *Id.* at 2705.

¹⁶⁰ *Id.* at 2708 (alteration in original).

¹⁶¹ *Id.* at 2710.

¹⁶² *See Ricci v. DeStefano*, 530 F.3d 88, 98 (2d Cir. 2008) (Cabrane, J., dissenting).

hard to fathom. The customary approach, after reversing a lower court's denial of a motion for summary judgment, would be to remand to the trial court for reconsideration based on the full record.¹⁶³ Instead, the Court ordered judgment for the plaintiffs, concluding that there were no triable issues of material fact and that the plaintiffs were entitled to judgment as a matter of law under the newly articulated standards for such Title VII cases.¹⁶⁴ All that was left for the district court, then, was to order promotion of the eligible plaintiffs, which it ultimately did (as discussed below).¹⁶⁵

In granting the City's original motion for summary judgment on the disparate-treatment claim,¹⁶⁶ the district court had applied the burden-shifting framework of *McDonnell Douglas Corp. v. Green*,¹⁶⁷ and found that the City had rebutted the plaintiffs' prima facie case that its action was racially motivated by proffering the legitimate reason that it was taken in good faith¹⁶⁸ to avoid the disparate impact against black candidates that would flow from rank-ordered appointment from the eligibility list.¹⁶⁹ Given that the racial impact of the exams, in both pass-rates and resulting appointments, violated the applicable EEOC Guidelines,¹⁷⁰ and that the evidence before the CSB raised serious questions about the predictive validity of the exams as well as the existence of alternative selection procedures with less discriminatory effect, the district judge discerned no evidence that the City's explanation was pretextual, and thus ruled for the City.¹⁷¹

Even if the district court's legal analysis here was sound, however,

¹⁶³ Remand was the route the Obama Justice Department advocated. See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

¹⁶⁴ *Ricci*, 129 S. Ct. at 2677.

¹⁶⁵ Left unaddressed was the matter of plaintiffs' claim for damages, for which either party may opt for jury trial. See Civil Rights Act of 1991, 42 U.S.C. § 1981 note, Sec. 102(3)(c) (2006).

¹⁶⁶ *Ricci*, 554 F. Supp. 2d at 163.

¹⁶⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁶⁸ Plaintiffs' cross motion for summary judgment, contending that good faith was not a defense here, was denied by the district court. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

¹⁶⁹ *Id.* at 152.

¹⁷⁰ The City's requests for admissions regarding the adverse impact of the examinations and the existence of less discriminatory alternatives, served on the plaintiffs and not responded to, thereby conclusively established them as facts. See FED. R. CIV. P. 36(a)(3); *Ricci*, 554 F. Supp. 2d at 153.

¹⁷¹ *Ricci*, 554 F. Supp. 2d at 163.

there is a problem with the record supporting *either* of the cross motions. That record consisted primarily¹⁷² of the transcript of the non-adversarial CSB hearings, in which the testimony was unsworn, many voices were unidentified, and much of it is described as “indiscernible.”¹⁷³ One testing expert even “testified” on a speakerphone connection.¹⁷⁴

Federal Rule of Civil Procedure 56(e) requires submission of “facts that would be admissible in evidence.”¹⁷⁵ The notion is to determine whether, given the record evidence, a reasonable jury could find for the party moved against; if not, summary judgment is appropriate.¹⁷⁶ Accordingly, unsworn or otherwise inadmissible evidence, such as hearsay, may not be used to support or oppose such a motion.¹⁷⁷ The record in *Ricci*, both at the district court and Supreme Court levels, appears to lack the “evidentiary materials” required to support summary judgment for *either* party.¹⁷⁸

Recognizing the problem, the district judge explained:

Plaintiffs argue that Dr. Hornick’s non-sworn, hearsay statement at the

¹⁷² Both sides submitted discovery materials and affidavits, but they did not contain data pertinent to the questions of job relation and validity. See *Ricci*, 554 F. Supp. 2d at 142.

¹⁷³ See, e.g., Joint App., *supra* note 53, at 22, 23, 26, 29.

¹⁷⁴ Joint App., *supra* note 53, at 85–107.

¹⁷⁵ “Supporting or opposing affidavits must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.” Fed. R. Civ. P. 56(e). By amendment, which took effect on December 1, 2010, Fed. R. Civ. P. 56(c)(2) provides that “a party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” *Id.* See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“[Determination on remand is] whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent’s burden of proof at trial.”). “The court may consider any material *that would be admissible or usable at trial.*” CHARLES A. WRIGHT ET. AL., *FEDERAL PRACTICE & PROCEDURE* § 2721 (3d ed. 1998) (emphasis added).

¹⁷⁶ *Celotex*, 477 U.S. at 323.

¹⁷⁷ See *Addickes v. Kress Co.*, 398 U.S. 144, 158–59, n.16, 17, 19 (1970) (unsworn statements do not meet the requirements of FED. R. CIV. P. 56(e)); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991) (unsworn letter from expert is not proper); *Setterlund v. Potter*, 597 F. Supp. 2d 167, 172 (D. Mass. 2008) (unsworn witness statements may not be used); *Watts v. Kroger Co.*, 955 F. Supp. 674, 677–78 (N.D. Miss. 1997) (since plaintiff’s statement would be inadmissible at trial as improper lay opinion, it may not be used on a summary judgment motion).

¹⁷⁸ *Celotex*, 477 U.S. at 324. Indeed, the *Ricci* plaintiffs themselves acknowledged the inadequacy of the record when they took issue with the characterization that witnesses “testified” at the CSB. See Plaintiffs’ Responses to Defendants’ Local Rule 56(a)(1) Statement, ¶¶ 44, 46, 48–50.

CSB hearing is inadmissible as non-disclosed expert evidence. Plaintiffs' argument is rejected because defendants proffer Dr. Hornick's not for the truth of his conclusion that the tests had a racially disparate impact, but to show that defendants had a good faith belief, based in part on Dr. Hornick's testimony, that such a disparate impact existed and justified the decision not to certify the exams.¹⁷⁹

While it is true that an employer need not be right about its stated reason for the challenged personnel decision, but must simply have a good faith belief in it, in order to prevail on a disparate-treatment claim,¹⁸⁰ Judge Arterton's minimization of the hearsay problem seems too dismissive. And if the district court erred in granting summary judgment for the defendants, the Supreme Court similarly had no basis for ordering summary judgment for the plaintiffs on the very same deficient record.

In any event, granting summary judgment at the Supreme Court level is highly irregular. In *Celotex Corp. v. Catrett*, for example, having reversed the denial of summary judgment for the defendant, the Court remanded the motion, deeming the lower court "better suited than we are to make these determinations in the first instance."¹⁸¹ When the circuit court then held that summary judgment was inappropriate, it reserved decision on "whether this action must go to trial or whether, to the contrary, the case could be disposed of on summary judgment on the basis of a *more fully developed record*."¹⁸²

To grant summary judgment to the *Ricci* plaintiffs, the Court must have found that they had carried their burden of showing that the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record did not raise a single genuine issue of material fact for trial.¹⁸³ This was clearly not the case. Moreover, as Justice Ginsburg protested, the majority short-circuited the litigation and "stack[ed] the deck further by denying [the City] any chance to satisfy the newly announced strong-basis-in-evidence standard. When this Court formulates a new legal rule,

¹⁷⁹ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 148 n.4 (2006).

¹⁸⁰ See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 207 (1997).

¹⁸¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

¹⁸² *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987) (emphasis added).

¹⁸³ Cf. *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (genuine issue of material fact regarding whether promotions were made pursuant to narrowly tailored remedy precluded summary judgment for City).

the ordinary course is to remand and allow the lower courts to apply the rule in the first instance.”¹⁸⁴

Therefore, at the least, the Supreme Court should have remanded for further evidentiary proceedings. Had it done so, it is unlikely that the lower court would have granted either of the cross-motions, given the disagreements among the experts on test validity and lesser discriminatory alternatives. Indeed, there were any number of genuine issues of material fact in dispute requiring trial. Instead, by ordering judgment for the plaintiffs, the remand simply became an exercise in parceling out the goodies.

The Supreme Court’s direction that the plaintiffs were “entitled to summary judgment on their Title VII claims”¹⁸⁵ led Judge Arterton to issue an order on November 24, 2009, directing entry of judgment against the City on the disparate-treatment claim.¹⁸⁶ The order required that the CSB certify the results of the 2003 promotional exams, and the promotion of fourteen of the named plaintiffs.¹⁸⁷ The following month, the City opted to promote twenty-four firefighters in rank-order from the original lists, including the fourteen *Ricci* plaintiffs—thirteen white and one Hispanic—as well as three blacks and two Latinos who were not involved in the case.¹⁸⁸

Eight black firefighters led by Gary Tinney (head of the Firebirds, an association of black professional firefighters) sought, unsuccessfully, to intervene to halt the promotions.¹⁸⁹ In opposing the motion, the City ar-

¹⁸⁴ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2702 (2009) (alteration in original).

¹⁸⁵ *Id.* at 2681.

¹⁸⁶ William Kaempffer, *Judge Orders New Haven to Promote Firefighters*, NEW HAVEN REG., Nov. 24, 2009, available at http://www.nhregister.com/articles/2009/11/24/news/new_haven/doc4b0c7f632b093927209424.txt.

¹⁸⁷ *Id.*

¹⁸⁸ William Kaempffer, *New Haven Fire Board Approves Long-Sought Promotions*, NEW HAVEN REG., Dec. 1, 2009, available at <http://www.nhregister.com/articles/2009/12/01/news/doc4b1571ef3b1b9626869946.txt>. The ten promoted who were not original *Ricci* plaintiffs were required to sign a waiver promising not to sue the City or seek back pay or constructive seniority, even though several, including the second and third highest scorers, outscored some of the plaintiffs (Frank Ricci was sixth on the lieutenant’s eligibility list) who were promoted and awarded constructive seniority, and are further seeking back pay, compensatory, and punitive damages from the City. See Thomas Macmillan, *10 More Firefighters Promoted*, NEW HAVEN REG., Dec. 4, 2009, available at http://www.newhavenindependent.org/index.php/archives/entry/10_more_firefighters_promoted/. Six original *Ricci* plaintiffs who either failed the test or scored too low to be promoted also sought promotions in the remand proceedings, to no avail. Telephone Interview With Victor A. Bolden, *supra* note 68.

¹⁸⁹ Thomas Macmillan, *Ricci Case “Tinney Intervenors” Try Again*, NEW HAVEN INDEP., Dec. 8, 2009, available at http://www.newhavenindependent.org/index.php/archives/entry/ricci_

gued it was untimely.¹⁹⁰ Karen Torre, lawyer for the *Ricci* plaintiffs, took the opportunity to personally attack Tinney for using “his race and racial rhetoric to escape the consequences of his exam performance.”¹⁹¹

B. THE FORECLOSURE OF FUTURE CASES

It is axiomatic, as a matter of both constitutional due process and the finality doctrine, that there can be no claim preclusion against non-parties not in privity with parties to the original case, and no issue preclusion on matters not actually litigated and determined by the judgment.¹⁹² A unanimous Supreme Court recently reaffirmed this “deep-rooted historic tradition that everyone should have his [or her] own day in court.”¹⁹³ Nonetheless, as noted above, Justice Kennedy pre-determined *any* future action alleging disparate impact arising from the 2003 NHFD exam administration.

Michael Briscoe, a black firefighter who took the 2003 lieutenant’s exam but did not participate in the *Ricci* litigation, brought such an action against the City in October, 2009.¹⁹⁴ Specifically, he challenged the 60% written to 40% percent oral weighting of the exam components.¹⁹⁵ Had the oral portion counted 70%, as in some other public safety agencies, Briscoe, who scored the highest of all seventy-seven candidates, would likely have been promoted, along with two other black firefighters.¹⁹⁶ His written score, however, brought him down to twenty-fourth on the list.¹⁹⁷

Briscoe claimed that this constituted disparate impact, pointing out that black candidates, as a group, performed substantially better on the

cases_tinney_intervenors_try_again/

¹⁹⁰ *Id.*

¹⁹¹ *Id.* It is particularly ironic that Ms. Torre, who argued that intervention by the black firefighters was untimely, at the same time successfully argued for the intervention of white officers opposing remedial relief to minorities in a case filed *twenty-five years before*. See *Bridgeport Guardians v. Delmonte*, 602 F.3d 469 (2d Cir. 2010).

¹⁹² See Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, & Thomas O. Main, *Civil Procedure: Doctrine, Practice, and Context* 879–89 (3d ed. 2008).

¹⁹³ See *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (rejecting the doctrine of preclusion based on virtual representation). A decision of the Court certainly has *stare decisis* effect on future litigation involving non-parties, based on principles of law, but that is a far cry from foreclosing their litigation entirely.

¹⁹⁴ *Briscoe v. City of New Haven*, 2010 WL 2794212 (D. Conn. 2010).

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

oral exam than their white counterparts, and that the oral component was much more closely related to the duties of a fire officer.¹⁹⁸ Two *Ricci* plaintiffs moved to intervene to oppose Briscoe's claims.¹⁹⁹

The City moved to dismiss on the grounds that the Title VII claim was foreclosed by the Supreme Court's decision, and U.S. District Judge Haight reluctantly agreed.²⁰⁰ Closing the *Catch-22* circle, he concluded:

The Supreme Court having declined to remand the case for further evidentiary proceedings regarding disparate impact, Briscoe cannot circumvent that decision by filing another lawsuit with respect to the same exams to attempt to create the record that would otherwise have been made upon remand.²⁰¹

With obvious understatement, the judge acknowledged that "the weighting issue . . . does not appear to have been a primary focus of the litigation."²⁰² Indeed, all Justice Kennedy says about it is that the City produced no evidence to show that the written to oral split was arbitrary or non-job-related.²⁰³ The *Ricci* plaintiffs of course fully supported the validity of the entire selection process that served them so well, and the City similarly had no incentive to challenge this provision of the collective bargaining agreement.²⁰⁴ Judge Haight further acknowledged that there was no opportunity to litigate this matter on the peremptory remand of *Ricci*.²⁰⁵

Nonetheless, while he credits Briscoe's due process/day-in-court plea, Judge Haight concluded it is trumped:

Briscoe argues that it is unfair to apply *Ricci* to foreclose his case, citing cases for the familiar propositions that one is not bound by the decision in a case to which he was not a party, and that everyone deserves his own day in court. However, this argument, while appealing and true as far as it goes, does not survive analysis when viewed in light of the fact that the Supreme Court in *Ricci* specifically anticipated and explicitly foreclosed subsequent disparate impact suits, such as Briscoe's, against the City based on the 2003 exams. The Court concluded that based upon the record before it, no strong basis in evidence had been established to sup-

¹⁹⁸ Complaint for Damages and Injunctive Relief, ¶¶ 5, 8, *Briscoe v. New Haven*, 2010 WL 2794212 (D. Conn. 2010), No. 3:09-cv-01642 (CSH) (D. Conn. Oct. 15, 2009).

¹⁹⁹ *Briscoe*, 2010 WL 2794212, at *8.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 7.

²⁰² *Id.* at 19.

²⁰³ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2679 (2009).

²⁰⁴ See *Briscoe*, 2010 WL 2794212, at *23–24.

²⁰⁵ *Id.* at 7.

port the City's decision to throw out the exams because of disparate impact. And the Court precluded any further expansion of that record, either on remand in *Ricci* or in some subsequent disparate impact suit such as *Briscoe*'s. *If, as he contends, Briscoe is denied his day in court or is bound by a decision in a case to which he was not a party, it is because the Supreme Court decided as much, and this court is bound by the decisions of the high court.*²⁰⁶

Thus ended the final chapter of what Justice Ginsburg described as a "stacking of the deck"²⁰⁷ against the black firefighters seeking promotion in New Haven.²⁰⁸ A non-party to *Ricci*, whose interests were not remotely represented by any party, was foreclosed from litigating issues that were not litigated in that case. Surely any first-year law student will be perplexed at this result, as it confers binding application to pure dicta regard-

²⁰⁶ *Id.* at 8 (emphasis added). Judge Haight suggests that *Briscoe* should have intervened at the outset of the original litigation in 2004. *Id.* at 9. *But see* *Briscoe v. City of New Haven*, 2010 WL 2794231, at *2 (D. Conn. 2010) (acknowledging that the City did not disclose any test scores until after the Supreme Court's decision in June 2009).

²⁰⁷ *Ricci*, 129 S. Ct. at 2702.

²⁰⁸ The whipsawing of the black firefighters stands in sharp contrast to the Supreme Court's warm welcome years earlier to white firefighters contesting an affirmative action decree in Birmingham, Alabama. *See* *Martin v. Wilks*, 490 U.S. 755 (1989). In an opinion by Chief Justice Rehnquist, the Court held that the white plaintiffs could collaterally attack the decree entered in the earlier case even though they had failed to intervene, relying on the fundamental proposition explicitly ignored in *Briscoe*, i.e., that one is not bound by a judgment entered in their absence. *Id.* *Martin v. Wilks* puts the burden on "plaintiffs who seek the aid of the courts to alter existing employment policies" to identify and join all those who would be adversely affected if plaintiffs prevail. *Id.* at 767. *See also* *Bridgeport Guardians v. Delmonte*, 602 F.3d 469 (2d Cir. 2010) (allowing white officers to intervene to challenge the remedial order in a twenty-five-year-old race discrimination suit).

Martin v. Wilks, together with several other decisions during that Term, prompted Congress to enact the Civil Rights Act of 1991, which among other things forecloses challenges to litigated or consent judgments by persons who had notice that the proposed judgment might adversely affect them and had an opportunity to present objections, or were adequately represented by a party on the same legal grounds. *See* Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1 (1989); 42 U.S.C. § 2000e-2(n) (2006).

These conditions do not apply to the *Briscoe* litigation, as neither the City nor the plaintiffs could be deemed to have represented his interest in challenging the weighting of the components. *See Briscoe*, 2010 WL 2794212. Moreover, *Briscoe* alleged the City knew or should have known, based on past experience, that the 60% written to 40% oral split would harm black applicants, a claim that no party raised in the original case. *Id.* And neither the nature of the original *Ricci* action, nor its summary disposition, provided *Briscoe* with the kind of notice contemplated by §2000e-2(n), especially since the City refused to disclose test scores to applicants until after proceedings concluded. *See* Brief for Plaintiff-Appellant at 3, *Briscoe v. City of New Haven*, 2010 WL 2794212 (2d Cir. 2010); *Briscoe v. City of New Haven*, 2010 WL 2794231 (D. Conn. 2010).

ing a hypothetical future case.

IV. WHAT IS LEFT OF TITLE VII?

Just as its predecessor significantly increased the burden of proving traditional (i.e., with minority or female plaintiffs) Title VII disparate-treatment cases,²⁰⁹ the Roberts Court has now constrained the disparate-impact prohibition. What Justice Scalia would do directly, as he suggests in his *Ricci* concurrence,²¹⁰ Justice Kennedy accomplishes by characterizing employer action to avoid disparate impact as itself unlawful, race-conscious discrimination.²¹¹

The Court fails to acknowledge that the disparate-impact provisions of Title VII are, and always have been, necessarily race-conscious, as they “require an employer to be aware of the race of individual applicants when adopting selection procedures and, in fact, to consider race if the selection procedure ultimately results in a racially disparate impact.”²¹² Since first recognized in *Griggs v. Duke Power Co.*,²¹³ which involved intelligence tests and a high school diploma requirement, the impact principle has been Title VII’s primary regulatory mechanism to remove unnecessary (i.e., non-merit) barriers to minority and female employment,²¹⁴ including writ-

²⁰⁹ See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, *supra* note 180.

²¹⁰ *Ricci*, 129 S. Ct. at 2681–83. Inexplicably, just a month after *Ricci* was decided, Justice Scalia authored an opinion for a unanimous Court ruling that black firefighter applicants could challenge Chicago’s use of an arbitrary cut-off score for its written test, notwithstanding the Seventh Circuit’s conclusion that the disparate-impact challenge was untimely because it was not filed within 300 days of sorting the scores. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010). In concluding that there was a continuing violation as long as candidates were certified from the civil service list, Justice Scalia offers a solitary, perfunctory cite to *Ricci*. *Id.* at 2197–98. He recites the history of *Griggs* and the Civil Rights Act of 1991 with nary a mention of his dire prediction of impact’s demise just weeks before. *Id.* at 2197. Adding to the irony, Scalia writes: “It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.” *Id.* at 2200. Judge Haight, sorting out the aftermath of *Ricci*, concluded that *Lewis*, as a timeliness case, does not modify *Ricci* “in any way.” *Briscoe v. City of New Haven*, 2010 WL 2794231, at *4 (D. Conn. 2010).

²¹¹ *Ricci*, 129 S. Ct. at 2675.

²¹² Brief for the New York Law School Racial Justice Project as Amicus Curiae in Support of Respondents at 20, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). See also Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 11, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

²¹³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²¹⁴ See generally Stryker, *supra* note 99, at 14, 24 (describing impact theory as “an aggressive enforcement strategy” and noting that “disparate impact is widely credited with promot-

ten tests,²¹⁵ height-weight minimums,²¹⁶ degree requirements,²¹⁷ and arrest and conviction records.²¹⁸

The targets of disparate-impact analysis are selection procedures that disproportionately exclude minorities or females and cannot be demonstrated to be significantly related to job performance. The impact prohibition, as codified by the Civil Rights Act of 1991,²¹⁹ thus wisely insists that personnel decisions be made on a merit and non-discriminatory basis, focusing on the qualifications and skills necessary to successfully perform the position at issue.²²⁰ Chief Justice Burger²²¹ wrote for the unanimous *Griggs* Court:

ing wholesale change in employment practices.”); Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987).

²¹⁵ *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (“[Title VII guarantees each individual] the *opportunity* to compete equally with white workers on the basis of job-related criteria.”).

²¹⁶ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

²¹⁷ *Griggs*, 401 U.S. at 433.

²¹⁸ *Green v. Mo.-Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975); *see also* Sam Hananel, *Job-Screening Tactics Draw Critics*, BOS. GLOBE, Aug. 12, 2010, at B8 (EEOC warns that screening candidates based on criminal records or credit problems “can be illegal if it has a disparate impact on racial minorities,” who are statistically more likely to be incarcerated and have poor credit histories).

²¹⁹ *See* Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k) (2006).

²²⁰ Thus, descriptions of impact doctrine as requiring quota hiring, such as that of Professor Richard Primus—“Title VII’s disparate impact doctrine . . . requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification”—are as inaccurate as they are bizarre. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010); *see also* Rutherglen, *supra* note 128, at 85 (asserting that New Haven took away the benefits of the exams from the white passers and “redistributed” them to minorities who failed).

Primus acknowledges that quotas are not part of the judicial remedies for an impact violation, which only include prospective injunctive relief to end the practice, back pay, and other monetary relief. Primus, *supra* note 115, at 1374. He is instead invoking the “parade of horrors” that almost derailed the Civil Rights Act of 1991, namely that employers will preemptively engage in quota practices in response to the risk of disparate-impact liability. *See* Stryker, *supra* note 99, at 14 (opponents of the bill “kept up a constant ‘drumbeat’ of quotas,” and President George H.W. Bush vetoed an earlier version as a “quota” bill).

That such fear is misplaced is underscored by the Court’s resolution of *Connecticut v. Teal*, in which the Connecticut agency sought to compensate for the adverse impact of a civil service exam by affirmatively promoting minority candidates lower on the eligibility list. *Connecticut v. Teal*, 457 U.S. 440 (1982). The decision rejects such a preemptive “bottom-line” defense, and requires that each step in the selection process be free of disparate impact. *Id.*

²²¹ Justice Burger was appointed by Republican President Richard M. Nixon. John Fox, *Biographies of the Robes: Warren Earl Burger*, PBS (Dec. 2006), http://www.pbs.org/wnet/supremecourt/rights/robes_burger.html.

[The goal of Title VII] was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees 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 employment practices.

....

... What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.²²²

Griggs simply acknowledged what is conventional wisdom among civil rights lawyers, sociologists, and labor market observers, namely that “[i]nstitutionalized practices often perpetuate discriminatory patterns established in the past even when race or gender animus is absent.”²²³

Courts that addressed the issue before *Ricci* uniformly held that corrective measures to avoid disparate impact against minorities or women do not constitute intentional discrimination against white males. In *Hayden v. County of Nassau*,²²⁴ the Second Circuit dismissed a challenge by white and Latino applicants to the Nassau County police department’s reconfiguration of its entrance examination, which was designed to minimize its discriminatory impact on minority candidates:

Nothing suggests that the County sought to disadvantage appellants, or that the County was propelled by sinister or invidious motivations. A desire to reduce the adverse impact on black applicants and rectify hiring practices which the County admitted in the 1982 consent order²²⁵ might

²²² *Griggs*, 401 U.S. at 429–31 (alteration in original). As New Haven Corporation Counsel Victor Bolden explained: “No one debates that a high school diploma is not a worthy thing to have, but in the particular context of [the unskilled jobs at Duke’s power plant], it was excluding African Americans and the job it was excluding them from, *you did not need* a high school diploma to actually perform those tasks.” Telephone Interview with Victor A. Bolden, *supra* note 68 (emphasis added).

Moreover, the consequence of imposing the diploma and test requirements was to effectively maintain the same segregated workforce at Duke Power that was in place before Title VII took effect on July 5, 1965. See *Griggs*, 401 U.S. at 428–29. Therein lies another importance of preserving the disparate-impact dimension of Title VII in full force: it prevents the easy circumvention of Title VII by clever imposition of “neutral” or “objective” devices.

²²³ Stryker, *supra* note 99, at 15.

²²⁴ *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999).

²²⁵ The New Haven Fire Department entered into the same kind of consent decree in 1975, including an agreement to revise its promotional practices. See *Firebird Soc’y of New Haven, Inc. v. New Haven Bd. of Fire Comm’rs*, 66 F.R.D. 457 (D. Conn. 1975), *aff’d* 515 F.2d 504 (2d

support an inference of discrimination is not analogous to an intent to discriminate against non-minority candidates. As the district court so aptly phrased it: “where an exam that discriminates against a group or groups of persons is reviewed, studied and changed in order to eliminate, or at the very least, alleviate such discrimination, there is a complete absence of intentional discrimination.”

Appellants’ position would have us equate the County’s desire to eliminate the discriminatory impact of its hiring practices on minority applicants with an intent to discriminate against Appellants. To so find could seriously stifle attempts to remedy discrimination. If employers or governmental entities fear that they will be charged with discriminating against non-minorities, they will shy away from all proper efforts to rectify prior discrimination.²²⁶

As Justice Souter observed during oral argument in *Ricci*, whatever Congress wanted to attain by codifying the disparate impact-principle, it could not have wanted a “damned-if-you-do, damned-if-you-don’t situation,” in which the City would face a disparate-impact case if it went forward with the results of the exams, and a disparate-treatment case if it did not.²²⁷ Rather, as Justice Ginsburg reads them, the statute’s disparate-treatment and disparate-impact provisions are “twin pillars” in the effort to achieve workplace equality.²²⁸ Justice Souter also criticized the *Ricci* plaintiffs’ position, (ultimately adopted by the majority and a central tenet of Roberts Court dogma), that “make[s] no distinction between race as an animating discriminating object on the one hand and race consciousness [to remedy the defects in the exams] on the other.”²²⁹

The City did not manipulate the 2003 test scores or promote lower-scoring black candidates.²³⁰ It merely invalidated the entire process to start

Cir. 1975) (motion of white firefighters to intervene after entry of consent decree denied).

²²⁶ *Hayden*, 180 F.3d at 51. See also *Byers v. City of Albuquerque*, 150 F.3d 1271, 1275–76 (10th Cir. 1998) (lowering of the written test score needed to proceed to the next round of the selection process, by one point, to accommodate more non-white candidates is permitted).

²²⁷ Tr. Oral Arg., *supra* note 30, at 8. Quoting the EEOC Guidelines, the *Ricci* dissenters observe that “[b]y the enactment of title VII, Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement.” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2699 (2009) (Ginsburg, J., dissenting) (quoting 29 C.F.R. § 1608.1(a) (2008)).

²²⁸ *Ricci*, 129 S. Ct. at 2699.

²²⁹ Tr. Oral Arg., *supra* note 30, at 9 (alteration in original).

²³⁰ See Brief for Respondents on the Merits at 2, Sec. III (C)(2)(b), *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). There was thus no violation of the “race-norming” prohibition in 42 U.S.C. § 2000e-2(l), which states that “[i]t shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for

over with procedures more likely to produce qualified officers and less likely to exclude minorities.²³¹ The City's efforts were far from the rigid quota or set-aside approaches²³² condemned in *Regents of University of California v. Bakke*,²³³ *Wygant v. Jackson Board of Education*,²³⁴ *Adarand Constructors, Inc. v. Pena*,²³⁵ *Gratz v. Bollinger*,²³⁶ and *Parents Involved in Community Schools v. Seattle School Dist. No. 1*.²³⁷ Nonetheless, the *Ricci* majority somehow equated the two situations, which jeopardizes the enforcement of the crucial disparate-impact principle.²³⁸

employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." *Id.*

²³¹ *Ricci*, 129 S. Ct. at 2661. Prior precedent permitted far more aggressive corrective efforts on a showing of a conspicuous imbalance in traditionally segregated job categories, without requiring the employer to prove its own violation of Title VII, as Justice Kennedy's opinion effectively demands. See *Johnson v. Transp. Agency* 480 U.S. 616, 630 (1987) (passing over a male to promote a female with lower test score pursuant to affirmative action plan); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 212 (1979) (affirmative action plan for on-the-job training, which mandated a one-for-one hiring quota for minority workers). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("strong basis in evidence" requirement is satisfied by evidence "approaching a prima facie case"). It was undisputed that such imbalance existed within the supervisory ranks of the NHPD. See *supra* note 54.

²³² The Second Circuit judges in *Ricci* who voted against rehearing viewed the characterization of the City's action as resembling a quota to be "entirely mistaken." *Ricci v. DeStefano*, 530 F.3d 87, 90 (2d Cir. 2008). However, a very different tone was set at the Supreme Court when counsel for the petitioners opened oral argument with the characterization that "[r]acial classifications are inherently pernicious and, if not checked, lead as they did in New Haven to regrettable and socially destructive politics." Tr. Oral Arg., *supra* note 30, at 4. The Deputy Solicitor General's persistent arguments that the case did not involve racial classification were similarly given short shrift. See *id.* at 34–39. That the case actually involved avoiding exclusionary impact, and not racial classification, was relegated to the dissent to explain.

²³³ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (reserving certain medical school seats for minorities only).

²³⁴ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (affording special protection to minorities against lay-off).

²³⁵ *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (contract set-asides for minority bidders).

²³⁶ *Gratz v. Bollinger*, 539 U.S. 244 (2003) (awarding extra points in college admission process based on race of applicant).

²³⁷ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (reliance upon race in student assignment plans to determine which public schools children could attend).

²³⁸ See Brief for Lawyers' Committee for Civil Rights Under Law et. al. as Amici Curiae Supporting Respondents at 7, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

V. A BRIEF HISTORY OF DISCRIMINATION IN FIREFIGHTING

For decades in the earlier part of the 20th century, [fire service] was strictly dominated by whites in all ranks and, like the military, tended to enjoy (particularly with ranking officers) a peculiar sense of "tradition," of legacies and closed traditions of handling down fire careers from fathers to sons. In the 1960s and 1970s, as more blacks attempted to gain entrance into the fire-fighting profession, numerous attempts were made to close ranks and keep them out. Racism in both hiring and promotion was rampant, as attested to by the numerous cases filed and consent judgments entered by courts during the late 1960s through the 1980s. These decrees had to take race into account to overcome the decades of racial discrimination and segregation, vestiges of which still linger in the fire service today.

. . . .

*As the decrees have expired, the percentage of professional black firefighters has drastically declined by nearly half In 2008, only 8.2% were black, and of first-line supervisors, only 5.8% were black.*²³⁹

When Title VII was extended to cover public employment in 1972, as Justice Ginsburg recalled in her dissent, "municipal fire departments across the country, including New Haven's, pervasively discriminated against minorities."²⁴⁰ While Justice Kennedy's *Ricci* opinion starts the narrative in Act III of the drama, the dissent put the dispute in the context of the ugly history of racial exclusion and intolerance in firehouses across the country in Acts I and II.²⁴¹ The omitted scenes include egregious instances of harassment, threats, and violence against the few minorities who broke through the barriers and secured positions on fire departments.²⁴² What makes the "mixing of the races" so much more volatile in firefighting than in policing or other public employment positions is that firefighters share intimate quarters during their long shifts.²⁴³ What in turn

²³⁹ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 6, 27, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) (citing U.S. D.O.L. Bureau of Labor Statistics) (alteration in original).

²⁴⁰ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2690 (2009).

²⁴¹ *See id.* at 2665, 2703.

²⁴² *See id.* at 2590–91.

²⁴³ U.S. Comm. on Civil Rights, *For All the People . . . By All the People: A Report on Equal Opportunity in State and Local Employment* 88 (1969); Ossher, Brooks, & Robinson, *supra* note 27, at 1 ("37 years after a court decree forced minority hiring, many units and firehouses [in Boston] are starkly and increasingly segregated. Old rules and city inaction have put hard-

makes the situation of ostracized minorities so much more vulnerable is that fire crews depend critically on each other in order to survive.

The case of *De Grace v. Rumsfeld*²⁴⁴ is emblematic. The plaintiff, Bobby De Grace, was employed as the only African American among some forty civilian firefighters at the Naval Air Station at South Weymouth, Massachusetts (NASSW) in the late 1970s.²⁴⁵ The trial court found the department was “infected with pervasive racism,” which was blithely ignored by the authorities.²⁴⁶ As a result, De Grace was terminated at the end of his probationary period, but reinstated after the Naval Equal Employment Opportunity Examiner found that derogatory racial terms were routinely used to address him and that his supervisors were “coloured by hostility and racial prejudice.”²⁴⁷

Although the Examiner recommended that his fellow firefighters and supervisors be given training on racial sensitivity, De Grace’s reinstatement only exacerbated the situation.²⁴⁸ “Troubling events,” as the First Circuit later put it, began to escalate.²⁴⁹ First, his safety equipment was damaged, including his crash helmet and survival knife.²⁵⁰ Then, De Grace was subjected to the “‘silent treatment’” by his co-workers and supervisors.²⁵¹ On occasion, the crew would refuse to ride with him.²⁵² Finally, he received three ominously threatening handwritten notes in his locker.²⁵³ The first one read: “Hey boy get your Black ass out before you don’t have one.” The second note stated, “I don’t want you sleeping in the same place as me. Your dirtier and smellier than a mud turtle, so why don’t ya just take a hint and get the f[***] out you Black niger;” and the third, “Niger, If we end up having a fire, you’ll be staying in it and getting a lot blacker.”²⁵⁴ The district court found that one or more of De Grace’s co-workers

won diversity gains in peril.”).

²⁴⁴ *De Grace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980). The author was co-counsel for the plaintiff at trial and on appeal.

²⁴⁵ *Id.* at 799 n.2.

²⁴⁶ *Id.* at 799.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 800.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

were responsible for the notes.²⁵⁵

When, upon receipt of the last threat, he absented himself from the unit, De Grace was again terminated.²⁵⁶ The First Circuit later ruled that his trepidation about returning was not “an unreasonable, aberrational response to notes of such a tenor especially in light of firefighters’ occupational situation where mutual dependency and cooperation is required for safe firefighting.”²⁵⁷ It also found that NASSW’s initial failings to correct the racially hostile work environment “may have paved the way for the intensification of hostile relations which culminated with the threatening notes.”²⁵⁸ On remand, the district court ultimately found that De Grace’s absence was the reasonable response to pervasive racial hostility and physical threats, which his superiors culpably failed to even attempt to alleviate.²⁵⁹

Such discriminatory treatment of African Americans in the Nation’s fire departments is not a relic of the past. A 2009 federal district court decision regarding the Camden, New Jersey fire department discloses a very similar pattern.²⁶⁰ As the first and only non-white at his fire station in the early 1980s, plaintiff Kevin Hailey was subjected to constant prejudicial treatment—restricted to sleeping in certain beds, ignored by his fellow firefighters, and referred to by racial epithets.²⁶¹ On several occasions his superiors abandoned him and he was left alone to fight fires.²⁶²

In 1989, Hailey was appointed as captain after scoring well on the exam, yet he continued to experience intolerance.²⁶³ Other firefighters openly claimed that Hailey benefitted from racial curving of exam scores, dubbing his rise “Hailey’s Comet.”²⁶⁴ He heard comments like “there is no way this nigger beat me on the test.”²⁶⁵ He was criticized in front of his

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 801.

²⁵⁷ *Id.* at 804.

²⁵⁸ *Id.* at 805 n.5.

²⁵⁹ Findings, Rulings and Order for Judgment After Remand, *De Grace v. Rumsfeld*, 614 F.2d 796 (1980) (No. 76-1205-S).

²⁶⁰ *Hailey v. City of Camden*, 631 F. Supp. 2d 528 (D.N.J. 2009). The jury verdict in favor of plaintiffs was upheld by the district court. *Hailey v. City of Camden*, 650 F. Supp. 2d 349 (D.N.J. 2009).

²⁶¹ *Hailey*, 631 F. Supp. 2d at 533.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

men by the Deputy Chief, thereby undermining his credibility.²⁶⁶ Then, after finishing second among more than fifty candidates on the test for battalion chief and being appointed to that position in 1992, white firefighters routinely disregarded his orders at fire scenes, and the chiefs refused to discipline them.²⁶⁷ The racial slurs persisted.²⁶⁸ Finally, rising to deputy chief in 2002, Hailey still found himself powerless despite his rank.²⁶⁹ On one occasion, white battalion chiefs tried to relieve him of command at a fire scene.²⁷⁰

Co-plaintiff Terrence Crowder had similar experiences at another firehouse in Camden.²⁷¹ Like Hailey, Crowder was relegated to “the black room” and was left alone at fire scenes.²⁷² Superiors ignored Crowder’s complaints.²⁷³ Indeed, when a Captain ordered Crowder, “[Nigger], mop the floor,” Crowder himself ended up charged with “insubordination and conduct unbecoming a fire fighter.”²⁷⁴

In a similar vein, litigation revealed in 2006 that most of the black officers and firefighters in the Cleveland fire department worked in segregated station houses pejoratively labeled “Monkey Islands.”²⁷⁵ No black officers, and very few black firefighters, were assigned to houses on the west side of the city.²⁷⁶ Plaintiff Emmett Jordan was one of the few exceptions, and while assigned there his colleagues called him “Sambo” and “Welfare Firefighter,” and subjected him to persistent offensive racial jokes and graffiti.²⁷⁷ Fellow firefighters tampered with and misplaced Jordan’s protective gear.²⁷⁸ The white firefighters erected a “Wall of Hate” to segregate the blacks, which remained in place until 1999.²⁷⁹ Jordan was shunned, demeaned, disproportionately disciplined, assigned menial

²⁶⁶ *Id.* at 534.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Jordan v. City of Cleveland*, 464 F.3d 584, 590 (6th Cir. 2006).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 592–93.

²⁷⁸ *Id.* at 589.

²⁷⁹ *Id.*

chores, and warned not to complain.²⁸⁰ White firefighters formed the “Caucasian American Firefighters Association” (and later changed the name to “Concerned American Firefighters Association”) to oppose any affirmative action efforts.²⁸¹ In addition, two white-only social networking clubs were deemed to provide the “fast track” to advancement within the Cleveland department.²⁸²

Racially demeaning comments from white colleagues and supervisors, silent treatments, and the practice of assigning black firefighters to “black beds” and separate eating facilities, all remained commonplace in our Nation’s firehouses until at least the late 1970s.²⁸³ As recently as 2010, an investigation of the Boston Fire Department found that a high degree of segregation still persists in the city’s firehouses,²⁸⁴ and that the gains in minority hiring practices under prior civil rights consent decrees are now being turned back.²⁸⁵ A long-standing “legacy” policy magnifies the unfairness by allowing Boston firefighters with relatives in the Department to choose their assignment, usually to the busiest and most elite venues, such as the marine unit.²⁸⁶ These career-enhancing benefits flow almost exclusively to the large percentage of white firefighters with family on the job.²⁸⁷

²⁸⁰ *Id.* at 590.

²⁸¹ *Id.* at 589 n.5.

²⁸² *Id.* at 589.

²⁸³ See *Hammon v. Barry*, 813 F.2d 412, 434–35 (D.C. Cir. 1987) (Mikva, J., dissenting) (segregation of black sleeping quarters, assignments, and breathing equipment continued until 1971, and segregated seating at meals until the late 1970s); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 513 (8th Cir. 1977) (exclusion of blacks from firehouse eating arrangements); *McNamara v. City of Chicago*, 959 F. Supp. 870, 874–75 (N.D. Ill. 1997) (segregation of fire companies and trucks, assignment of white firefighters to black firehouses only as punishment, providing black firefighters with older equipment, unfairly scoring minorities below whites on efficiency evaluations); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187, 1194 (D. Md. 1973) (segregation of department facilities, “black beds,” and atmosphere of harassment and ostracism through the late 1960s led to high attrition rate). See also *Ass’n Against Discrimination in Emp’t, Inc. v. City of Bridgeport*, 479 F. Supp. 101 (D. Conn. 1979) (pervasive policy of discrimination against black and Hispanic applicants for fire department).

²⁸⁴ *Ossher, Brooks, & Robinson, supra* note 27, at 1, 8. The firehouse in the heart of the black community is staffed by forty-six firefighters, only seven of whom are non-white. It is derisively dubbed “Fort Dudley” and keeps its doors closed to the neighborhood. The elite Marine Unit in the harbor has no non-white members, and the Fire Academy has only one minority on staff. *Id.*

²⁸⁵ *Id.* at 1. The civil service preferences for military veterans and for firefighters laid off from other departments overwhelmingly benefits white applicants. *Id.* at 8.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

In short, black firefighters around the country may still find themselves in separate and starkly unequal work environments.²⁸⁸

The New Haven Fire Department is no exception to this unfortunate history. Discrimination litigation dates back to at least 1973, at which point the Department had no Hispanics and only 18 blacks among its 502 men.²⁸⁹ Only 1 black firefighter held a supervisory position among the 107 officers.²⁹⁰ A consent decree was entered regarding hiring and promotional practices, containing the Department's agreement to validate the tests used for promotion.²⁹¹ The decree was unsuccessfully challenged by white officers who claimed, like the *Ricci* plaintiffs, that they merely sought to "preserve a system of promotions based upon merit and not considerations of race."²⁹²

That was the first of several race discrimination cases filed over the course of the next thirty years.²⁹³ As Superior Court Judge Lynda B. Munro noted with frustration in 2002, it had been "over 20 years [since] the hiring and promotional practices of the City of New Haven Fire Department have been under judicial scrutiny. The City has come up wanting on now a third occasion."²⁹⁴ Judge Munro appointed a special master to oversee promotions in the Department, but violations still persisted.²⁹⁵ As of 2007, the NHFD employed only 99 blacks among 359 uniformed person-

²⁸⁸ It should also be noted that black firefighters in many departments have been denied the valuable opportunity to "act up" to officers' positions when a vacancy occurs, or to serve "acting time" to fill in for a shift commander. *See, e.g.,* *Jordan v. City of Cleveland*, 464 F.3d 584, 591 (6th Cir. 2006); *McNamara v. City of Chicago*, 959 F. Supp. 870, 875 (N.D. Ill. 1997).

²⁸⁹ *See Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn. 1975), *aff'd*, 515 F.2d 504 (2d Cir. 1975) (motion of white firefighters to intervene after entry of consent decree denied).

²⁹⁰ *Id.* at 460.

²⁹¹ *Id.* at 462.

²⁹² *Id.* at 463. Although ostensibly seeking strict compliance with civil service provisions, white New Haven firefighters advocated manipulation of those very provisions when it served their own interests. *See, e.g.,* *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 593 A.2d 1383 (Conn. 1991) (successful challenge by black firefighters to the practice of "stockpiling," making promotions from an expiring eligibility list even though there were no actual vacancies), *aff'd*, 630 A.2d 131 (Conn. App. Ct. 1993); *Broadnax v. City of New Haven*, 2002 WL 449712 (Conn. Super. Ct. Feb. 27, 2002) (enjoining promotional practice of "underfilling," which disproportionately favored whites), *aff'd in part, rev'd in part*, 851 A.2d 1113 (Conn. 2004).

²⁹³ *See Broadnax*, 2002 WL 449712, at *14.

²⁹⁴ *Id.* (alteration in original).

²⁹⁵ *Broadnax v. City of New Haven*, 2003 WL 21805808, at *3 (Conn. Super. Ct. Jul. 25, 2003), *rev'd*, 851 A.2d 1113 (Conn. 2004).

nel, and only 13 among its 82 officers.²⁹⁶ This in a city with a population that is 40% black and more than 20% Hispanic.²⁹⁷

The *Ricci* majority on the Court preferred to ignore the historical context of the matter before them.

VI. THE CULTURE OF TESTING, THE TEST GAP, EMPLOYMENT TESTS, AND THE NEW HAVEN EXPERIENCE

*I've spoken to at least 10,000, maybe 15,000 firefighters in group settings in my consulting practice and I have never one time ever had anyone in the fire service say to me, "Well, the person who answers—gets the highest score on a written job knowledge, multiple-guess test makes the best company officer." We know that it's not as valid as other procedures that exist.*²⁹⁸

*Tests that transform differences that are as likely to be a product of measurement error or flawed test design as they are a reflection of superior qualifications create nothing but the illusion of meritocracy. That illusion creates not only a false sense of individual entitlement to jobs and promotions, but also a real public danger in the context of positions such as fire and police officers. When the safety and lives of citizens are at stake, it is particularly critical for public employers to have the leeway to ensure that the tests they deploy accurately identify those candidates who are most qualified for these important jobs.*²⁹⁹

It is no revelation that our society is obsessed with standardized tests—it is only a slight exaggeration to call it continuous testing from the cradle to the grave.³⁰⁰ But we should pause to ponder the consequences of

²⁹⁶ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 8, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

²⁹⁷ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009) (Ginsburg, J., dissenting). As of 2009, there were only eleven female firefighters. Allan & Bazelon, *supra* note 19.

²⁹⁸ *Ricci*, 129 S. Ct. at 2694 (Ginsburg, J., dissenting) (quoting App. in No. 06-4996-cv at A1033) (Test consultant Christopher Hornick's testimony before the New Haven Civil Service Board); Joint App., *supra* note 53, at 96–97. As one retired firefighter put it, "Some of the worst officers you've ever had were 'book smart' officers." Thomas MacMillan, *NAACP Backs City in Firefighter Case*, NEW HAVEN INDEP., Jan. 16, 2009, available at http://www.newhavenindependent.org/index.php/archives/entry/naacp_backs_city_in_firefighter_case/.

²⁹⁹ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 23, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³⁰⁰ For testing in schools, see generally Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* (2010), criticizing the reliance on testing in the U.S. education system, or Peter Sacks, *Standardized Minds: The High Price of America's Testing Culture and What We Can Do to Change It* (1999), advo-

placing so much stock in these devices as reliable predictors of success, either in education or on the job.

As a high test scorer, Frank Ricci claimed he was entitled to promotion.³⁰¹ After all, he had overcome his dyslexia by studying eight to thirteen hours a day, spent more than \$1,000 to purchase reading materials, and then paid his neighbor to read them on tape so he could “give it [his] best shot.”³⁰² We may forgive Ricci for assuming that his test performance guaranteed him the promotion, given the misconceived definition of “merit” and “qualification” shared by many of our fellow citizens. It is harder, however, to overlook Ricci’s insulting explanation for the poorer performance of his black colleagues—that they just did not study as hard³⁰³—as it “merely serves to buttress many white firefighters’ false sense of superiority, reinforcing classic examples of debasing stereotypes that African-Americans are just ‘dumb’ and/or ‘lazy.’”³⁰⁴

The *Ricci* plaintiffs exacerbated this slur with their proposed alternatives to non-certification of the eligible list—that the City could get tutors for the black firefighters or make additional study materials available to them.³⁰⁵ Experience teaches that it was neither ability, nor intelligence, nor study habits, but “the implicit problems that arise in high-stakes testing and candidates’ own innate awareness of the stereotypes at play,” that works against the minority test-takers.³⁰⁶

Yet Frank Ricci’s views again reflect those of many white Americans who, according to several studies, attribute the gap in socioeconomic status between whites and blacks to differences in their innate abilities and motivation.³⁰⁷ Any effort to assist minorities is thus viewed as “lowering standards” to accommodate the “less qualified.”³⁰⁸ Response to the *Ricci*

cating for the use of academic portfolios over testing to measure students’ ability, or Defending Standardized Testing (Richard Phelps, ed. 2005), for a discussion of current standardized testing procedures.

³⁰¹ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

³⁰² *Ricci*, 129 S. Ct. at 2667 (alteration in original).

³⁰³ *Ricci*, 554 F. Supp. 2d at 150–151.

³⁰⁴ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 21, 33–34, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³⁰⁵ *Id.* at 34.

³⁰⁶ *Id.*

³⁰⁷ See Anne Lawton, The Meritocracy Myth and the Illusion of Equal Employment Opportunity, 85 MINN. L. REV. 587, 596, 625 (2000).

³⁰⁸ See generally Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 U.C.L.A. L. REV. 1251–52 (1995).

decision largely confirms these beliefs in the myth of meritocracy. For example, comments on the Employment Discrimination Law Professor listserv include:

[Before the Supreme Court's decision] New Haven was rejecting or passing over highly qualified, degreed and experienced white officers in favor of uneducated, inexperienced and blatantly unqualified blacks, in some cases passing over medal and award winners in favor of low-scoring blacks with arrest records. It was a sewer of race politics and *Ricci* put an end to it.³⁰⁹

It is sheer nonsense to suggest that if a failing or barely passing black candidate (with no diplomas and no credentials) loses a promotion to a white guy who expectedly scores #1 on the Captain's exam (because he has multiple degrees, certificates, is a paramedic, fire instructor, and a serious student of fire science and first response tactical protocols) that "race" discrimination has occurred. In academe, you folks may think it is okay to hire a marginal candidate for a faculty position over a more highly credentialed and smarter person for the sake of "diversity"—you can't kill anyone by your negligence—but it is outrageous and the height of elitist arrogance to impose that PC on firefighters whose safety and lives liberals continue to play with.³¹⁰

Another entry, posted on the *New Haven Independent* website, complained that if the black plaintiffs "had put as much energy into studying and trying to pass the tests as they have put into whining and suing for special treatment, maybe they would be being promoted now."³¹¹

How did our almost mystical belief in the sorting capacity of standardized testing come about?

Historically, employment testing emerged as a reform of the "spoils system," which was driven by patronage and corruption.³¹² In the 1850s, the federal government began to hold "pass examinations" to determine, in

³⁰⁹ *Ricci Discussion on the Empdiscr Listserv*, Workplace Professor Blog (Oct. 7, 2009), http://lawprofessors.typepad.com/laborprof_blog/2009/10/ricci-discussion-on-the-empdiscr-listserv.html (comments by Cas on Oct. 7, 2009 3:02:05 PM, Oct. 8, 2009 at 9:27:05 AM).

³¹⁰ *Id.*

³¹¹ Thomas MacMillan, *supra* note 189 (comment by Walt on Dec. 8, 2009 11:23 AM. Posted December 8, 2009).

³¹² The use of written exams for personnel selection in government bureaucracies dates back to China in the third century, during the Han Dynasty, and expanded during the Sui and Sung Dynasties. See DERKE BODDE, *CHINESE IDEAS IN THE WEST* (1948). It represented an effort to decrease reliance upon wealthy aristocratic candidates and to open positions to the lower classes. *Id.*

an impartial manner, the qualifications of clerks.³¹³ President Ulysses Grant, who campaigned on a platform of civil service reform, signed the first such bill in 1871, which provided for entry level and promotional competitive examinations.³¹⁴ Following the assassination of President James Garfield by a disappointed office seeker in 1881, the civil service reform movement gained strength.³¹⁵ The Civil Service Act of 1883 placed approximately 10% of federal positions under the regime of competitive exams.³¹⁶ By the end of President Theodore Roosevelt's term, nearly two-thirds of federal positions were subject to civil service procedures.³¹⁷ The states soon followed suit.³¹⁸

The widespread assumption that the examination system is merit-based—indeed, the very equation of test success with merit—is reflected in judicial statements like the following:

[T]he deeply rooted policies that support civil service examinations . . . secure more efficient employees, promote better government, eliminate as far as practicable the element of partisanship and personal favoritism, protect the employees and the public from the spoils system and secure the appointment to public positions of those whose merit and fitness have been determined by proper examination.³¹⁹

³¹³ U.S. Office of Pers. Mgmt, *Biography of an Ideal: A History of the Federal Civil Service*, 190, available at <http://www.opm.gov/BiographyofAnIdeal/docs/TextOnlyVersion.pdf>.

³¹⁴ *Id.* at 195.

³¹⁵ *Id.* at 198–201.

³¹⁶ *Id.* at 199, 210.

³¹⁷ *Id.* at 216.

³¹⁸ Standardized tests were also employed by the Army during World War I to match recruits with appropriate jobs. See Anna S. Rominger & Pamela Sandoval, *Employee Testing: Reconciling the Twin Goals of Productivity and Fairness*, 10 DEPAUL BUS. L.J. 299, 305 (1998). Meanwhile, psychologists developed multiple-choice exams that purportedly measured intelligence. *Id.* By the 1950s, private employers were relying on such tests as an inexpensive method of personnel selection, even though it was recognized that the tests excluded women and minorities in disproportionate numbers. *Id.*

³¹⁹ *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs*, 630 A.2d 131, 135 (Conn. App. Ct. 1993). The remarks of U.S. District Judge Harrington in dismissing a challenge to the acknowledged disparate impact of the Massachusetts test for licensing teachers further illustrates the point:

Minimal standards are as necessary to the teaching profession as they are to the legal and medical professions. For how else can the public be assured that a teacher is competent? A person who fails the bar examination does not practice law! A competent teacher is one who has thorough knowledge of his subject and the faculty of communicating that knowledge effectively to his students. No student deserves to suffer an inferior education because he was exposed to a teacher less than qualified. Society would be better served for plaintiffs to ameliorate their scholastic deficiencies by further disciplined study, rather than to seek to undermine the standards of a profession most es-

Not surprisingly, the *Ricci* plaintiffs began their Supreme Court brief with the blanket assertion that “Connecticut law and New Haven’s charter implement a civil service system that promises fair and merit-based treatment for all.”³²⁰

But what began as a progressive reform has evolved into a calcified structure that has little to do with actual qualifications for, or ability to perform, the job.³²¹ The civil service system is easily gamed, and at its best rewards rote memorization over all other skills. It has also become the major obstacle to equal employment opportunity in the public sphere. Replacing “nepotism, cronyism, political horse-trading, graft and bribery” with a “strictly merit-based system”³²² is a laudable goal, but one hardly achieved by awarding jobs to the winners of the multiple-choice sweepstakes. As District Judge Nicholas Garaufis recently stated in his ruling against the New York City Fire Department examinations:

[It] is natural to assume that the best performers on an employment test must be the best people for the job. [But] when an employment test is not adequately related to the job for which it tests—and when the test adversely affects minority groups—we may not fall back on the notion that better test takers make better employees.³²³

Moreover, Justice Ginsburg notes that nothing in the New Haven City Charter requires selection of firefighters by multiple-choice exams.³²⁴ Rather, it mandates competitive examinations that are “practical in nature, shall relate to matters which fairly measure the relative fitness and capacity of the applicants to discharge the duties of the position which they seek, and shall take into account character, training, experience, physical and mental fitness.”³²⁵ The City could thus choose among a variety of evaluation methods. Instead, it has preserved the regime set out in its two-

sential to the vitality of a nation’s culture.

Alston v. Massachusetts, 661 F. Supp. 2d 117, 125 (D. Mass. 2009).

³²⁰ Brief for Petitioner on the Merits at 2, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³²¹ Some public employers are therefore abandoning the system. See, e.g., Caitlin Castello, *Wellesley Town Meeting Votes to Drop Civil Service for Police*, BOS. GLOBE, Apr. 11, 2010, at 7.

³²² Complaint at ¶ 15, *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006) (No. 3:04cv1109).

³²³ *United States v. City of New York*, 637 F. Supp. 2d 77, 84 (E.D.N.Y. 2009).

³²⁴ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009).

³²⁵ *Id.*

decades-old collective bargaining agreement with the firefighters union,³²⁶ particularly the 60% written to 40% oral split.

No exploration of alternatives has apparently ever been undertaken. This is most likely because of pressure from the firefighter's union, which supported challenges to the City's decision not to certify the exam results, and even initially filed its own suit.³²⁷ The case was ultimately dismissed because the court ruled the collective bargaining agent could not take sides in the dispute.³²⁸ The firefighters union later supported its white members through other means.³²⁹

Like many public employers, the NHFD has historically promoted in lock-step order of test scores.³³⁰ Where it has deviated from civil service rules, it has been to promote white officers to vacancies that did not even exist—a practice known as “underfilling”—which gives these candidates an advantage when the positions actually open.³³¹ This practice was ultimately struck down by the courts.³³² Even as the *Ricci* case was pending, the firefighters union and NHFD were again being sued for circumventing civil service requirements to promote a favored candidate.³³³

When the City tried to alleviate some rigid aspects of civil service appointment, for example rounding test scores off to the nearest integer rather than carrying them out to the hundredths place, white officers successfully challenged it.³³⁴ Promotions in the police department, as a result, had to be made in strict order of test scores from the eligibility list: Sgt.

³²⁶ *Id.* at 2691, 2669. Unfortunately in such contexts, there is a history of union heads advantaging themselves and their buddies, often to the detriment of minorities and women. *See generally* PHILIP S. FONER, BLACK WORKERS: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT (Foner & Ronald L. Lewis eds., 1978) (including statistical data on free black labor).

³²⁷ *New Haven Firefighters Local 825 v. City of New Haven*, 2005 WL 3531465, at *1 (D. Conn. Dec. 22, 2005). *See* Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 25, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³²⁸ *New Haven Firefighters Local 825*, 2005 WL 3531465, at *1.

³²⁹ *See* Allan & Bazelon, *supra* note 19. The union's support of the *Ricci* plaintiffs not surprisingly had a polarizing effect on the morale of black firefighters like Gary Tinney, who reported: “I can walk into firehouses and these [white] guys will walk away from me.” MacMillan, *supra* note 298.

³³⁰ *See Broadnax v. City of New Haven*, 851 A.2d 1113, 1120 n.9 (Conn. 2004).

³³¹ *Id.* at 1119 n.2.

³³² *Id.* at 1138.

³³³ *See Broadnax v. City of New Haven*, 932 A.2d 1063 (Conn. Super. Ct. 2007).

³³⁴ *See Kelly v. City of New Haven*, 2004 WL 114377 (Conn. Super. Ct. 2004).

James W. Kelly (83.30); Sgt. John P. Kelly (83.00); Sgt. Joseph Streeto (78.39); Sgt. Kevin Emery (78.10); Sgt. Diane Langston (78.02).³³⁵ No responsible testing expert could validate such overly fine-tuned selections, which ignore both the margins of error as well as the limits of the test's validity.

A. TEST VALIDITY AND JOB RELATION

Multiple-choice (sometimes dubbed "multiple-guess") exams are popular in large part because "they are easy and inexpensive to administer, and seemingly 'objective.'"³³⁶ Scored mechanically, they appear to take corruption, bias, and favoritism out of the process. Yet they are of dubious validity in predicting job performance, place a premium on test-taking skills, strategies, and gambits,³³⁷ and are widely recognized as disadvantaging minorities.³³⁸

Two members of the *Ricci* majority themselves, Justices Clarence Thomas and Antonin Scalia, have criticized the continued reliance by law schools on the multiple-choice LSAT: "[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions test (LSAT). Nevertheless, law schools continue to use the test and then attempt to 'correct' for black underperformance by using racial discrimination in admissions."³³⁹ Yet they were seemingly unconcerned with the discriminatory use of such tests in the civil service context.

Griggs teaches that "[i]f an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the

³³⁵ *Id.* at 4. ,

³³⁶ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 25, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³³⁷ *Vulcan Pioneers v. New Jersey Dep't of Civil Servs.*, 625 F. Supp. 527, 539 (D.N.J. 1985). The dramatic expansion of the test-preparation industry—Kaplan, Princeton Review, etc.—only underscores this point.

³³⁸ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 25, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). See also Winfred Arthur Jr., Bryan D. Edwards, & Gerald V. Barrett, *Multiple-Choice and Constructed Response Tests of Ability: Race-Based Subgroup Performance Differences On Alternative Paper-and-Pencil Test Formats*, 55 PERSONNEL PSYCHOL. 985, 991–92 (2002).

³³⁹ *Grutter v. Bollinger*, 539 U.S. 306, 369–70 (2003) (Scalia, J. & Thomas, J., concurring in part and dissenting in part).

practice is prohibited.”³⁴⁰ “Congress has placed on the employer the burden of showing that any [such] given requirement must have a manifest relationship to the employment in question.”³⁴¹ Tests must be shown to be “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated,” and to “fairly [measure] the knowledge or skills required by the particular job or class of jobs which the applicant seeks.”³⁴² In short, exams must reliably predict an individual’s success on the job. As the *Griggs* court noted, “[what] Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.”³⁴³

As U.S. District Judge Garaufis observed, the *Griggs* doctrine operates as both a limitation and a license: employers are given explicit permission to use job-related tests even if they have adverse impact, but only if they can be validated through professionally accepted methods.³⁴⁴ When Congress codified *Griggs* in 1991, it emphasized that a practice that produces disparate impact must be *both* “job related for the position in question and consistent with business necessity.”³⁴⁵

“History,” Chief Justice Warren Burger noted, “is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress mandated the commonsense proposition that they are not to become masters of reality.”³⁴⁶ Now, with *Ricci*, such tests have indeed become “mas-

³⁴⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³⁴¹ *Id.* at 432.

³⁴² *Id.* at 434 (alteration in original). Since *Griggs*, the Court requires even more rigorous statistical demonstration of job relation by professionally accepted psychometric standards. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Connecticut v. Teal*, 457 U.S. 440 (1982).

³⁴³ *Griggs*, 401 U.S. at 436 (alteration in original). Since “neither the high school completion requirement nor the general intelligence test [was] shown to bear a demonstrable relationship to successful performance of the jobs for which it was used,” Duke Power Company could no longer use them as selection devices. *Id.* at 431.

³⁴⁴ *United States v. City of New York*, 637 F. Supp. 2d 77, 99 (E.D.N.Y. 2009).

³⁴⁵ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

³⁴⁶ *Griggs*, 401 U.S. at 433. A recent example is the recipient of the Nobel Prize in Medicine for 2009, Carol W. Greider. See Regine Nuzzo, *Biography of Carol W. Greider*, 102 PROCEEDINGS NAT’L ACAD. SCI. U.S. AM. 8077 (2005) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1149435/?tool=pmcentrez>. Because she suffers from dyslexia, which affected her scores on standardized tests, only two graduate schools even offered her an interview. *Id.* Similarly, by her own admission, Sonia Sotomayor did poorly on her SAT, but nonetheless graduated Princeton with highest academic honors and now sits on the Supreme Court.

ters of reality,” as evidenced by Justice Kennedy’s naïve reliance on one firefighter’s plea for certification of the results at the CSB: “[E]very one’ of the questions on the written examination ‘came from the [study] material . . . [I]f you read the materials and you studied the material, you would have done well on the test.”³⁴⁷

But what both Kennedy and this firefighter failed to recognize is that, while “[a] test fashioned from materials pertaining to the job . . . superficially may seem job-related, [w]hat is at issue is whether it demonstrably selects people *who will perform better the required on-the-job behaviors*.”³⁴⁸ As the First Circuit Court of Appeals observed many years ago: “[T]here is a difference between memorizing (or absorbing through past experience) the firefighter terminology and being a good firefighter. If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary, the team might acquire authorities . . . who could not bat, pitch, or catch.”³⁴⁹ Indeed, there is a wide gulf between abil-

See Walter Kirn, *Life, Liberty and the Pursuit of Aptitude: Do Our Merit-based Ideas Get Us What We Deserve?*, N.Y. TIMES SUNDAY MAG., July 5, 2009, at 11. Our “conventional, test-based notions of merit might well have stopped her, had they been strictly enforced, before she even got started.” *Id.* Author Walter Kirn himself won the multiple-choice competition and ended up at Princeton, only to find that his perfect SAT scores did little to ensure real academic success. See WALTER KIRN, *LOST IN THE MERITOCRACY: THE UNDEREDUCATION OF AN OVERACHIEVER* (2009).

³⁴⁷ Ricci v. DeStefano, 129 S. Ct. 2658, 2667 (2009). Similar circularity of logic drove the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976). Test 21, which evaluated verbal ability, was held validated as a useful indicator of police academy success (rather than actual performance on the job) by a validation study showing a positive correlation between the test scores entering the training academy and test scores during the training program. *Id.* at 258, 262, 270 (Brennan, J., dissenting). As Justice Brennan noted, this is an unsurprising correlation, since both sets of tests put a premium on reading ability:

Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than “job-specific ability.” As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is “job related” is plainly erroneous.

Id. at 261–63, 270.

³⁴⁸ NAACP v. Beecher, 504 F.2d 1017, 1021–22 (1st Cir. 1974) (emphasis added).

³⁴⁹ *Id.* at 1023. Multiple-choice tests are “more probative of the test-taker’s ability to recall what a particular text stated on a given topic than of his firefighting or supervisory knowledge or abilities.” *Vulcan Pioneers v. New Jersey Dep’t of Civil Servs.*, 625 F. Supp. 527, 539–40 (D.N.J. 1985). Reviewing a similar exam, the Eleventh Circuit observed: “The best that can be said of the City’s test based on the evidence at trial was that it may have been valid with respect to reading materials provided to the applicants. This is immaterial, however, to whether the content of the questions related to the performance of the job [of fire lieutenant].” *Nash v. City of*

ity to perform a job and *ability to think about it*.³⁵⁰

Civil service multiple-choice exams for promotional positions are aptly characterized as “quasi-academic hurdle[s]” having little relation to job success.³⁵¹ In the *Ricci* case, the limitations of such tests were exacerbated by the way the exam was administered—after a three-month cramming period during which candidates were directed to the specific portions of the fire manuals that would be tested.³⁵²

Regarding professional education in the fields of law, medicine, and engineering, an influential Carnegie study acknowledged that students must learn abundant amounts of information, “but the ‘bottom line’ of their efforts will not be what they know *but what they can do*.”³⁵³ Knowing what to do and *being able to actually do it* are two very different things, and “stressful jobs, like those of police officers and firefighters, are especially prone to this problem.”³⁵⁴

Drivers obtain their licenses by first passing a multiple-choice test, which requires them to identify traffic signs and calculate the braking distance at certain speeds. This is followed, however, by an actual road test. Similarly, scuba divers are certified by an initial written test, requiring them to identify equipment, buoyancy, and water pressure at different depths, but after which they must pass a physical test consisting of pool and open water dives. Law schools select faculty not solely on the basis of academic achievement, but only after evaluating the candidate’s job talk, to observe his or her skills and potential as a teacher.³⁵⁵

Nonetheless, despite ample evidence that there is at best a poor correlation between multiple-choice tests and fire officer job performance, the *Ricci* Court majority stubbornly insisted that Frank Ricci had “earned” his

Jacksonville, 837 F.2d 1534, 1538–39 (11th Cir. 1988), *op. reinstated*, 905 F.2d 355 (11th Cir. 1990).

³⁵⁰ *Vulcan Pioneers*, 625 F. Supp. at 541.

³⁵¹ *Nash*, 837 F.2d at 1539 n.7.

³⁵² *See Ricci*, 120 S. Ct. at 2666.

³⁵³ William M. Sullivan, Anne Colby, Judith Welch Wagner, Lloyd Bond, & Lee. S. Schulman, *Educating Lawyers* 23 (2007) (emphasis added).

³⁵⁴ Richard S. Barrett, *Challenging the Myths of Fair Employment Practices* 40 (1998).

³⁵⁵ In contrast, lawyers are licensed based on written bar examinations requiring memorization of the law of that jurisdiction. As such, they have been severely criticized. *See Symposium, Rethinking the Licensing of New Attorneys: An Exploration of Alternatives to the Bar Exam*, 20 GA. ST. U. L. REV. vii. (2004) (examining alternatives to bar examinations and concluding that current examinations fail to assure competency of attorneys to practice independently). *See also* *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 740 n.13 (S.D. Miss. 2003) (reporting the reliability coefficient of the 1991 multi-state bar was a modest 0.79).

promotion to fire lieutenant, along with the awesome responsibilities that come with that position, by virtue of his multiple-choice prowess.

Test experts universally recognize that the knowledge, abilities, and skills (KASOs) required of a fire lieutenant or captain cannot be meaningfully measured by a multiple-choice examination,³⁵⁶ and courts have so held.³⁵⁷ As one decision noted, a fire captain's job is a sophisticated position that "involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities none of which is easily measured by a written, multiple-choice test."³⁵⁸

Cognitive and reading skills, the primary matters addressed by such tests, are a small part of what makes an effective fire supervisor.³⁵⁹ And by the time a firefighter is eligible for promotion, job knowledge of the sort tested by the New Haven exams is presumed because the firefighter has completed the training academy and been on the job for several years.³⁶⁰ A firefighter's ability to memorize and regurgitate a manual is a non-sequitur at the point of promotion.

³⁵⁶ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 16, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). "Written tests do not correspond well to the skills and abilities actually required for the job of a fire officer and are thus poor predictors of which candidates will make successful fire lieutenants and captains." *Id.* Even when used to select entry-level firefighters, written tests obviously cannot address the myriad of skills cadets need to succeed, such as ability to operate fire engines, to perform rescues from multiple-story buildings, and to work as a team.

³⁵⁷ See *Nash v. City of Jacksonville*, 837 F.2d 1534, 1535 (11th Cir. 1988) ("Just because test questions are drafted by qualified city employees does not mean that the questions are job-related."); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 616 F.2d 350, 359 (8th Cir. 1980) (finding invalid the St. Louis Fire Department's multiple-choice test used for fire captain eligibility because of its inability to differentiate job performance), *but see* *Firefighters Inst. for Racial Equal. ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 904 (8th Cir. 2000) (upholding city's multiple-choice test for battalion chief); *Vulcan Pioneers v. New Jersey Dep't of Civil Services*, 625 F. Supp. 527, 539–542 (D.N.J. 1985) (finding invalid the multiple-choice tests used by fire departments throughout New Jersey because the tests failed to evaluate the abilities required of a fire captain). See also *Lewis v. City of Chicago*, 2005 WL 693618, at *13 (N.D. Ill. 2005), *rev'd on other grnds*, 528 F.3d 488 (7th Cir. 2008) (finding city's evidence insufficient to support its reliance on test performance as an indicator of cadets' trainability because test was designed around on-the-job skills rather than actual training skills).

³⁵⁸ *Firefighters Inst. for Racial Equal.*, 616 F.2d at 359. There are validated written instruments available that do evaluate critical non-cognitive abilities, but they are rarely used. See *United States v. City of New York*, 637 F. Supp. 2d 77, 122 (E.D.N.Y. 2009).

³⁵⁹ *Vulcan Pioneers*, 625 F. Supp. at 547.

³⁶⁰ Brief for International Association of Black Professional Fire Fighters et al. as Amicus Curiae Supporting Respondents at 19, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

Rank-ordering candidates on the basis of these multiple-choice tests is particularly inappropriate. It “satisfies a felt need for objectivity, but it does not necessarily select better job performers.”³⁶¹ Reflecting the consensus of test professionals, Justice Ginsburg recognized that a “difference of one or two points on a multiple-choice exam should not be decisive of an applicant’s promotion chances if that difference bears little relationship to the applicant’s qualifications for the job.”³⁶² Even if an exam has validity as a crude pass/fail screening device, it may not be a reliable method of ranking candidates, which requires a showing that a better score is likely to translate into better job performance.³⁶³ Fire departments have not been able to demonstrate this.³⁶⁴ Typically, most test-takers answer a substantial percentage of the questions correctly, and the only differentiation comes as a result of a few questions that do not correlate with job performance.³⁶⁵

A recent administration of the entry-level firefighter exam in Massachusetts was found to have a margin of error of 8 points, so that there was no meaningful difference between a score of 100 and a score of 92.³⁶⁶ And the city of Chicago devoted considerable resources to develop an entry-level firefighter exam, only to have the experienced industrial psychologist it retained for the project admit in testimony that there was no statistical difference between scores within 13 points of each other—that is, a 98

³⁶¹ *Guardians Assoc. of the N.Y.C. Police Dep’t., Inc. v. Civil Serv. Comm’n*, 630 F.2d 79, 100 (2d Cir. 1980), quoted in *United States v. Vulcan Soc’y, Inc.*, 637 F. Supp. 2d 77, 128 (E.D.N.Y. 2009).

³⁶² *Ricci v. DeStefano*, 129 S.Ct. 2658, 2705 (2009) (Ginsburg, J., dissenting).

³⁶³ See *Vulcan Pioneers*, 625 F. Supp., at 538–39 (explaining that while content validity of an exam is appropriate for determining the minimum level of competency needed for a job, it is inappropriate for ranking purposes; finding invalid the multiple-choice exam that tested only knowledge and not abilities); *Hearn*, 340 F. Supp. 2d at 737 n.9 (“Content validity is an appropriate tool for validation of a test used solely as a measure of minimal competence to perform the job But for ranking purposes, unrelated to minimum competence, there must be proof that a higher test score correlates to better job performance.”). See also EEOC Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. §§ 5(G), 14(C)(9), 15(C)(7) (1978) (ranking is appropriate only where the user can show “that a higher score on a content valid selection procedure is likely to result in better job performance.”) This is especially the case where ranking “has a greater adverse impact than use on an appropriate pass/fail basis.” *Id.* at § 5(G). See also *United States v. Vulcan Society, Inc.*, 637 F. Supp. 2d 77, 128–30 (E.D.N.Y. 2009).

³⁶⁴ See, e.g., *Firefighters Inst.*, 616 F.2d at 359, *rev’d on other grnds*, 528 F.3d 488 (7th Cir. 2008); *Lewis v. City of Chicago*, 2005 WL 693618 (N.D. Ill. 2005), *rev’d on other grnds*, 528 F.3d 488 (7th Cir. 2008).

³⁶⁵ *Firefighters Inst.*, 616 F.2d at 360.

³⁶⁶ *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 173 (D. Mass. 2006); see also *Bos. Police Supervisors Fed’n v. City of Boston*, 147 F.3d 13, 24 (1st Cir. 1998) (scores within a three-point spread were functionally equivalent on promotional exam).

could not be meaningfully distinguished from an 85.³⁶⁷ Chicago ignored the consultant's admonition.³⁶⁸

Test validation was aptly defined by New Haven's then-Corporation Counsel Thomas Ude in his remarks to the CSB: "The question of whether an examination is valid is: is it really testing for what you're looking to test for?"³⁶⁹ Validation ensures that there is a reliable scientific basis for inferring that a higher test score corresponds to superior job skills and performance.³⁷⁰ Ude further explained:

[T]he goal of the test is to decide who is going to be a good supervisor ultimately, not who is going to be a good test-taker.

....

... [N]o one faced with a scene that our Lieutenants and Captains will be called upon to supervise, assess and manage is going to be presented with a multiple-choice option.

....

When you're talking about something like accounting where the principles are clear and there's pretty much only one way to do it, a multiple-choice exam or some other type of exam like that may be much simpler. But this isn't accounting.³⁷¹

The Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures ("EEOC Uniform Guidelines"),³⁷² traditionally granted great deference by the courts,³⁷³ recognize

³⁶⁷ *Lewis*, 2005 WL 693618, at *5 (N.D. Ill. 2005), *rev'd on other grnds*, 528 F.3d 488 (7th Cir. 2008).

³⁶⁸ See *id.*

³⁶⁹ Joint App., *supra* note 53, at 138. Ude pointed to *Vulcan Pioneers, Inc. v. N.J. Dep't. of Civil Serv.*, 625 F. Supp. 527 (D.N.J. 1985), in which the court rejected the state's promotional exams for fire lieutenant and captain because they tested for the specific terminology used in a particular manual, rather than the underlying concepts. For example, one question asked, "According to Firefighting Principles and Practices, the quality that firefighters most want in an officer is [blank?]" 625 F. Supp., at 539. The judge found the test "more probative of the test-taker's ability to recall what was in a particular text than of his firefighting or supervisory knowledge or abilities." *Id.*

³⁷⁰ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 7, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³⁷¹ Joint App., *supra* note 53, at 139-40.

³⁷² 28 C.F.R. §50.14 *et. seq.* (2011).

³⁷³ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 ("The [EEOC], having enforcement responsibility, has issued guidelines interpreting 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412-13 (1975); *Firefighters*

three modes of validating selection devices.³⁷⁴ It is worth noting that these guidelines are barely mentioned in Justice Kennedy's *Ricci* opinion.³⁷⁵

The two more rigorous types, criterion-related and construct validity, require empirical demonstration that the device is predictive of or significantly correlated with job performance.³⁷⁶ The third, content validity, is the only one even arguably applicable in defense of the NHFD exams.³⁷⁷ Content validity is generally easier to establish,³⁷⁸ as it merely requires showing that the substance of the selection device is "representative of important aspects of performance on the job" for which it is used.³⁷⁹ Simp-

Inst. for Racial Equal. v. City of St. Louis, 616 F.2d 350, 358 n.15 (8th Cir. 1980) (recognizing that EEOC's interpretations of its Uniform Guidelines are "entitled to great deference by the court" because the guidelines are "highly technical and somewhat difficult for those untrained in test construction to comprehend").

³⁷⁴ See *Vulcan Pioneers v. New Jersey Dep't of Civil Servs.*, 625 F. Supp. 527, 545–46 (D. N.J. 1985).

³⁷⁵ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2679 (2009). Justice Kennedy refers to the guidelines only to criticize New Haven for not demanding a validity study. *Id.* One commentary plausibly speculates:

[T]he Court may have conflated the issue of professional test development with the more important question of test validation. In other words, although the tests used by New Haven had been professionally developed that does not necessarily mean they had been validated under the law. Rather, validation requires more extensive analysis of how the test might predict performance. . . .

Diane Avery, Maria L. Ontiveros, Roberto L. Corrada, Michael Selmi & Melissa Hart, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* 288 (8th ed. 2010).

³⁷⁶ *Vulcan Pioneers*, 625 F. Supp. at 545–46. A criterion-related study determines whether the test is a valid predictor of job performance by following test-takers who had been promoted and assessing their actual performance in the job for a period of time. *Id.*

³⁷⁷ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 7 n.2, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³⁷⁸ See *Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 93 (2d Cir. 1980).

³⁷⁹ 28 C.F.R. § 50.14, § 5(B) (2011). See also 28 C.F.R. § 14(C)(4) ("To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question. . . . In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. . . . As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid."). The test user should be prepared to "identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure." 28 C.F.R. § 15(C)(5).

"The mere fact that a test 'is representative of important aspects of performance on the

ly put, the content of the exam must match the content of the job.³⁸⁰ Common examples include requiring an applicant for a secretarial position to type several pages or a bookkeeper to tally revenues and expenses.

But as common sense tells us, and as numerous courts have concluded,³⁸¹ multiple-choice exams like those in *Ricci* do not remotely replicate the job of fire supervisor. This is why the Uniform Guidelines reflect a general skepticism regarding such paper and pencil tests,³⁸² and instead require empirical evidence that the knowledge tested is linked with better performance on the job.³⁸³ Because these tests are usually poor approximations of actual work behaviors, they rarely make the grade for content validity.³⁸⁴ U.S. District Judge H. Lee Sarokin succinctly summed up the experience with multiple-choice devices: “they elevate memory over ability, knowledge of abstract concepts over practical know-how, terminology over the ideas they represented, and test-taking ability overall.”³⁸⁵

job’ (as content validity requires) matters only because it is reasonable to suppose that such a test will usefully distinguish among candidates—in other words, that using the test in selection will lead to a better performing workforce.” *Lewis v. City of Chicago*, 2005 WL 693618, at *12 (N.D. Ill. Mar. 22, 2005) (citation omitted), *rev’d on other grnds*, 528 F.3d 488 (7th Cir. 2008), *rev’d* 130 S. Ct. 2191. However, that is rarely the case. In *Lewis*, for example, the City candidly conceded that there were no measurable differences in job performance between black and white firefighters despite markedly different scores on cognitive ability tests. *Id.* Nor could the City support its assertion that there was a relationship between test performance and the “trainability” of cadets. *Id.*

³⁸⁰ *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 512 (8th Cir. 1977); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 616 F.2d 350, 361 (8th Cir. 1980).

³⁸¹ See, e.g., *Nash v. Consolidated City of Jacksonville*, 837 F.2d 1534, 1538 (11th Cir. 1988); *Firefighters Inst. for Racial Equal.*, 616 F.2d at 357; *Vulcan Pioneers*, 625 F. Supp. at 539–42.

³⁸² See Uniform Guidelines § 14(b)(3) (“Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.”)

³⁸³ *Firefighters*, 616 F.2d at 357.

³⁸⁴ Uniform Guidelines § 15(C)(4). Compare *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, 2009 WL 604898 (W.D.N.Y. Mar. 9, 2009) (elaborate job analysis, test preparation, and validation process produced a content-valid exam) with *Lewis v. City of Chicago*, 2005 WL 693618, at *5 (N.D. Ill. Mar. 22, 2005) (entry-level firefighter test had a pronounced disparate impact on black applicants and was not a reliable measure of the four cognitive abilities it was designed to measure). Multiple-choice exams also typically raise issues regarding the readability of the questions, and invite criticism that the appropriate reading-level required for the test is beyond that required for the job. See, e.g., *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 741 (S.D. Miss. 2003) (considering testimony of expert witness that reading level of test exceeded level required for sergeant’s job by several grade levels, making the test more about reading ability than about actual required knowledge).

³⁸⁵ *Vulcan Pioneers*, 625 F. Supp. at 546. See also Arthur, Edwards, & Barret, *supra* note 338 (discussing firefighter promotional tests). Physical ability tests have been found to correlate substantially better with entry-level firefighter performance than cognitive exams. *Bradley v.*

Given the well-established EEOC standards, the record before the Court in *Ricci* was woefully inadequate to weigh the validity of the NHFD examinations, or to assess less discriminatory alternatives.³⁸⁶ While the majority justices were clearly impressed that Frank Ricci believed the test questions were based on the Department's own rules, procedures, "nationally recognized" materials, and "accepted standards" for firefighting, and that another firefighter insisted that "every one of the questions came from the study material,"³⁸⁷ all that says *nothing* about the test's capacities to predict supervisory performance.

Moreover, several firefighters who appeared before the CSB disagreed with these assertions,³⁸⁸ and some pointed out conflicts between the materials the test takers were told to study and actual NHFD practice.³⁸⁹ The consultant who prepared the exams admitted that the questions were taken from national textbooks, and that some had no relevance to the NHFD.³⁹⁰ The CSB was also advised that there was "quite a heavy empha-

City of Lynn, 443 F. Supp. 2d 145, 175 (D. Mass. 2006).

³⁸⁶ DIANE AVERY, *supra* note 375, at 288. This makes it particularly jarring to see Petitioners' Brief on the Merits begin with the blithe declaration that the exams in question were "content-valid." Brief for Petitioner on the Merits at 1, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³⁸⁷ *Ricci v. DeStefano*, 129 S. Ct. 2658, 2667 (quoting App. in No. 06-4996-cv at A785-86).

³⁸⁸ Even firefighters who supported the *Ricci* plaintiffs conceded that the tests were not well-suited to the NHFD. Melissa Bailey, *Latino Group Backs White Firefighters*, NEW HAVEN INDEP., Feb. 6, 2009, available at

http://www.newhavenindependent.org/archives/2009/02/firefighter_sto.php. One called the test "unfair," and testified at the CSB that some of the questions were not relevant to the knowledge or skills necessary for the supervisory positions, such as whether to park a fire truck facing "up-town" or "downtown," a question copied from a New York City training manual. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 146 (D. Conn. 2006). Others complained that there were questions that did not pertain to the NHFD, such as reference to a "Second Battalion," which the department does not have. Joint App., *supra* note 53, at 48. Some questions even referred to equipment no longer in use. *Id.*

Other complaints from firefighters concerned the cost of the study materials, which was over \$500, and the volume, which exceeded 1,200 pages. Kristen Jensen & Jane Mills, *Soto-mayor Ruling Exposes a Racial Split in Firehouses (Update 2)*, BLOOMBERG NEWS (June 25, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=adYWwnqH6kbs>. There were accusations as well that some firefighters had the books way in advance of the official exam notice. Joint App., *supra* note 53, at 112-13.

³⁸⁹ *Id.* at 44. For example, the question "If you get into a motor vehicle accident en route to an emergency call, what do you do?" required the answer "Call a supervisor of apparatus." However, the NHFD actually tells firefighters something different—to call the Chief or the police. *Id.* at 45.

³⁹⁰ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 20-21, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) (citations omit-

sis on issues that only drivers of an apparatus would be familiar with.”³⁹¹ The number of questions dealing with such narrow issues clearly disadvantaged those without that experience.³⁹² Because training in the NHFD was not “on a level playing field as it should be,” those receiving the most training were at a distinct advantage.³⁹³ Dr. Janet Helms, an expert on the influence of race and culture on test performance, observed that “there were more opportunities for training and performance in the actual roles that were tested if you were a white male than if you were members of the other groups.”³⁹⁴

Due to these numerous flaws in the NHFD written exams, the Society for Industrial and Organizational Psychology, with extensive experience designing and validating promotional tests for fire and police departments, urged the Supreme Court that “there is no basis to conclude that certification of the test results would have led to the promotion of the most qualified candidates.”³⁹⁵ Nor was there “any reasonable likelihood that the City could have demonstrated that the NHFD promotional examinations were valid.”³⁹⁶

A firefighter from neighboring Bridgeport appearing at the CSB reported that his city had downgraded the proportion of its civil service score based on the written test from 70% to 30% because “an individual’s ability to answer a multiple-choice [exam] does nothing but measure their ability to read and retain.”³⁹⁷ He added, “[t]he thing that separates whether you’re going to be a good officer or not is your ability to score well on [the oral exam, which]. . . deals with scenarios, real-life scenarios. What

ted).

³⁹¹ Joint App., *supra* note 53, at 119.

³⁹² *Ricci*, 554 F. Supp. 2d at 149.

³⁹³ Joint App., *supra* note 53, at 119.

³⁹⁴ *Id.* at 125. The EEOC Uniform Guidelines caution against selecting candidates on the basis of knowledge, skills, or ability that can be readily obtained in an orientation period or on the job. Uniform Guidelines, § 5(F). *See also* *Hearn v. City of Jackson*, 340 F. Supp. 2d 728 (S.D. Miss. 2003). Questions on the NHFD exams about the melting points of certain materials would seem to fall into that category. Joint App., *supra* note 53, at 138. A testing expert also concluded that certain questions had “some pretty complex descriptions, for example, for the tactical items, which would make it difficult for someone to really interpret and understand that without other information.” Joint App., *supra* note 53, at 106.

³⁹⁵ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 3, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

³⁹⁶ *Id.* at 6.

³⁹⁷ Joint App., *supra* note 53, at 65. Studies have validated firefighter entry-level exams when the written component is reduced to 40% of the composite score. *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 152–53 (D. Mass. 2006).

would you do in a particular situation?”³⁹⁸

The oral component of the New Haven selection process was designed to assess managerial and leadership skills by requiring candidates to give detailed responses to specific fire scene situations, to suggest training strategies, and to plan interactive scenarios addressing subordinates' concerns.³⁹⁹ It drew upon the candidates' years of on-the-job experience and in-service training.⁴⁰⁰ Nonetheless, the NHFD persisted in giving conclusive weight to the multiple-choice instrument.⁴⁰¹

Command presence is recognized as the hallmark of a successful fire officer. It requires the supervisor on the scene of a fire “to act decisively, to communicate orders clearly and thoroughly to personnel on the scene, and to maintain a sense of confidence and calm even in the midst of intense anxiety, confusion, and panic.”⁴⁰² The developer of the NHFD written tests admitted that they were not designed to evaluate these traits.⁴⁰³ Yet the consequences of promoting superior officers lacking command

³⁹⁸ Joint App., *supra* note 53, at 66. *See also* Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 3, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428); *Howe v. City of Akron*, 2008 WL 5101239 (N.D. Ohio Nov. 26, 2008) (regarding the fairness of an oral assessment exercise, which consisted in part of a conference with a subordinate, and was used to determine who was promoted to the rank of fire lieutenant or captain).

³⁹⁹ Brief for Petitioner on the Merits at 9, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). *See also* Briscoe Complaint for Damages and Injunctive Relief, at ¶ 10 (providing examples of such questions).

⁴⁰⁰ *See* Brief for Petitioner on the Merits at 9, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

⁴⁰¹ A 60% oral and 40% written split would have ranked firefighter Briscoe ninth, instead of twenty-fourth. Briscoe Complaint for Damages and Injunctive Relief, at ¶ 15. A 70% oral to 30% written ratio would have placed three other black candidates on the promotion list as well. *Id.* at ¶ 17.

Critics of oral exams argue they are open to subjectivity, bias, and manipulation, and note in the specific context of the New Haven procedures that each panel had two minority members, thus potentially slanting the results. *See* Comments, *After Ricci Ruling, Black Firefighter Sues City* (Oct. 15–20, 2009), available at http://newhavenindependent.org/archives/2009/10/after_ricci_rul.php. But the *Ricci* plaintiffs conceded that the panelists were knowledgeable, well-trained and prepared, and that the process was closely monitored by IOS experts; and “post-assessment review showed the panel ratings were sound, consistent, and indicative of a high level of reliability.” Brief for Petitioner on the Merits at 9, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

⁴⁰² Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 11, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) (citations omitted).

⁴⁰³ Joint App., *supra* note 53, at 106. *See also* *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 511 (8th Cir. 1980) (explaining that failure to test for the major attribute of a fire captain, supervisory ability, is the typical fatal flaw found in these exams).

presence can be dire.

A two-year federal investigation into a fatal 2007 fire at a Boston restaurant concluded that the fire supervisors made a series of tragically flawed decisions that caused a massive fireball to propel through the building and kill two firefighters.⁴⁰⁴ The Firefighter Fatality Division of the National Institute for Occupational Safety and Health (NIOSH) concluded that the first supervisor to arrive failed to adequately size up the situation or establish a command post, but instead proceeded immediately into the burning building.⁴⁰⁵ The Report observed: “To effectively coordinate and direct firefighting operations on the scene, it is essential that the IC [(incident commander)] does not become involved in the fire fighting efforts.”⁴⁰⁶ Meanwhile, the second supervisor ordered the windows broken before the fire had been properly ventilated, causing the fatal downdraft.⁴⁰⁷ He had failed to communicate with the firefighter trying unsuccessfully to cut a release hole in the roof, and did not know the number or location of the firefighters in the building.⁴⁰⁸

The NIOSH blamed inadequate training and oversight of the supervisors for the breakdown of the entire incident management system—failure to assess the scene, to maintain a command post, to properly evaluate risk versus gain, to assign and delegate functions, to maintain accountability, and to effectively communicate with firefighters on the scene.⁴⁰⁹ In short, the Boston Fire Department failed to ensure that its superior officers possessed the skills and knowledge—the job performance requirements (JPRs)—to safely and effectively carry out their duties.⁴¹⁰

Virtually foreseeing such a tragic event, U.S. District Judge Sarokin recognized, in his ruling against a multiple-choice exam for selection of

⁴⁰⁴ Donovan Slack, *Federal Report Finds Supervision, Training Lacking*, BOS. GLOBE, Nov. 12, 2009, at G1, available at <http://www.cdc.gov/niosh/fire/reports/face200732.html>.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* There were other blunders as well, such as a firefighter proceeding into the building with a water hose that was both too short and lacking in a sufficient water connection. *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ Interesting in this regard is a comparison made by a noted testing expert. He administered an exam that included the question “When firefighters arrive on the scene of a house fire, what should the lieutenant do first?” White candidates were the highest scorers on the written question. But when he showed test-takers a photo of a home in flames and asked for an oral response, minorities did considerably better. Krissah Thompson, *Employment Exam Writers Tread Carefully*, WASH. POST, Sept. 7, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/06/AR2009090601988.html>.

fire captain, that while the most important function of the firefighter is to fight fires, “the most important job of the fire captain is to evaluate conditions at a fire scene and direct appropriate action be taken.”⁴¹¹ A selection process that fails to emphasize that dimension of the job is “fundamentally in error.”⁴¹²

To equate the qualifications for a fire supervisor with the results of a multiple-choice exam is the height of folly. Corporation Counsel Ude had this in mind when he asked the CSB not to certify the NHFD exam results:

It is not, as a rule, fair to change the rules of a game after the game has been played. But we’re not talking about a game here. We’re talking about a promotional exam that will affect the lives and safety not only of the people promoted but the people who they will be supervising and commanding and the citizens and the public of this city.⁴¹³

Police and fire chiefs often complain about the arbitrary constraints placed upon them by civil service testing. Boston Police Commissioner Edward F. Davis points to the promotion exam as a constant “roadblock for minorities,” impeding efforts to diversify the supervisory ranks: “One percentage point [on the exam] does not make or break a candidate, and we need to consider other things in promotions, such as leadership and the ability to communicate. All those things can’t be tested.”⁴¹⁴ He added that “the disparate impact of the exam stems from the way it’s administered—it’s a written exam, and at the end of the day, you don’t have enough minority candidates to choose from. I can’t tell you why that’s happening, but I can tell you that it is.”⁴¹⁵

⁴¹¹ *Vulcan Pioneers, Inc. v. New Jersey Dep’t of Civil Servs.*, 625 F. Supp. 527, 541 (D.N.J. 1985).

⁴¹² *Id.*

⁴¹³ Joint App., *supra* note 53, at 140.

⁴¹⁴ *Id.* See also Maria Cramer, *As Hub Promotes Officers, Discrimination Claims Await Hearing*, BOS. GLOBE, Feb. 27, 2010, at 1, 9 (reporting the promotion of twenty-five sergeants, only one of whom was a minority; six captains and fourteen lieutenants, all white males).

The consequences of inhibiting the ability of public safety forces to diversify their supervisory ranks are illustrated dramatically by the arrest of internationally-recognized Harvard scholar Henry Louis (“Skip”) Gates in his own home in July, 2009. The white sergeant, called to the scene on a neighbor’s report of Gates’ efforts to pry loose his stuck door, accused Gates of trying to burgle the house, engaged him in a verbal confrontation, and then arrested him for disorderly conduct. An African American police sergeant in Boston observed that if he had responded to the call, “I would have immediately recognized Skip. The fact that a white officer, who patrols Cambridge for a living, didn’t recognize this national celebrity in front of him, tells you where we are in terms of cultural diversity.” Brian R. Ballou, *Minorities Hired But Not Advanced*, BOS. GLOBE, July 27, 2009, at G1.

⁴¹⁵ *Id.* Commissioner Davis complained that he was legally bound to mimic the results of

B. TEST BIAS

Bias is a problem as old as written exams themselves. The first bureaucracy to utilize them, in China, sought to mitigate favoritism by employing copyists to rewrite applicants' answers to ensure that the handwriting could not be identified by the graders, who might be inclined for or against certain persons.⁴¹⁶

The concern about equity persists centuries later. The consultant who prepared the NHFD exams admitted that job knowledge tests like the kind used by the City "have a long history of resulting in disparate impact."⁴¹⁷ Indeed "[i]t is well-established that minority candidates fare less well than their Caucasian counterparts on standardized written examinations, and especially multiple-choice tests."⁴¹⁸ Although experts on standardized testing are unable to fully explain this disparity,⁴¹⁹ studies suggest that: (1) the

the statewide multiple-choice exam even though it favors rote memorization over all other skills, but was exploring other alternatives like interviews to assess applicants' ability to handle crime investigations and other real world situations faced by officers. *Id.*

Some chiefs have found their way around the constraints. A 1974 study of the Cambridge Police Department by the International Association of Chiefs of Police criticized the department's "abdication" of applicant evaluation to civil service, and recommended that oral interviews be conducted as part of the promotion process. *Burns v. Sullivan*, 619 F.2d 99, 102 n.4 (1st Cir. 1980). The Chief did just that, and rated interviewees on the basis of attitude, loyalty, judgment, leadership, supervisory abilities, initiative, resourcefulness, and technical skills. *Id.* When challenged for deviating from strict civil service practice, the court upheld the Chief's decision to skip over two white officers at the top of the sergeants' eligible list in favor of black candidates. *Id.* The Massachusetts civil service statute requires the appointing authority to submit a written explanation justifying bypass of the candidate at the top of the list, and the administrator has the right to reject it. MASS. GEN. LAWS ch. 31, § 27 (2010); *Lopez v. Massachusetts*, 558 F.2d 69 (1st Cir. 2009); *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 150 (D. Mass. 2006).

Frustration with civil service is shared by U.S. District Judge Patti Saris, who complained that "Massachusetts has had over thirty years to fine-tune a better approach" to firefighter selection than multiple-choice exams, which she found had a disparate impact on minorities and no relation to job performance. *Bradley v. City of Lynn*, 443 F. Supp. 2d at 175.

⁴¹⁶ HANDBOOK OF PSYCHOLOGICAL & EDUCATIONAL ASSESSMENT OF CHILDREN 19 (Cecil R. Reynolds & Randy W. Kamphaus eds., 2d ed. 2003).

⁴¹⁷ E-mail from Chad Legel, President, Indus./Organizational Solutions, Inc., to Brian Vavra, Research Assistant to Professor Mark S. Brodin (Jun. 25, 2009). Legel added that "commonly the impact can be defended based on test validity," which as noted above in Part VI.A could not be demonstrated here.

⁴¹⁸ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 24–25, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428) (citations omitted). "Year after year, test scores line up in the same race-regimented order, with whites and Asians faring better on most standard employment exams than blacks and Latinos." Thompson, *supra* note 410.

⁴¹⁹ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 156 (D. Conn. 2006).

reading level required may exceed that needed on the job, exacerbating disparities among racial subgroups in reading comprehension; (2) racial minorities are less “test wise” than white test-takers, and multiple-choice tests are particularly susceptible to test-taking strategies; (3) a test-taker’s unfavorable view of a test’s validity negatively influences performance, and evidence indicates that minority test-takers generally have a less favorable view of traditional written tests.⁴²⁰

As the Industrial-Organizational Psychologists informed the Court in *Ricci*, “[r]egardless of the exact cause of the disparity, it is clear that the use of written, multiple-choice tests beyond what is justified by the demands of a particular job has the effect of disproportionately excluding minority candidates without any corresponding increase in job performance.”⁴²¹ Boston College psychology professor Janet Helms had similarly advised the New Haven CSB.⁴²²

Part of the explanation for the disparity between the scores of minorities and whites in situations like the NHFD no doubt lies in their different experiences and opportunities. White firefighters are often second or third generation firefighters, sometimes within the same department.⁴²³ In New

⁴²⁰ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 24–25, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428). Also contributing to the test success gap, candidates of lower socioeconomic status may not have the same exposure to the experiences covered by, or the opportunities to prepare for, the test. Joint App., *supra* note 53, at 128. Studies of SAT results show a strong positive correlation between multiple-choice scores and family income. Neal Gabler, *The College Admissions Scam*, BOS. SUNDAY GLOBE, Jan. 10, 2010, at C9; Lisa Kocian, *Strong Showing on SAT’s*, BOS. GLOBE, Sept. 13, 2009, at G1 (“[average SAT scores go up] in lockstep with family income”). Individuals who speak English as a second language are obviously at a disadvantage on these tests. See Joint App., *supra* note 53, at 126 (“Sometimes they do because they [switch languages] during periods of stress. And so they’re unable to function as efficiently during the test as their monolingual counterparts. Sometimes it occurs because they have insufficient time to complete the examination.”) Finally, minority test-takers may score lower than white candidates if they are expected not to perform well—an adverse self-fulfilling prophecy. *Ricci*, 554 F. Supp. 2d at 149. “Test scores may be lower if the test-takers are functioning under expectations that they will not perform well on the test. We talk about that in psychology as stereotype threat, fear that they will confirm negative stereotypes about their group by not performing well. This places the person under undue stress and, rather than focusing on the test per se, they expend a lot of energy in trying to do the best they can rather than simply answering the questions.” Joint App., *supra* note 53, at 127. See also Arthur, Edwards, & Barret, *supra* note 338, at 988, 992.

⁴²¹ *Id.*

⁴²² Joint App., *supra* note 53, at 131 (“[W]e’ve always found a disparity between blacks and whites, Hispanics and whites on [multiple choice tests]. The disparity has been about the same. It deviates by a couple of points. But we can almost tell you what your disparity will be even before the test is taken.”).

⁴²³ Ossher, Brooks, & Robinson, *supra* note 27, at 1, 8.

Haven, one incumbent captain's father and grandfather both served as fire chief in the NHFD; another firefighter's father and four uncles were firefighters; and Frank Ricci himself has an uncle and two brothers who are firefighters.⁴²⁴ Ricci even told an interviewer, "when we were kids, we could either be a fireman, or a fireman, or a fireman."⁴²⁵

This generational advantage gives white firefighters access to mentoring, advice, and institutional knowledge that can prove valuable when maneuvering the civil service maze.⁴²⁶ One black New Haven firefighter complained to the CSB that "the people that have [the right] books are uncles, nephews, kids from people that have been in the Fire Department for years. . . . I never had anyone that was a grandfather or uncle or anybody."⁴²⁷ Another commented, "You know, a lot of my Caucasian counterparts, they've come into the fire houses when they were little kids."⁴²⁸ A third summed it up to a reporter: "If you look at the history of the [NHFD] there's a group of folks, their fathers, their grandfathers, their uncles—they're all part of this network" that only white firefighters can utilize.⁴²⁹

The fire service in America has a long history of perpetuating legacies, where working in the fire department becomes a family tradition, indeed the family business.

In any career fire department, it is commonplace to see the same surnames on seniority rosters spanning decades. In essence, the fire service, like many other professions, can often exemplify "opportunity hoarding by one group to the detriment of another." Indeed, "opportunity hoarding" can be widely seen in the numerous reverse discrimination suits against fire departments by individuals, such as [Ricci et.al.], seeking to

⁴²⁴ See Allan & Bazelon, *supra* note 19.

⁴²⁵ *Id.*

⁴²⁶ Professor Helms further explains: "Because men of color and women are often excluded from their white male co-workers, they are often excluded from the informal mentoring that happens in these groups. There is evidence to suggest that having guidance as to how to behave in interviews, as well as other kinds of coaching, may improve test performance. . . . [S]o often what will happen is that women and men of color have to earn their way into the brotherhood of white firefighters. While they're earning their way into that brotherhood, that often means that they're doing things by themselves that their white male peers are doing collaboratively." Joint App., *supra* note 53, at 125, 129. Accordingly, their innovative approaches may work against them on the rigid civil service devices. Ricci v. DeStefano, 554 F. Supp. 2d 142, 149 (D. Conn. 2006).

⁴²⁷ Joint App., *supra* note 53, at 71.

⁴²⁸ Joint App., *supra* note 53, at 76.

⁴²⁹ See Allan & Bazelon, *supra* note 19.

restore the former status quo, and falling victim to believing that every act that increases diversity on a firefighting force necessarily is intentionally “racist” against whites.⁴³⁰

C. ALTERNATIVES TO MULTIPLE-CHOICE TESTING

There was no dispute that the NHFD exams excluded all the African American candidates from promotion.⁴³¹ Justice Kennedy conceded that “[t]he racial impact here was significant,”⁴³² and the City “was faced with a *prima facie* case of disparate-impact liability.”⁴³³ The combination of weighting the written exam over the oral component, and then selecting candidates strictly in rank order, “cemented the disproportionate rejection of minority candidates for promotion [in the NHFD].”⁴³⁴ Given the substantial evidence that the exams were not valid predictors of job performance, the City was legally obligated to consider alternatives.⁴³⁵

The City could most easily have reduced the racial impact by changing the ratio of the multiple-choice exam and the oral interview, as Bridgeport had done.⁴³⁶ Or it could have suspended the “rule-of-three” to allow wider consideration of qualified candidates with more potential as supervisors.⁴³⁷ Discarding rank-ordering in favor of banding, a technique that

⁴³⁰ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 23, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428) (citations omitted) (alteration in original).

⁴³¹ See Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

⁴³² *Id.* at 2678.

⁴³³ *Id.* at 2662.

⁴³⁴ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 4, 22, 26–27, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428).

⁴³⁵ “Where two or more selection procedures are available which serve the user’s legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.” 29 C.F.R. § 1607.3B (1990), cited in *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 979 F.2d 721, 727 (9th Cir. 1992).

⁴³⁶ A reverse discrimination challenge to Bridgeport’s favoring of the oral examination was rejected. See *Bolton v. City of Bridgeport*, 467 F. Supp. 2d 245 (D. Conn. 2006). But another case, filed by twelve white firefighters challenging the rescoring of the 2006 lieutenant’s exam from 50% written to 75% oral, was settled favorably to the plaintiffs’ advantage in 2009 after Ricci came down. See Keila Torres, *White Firefighters Settle Promotion Lawsuits Against Bridgeport*, CONN. POST, Dec. 2, 2009, available at <http://www.ctpost.com/default/article/White-firefighters-settle-promotion-lawsuits-272036.php>.

⁴³⁷ See, e.g., *Glass City Black Bros. v. Neeb*, 540 F. Supp. 852, 855 (D. Ohio 1982). On the rare occasion when a fire chief defies custom and passes over the highest scorer on the written exam for promotion, other forces may intervene, as happened when the Civil Service Commission overturned the appointment of the man third on the eligible list in Belmont, Massachu-

combines candidates with close scores into one unit from which the hiring authority may appoint any member, thus recognizing the limits and margin of error of the tests, is another alternative to which some courts resorted.⁴³⁸ The point is that lock-step appointments based solely on test scores carried out to the hundredths place, generating meaningless distinctions, should be replaced with a more flexible practice that permits the appointing authority to take into consideration other critical skills not measured by the written exam.

From a broader perspective, how should fire departments meaningfully identify leadership and management skills, command presence, and interpersonal facility of their potential supervisors? Testing expert Hornick suggested one such approach to the New Haven CSB:

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

. . . For example, you were not using an assessment center process, which is essentially an opportunity for candidates to demonstrate their knowledge of the SOP's, standard operating procedures, to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test.

For example, there's concepts of situation judgment tests that can be developed and designed, customized within organizations that demonstrate dramatically less adverse impacts that are very well received by candidates that test the ability to apply their knowledge as opposed to just memorize and give the correct answer from a multiple choice, recogniz-

setts. See Connie Page, *State Panel Overrules Fire Chief, Civil Service Vacates '07 Decision on Captain*, BOS. GLOBE, Sept. 17, 2009, at G1. The chief based his selection on the oral interview, which rated the candidate's leadership abilities. *Id.* The Commission found the chief not only "violated basic merit principles" but harmed department morale by skipping the two top scorers. *Id.*

⁴³⁸ See *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 656 (7th Cir. 2001); *Biondo v. City of Chicago*, 382 F.3d 680, 684–85 (7th Cir. 2004); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 979 F.2d 721 (9th Cir. 1992); *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 173–74 (D. Mass. 2006) (banding scores within an eight-point range). See generally John W. Lasky, *Loosen the Shackles on Pennsylvania Local Government's Hiring Authority: An Argument for Banding*, 37 DUQ. L. REV. 445 (1999). Efforts to band scores are often fiercely resisted by white officers and their unions. See Ballou, *supra* note 414, at G1 (Superior Court judge issued injunction preventing banding).

ing what's the correct answer from a particular reading source.

....

[A] person's leadership skills, their command presence, their interpersonal skills, their management skills, their tactical skills could have been identified and evaluated in a much more appropriate way that would have tested their real skills and not necessarily their ability to in two-and-a-half minutes describe.⁴³⁹

An assessment center is "a form of standardized evaluation that seeks to test multiple dimensions of job qualification through observation of job-related exercises [primarily job simulations] and other assessment techniques."⁴⁴⁰ Multiple assessors observe and rate how candidates handle the problems and challenges of the job as they role-play while viewing videos of a fire scene, respond to questions, and formulate appropriate orders.⁴⁴¹ About 60% to 70% of fire departments reportedly now use them,⁴⁴² and there is a consensus among industrial psychologists that, as measures of skills rather than knowledge, they are better predictors of job performance than other forms of promotional testing.⁴⁴³ Used properly, assessment centers are able to reliably measure leadership capacity, problem-solving skills, and command presence.⁴⁴⁴ The research literature also demonstrates that they reduce adverse impact on racial minorities.⁴⁴⁵ Despite the ob-

⁴³⁹ Joint App., *supra* note 53, at 101–02; Ricci v. DeStefano, 554 F. Supp. 2d 142, 149 (D. Conn. 2006).

⁴⁴⁰ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 4, 22, 26–27, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428) (citations omitted). See also Floyd Delon, *Assessment Center Screenings for School Administration Certification and Employment: Possible Legal Challenges*, 43 ED. LAW REP. 841 (1988); Charles Hale, *Assessment Centers*, LAW & ORDER, Feb. 1, 2005, at 22.

⁴⁴¹ See Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 29–30, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428).

⁴⁴² Ricci v. DeStefano, 129 S. Ct. 2658, 2705 (2009) (Ginsburg, J., dissenting). See also Rominger & Sandoval, *supra* note 318, at 345.

⁴⁴³ Hale, *supra* note 440.

⁴⁴⁴ See also Chris Williams, Video Assessments Gain Ground as Way to Grade Future Teachers, BOS. GLOBE, Nov. 3, 2010.

⁴⁴⁵ Brief for Industrial-Organizational Psychologists as Amicus Curiae Supporting Respondents at 29–32, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428) (citations omitted); Ellen Zweig, *Challenges to Employment Testing Under Title VII: Creating "Built In Headwinds" For the Civil Service Employer*, 12 FORDHAM URB. L.J. 749, 770 (1984). But cf. Hearn v. City of Jackson, 340 F. Supp. 2d 728, 741 n.17 (S.D. Miss. 2003) (black candidates for promotion to police sergeant fared much better on the written test score than on the assessment center).

vious downsides of cost⁴⁴⁶ and time, several courts have recommended the assessment center as a more valid and less discriminatory alternative for fire supervisor selections.⁴⁴⁷

The promotional process used by the military, referred to positively in *Grutter v. Bollinger*,⁴⁴⁸ is also instructional. The stated goal of the Army's selection system is to identify those officers who have demonstrated that they possess the professional and moral qualifications, integrity, physical fitness, and ability to successfully perform the duties expected of an officer in the next higher grade.⁴⁴⁹ The selection is overseen by boards composed of experienced senior officers who review the entire performance record of each officer being considered for promotion.⁴⁵⁰ Everything that is in his or her military records—including decorations and medals, dates of service, dates of assignments, duty positions (past and present), performance reports, educational accomplishments, military training, Army Physical Fitness Test (APFT) score, and records of disciplinary action—is considered.⁴⁵¹ Officers are scored on a scale of 150 promotion points based on their self-confidence, bearing, oral expression and conversational skill, knowledge of basic soldiering, knowledge of world affairs, awareness of military programs, and attitude.⁴⁵² Although written exams are used to test basic knowledge, the prime consideration is past performance, measured by periodic feedback and formal evaluation reports.⁴⁵³

As another alternative, many public employers use a layered approach like that of Jackson, Mississippi, which selects police sergeants by way of a three-stage process.⁴⁵⁴ The first step is a written test. Those who

⁴⁴⁶ Assessment centers can cost nearly ten times the amount per candidate than paper and pencil tests do. Zweig, *supra* note 445, at 771; Donald Brush, *Identifying Managerial Potential*, PERSONNEL, May, 1980, at 68. The economic benefits of selecting the right manager may, however, exceed the out-of-pocket expenses. Zweig, *supra* note 445, at 771.

⁴⁴⁷ See, e.g., *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 513 (8th Cir. 1977); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 616 F.2d 350, 360–62 (8th Cir. 1980).

⁴⁴⁸ 539 U.S. 306, 331 (2003).

⁴⁴⁹ *The Army Officer Promotion System*, MILITARY.COM, http://www.military.com/MilitaryCareers/Content/0,14556,Promotions_Army_Officer,00.html.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ See *id.*

⁴⁵⁴ See *Hearn v. City of Jackson*, 340 F. Supp. 2d 728 (S.D. Miss. 2003). See also *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 175 (D. Mass. 2006) (recommending multi-pronged test-

pass progress to the second stage, which consists of simulation exercises like those used in assessment centers. Finally, there is a structured interview.⁴⁵⁵ The written test is thus used merely as a screening, not ranking, device, covering the basic knowledge that persons occupying the position should know. Other departments are experimenting with variations on multiple-choice devices in which test-takers view video simulations and are permitted to respond by selecting more than one answer, valuing divergent as opposed to convergent thinking, which recognizes that most real-life problems do not have a single answer.⁴⁵⁶

VII. CLOSING REFLECTIONS ON MERIT, QUALIFICATIONS, AND DIVERSITY

Tests often create a mere illusion of meritocracy.⁴⁵⁷ This is particularly the case with civil service exams, and some courts have candidly distinguished “merit” from the questionable results of these sorting devices.⁴⁵⁸ A better definition of the complex term “merit” in the context of a fire supervisor must mean the ability to effectively lead.⁴⁵⁹ This is “a reflection of character, integrity, and command constructs that do not lend themselves well to written ‘job knowledge’ tests . . . [J]ob knowledge is only a small part of the job performance domain.”⁴⁶⁰ Nor do one-size-fits-all multiple-choice tests measure a candidate’s determination, courage, or calm under pressure, all of which should be key components in the promotion of superior officers.⁴⁶¹

Justice William Brennan recognized many years ago how dubious the equation of merit and civil service ranking truly is. In *Johnson v. Santa Clara Transportation Agency*,⁴⁶² the public employer promoted a female

ing, including physical ability).

⁴⁵⁵ *Hearn*, 340 F. Supp. 2d 728.

⁴⁵⁶ Thompson, *supra* note 410.

⁴⁵⁷ Christopher J. Meade argued this point, unsuccessfully, for respondents in *Ricci v. DeStefano*. Tr. Oral Arg., *supra* note 30, at 57. See also Lawton, *supra* note 22.

⁴⁵⁸ See, e.g., *Adams v. City of Chicago*, 469 F.3d 609, 613–16 (7th Cir. 2006) (“Chicago had never considered merit for promotions to sergeant in the 100 years after written exams were instituted for the police officers.”)

⁴⁵⁹ Brief for International Association of Black Professional Fire Fighters et al. as Amici Curiae Supporting Respondents at 13, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428).

⁴⁶⁰ *Id.* at 18.

⁴⁶¹ Kim, *supra* note 346, at 12.

⁴⁶² See *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616 (1987).

over a male despite the fact that the former had a civil service score of seventy-three and the latter a seventy-five.⁴⁶³ In rejecting the male candidate's claim that the employer unfairly discriminated against him, Brennan observed:

Justice Scalia's dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the work force . . . [That speculation] ignores the fact that "[it] is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection . . . [F]inal determinations as to which candidate is 'best qualified' are at best subjective."

This case provides an example of precisely this point. Any differences in qualifications between Johnson and Joyce were minimal, to say the least.⁴⁶⁴

If employers continue to rely on multiple-choice tests in the absence of demonstrable proof that they truly predict job performance, and in the face of evidence that they unfairly disadvantage minorities and women, does that not constitute *intentional discrimination*?⁴⁶⁵ At least one court has pondered this:

[P]laintiffs have alleged that the City engaged in intentional race discrimination, or disparate treatment, by proceeding to use the results of a test which it knew had a discriminatory impact and rely, in support of their contention in this regard, on the fact that the City used the test results, without making any adjustment to the results or cut-score, after the Justice Department had specifically informed the City that the test had a disparate impact. In the court's opinion, however, City officials involved in the decision to so proceed, all of whom, as it happens, were black, testified credibly that they had no intent to discriminate. All of the City's witnesses explained that while they were aware of the Justice Department's comments regarding the test and test results, they believed those comments related to any future exams they might use and interpreted the Justice Department's letter as expressly approving their use of the test

⁴⁶³ *Id.* at 624–25.

⁴⁶⁴ *Id.* at 641 n.17 (citations omitted). As Professor Selmi pointed out, it is "remarkable" that the two-point test score differential could be thought to tell us anything meaningful about the qualifications of these candidates. See Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 U.C.L.A. L. REV. 1251, 1253 (1995).

⁴⁶⁵ See generally Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943 (1984) (invoking the common law rule that an actor intends the foreseeable consequences of his action).

results for this particular round of promotions. Their interpretation in this regard was reasonable, in the court's opinion, given the language of the Justice Department's letter, and in the absence of further proof to suggest a basis for inferring an intent on the part of City officials to discriminate, the court concludes that plaintiffs' disparate treatment claim is without merit and should be dismissed.⁴⁶⁶

If New Haven had continued to rely on selection devices that courts have found discriminatory, and which the City itself agreed in consent decrees to correct, and had simply certified the 2003 civil service results, could it not be said that the City was knowingly perpetuating the white male privilege that inevitably results?⁴⁶⁷ Imagine the reverse situation, where it is minority or female candidates who are the consistent beneficiaries of such practices, to the exclusion of white males. Would the *Ricci* majority be so sanguine as to permit *that status quo* to continue?

Some years ago the Supreme Court confronted such a situation.⁴⁶⁸ St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections, was warned in a consultant's study that "too many blacks were in positions of power," and that "blacks possessed too much power at St. Mary's."⁴⁶⁹ The facility subsequently replaced all its black administrators with whites, and in the first year of the new regime twelve black staff and only one white were fired.⁴⁷⁰ Shift commander Melvin Hicks challenged his discharge in a Title VII case. At trial, he successfully discredited the employer's justifications for his termination, namely by proving that the minor disciplinary infractions cited were routinely ignored when committed by white employees.⁴⁷¹ The district court found in fact that there was a "crusade" against the black plaintiff, and that he had

⁴⁶⁶ Hearn v. City of Jackson, 340 F. Supp. 2d 728, 743 (S.D. Miss. 2003). See also United States v. City of New York, 637 F. Supp. 2d 77, 81 (E.D.N.Y. 2009) (Vulcan Society as intervenor claimed the city's "continued reliance on and perpetuation of these racially discriminatory hiring processes constitute intentional race discrimination," a claim left unresolved after finding of disparate impact).

⁴⁶⁷ This is precisely the allegation firefighter Briscoe made in his unsuccessful suit against New Haven. See Part III.B.

⁴⁶⁸ See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). See generally Brodin, *supra* note 180.

⁴⁶⁹ Mark S. Brodin, The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse, *supra* note 180, at 193.

⁴⁷⁰ Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1249 (E.D. Mo. 1991).

⁴⁷¹ St. Mary's Honor Ctr., 509 U.S. at 508.

been placed on “the express track to termination.”⁴⁷² Hicks thus succeeded in proving pretext—the final phase of a *McDonnell Douglas Corp. v. Green* case of disparate treatment.⁴⁷³

Notwithstanding these findings, and breaking with precedent, Justice Scalia concluded for the Court that Hicks could prevail only if he proved *in addition* that St. Mary’s resorted to its crusade and pretextual justification to hide racial discrimination, as opposed to *some other* motive like personal animosity.⁴⁷⁴ The latter explanation was purely speculative, not raised by St. Mary’s at trial, and sharply contradicted by the evidence at trial.⁴⁷⁵ On remand, judgment was entered for the defendant.⁴⁷⁶

This ruling for an employer that responded to a perceived imbalance *in favor of black employees* by summarily terminating them stands in stark contrast to *Ricci*, which condemned New Haven for trying to avoid *white-only* promotions by scuttling a selection process of dubious validity. While *St. Mary’s Honor Center* raised the bar for proof of traditional discrimination cases (brought by minorities or women), *Ricci* lowers it for white male plaintiffs bringing reverse discrimination suits.

Ricci v. DeStefano plays quite well with the post-racial narrative so popular in certain political circles—that ours is now a “color-blind” society, with racism against black Americans a thing of the past; that, indeed, “they” now have too much power, and the pendulum has swung too much in their direction; that together with immigrants, “they” are stealing jobs from hard-working whites, who are the new victims of discrimination that require special legal protection.⁴⁷⁷ It is truly the stuff of fiction.

⁴⁷² Hicks v. St Mary’s Honor Ctr., 756 F. Supp. at 1251.

⁴⁷³ McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

⁴⁷⁴ St. Mary’s Honor Ctr., 509 U.S. at 510–11.

⁴⁷⁵ *Id.* at 543 (Souter, J., dissenting); Brodin, *supra* note 180, at 192–99. The Eighth Circuit had ruled, not surprisingly, that it was improper for a court “to assume—without evidence to support the assumption—that defendants’ actions were somehow ‘personally motivated.’” Hicks v. St. Mary’s Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992).

⁴⁷⁶ Hicks v. St Mary’s Honor Ctr., 90 F.3d 285 (8th Cir. 1996).

⁴⁷⁷ See Richard Kim, *Race, Lies and Videotape: Lessons From the Shirley Sherrod Saga*, THE NATION, July 16, 2010, available at <http://www.thenation.com/blog/37951/race-lies-and-videotape-lessons-shirley-sherrod-saga>.