

WILL “EQUAL” AGAIN MEAN EQUAL?:
UNDERSTANDING *RICCI V. DESTEFANO*

NOTE

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I. INTRODUCTION

*Ricci thus leaves the Court with a troubling dilemma it must eventually confront: either retreat from its current colorblind approach to equal protection, or rule disparate impact—a doctrine firmly ensconced in history, precedent, and congressional approval—unconstitutional.*¹

“This nation was founded on the affirmative premise that ‘all men are created equal.’”² Without regard to background, education, or lineage, America has stood on the promise of “equality in rights and in obligations”³ and that “the door ought to be equally open to all.”⁴ Nearly one hundred years later, Frederick Douglass offered this simple pledge of absolute equality—not pity, not sympathy—as the solution to years of slavery of African Americans.⁵ The passage of the Fourteenth Amendment and its explicit mandate that no State shall “deny to any person within its jurisdiction the equal protection of the laws”⁶ was the answer to Douglass’s plea and was the fulfillment of the Declaration of Independence’s promise.⁷ Centuries later, the Court’s commitment to color-blindness has remained a consistent marker of equal protection jurisprudence.⁸

It is against this background that *Ricci v. DeStefano*⁹ will be remembered as the case with the greatest impact on race

1. *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 282, 283 (2009).

2. Brief for The Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae Supporting Petitioners at 2, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 507011 [hereinafter Claremont Brief] (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

3. James Wilson, *Of Man, as a Member of Society, Lectures on Law* (1791), reprinted in 1 FOUNDERS’ CONSTITUTION 555–56 (Phillip B. Kurland & Ralph Lerner eds., 1987).

4. THE FEDERALIST NO. 36, at 259 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

5. Frederick Douglass, *What the Black Man Wants* (1865), reprinted in THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 157–65 (Philip S. Foner ed., Int’l Publishers 1950).

6. U.S. CONST. amend. XIV, § 1.

7. See Claremont Brief, *supra* note 2, at 6 (“The Fourteenth Amendment’s guarantee of equal protection of the laws to all citizens, regardless of race, was the fulfillment of the Declaration of Independence’s promise and the Civil War’s sacrifice.”); accord *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”).

8. See *infra* note 60 and accompanying text.

9. 129 S. Ct. 2658 (2009).

jurisprudence in recent history.¹⁰ While the Court's adoption of the strong-basis-in-evidence standard as a matter of Title VII statutory construction is noteworthy,¹¹ *Ricci*'s identification of the conflict between the Constitution's equal protection mandate and Title VII's disparate-impact provision¹² will haunt the Court in future cases.¹³

This Note responds to Justice Scalia's question in *Ricci*: "Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?"¹⁴ Section II of this Note introduces the events that led to *Ricci* and the case's journey from the district court to the Supreme Court. Section III explores the Court's opinion in *Ricci*, beginning with a discussion of the state of the law before *Ricci* in Section III(a). Section III(b) addresses the facial impact of *Ricci*, discussing both the plaintiff-firefighters' and the Court's adoption of the strong-basis-in-evidence standard. Section III(c) explores the Court's treatment of the Equal Protection Clause as it addressed petitioner's Title VII claims and establishes a foundation for Section III(d)'s inquiry into the constitutionality of Title VII. Utilizing strict scrutiny review, Section III(d) shows that the disparate-impact provision of Title VII is patently unconstitutional and suggests a means of resolution. Section III(e) provides anticipatory rebuttal to several justifications for Title VII's disparate-impact provision. Section IV concludes this Note.

II. CASE RECITATION

A. *The Facts of Ricci v. DeStefano*

The City of New Haven's civil service promotion system requires the City to fill vacancies in classified civil-service ranks

10. See David G. Savage, *The Future in Black and White: In the Era of President Barack Obama, Race Relations Still Play Out*, 95-JUN A.B.A. J. 18, 20 (2009) (noting the practical impact of *Ricci*).

11. *Ricci*, 129 S. Ct. at 2678; Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 60–61 (2009) (discussing the strong-basis-in-evidence standard).

12. See Marcus, *supra* note 11, at 61 (noting that *Ricci* was the first case to identify this conflict).

13. See John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2008*, 12 GREEN BAG 429, 432 (2009) (noting *Ricci*'s impact on the future of anti-discrimination law).

14. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

with the most qualified individuals, as determined by the results of examinations.¹⁵ After each examination, the New Haven Civil Service Board certifies the applicants that passed the examination.¹⁶ Under the “‘rule of three,’ the relevant hiring authority must fill each vacancy by choosing one candidate from the top three scorers on the list.”¹⁷

In November and December 2003, firefighters took qualification examinations for lieutenant and captain.¹⁸ The examination results showed “white candidates . . . outperform[ing] minority candidates,” prompting the City to open public debate about the examinations.¹⁹ “City officials expressed concern that the tests had discriminated against minority candidates,” while Industrial/Organizational Solutions’ counsel “defended the examinations’ validity” and attributed “any numerical disparity between white and minority candidates . . . to . . . external factors.”²⁰

The City eventually threw out the examination results.²¹ The firefighters who would have been promoted based on their performance sued the City, alleging that, by discarding the test results, the City discriminated against the plaintiffs based on their race in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.²²

B. *The District Court Opinion*

The plaintiff-firefighters and the City made cross-motions for summary judgment in the United States District Court for the District of Connecticut on the Title VII and Equal Protection

15. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2665 (2009); *see also id.* at 2665–66 (discussing the development process for the promotion tests).

16. *Id.* at 2665.

17. *Id.*

18. *Id.* at 2666. “The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered.” *Id.* at 2664.

19. *Id.* at 2664. Of the “[s]eventy-seven candidates complet[ing] the lieutenant examination . . . 34 candidates passed.” *Id.* at 2666. “10 candidates were eligible for . . . promotion to lieutenant. All 10 were white.” *Id.* Nine were eligible for promotion to captain, seven of whom were white and two of whom were Hispanic. *Id.*

20. *Id.* Industrial/Organizational Solutions noted the results were consistent with “results of the Department’s previous promotional examinations.” *Id.*

21. *Id.*

22. *Id.*

claims.²³ The district court granted summary judgment in favor of the City after finding no genuine issue as to any material fact relevant to the outcome of the firefighters' Title VII and Equal Protection claims.²⁴ It held that the City's desire to avoid making promotions based on a test with a racially disparate impact was not intentional discrimination under Title VII's disparate-treatment provision and was not a violation of the Equal Protection Clause.²⁵

C. *The Second Circuit Opinion*

In a summary order from a three-judge panel and later in a per curiam opinion, the United States Court of Appeals for the Second Circuit upheld the judgment of the district court.²⁶ In a brief paragraph, a narrow majority of the court affirmed "for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below."²⁷ Notably, six members of the court urged for rehearing en banc, arguing that the district court failed to subject the City's justifications to the "most searching examination," as required by *Adarand*.²⁸

D. *Ricci Before the Supreme Court*

i. Justice Kennedy's Majority Opinion

A five-member majority²⁹ of the Supreme Court overruled the

23. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 144 (D. Conn. 2006). The City also "moved for summary judgment on plaintiffs' [additional] claims." *Id.* at 145.

24. *See id.* at 145, 151 (stating summary judgment standard and the finding). The district court also made a similar finding on the plaintiffs' other claims. *Id.*

25. *Id.* at 158–62. The Court noted although the firefighters' evidence and the City's arguments showed that the "City's reasons for advocating non-certification resulted from the racial distribution of the results," the City's actions were race-neutral because the results in their entirety were denied certification, and there was an "absence of any evidence of discriminatory animus toward plaintiffs." *Id.* at 152, 158.

26. *Ricci v. DeStefano*, 265 F. App'x 106, 107 (2d Cir. 2008) (summary order). After disposition by summary order, one judge requested a poll on whether to rehear the case en banc. After the poll, the original three-judge panel withdrew the summary order and filed the per curiam opinion and denied rehearing. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam). The per curiam order and concurring and dissenting opinions were subsequently filed. *Id.*

27. *Id.* The court additionally noted that because the Board was "trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." *Id.*

28. *Id.* at 99 (Cabrenes, J., dissenting) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995)).

29. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Kennedy to form the majority. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2663 (2009). Justices

lower court's decision and concluded that race-based actions like the City's are impermissible under Title VII "unless the employer can demonstrate a strong basis in evidence that, had it not taken action, it would have been liable under the disparate-impact statute."³⁰ The Court did not address whether the City's actions violated the Equal Protection Clause.³¹

The majority began their analysis with the premise that "the City's actions would violate the disparate-treatment provision of Title VII absent some valid defense."³² The Court found that all the evidence demonstrated that the City did not certify the examination results because of statistical racial disparities,³³ but acknowledged that the City acted to comply with the disparate-impact provisions of Title VII.³⁴ The Court recognized the need to provide guidance for situations when the disparate-impact and disparate-treatment provisions would be in conflict absent a rule to reconcile them.³⁵ Finally, the Court noted that in providing such guidance, its decision must be consistent with the important purpose of Title VII—"that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."³⁶

The Court then turned to equal protection cases for "helpful guidance" in addressing Title VII,³⁷ noting that the same interests exist in the interplay between the disparate-treatment and disparate-impact provisions of Title VII.³⁸ The Court explained that while the present case did not require it to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution, constitutional authorities are relevant.³⁹ Based on past holdings that actions based on race comply with the Equal Protection Clause only where there is a "strong basis in evidence" that

Scalia (discussed *infra* Section II(d)(ii)) and Alito (omitted from discussion) also filed separate concurring opinions. *Id.*

30. *Id.* at 2664.

31. *Id.* at 2664–65, 2681. Because a decision for the firefighters on their Title VII claim would provide the relief sought, the Court considered it first. *Id.* at 2672.

32. *Id.* at 2673.

33. *Id.*

34. *Id.* at 2674.

35. *Id.*

36. *Id.*

37. *See id.* at 2675 ("Our cases discussing constitutional principles can provide helpful guidance in this statutory context.").

38. *Id.* at 2675–76.

39. *Id.* at 2675.

remedial actions were necessary, the Court found that applying the strong-basis-in-evidence standard to Title VII would give effect to both the disparate-treatment and disparate-impact provisions.⁴⁰ The Court stated that its holding did not address the constitutionality of the measures taken by the City to comply with Title VII.⁴¹ Further, the Court explicitly did not hold that meeting the strong-basis-in-evidence standard satisfied the Equal Protection Clause.⁴²

After adopting the strong-basis-in-evidence standard, the Court found “no genuine dispute” as to whether the “City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results.”⁴³ Based on this finding, the Court held that the firefighters were entitled to summary judgment on their Title VII claim, reversed the judgment of the Court of Appeals, and remanded the cases for further proceedings.⁴⁴

ii. Justice Scalia’s Concurrence

Justice Scalia wrote a concurring opinion to note that the Court’s resolution merely postponed “the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution’s guarantee of equal protection.”⁴⁵ Continuing the majority’s discussion of the intersection of Title VII and the Equal Protection Clause, he highlighted but did not resolve the inherent discrimination mandated by Title VII’s disparate-impact provision.⁴⁶

iii. Justice Ginsberg’s Dissent

Justice Ginsburg and three other members of the Court dissented from the judgment,⁴⁷ first noting that in assessing

40. *Id.* at 2675–76.

41. *Id.*

42. *Id.* at 2676.

43. *Id.* at 2681.

44. *Id.*

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

46. *See id.* at 2683 (“The Court’s resolution of these cases makes it unnecessary to resolve [the conflict].”). Justice Scalia described this inherent discrimination as “plac[ing] 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.” *Id.* at 2682.

47. Justices Stevens, Souter, and Breyer joined Justice Ginsburg in her dissent. *Id.* at

claims of race discrimination, context is determinative.⁴⁸ The dissent argued that the City did not violate Title VII because its refusal to certify the promotion tests was motivated by an attempt to avoid liability under the disparate-impact provision of Title VII, not by a discriminatory animus.⁴⁹ Further, the dissent argued that the majority ignored evidence of multiple flaws in the tests the City used, the legacy of racial discrimination in fire departments, and the Court's holding in *Griggs*.⁵⁰ Because of these factors, the dissent found no Title VII violation in the City's actions.⁵¹

III. ANALYSIS

The Court's opinion in *Ricci* made clear that the constitutional requirements of the Equal Protection Clause and the statutory requirements of Title VII are often in conflict.⁵² Before "thinking about how—and on what terms—to make peace between them,"⁵³ it is crucial not only to understand the foundational basis of the Equal Protection Clause and Title VII separately, but to identify the complications that arise when attempting to reconcile them. This section will address: (1) the state of the law before *Ricci*; (2) the facial impact of *Ricci* to date; (3) *Ricci*'s impact on the constitutionality of Title VII; (4) the most advisable solution for reconciling the mandates of the Equal Protection Clause and Title VII; and (5) responses to anticipated critiques.

A. *The State of the Law Before Ricci*

*[T]he law can both contribute to the prevention of discriminatory conduct and exacerbate discrimination. However, when effective, it can play a leading role in ending the propensity of individuals and societies to discriminate.*⁵⁴

Prior to the Court's ruling in *Ricci*, Title VII and the Equal

2689 (Ginsburg, J., dissenting).

48. *Id.* at 2689–90.

49. *Id.* at 2709–10.

50. *Id.* at 2709 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

51. *Id.* at 2710.

52. See Marcus, *supra* note 11, at 54–55 ("Although *Ricci* does not resolve this conflict, it does identify the problem clearly and suggests that a future case will resolve it.").

53. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).

54. Hugo Rojas, *Legal Responses to Discriminatory Actions: A Comparative Analysis*, 5 LOY. U. CHI. INT'L L. REV. 127, 148 (2008).

Protection Clause were primarily addressed as separate, yet related, tools to end discrimination.⁵⁵ By resolving cases with both Title VII and Equal Protection claims on only one ground—finding the employer’s action unlawful under Title VII and avoiding the larger constitutional inquiry—the Court had not directly addressed the constitutionality of Title VII under the Equal Protection Clause prior to *Ricci*.⁵⁶

i. Equal Protection Law

The Fourteenth Amendment states that “nor shall any State . . . deny to *any person* within its jurisdiction the equal protection of the laws.”⁵⁷ Emphasizing “*any person*,” the Court has long held that equal protection rights are guaranteed to the individual and are “*personal* rights.”⁵⁸ Courts and legal scholars have struggled to identify a firm definition for “equal protection,” but have generally required like cases to be treated alike and “different cases differently.”⁵⁹ The Court’s equal protection jurisprudence has been historically understood to express the Constitution’s overwhelming commitment to color-blindness.⁶⁰ The Court’s application of strict scrutiny review, which leads to invalidating

55. See generally *infra* Section III(a) (iii) (exploring the pre-*Ricci* intersection between equal protection and Title VII).

56. Brief for the Society for Human Resource Management as Amicus Curiae Supporting Respondents at 11, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 796287 [hereinafter HRM Brief] (“No decision of this Court or other court (of which we are aware) holds that an employer violates Title VII when it refuses to certify test results having an undisputed disparate impact.”). However, various circuit courts had ruled on this issue. See, e.g., *People Who Care v. Rockford Bd. of Educ.*, Sch. Dist. No. 205, 111 F.3d 528, 535 (7th Cir. 1997) (holding that avoiding a Title VII disparate-impact claim cannot justify race-based disparate treatment); *Dean v. City of Shreveport*, 438 F.3d 448, 454 (5th Cir. 2006) (holding that fear of liability cannot immunize discriminatory actions from constitutional strict scrutiny).

57. U.S. CONST. amend. XIV, § 1 (emphasis added).

58. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis added) (internal citations omitted).

59. See generally Robert John Araujo, *What Is Equality? Arguing the Reality and Dispelling the Myth: An Inquiry in a Legal Definition for the American Context*, 27 QUINNIPIAC L. REV. 113, 118, 151–53 (2009) (internal citations omitted) (exploring present day equal protection jurisprudence).

60. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”). See generally ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (Yale Univ. Press 1975) (discussing equal protection jurisprudence). The United States is not alone in holding the principle of nondiscrimination at the highest level within its legal hierarchy. See generally Rojas, *supra* note 54, at 130–32 (discussing global equality principles).

government action in all but the rarest circumstances,⁶¹ evidences this commitment to equal protection claims.⁶²

The first step of a court's equal protection analysis—identifying whether the action should be subjected to strict scrutiny—ends when the court finds *any* use of race by the government.⁶³ Strict scrutiny will apply equally to race-based actions against a minority and to those based on a desire to remedy past injuries to minorities.⁶⁴ Further, even if the government action can be considered race-neutral in some nominal sense, the action will not be insulated from strict scrutiny if it is shown that the law was motivated by a racial purpose or object.⁶⁵ The Court has made clear that all race-based government actions are subject to strict scrutiny,⁶⁶ requiring the government to demonstrate that the race-based

61. See *infra* notes 69–76 and accompanying text.

62. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (applying strict scrutiny to race discrimination claims); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (holding that strict scrutiny applies to racial classifications).

63. Brief for The National Association of Police Organizations as Amicus Curiae Supporting Petitioners at 7, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 2809358 [hereinafter *Police Organizations Brief*] (citing *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003)). However, some have read *Parents Involved* to hold that some actions will not be subjected to strict scrutiny, particularly in the education context. See Brief for New York Law School Racial Justice Project as Amicus Curiae Supporting Respondents at 5–6, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 815208 (citing *Parents Involved*, 551 U.S. at 788–89 (assuming facially race-neutral measures that are race-conscious are one of the available options)); Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 6, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 507014 [hereinafter *United States Brief*] (stating that race-neutral measures are preferable to racial classifications).

64. The standard of review is not dependent on the race of those burdened or benefited by the classification. See, e.g., *Croson*, 488 U.S. at 494.

65. See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Miller v. Johnson*, 515 U.S. 900, 913 (1995)). Equal protection jurisprudence is replete with references to “purpose” and “intent,” requiring that a purpose to discriminate be present before a constitutional violation is found. Ralph R. Banks & Richard T. Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1089–90 (2009). In general, any consideration of race in making an employment decision is considered to be “intentional” and to constitute “purpose.” Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (equating consideration of gender to intentional discrimination in the employment context). “The Court has never held that government acts with a discriminatory purpose only when they act with animus towards a racial group.” Brief for Law Professors and other Academics as Amicus Curiae Supporting Petitioners at 14, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 564457 (citing Brian T. Fitzpatrick, *Strict Scrutiny of Facially Neutral State Action and the Texas Top Ten Percent Plan*, 53 BAYLOR L. REV. 289, 309 (2001)).

66. See, e.g., *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (holding that all racial classifications imposed by government must be analyzed under strict scrutiny) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

action is “narrowly tailored” to achieve a compelling interest.⁶⁷

Through decisions on numerous cases asserting violation of Fourteenth Amendment rights, the Court has indicated the nature of governmental motivations that constitute compelling interests.⁶⁸ Race-based decision-making has been described as the “outer limits” of the Equal Protection Clause.⁶⁹ While the Court has recognized that a government actor’s desire to remedy its own past discrimination may justify remedial resort to racial classifications,⁷⁰ the Court has required that the actor first have a strong basis in evidence for its conclusion that remedial action was necessary.⁷¹ Compliance with a federal law is not automatically a compelling interest in itself.⁷² Further, the Court has never recognized a compelling governmental interest in avoiding unintentional racial disparities or societal discrimination,⁷³ or in merely avoiding the threat of litigation.⁷⁴ Additionally, the Court has rejected an interest in developing minority role models as justification for race-based action in

67. The burden to meet strict scrutiny review is on the decision maker, not the victim. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25 (1995); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

68. See *infra* notes 78–85 and accompanying text.

69. Police Organizations Brief, *supra* note 63, at 20 (citing *Parents Involved*, 551 U.S. at 744).

70. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). “Until *Grutter*, this Court had identified as a compelling state interest only the remedying of past discrimination . . .” and the “repudiation of *Korematsu* demonstrates the caution with which one should indulge such claims” and the “dangers of blurring the bright-lines of the Fourteenth Amendment.” Claremont Brief, *supra* note 2, at 14.

71. See *infra* note 79 and accompanying text (discussing the necessity of actual past discrimination in warranting race-based action). Cf. *Lomack v. City of Newark*, 463 F.3d 303, 307–08 (3d Cir. 2006) (concluding that without evidence of past discrimination by a governmental entity, the use of racial classifications did not satisfy strict scrutiny and is not permitted under the Equal Protection Clause).

72. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (plurality opinion) (“[S]imple legislative assurances of good intention cannot suffice.”). But see Brief for Respondents at 50, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 740763 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006)) (“That compliance with a federal statute may serve as a compelling interest is entirely sensible.”).

73. See, e.g., *Croson*, 488 U.S. at 492–94 (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1986) (dissenting opinion) (defining “societal discrimination” as “discrimination not traceable to its own actions”). *Croson* and similar cases indicate that there can be instances of historical discrimination outside the state’s responsibility, where such discrimination occurs naturally rather than as a product of state power. Martha R. Mahoney, *What’s Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1585–86 (2009).

74. See *Shaw v. Hunt*, 517 U.S. 899, 908–09, 943 (1996) (Stevens, J., dissenting) (finding mere threat of liability is not a compelling interest).

employment.⁷⁵ However, in the context of education, the Court has found diversity to be a compelling government interest.⁷⁶

The “narrowly tailored” requirement of strict scrutiny analysis ensures that “the means chosen ‘fit’ the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”⁷⁷ Strict scrutiny review is said to require “the most exact connection” between justification and classification, but the Court has repeatedly rejected the notion that it is “strict in theory, but fatal in fact.”⁷⁸ Equal protection cases before the Court have not provided an exact and consistent definition of what actions are “narrowly tailored”; rather, the Court engages in a case-by-case analysis of government action and the offered interest.⁷⁹ However, it is clear that at a minimum, “narrowly tailored” requires the classification be “narrowly tailored” “to the interest in question, rather than in the far-reaching, inconsistent and *ad hoc* manner,” and be supported by a detailed evidentiary showing.⁸⁰

ii. Affirmative Action Law: Title VII

Section 5 of the Fourteenth Amendment provides that “Congress shall have power to enforce, by appropriate

75. See *Wygant*, 476 U.S. at 276 (plurality opinion) (“Societal discrimination . . . is too amorphous a basis for imposing a racially classified remedy. The role model theory . . . typifies this indefiniteness.”).

76. In *Grutter*, the Court recognized a compelling interest in diversity within higher education, identifying an interest in ensuring a broader array of qualifications and characteristics, of which racial or ethnic origin is a single element. *Grutter v. Bollinger*, 539 U.S. 306, 324–25 (2003). The Court’s holding in *Grutter* is limited, as the Court relied upon considerations unique to higher education. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (citing *Grutter*, 539 U.S. at 329).

77. *Grutter*, 539 U.S. at 333 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (2003)). Constitutional law scholars generally construe “narrowly tailored” to mean being only as broad as is necessary to promote a substantial governmental interest that would be achieved less effectively without the restriction. BLACK’S LAW DICTIONARY 1050 (8th ed. 2004); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 673–74 (3d ed. 2006) (defining “narrowly tailored”).

78. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1998). Compare *Parents Involved*, 551 U.S. at 720 (“exact”) with *Grutter*, 539 U.S. at 326 (“fatal in fact”).

79. Cf. *Parents Involved*, 551 U.S. at 723–24 (Kennedy, J., concurring) (comparing *Grutter*, where race was one factor of determination, and the present case, where it was the only factor).

80. *Parents Involved*, 551 U.S. at 786 (Kennedy, J., concurring). In determining whether an explicit racial classification is “narrowly tailored,” the Court often considers whether the government actor has considered the availability of race-neutral alternatives to accomplish the purported interest. *Grutter*, 539 U.S. at 339.

legislation, the provisions of [the Fourteenth Amendment].”⁸¹ The scope of “appropriate” has been shaped over time by the views of Justices concerning the best remedy for discrimination, ranging from race-neutral to race-conscious approaches.⁸² This section will focus on Congress’s remedy to eliminate discrimination in the workplace through Title VII of the Civil Rights Act of 1964.

Title VII prohibits employment discrimination on the basis of race, whether in the form of intentional discrimination (disparate treatment) or in the form of practices that are not intended to discriminate, but in fact have a proportionately adverse impact (disparate impact).⁸³ The Court has identified “equality of opportunity and meritocracy” as goals of Title VII, noting that the Act does not require the hiring of any person simply because he was formerly the subject of discrimination or because he is part of a minority group.⁸⁴ However, the Court has suggested that Congress intended voluntary compliance with Title VII be the desired means of achieving Congress’s objectives.⁸⁵

The disparate-treatment provision of Title VII states that it is an unlawful employment practice to fail or refuse to hire, discharge, or to otherwise discriminate against any individual

81. U.S. CONST. amend. XIV, § 5.

82. Chief Justice Roberts recently argued that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” starkly contrasting with Justice Blackmun’s view that “in order to get beyond racism, we must take account of race.” Marcus, *supra* note 12, at 54 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) and *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)).

83. See 42 U.S.C. § 2000e-2 (2008) (outlining unlawful practices).

84. Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 GA. L. REV. 993, 1037–38 (2009) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971)). See, e.g., *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. E.E.O.C.*, 478 U.S. 421, 459 (1986) (“[T]here is no requirement in Title VII that an employer maintain a racial balance in his work force.” (quoting 110 CONG. REC. 7213 (1964))); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (“Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution.”); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (noting Title VII does not demand an employer give preferential treatment to minorities).

85. See, e.g., *Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986) (expressing Congress’ strong encouragement of voluntary compliance through the enactment of Title VII); *Johnson v. Transp. Agency*, 480 U.S. 616, 626, 630 n.8 (1987) (same). For the argument that Title VII strongly “encourages” rather than “allows” for compliance, see *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979) (“The very statutory words intended as a spur or catalyst to cause ‘employers and unions to self-examine and to self-evaluate their employment practices . . .’”) (internal citations omitted).

with respect to any aspect of his employment because of his race.⁸⁶ “On the basis of” is defined with reference to Section 2(m), stating that “an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor.”⁸⁷ Where an employee alleges that intentional discrimination caused an employment decision, the claim is analyzed under the burden-shifting framework of *McDonnell Douglas v. Green*.⁸⁸ The employee must first establish a prima facie case of discrimination, after which the burden shifts to the employer to present some legitimate, nondiscriminatory reason for the decision, and finally, the burden shifts back to the employee to prove the reason offered by the employer was merely a pretext.⁸⁹

The disparate-impact provision of Title VII addresses the government’s interest in identifying and eliminating intentional or unconscious discrimination that cannot be proved through the disparate-treatment provision.⁹⁰ The Court has read the disparate-impact provision as designed to address actual, but difficult to prove, discrimination.⁹¹ To implement this provision, four federal agencies have jointly adopted the Uniform

86. 42 U.S.C. § 2000e-2(a)(1) (2008). “[O]therwise to discriminate,” as used in Title VII, includes “adjust[ing] the scores of, us[ing] different cutoff scores for, or otherwise alter[ing] the results of, employment related tests” § 2000e-2(1). Further, it is an unlawful employment practice for an employer to “limit, segregate, or classify” his employees or applicants in any way that would adversely impact the individual’s status on the basis of these listed factors. § 2000e-2(a)(2).

87. § 2000e-2(m) (emphasis added).

88. 411 U.S. 792, 802–05 (1973) (outlining the burden-shifting framework for disparate-treatment claims).

89. *Id.* It is noteworthy that no “business necessity” defense is provided for disparate-treatment claims. Compare 42 U.S.C. § 2000e-2(a)(1) (2008) (disparate-treatment) with § 2000e-2(k)(1)(A)(i) (disparate-impact). Some argue that the *McDonnell Douglas* framework is intended to be flexible and the employer’s offered reason should be viewed subjectively, asking whether the employer honestly believed in legitimacy of the reason. Brief for the International Association of Hispanic Firefighters et al. as Amici Curiae Supporting Respondents at 6, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 796286 [hereinafter Int’l Firefighters Brief] (citing BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 86–87 (4th ed. 2007)).

90. Marcus, *supra* note 12, at 78.

91. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (describing the disparate-impact provision of Title VII as attacking Title VII’s core concern, intentional discrimination). Some have argued, however, that Title VII is intended to address “barriers” in employment opportunity, where the “barrier” is not discrimination of the type defined in Title VII. Cf. HRM Brief, *supra* note 56, at 7–8 (“Title VII also outlaws practices that . . . erect unnecessary barriers to employment opportunity for minority groups.”) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–31 (1971)).

Guidelines on Employee Selection Procedures,⁹² which require employers to conduct a “validity study” to establish the job-relatedness of any employment examination which has an “adverse impact.”⁹³ If the examination has an adverse impact, the Guidelines require the employer to identify an alternative selection device with less adverse impact as a part of the “validity study.”⁹⁴ Under Title VII’s disparate-impact provision, a plaintiff establishes a prima facie violation by showing that the employer uses a facially neutral employment practice that in fact causes a disparate impact.⁹⁵ Because the employment practice in a disparate impact claim is facially neutral, the hallmark of a prima facie for such a claim is a statistical disparity—that members of one race have done better than members of another race.⁹⁶ The employer’s liability is dependent upon the result of its actions, not its state of mind.⁹⁷ An employer may defend against liability by demonstrating that the practice is job-related for the position in question and consistent with a business necessity; however, even if the employer makes this defense, the employee may succeed by showing that the employer refuses to adopt an available alternative employment practice with less disparate impact that still serves the employer’s legitimate needs.⁹⁸ Discrimination is situated as an empirical fact to discover rather than a product of a formal structure of deduction, requiring the plaintiff to produce direct evidence of

92. These agencies are the Department of Justice, Equal Employment Opportunity Commission, Department of Labor, and Office of Personnel Management. *See generally* 43 Fed. Reg. 38290 (1978). For each department’s adoption, *see generally* 28 C.F.R. § 50.14 (2009) (Dept. of Justice); 29 C.F.R. § 1607 (2009) (EEOC); 41 C.F.R. § 60-3 (2009) (Dept. of Labor); 5 C.F.R. § 300.103(c) (2009) (Office of Personnel Management).

93. *See, e.g.*, 29 C.F.R. § 1607.3(A), (B) (2009) (EEOC adoption). Under the “four-fifths rule,” “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.” 29 C.F.R. § 1607.4(D) (2009).

94. *See, e.g.*, 29 C.F.R. § 1607.3(B) (2009) (EEOC adoption).

95. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2008).

96. *See, e.g.*, *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (defining disparate-impact claims).

97. *Cf. Banks*, *supra* note 65, at 1073–74 (noting unconscious bias is irrelevant to a question of discrimination under Title VII).

98. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (noting the final burden of proof falls on the employer). Some have argued that this “pretext” stage of the disparate-impact model creates an obligation for employers to consider lesser disparate-impact practices on protected groups, suggesting that an obligation exists before each decision is made. HRM Brief, *supra* note 56, at 16–17 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

discriminatory intent or to eliminate possible nondiscriminatory reasons.⁹⁹ The burden of proof on the plaintiff and the “business necessity” test attempt to reconcile equality of opportunity with meritocracy and to ensure that Title VII does not blunt efficiency in the workplace.¹⁰⁰

iii. The Pre-*Ricci* Intersection Between the Laws

Title VII and similar affirmative action measures were adopted to eliminate discrimination against protected classes, whether the discrimination arises from the effects of past or present practices.¹⁰¹ The Court has acknowledged another objective of Title VII in line with the Equal Protection Clause: “To protect all individuals, regardless of race, from employment discrimination.”¹⁰² Affirmative action entails exactly what the nondiscrimination mandate prohibits—“treating individuals differently on account of race”¹⁰³—resulting in the conflict explored in this Note.

The Court could have solved this conflict by taking the position originally advocated by Justice Rehnquist, that: “[N]o discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative.”¹⁰⁴ Instead, the Court chose a more moderate position and deferred to the spirit of the Act rather than its language,

99. See Banks, *supra* note 65, at 1076–79 (contrasting the Court’s “empiricist” position under *St. Mary’s Honor Ctr. v. Hicks* with the formalism of the *McDonnell Douglas* line of cases) (internal citations omitted); Rosemary Alito, *Disparate Impact Discrimination under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1022 (1993) (arguing the disparate-impact provision should maintain the burden of proof on the plaintiff).

100. Davis, *supra* note 84, at 1037–39.

101. *Id.* at 999. The Uniform Guidelines on Employee Selection Procedure are designed to assist the employer in monitoring the results of selection procedures for disparate impact. See, e.g., 29 C.F.R. § 1607.1(B) (2009) (EEOC adoption). The Court has not held that the Uniform Guidelines are binding. *But see* HRM Brief, *supra* note 56, at 14 (noting the Court has recognized the binding effect of the predecessor of the Uniform Guidelines); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657–58 (1989) (observing that the Court has taken note of employers’ duty under the Uniform Guidelines to monitor the disparate impact of selection procedures).

102. Davis, *supra* note 84, at 999. Nothing in the Court’s decisions prior to *Ricci* suggested that Title VII was designed to loosen the restrictions against state-sanctioned discrimination. Rather, the decisions indicate that the obligation of an employer under Title VII was only intended to extend as far as the Constitution allows. Police Organizations Brief, *supra* note 63, at 23 (citing *Johnson v. Transp. Agency*, 480 U.S. 616, 628 n.6 (1987)).

103. Banks, *supra* note 65, at 1100–01. See also United States Brief, *supra* note 63, at 10 (“Compliance with [Title VII] necessarily requires an employer to consider race.”).

104. Davis, *supra* note 84, at 999 (citing *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 254 (1979)).

holding that Title VII does not condemn “all voluntary, private, race-conscious affirmative action plans.”¹⁰⁵ The Court has required that a valid plan meet three requirements: (1) “it must address a manifest imbalance in [a] traditionally segregated job categor[y]”; (2) it “must not unnecessarily trammel the rights of workers” who are not in the protected class; and (3) it must be temporary.¹⁰⁶ Nevertheless, the “race-conscious affirmative action plans” the Court does not condemn¹⁰⁷ cause conflict with the Equal Protection Clause.¹⁰⁸ According to Kenneth Marcus and others, this conflict is best understood in three primary areas: “racial classifications, illicit motives, and racially allocated benefits.”¹⁰⁹

a. Racial Classifications and Racially Allocated Benefits

Under the Equal Protection Clause, the Court subjects all racial classifications or allocation of benefits by state actors to strict scrutiny.¹¹⁰ While Title VII’s disparate-impact provisions do not reference particular racial groups or prescribe racial classifications, whether actual or implied, “disparate-impact compliance entails preferential treatment or the use of quotas by public employers.”¹¹¹ Title VII’s text contains no standard of review; however, the Court has interpreted the burden imposed by Title VII as consistent with the ban on discrimination under the Equal Protection Clause.¹¹² Because of this burden, preferential compliance efforts lead to conflict between Title VII

105. *Id.* at 1001–02 (citing *Weber*, 443 U.S. at 208). Davis notes that the Court conceded that Title VII’s prohibition to discriminate because of race in hiring practices “raised a significant question about the legality of any race-based affirmative action plan.” *Id.*

106. *Id.* at 1003.

107. *Id.* at 1002.

108. See *Johnson v. Transp. Agency*, 480 U.S. 616, 652 (1987) (O’Connor, J., concurring) (“Employers are ‘trapped between the competing hazards of liability to minorities if affirmative action is *not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken.”) (internal citations omitted). See also Marcus, *supra* note 11, at 62 (“[Title VII] conflicts with the Equal Protection Clause to the extent that it . . . classifies people by racial groups.”).

109. Marcus, *supra* note 11, at 62.

110. *Id.* at 62–64. See also Lauren Klein, Ricci v. DeStefano: “Fanning the Flames” of Reverse Discrimination in Civil Service Selection, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 391, 397 (2009) (noting application of strict scrutiny by other circuits).

111. See Marcus, *supra* note 11, at 63 (noting racial quotas may be the cheaper alternative than to determine whether disparities result from policies that are consistent with business necessity or from a discriminatory animus).

112. Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 HARV. J.L. & PUB. POL’Y 971, 983 (2009).

and the Equal Protection Clause.¹¹³

b. *Illicit Motives*

Government actions motivated by discriminatory intent are also subject to strict scrutiny under the Equal Protection Clause.¹¹⁴ The Court has consistently applied this principle not only to those actions that contain express racial discrimination, but also to facially-neutral actions that are motivated by a racial purpose.¹¹⁵

Title VII's disparate-impact provision is particularly problematic under the Equal Protection Clause because its purpose is not limited to ascertaining hidden discriminatory intent or unconscious bias.¹¹⁶ Public resistance to originally included quotas led Congress to remove many of the provisions from the 1991 Act that would have greatly increased the pressure on employers to achieve proportional community representation.¹¹⁷ However, evidence made available during hearings and following the enactment of Title VII has likely compelled employers to alter the racial composition of their workforce, even where previous discrimination did not lead to current demographics.¹¹⁸ “[T]he Court ha[s] rejected as ‘flawed’ the argument that strict scrutiny review [does] not apply” to such actions despite any “need to consider race for purposes of compliance with antidiscrimination law.”¹¹⁹

Legal scholars have observed that affirmative action measures, including the disparate-impact provision of Title VII, were widely accepted before *Ricci*.¹²⁰ “[T]o the extent that the disparate-impact provision is narrowly construed as a means to limit intentional or even unconscious discrimination, the conflict [between Title VII and the Equal Protection Clause] dissolves.”¹²¹ However, as evidenced by *Ricci*, the disparate-

113. See *supra* notes 104–09 and accompanying text.

114. Marcus, *supra* note 11.

115. *Id.*

116. *Id.* at 65. Marcus notes that Congressional motives may have included an interest in achieving racial diversity in the workforce. *Id.* at 66.

117. *Id.*

118. *Id.*

119. Marcus, *supra* note 11, at 67.

120. *Id.* at 69–70 (“[B]efore *Ricci*, conflicts between the two provisions were largely decided in favor of disparate impact—and disparate treatment had been construed narrowly enough to avoid the appearance of discord.”).

121. *Id.* at 70.

impact provision of Title VII has “grown in ways that exceed [the Act’s] core purpose,”¹²² necessitating serious consideration under the Equal Protection Clause.

B. *The Facial Impact of Ricci*

*Five years after it improperly scrapped two exams, and a week after a federal judge ordered it to do so, the [City of New Haven] . . . plans to bring the lists to the fire commission Tuesday to promote fourteen firefighters who have fought [for] promotion since 2004.*¹²³

The fourteen plaintiff-firefighters in *Ricci* are the immediate beneficiaries of the Court’s ruling, as they will receive long-anticipated promotions.¹²⁴ However, the real impact of *Ricci* stretches much further, both in the application of Title VII by lower courts and employers and in Equal Protection jurisprudence.¹²⁵ This Section will address the Court’s holding read narrowly; *Ricci*’s impact on Equal Protection jurisprudence will be discussed in Section III(c).

In *Ricci*, the Court adopted the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the provisions of Title VII.¹²⁶ The Court limited its statutory holding to future readings of Title VII, noting that its holding did not address the constitutionality of the measures taken by the City in purported compliance with Title VII.¹²⁷ Because the Court found no evidence that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available, the Court found the City’s action of discarding the test results impermissible under Title VII.¹²⁸

122. *See id.* at 69–70 (noting the growth of disparate impact).

123. William Kaempffer, *City Moving to Promote 14 Firefighters*, NEW HAVEN REG., Nov. 30, 2009, available at http://www.nhregister.com/articles/2009/11/30/news/new_haven/a1-necivilservice.txt. The federal district judge will determine who will be promoted and the type of damages to be awarded in the suit, while a jury will determine the amount of damages. Thomas Macmillan, *Ricci’s Back in Court*, NEW HAVEN REG., Nov. 11, 2009, available at http://www.newhavenindependent.org/archives/2009/11/ricci_is_back_i.php.

124. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009).

125. *See infra* Section III(b) & (c) and accompanying text.

126. *Ricci*, 129 S. Ct. at 2663.

127. *Id.* at 2676.

128. *Id.* at 2681. The Court explained that a mere fear of litigation does not meet this standard. *Id.*

Since the Court's ruling in *Ricci*, lower courts have read *Ricci* to reaffirm and emphasize the importance of the disparate-treatment provision of Title VII.¹²⁹ Lower courts have additionally stressed that the purpose of Title VII is to promote hiring on the basis of job qualifications, not on the basis of a protected characteristic, emphasizing the priority of the disparate-treatment provision over the disparate-impact provision.¹³⁰ In cases with disparate impact claims, lower courts have read *Ricci* to make clear that a statistical disparity will only be a "threshold showing" in a disparate impact case, and the employee must still show that the employer's action was not consistent with business necessity or that there was an equally valid, less-discriminatory alternative that the employer refused to adopt.¹³¹ Most importantly, lower courts have interpreted *Ricci* to hold that evidence that an employer utilized an affirmative action plan may constitute direct evidence of unlawful discrimination, and in such a case, the relevant inquiry is whether the affirmative action plan is valid under Title VII and under the Equal Protection Clause.¹³² Lastly, it should be noted that since the Court's ruling in *Ricci*, several black firefighters have filed suit or drafted Equal Employment Opportunity Commission complaints, claiming that the City disproportionately considered the written and oral sections of the test, causing a disparate impact on black firefighters, and the City unjustly denied them promotions.¹³³

It is useful not only to examine subsequent lower court rulings for the facial impact of *Ricci*, but also to examine *Ricci*'s

129. See, e.g., *United States v. City of New York*, 631 F. Supp. 2d 419, 429 (S.D.N.Y. 2009) (citing *Ricci*, 129 S. Ct. at 2672) (emphasizing Title VII's disparate-treatment provision).

130. See, e.g., *Jiminez v. Dyncorp Int'l, LLC*, 635 F. Supp. 2d 592, 601 (W.D. Tex. 2009) (citing *Ricci*, 129 S.Ct. at 2674 and *Griggs*, 401 U.S. at 434); cf. *Wil's Indus. Serv., Inc. v. U.S. Steel Corp.*, No. 2:07 cv 128, 2009 WL 2169663, at *4 (N.D. Ind. July 17, 2009) (emphasizing the "important purpose" that "the workplace be an environment free of discrimination where race is not a barrier to opportunity").

131. *Ricci*, 129 S. Ct. at 2678.

132. See, e.g., *Humphries v. Pulaski County Special Sch. Dist.*, 580 F.3d 688, 694 (8th Cir. 2009).

133. See, e.g., David G. Savage, *Supreme Court to Consider Another Case on Racial Bias in Hiring*, L.A. TIMES, Feb. 20, 2010, available at <http://www.latimes.com/news/nation-and-world/la-na-court-firefighters21-2010feb21.0,5348715.story>; William Kaempffer, *City Facing More Firefighter Suits*, NEW HAVEN REG., Nov. 13, 2009, available at http://www.nhregister.com/articles/2009/11/30/news/new_haven/a1-necivilservice.txt (discussing EEOC claims). See also *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2009 WL 5184357, at *1 (D. Conn. Dec. 23, 2009) (denying the City's motion to stay discovery and discussing the potential effect of pending matters in *Ricci* on *Briscoe*).

subsequent readings by legal scholars. Scholars have consistently noted the Court's importation of the strong-basis-in-evidence standard into Title VII from equal protection jurisprudence.¹³⁴ Justice Kennedy's opinion has been read to surmise that Congress wanted the courts to establish relevant standards rather than categorically prohibit disparate treatment or disparate impact.¹³⁵ Reading *Ricci* and *Parents Involved* together, the Court has established that racially-neutral governmental actions with a predominant racial motive require both strict-scrutiny and disparate-treatment analysis.¹³⁶ The Court's discussion of Title VII's encouragement of quotas has also been cited as noteworthy.¹³⁷

Ricci has also resulted in increased scrutiny of all employment practices, specifically decisions based on written examinations or similar forms of testing.¹³⁸ This increased scrutiny has brought tremendous uncertainty, as the Court did not establish clear guidelines for employers.¹³⁹

134. Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 37 (2009); Marcus, *supra* note 11, at 60.

135. Marcus, *supra* note 11, at 59 (internal citations omitted). He further notes that Kennedy emphasized that this standard will allow violations of the disparate-treatment provision only in the name of compliance with the disparate-impact provision in limited circumstances. *Id.* at 60–61.

136. *Id.* at 59, 72 (explaining that in *Parents Involved*, Justice Kennedy appeared to argue that race-neutral measures do not trigger strict scrutiny, but in *Ricci*, Justice Kennedy emphasized that the City decided not to certify the results because of racial disparities in performance, and absent sufficient justification, race-based decision making will violate Title VII) (internal citation omitted).

137. *Id.* at 70.

138. Lower courts have noted that *Ricci* should serve as a reminder that designing employment examinations is difficult, requiring consultation with experts and considerations of accepted testing standards. *United States v. City of New York*, 637 F. Supp. 2d 77, 83 (E.D.N.Y. 2009). *Cf.* Brief for Equal Employment Advisory Council as Amicus Curiae Supporting Respondents at 6, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 815203 (“[*Ricci* has] great importance to the many private sector employees that routinely utilize employment tests as part of their employment selection processes.”).

139. See Ameet Sachdev, *Supreme Court Case Over Firefighter Promotion Exam Tests Westchester Firm, Founder*, CHI. TRIB., Sept. 20, 2009, available at http://articles.chicagotribune.com/2009-09-20/business/0909190187_1_flawed-test-supreme-court-exam (quoting Cheryl Tama Oblander, a Chicago lawyer, who argues that *Ricci* “makes a bigger mess out of testing”).

C. Ricci and the Constitutionality of Title VII

*The very radicalism of holding disparate impact doctrine unconstitutional as a matter of equal protection suggests that only a very uncompromising court would issue such a decision. . . . [I]t is no less true that the very incompatibility of current disparate-impact doctrine with equal protection suggest that only a very irresponsible court could uphold the former in a challenge based on the latter.*¹⁴⁰

The Court's opinion in *Ricci* makes clear that the constitutionality of disparate impact liability under Title VII is far from certain.¹⁴¹ While the majority avoids this conflict by resolving *Ricci* on a statutory level,¹⁴² Justice Scalia's brief concurrence leaves little doubt of *Ricci*'s impact on the future of equal protection jurisprudence.¹⁴³

Although the majority clearly limits their holding to the Title VII claim,¹⁴⁴ their language is revealing. Notably, the Court makes it clear that no individual should face workplace discrimination because of race,¹⁴⁵ echoing the promise of the Equal Protection Clause.¹⁴⁶ It is also significant that five members of the Court relied upon equal protection jurisprudence in adopting the strong-basis-in-evidence standard.¹⁴⁷ Reaffirming *Croson*, the Court held that a nebulous claim of past discrimination cannot justify the use of a racial quota.¹⁴⁸ The Court did not address whether the statutory

140. Marcus, *supra* note 11, at 83 (citing Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003)). Marcus argues that we should not prefer that our jurisprudence in this area be compromised. *Id.*

141. *Id.* at 54–55.

142. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2665–65, 2681 (2009); *See also* Marcus, *supra* note 11, at 54–55 (noting the Court “does not resolve this conflict”).

143. *See, e.g.*, Elwood, *supra* note 13, at 432 (noting *Ricci*'s impact in light of Justice Sotomayor's appointment to the Court); Marcus, *supra* note 11, at 54–55 (“[*Ricci*] suggests that a future case will resolve [the question].”); *2008 Term, supra* note 1, at 283 (“*Ricci* strongly suggests that Title VII's disparate impact provisions are unconstitutional.”). Several scholars have argued that while Justice Scalia's concurrence questions the constitutionality of Title VII, no one should underestimate the Court's ability to avoid that question. Elwood, *supra* note 13, at 432–33; *see also* Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 423 (2009) (“[A]t this stage, it is hard to imagine that there would be five votes for such a radical change . . .”).

144. *Ricci*, 129 S. Ct. at 2675–76.

145. *Id.* at 2681.

146. *Cf. supra* Section III(a)(i) (discussing equal protection jurisprudence and the “color-blind” notion).

147. *Ricci*, 129 S. Ct. at 2675.

148. *Id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). Borrowing equal protection language, the Court further states that fear of litigation is

constraints of Title VII must be parallel in all respects to those under the Constitution, but did warn that constitutional authorities are relevant.¹⁴⁹ This warning not only legitimized the Court's importation of a strong-basis-in-evidence standard into Title VII, but also provides a basis for a future finding that Title VII's disparate-impact provision is unconstitutional.¹⁵⁰

The Court has never ruled on Justice Scalia's question: "Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?"¹⁵¹ Because *Ricci* was decided on a narrow majority, *Ricci*'s concurring and dissenting opinions also provide insight on the future of equal protection jurisprudence.

Justice Scalia's concurrence makes his answer apparent, as he reads the Court's equal protection jurisprudence to hold that the government is strictly prohibited from discriminating on the basis of race.¹⁵² Because of this prohibition, he reasons, the government is surely also prohibited from enacting laws commanding third parties to discriminate on the basis of race.¹⁵³ Further, he asserts that Title VII's disparate-impact provision "place[s] a racial thumb on the scales," requiring employers to evaluate the racial outcomes of their policies and to make decisions based on those racial outcomes, and that type of racial decision-making is discriminatory.¹⁵⁴ In his view, neither Title VII's consideration of race on a "wholesale, rather than retail,

not enough to justify an employer's reliance on race to the detriment of others. *Id.* at 2681.

149. *Id.* Cf. Transcript of Oral Argument at 52, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328) (Roberts, C.J.) (finding the argument "odd . . . that you can violate the Constitution because you have to comply with the statute").

150. See 2008 Term, *supra* note 1, at 283 (suggesting *Ricci*'s implications on Equal Protection jurisprudence).

151. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) ("[*Ricci*] merely postpones the evil day on which the Court will have to confront the question."). See also, e.g., Ogletree, *supra* note 134, at 37 (discussing Justice Scalia's attack on Title VII).

152. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

153. *Id.* Justice Thomas has also been noted as a vocal critic of affirmative action measures that violate the legal mandate of color-blindness. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1174 (2008).

154. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (discussing the majority opinion) (citing *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). For Chief Justice Roberts and Justice Scalia, setting aside a test simply because one race predominates is far from race-neutral. See Transcript of Oral Argument at 36, *Ricci*, 129 S. Ct. 2658 (2009) (Scalia, J.), 54 (Roberts, C.J.). Justice Alito, joined in his concurrence by Justices Thomas and Scalia, also stresses that there are some actions a public official cannot take, including engaging in intentional racial discrimination. *Ricci*, 129 S. Ct. at 2688 (Alito, J., concurring).

level” nor the supposedly benign motive behind the statute can save it from strict scrutiny.¹⁵⁵ For Justice Scalia, the disparate-impact provision sweeps too broadly in its current state to be constitutional under the Equal Protection Clause.¹⁵⁶

The dissenting members of the Court in *Ricci* take a very different view of the Equal Protection Clause, as their opinion rests on the notion that context matters. Justice Ginsburg argues that equal protection doctrine is of limited utility in construing Title VII, evidencing her belief that the authority for and the scope of Title VII does not stem from the Equal Protection Clause.¹⁵⁷ Her assertion rests on two precedents of the Court: (i) the Equal Protection Clause prohibits only intentional discrimination and does not have a disparate impact component;¹⁵⁸ and (ii) until *Ricci*, the Court has never questioned the constitutionality of the disparate-impact provision.¹⁵⁹ She further argues that observance of Title VII’s disparate-impact provision does not require racial preferences and suggests that, as a result, Title VII should not be subjected to the strict scrutiny of the Equal Protection Clause.¹⁶⁰ If Justice Scalia’s question was before the Court at the time *Ricci* was decided, at least four members of the Court would likely uphold the constitutionality of Title VII in its entirety, subjecting it to less than strict scrutiny.

Ricci leaves Justice Scalia’s question largely unanswered, and it is admittedly difficult to predict the Court’s resolution given the splintered nature of the Justices’ current writings. *Ricci*, however, makes one point unquestionably clear: The burdens of Title VII must be reconciled with the demands of the Equal

155. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (internal citations omitted).

156. *Id.* at 2682. Justice Scalia does, however, cite Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 498–99, 520–21 (2003) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) to suggest that using Title VII’s disparate-impact provisions to “smoke out” actual and intentional discrimination may be permissible. *Cf.* Transcript of Oral Argument at 29, *Ricci*, 129 S. Ct. 2658 (2009) (Scalia, J.) (stating that the disparate-treatment and disparate-impact provisions are “at war with one another”).

157. Justice Ginsburg describes the equal protection cases from which the Court draws its “strong basis in evidence” standard as “particularly unsuitable.” *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

158. *Id.* at 2700 (citing *Feeney*, 442 U.S. at 272); *Washington v. Davis*, 426 U.S. 229, 229 (1976)).

159. *Ricci*, 129 S. Ct. at 2700.

160. *Cf. id.* at 2701 (comparing the facts of *Ricci* to the government actions considered in *Wygant* and *Croson*) (internal citations omitted).

Protection Clause.¹⁶¹

D. *The Solution: Strict Scrutiny Application to Title VII*

*The guarantee of Equal Protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.*¹⁶²

The proper starting point for analyzing the constitutionality of Title VII is identifying the authority of Congress to enact such a law.¹⁶³ In a similar context,¹⁶⁴ the Court has found a congressional affirmative action act to be an “appropriate” exercise of power under Section 5 of the Fourteenth Amendment.¹⁶⁵ Similarly, there is little doubt that Title VII is an “appropriate” measure of congressional power.¹⁶⁶ However,

161. See *Ricci*, 129 S. Ct. at 2682–83 (Scalia, J., concurring) (discussing the conflict between the Equal Protection Clause and Title VII).

162. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) (Powell, J., joined by White, J.).

163. The Commerce Clause and Section 5 of the Fourteenth Amendment are frequently identified as sources of Congress’ authority for Title VII. See, e.g., Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 5, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 815209 [hereinafter ACLU Brief] (citing *Ex parte Commonwealth of Va.*, 100 U.S. 339, 345–46 (1879) (Section 5 of the Fourteenth Amendment) and *United States v. Darby*, 312 U.S. 100, 115–16 (1941) (Commerce Clause)).

164. See generally *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (discussing Congress’s power to act under the Fourteenth Amendment and Commerce Clause). In *Fullilove*, the Court found the Minority Business Enterprise program at issue to be an appropriate exercise of Congressional power under Section 5 of the Fourteenth Amendment. *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980). However, in *Adarand*, the Court noted that the Court’s treatment of congressional power in *Fullilove* was not dispositive on the issue of the standard of review the Fifth Amendment requires for an action taken by the Federal Government. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (citing *Croson*, 488 U.S. at 491). The *Adarand* Court did however note that *Croson* had some bearing on federal race-based action, indicating that *Fullilove*’s ruling on the “appropriateness” of Congress’s action may provide a basis for finding that Title VII is a type of measure “appropriate” under Section 5 of the Fourteenth Amendment. See generally *id.* at 222–23.

165. See *Fullilove*, 448 U.S. at 478 (passing on the constitutionality of the “minority business enterprise” provision of the Public Works Employment Act of 1977). The Court stated:

Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws.

Id.

166. See, e.g., ACLU Brief, *supra* note 163, at 6 (“Congress enacted Title VII as part of

while Congress has broad powers under Section 5 of the Fourteenth Amendment to enact “appropriate” legislation, it must do so consistent with the Constitution.¹⁶⁷

Because the Court has read the Equal Protection Clause to require that every race-based government action be subjected to strict scrutiny,¹⁶⁸ so too must any form of a racial classification by Congress under the Fourteenth Amendment be subject to strict scrutiny.¹⁶⁹ It follows that if Title VII is a proper congressional action, the government must prove (i) a compelling governmental interest, and (ii) that its action was “narrowly tailored” to this interest.

i. Congress’s Compelling Interest

The Court has never published an exhaustive list of governmental interests that it will find “compelling,” but it has provided significant direction for government actors through past decisions.¹⁷⁰ A government actor’s desire to remedy its own past discrimination has been held as a compelling interest, provided the actor first had a strong basis in evidence for its conclusion that remedial action was necessary.¹⁷¹ However, the Court has *never* recognized a compelling interest in avoiding unintentional racial disparities or societal discrimination,¹⁷² and little authority exists to suggest that compliance with a federal antidiscrimination law is itself a compelling interest.¹⁷³

the Civil Rights Act of 1964 in light of overwhelming evidence of pervasive inequality in the American job market,”) (citing *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202–03 (1979)); *See generally* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (addressing Title VII without questioning its constitutionality); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (same); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (same). Further inquiry into “appropriateness” under the Commerce Clause is beyond the purview of this Note.

167. *See, e.g., Ex parte Commonwealth of Va.*, 100 U.S. at 345–46 (holding Congress’s power to enforce the Fourteenth Amendment includes power to enact “[w]hatever legislation is appropriate . . . if not prohibited” by the Constitution) (emphasis added); *Darby*, 312 U.S. at 115–16 (same for Commerce Clause).

168. *See supra* notes 63–64 and accompanying text.

169. *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (noting that any race-based classification, even those that are benign, automatically receive strict scrutiny review); *But see* ACLU Brief, *supra* note 163, at 36 (citing *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) for contention that Section 5 affords Congress considerable leeway to determine necessary actions to “deter[] or remed[y] constitutional violations”).

170. *See supra* notes 72–80 and accompanying text.

171. *See* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989); *Lomack v. City of Newark*, 463 F.3d 303, 307–08 (3d Cir. 2006).

172. *Wyant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

173. *But see, e.g.,* ACLU Brief, *supra* note 163, at 11–12 (“[The Court has] repeatedly

Three primary motivations have been offered as the basis for Title VII: (i) to remedy past discrimination;¹⁷⁴ (ii) to eliminate all forms of present discrimination;¹⁷⁵ and (iii) to ensure against future racial disparities in the workplace.¹⁷⁶ Based on the Court's prior rulings, if Title VII is based on a desire to remedy past discrimination in traditionally segregated fields, then it is unquestionably founded on a "compelling" interest.¹⁷⁷ This interest can likely not only extend to discrimination occurring before the passage of Title VII, but also to those actions of employers that occurred concurrently with the passage of Title VII but before the employer took remedial action.¹⁷⁸ However, an interest in proactively ensuring against future racial disparities by employers cannot be a compelling interest, as it is reminiscent of a desire to avoid unintentional discrimination that the Court has never recognized as a compelling interest.¹⁷⁹ To the extent that Title VII is based upon an accepted compelling interest—remediating past and eliminating present actual discrimination—it is only constitutional if it is "narrowly tailored" to this interest.¹⁸⁰

assumed that compliance with presumptively valid federal antidiscrimination law is a compelling state interest.") (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996), *Shaw v. Hunt*, 517 U.S. 899, 915 (1996), and *Shaw v. Reno*, 509 U.S. 630, 656 (1993)).

174. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986–87 (1988); Davis, *supra* note 93, at 1038 (same).

175. *See, e.g.*, *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986) (discussing voluntary compliance); *Johnson v. Transp. Agency*, 480 U.S. 616, 630 n.8 (1987) (same); ACLU Brief, *supra* note 163, at 6 ("Congress recognized that dismantling the racially stratified employment market was a critical step to achieving broader economic and social equality.").

176. *See, e.g.*, *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 204 (1979) (arguing Title VII was intended to spur "employers and unions to self-examine and to self-evaluate their employment practices"); HRM Brief, *supra* note 56, at 7–8 (discussing Title VII's implications on "barriers to employment opportunity for minority groups").

177. *See supra* notes 70–71 and accompanying text. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

178. *See Grutter*, 539 U.S. at 328. (discussing remedying "past" discrimination as a compelling interest).

179. *See supra* note 73 and accompanying text. *But see Tennessee v. Lane*, 541 U.S. 509, 520 (2004) ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.").

180. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). For purposes of further analysis within this section, it will be assumed that proactively ensuring against future racial disparities by employers would not be offered as a compelling interest.

ii. Title VII Is Not “Narrowly Tailored”

For a government action to be “narrowly tailored” as defined by equal protection jurisprudence, it must be no broader than is reasonably necessary to promote a substantial governmental interest that would be achieved less effectively without the government action.¹⁸¹ The Court will analyze each government action on a case-by-case basis, with past rulings offering limited guidance on the presently considered action.¹⁸² For this reason, Title VII must be analyzed directly against its offered compelling interest, with only minimal emphasis on the Court’s treatment of similar acts.¹⁸³ Because the disparate-treatment and disparate-impact provisions of Title VII address discrimination differently, it is helpful to analyze each provision separately to determine whether it is “narrowly tailored” to the offered compelling interest.¹⁸⁴

a. *Title VII: Disparate-Treatment Provision*

The disparate-treatment provision of Title VII makes it unlawful for an employer to discriminate against any individual with respect to any aspect of employment *because of* the individual’s race.¹⁸⁵ The burden to prove that an employment decision or action was taken *because of* race is on the plaintiff-employee, requiring that the employee offer tangible evidence of actual discriminatory purpose or intent.¹⁸⁶ The disparate-treatment provision only addresses alleged discrimination where intent or purpose can be proven,¹⁸⁷ and therefore reaches no further than necessary to meet the government’s interest in eliminating all past and present discrimination in the workplace.¹⁸⁸ Because the disparate-treatment provision is “narrowly tailored” to the offered compelling interest, it is

181. *See supra* notes 77–80 and accompanying text.

182. *See supra* note 79 and accompanying text.

183. *See id.* (discussing the Court’s case-by-case analysis).

184. *Compare supra* notes 86–89 and accompanying text (disparate-treatment provision) *with supra* notes 90–100 and accompanying text (disparate-impact provision).

185. *See supra* note 86 and accompanying text.

186. *See supra* notes 88–89 and accompanying text. A showing of a percentage disparity of minorities treated in a different way by itself will not be enough to satisfy the disparate-treatment provision of Title VII, as the employee must prove the employment action occurred *because of* his race. *Id.*

187. *Id.*

188. *Cf. supra* notes 90–100 and accompanying text (discussing the disparate-impact provision).

constitutional under the Equal Protection Clause.¹⁸⁹

b. *Title VII: Disparate-Impact Provision*

Title VII's disparate-impact provision provides a remedy for the employee who can show a racially disparate impact in an employment practice, but cannot prove intentional discrimination.¹⁹⁰ The employer's liability under this provision is based on the result of his actions, not his intent or motivation.¹⁹¹ While the employer may offer proof that he took action out of business necessity, the employee-plaintiff will still succeed if he can show an available alternative employment practice with less disparate impact.¹⁹² Arguably, Title VII does not require employers to hire a person simply because he is a member of a minority group and Congress preferred voluntary compliance to achieve Title VII's goals.¹⁹³ Yet, the Uniform Guidelines require employers to proactively conduct "validity studies" to establish the job-relatedness of any employment examination with an adverse impact and, if necessary, to substitute a selection device with less adverse impact.¹⁹⁴

The disparate-impact provision of Title VII reaches much further than actual, provable discrimination or discriminatory intent that is initially difficult to discover; it reaches those employment actions without any racially-based motivation.¹⁹⁵ The breadth of this provision warrants inquiry into whether it is necessary to accomplish the government's interest in eliminating all past and present employment discrimination.¹⁹⁶ While it is certainly reasonably necessary to view gross statistical disparity as some evidence of intentional discrimination for Title VII purposes,¹⁹⁷ the "validity study" requirement and the

189. See *supra* notes 170–80 and accompanying text.

190. See *supra* notes 90–91, 96–97 and accompanying text.

191. *Supra* note 97 and accompanying text.

192. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

193. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987).

194. See *supra* notes 92–93 and accompanying text.

195. *Watson*, 487 U.S. 977, 986–87 (1988); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

196. The "narrowly tailored" analysis might be different if an interest in eliminating all future discrimination in the workplace were established as a compelling interest. However, as discussed previously, that interest is unlikely to be found compelling. See *supra* notes 77–80 and accompanying text.

197. Cf. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (suggesting that using Title VII's disparate-impact provisions to "smoke out" actual and intentional discrimination is permissible).

accompanying burden to choose the least disparate employment practice possible is not.¹⁹⁸ Rather, the disparate-impact provision is the type of far-reaching means found unconstitutional by Justice Kennedy in *Parents Involved*.¹⁹⁹ Because the disparate-impact provision is not “narrowly tailored” to the offered compelling interest, it is not constitutional under the Equal Protection Clause.²⁰⁰

When Justice Scalia’s question is properly before the Court, the Court would be well-advised to strike down the disparate-impact provision of Title VII and spur Congress to re-enact it without its constitutionally-problematic features.²⁰¹

E. Response to Anticipated Defenses of Title VII

Many legal scholars have argued against a color-blind approach to equal protection jurisprudence and have been quick to warn against striking down Title VII after Justice Scalia’s concurrence in *Ricci*.²⁰² While probable defenses of Title VII are endless, this Section will address arguments that: (i) a color-blind approach ignores reality; (ii) the Court should not usurp the will of the people as evidenced by Title VII; (iii) Title VII promotes—and the Court should not limit—employer freedom; (iv) diversity is, in itself, a compelling interest; and (v) Title VII’s disparate-impact provision is necessary to “smoke out” intentional discrimination.

i. A Color-Blind Approach Does Not Ignore Reality

Opponents of a color-blind equal protection jurisprudence argue that such an approach fails to acknowledge the current state of racial disparity and unequal opportunity in America.²⁰³

198. The requirement that employers proactively subject every employment practice to a validity test and take action to choose an employment practice with a lesser disparate-impact is not the least restrictive alternative, as the disparate-treatment provision of Title VII was previously found in this Section to be adequate to address past and present employment discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973).

199. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 786 (2007) (Kennedy, J., concurring).

200. *Id.*; *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

201. See Marcus, *supra* note 11, at 80–81 (offering “strik[ing] down” the disparate-impact provision as a solution).

202. See *infra* Section III(e) and accompanying text.

203. Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 510–11 (2009) (describing the color-blind approach as “turning a blind eye”). Shuford offers evidence that African-Americans and Latinos

They insist that while past affirmative action measures have yielded significant progress, the persistence of racial disparities warrants government intervention that utilizes all measures, including race-conscious ones.²⁰⁴ Further, they contend that the invocation of color-blindness is equal to racism—that color-blindness is itself selective and based on a history of discrimination.²⁰⁵

This argument ignores the message that every race-based government action sends: A politically acceptable burden can be imposed on particular groups on the basis of race.²⁰⁶ Title VII's disparate-impact provision is a blatant encouragement of race-based preferences in employment decisions²⁰⁷ when doing so meets a government interest.²⁰⁸ Title VII does more than make racial discrimination in employment practices unlawful; it requires employers to proactively monitor employment practices for racially disparate outcomes and replace facially-neutral practices with ones that are more apt to have equal outcomes measured by race.²⁰⁹ This aspect of Title VII indicates a clear mandate for government race-based classifications, and further, for racial preferences.²¹⁰

suffer disproportionately in employment. *Id.* at 518–19; *See generally* Banks, *supra* note 65 (pointing to disparities in health, employment, education, and incarceration).

204. *See, e.g.*, Shuford, *supra* note 203, at 524 (promoting race-conscious affirmative action measures). However, even those who do not believe that we currently live in a color-blind world argue that such a world is one to which we should aspire. Carbado, *supra* note 163, at 1194.

205. *See* Banks, *supra* note 65, at 1109 (exploring current critiques of a color-blind approach); *Cf.* Carbado & Harris, *supra* note 153, at 1211 (discussing the “racial signifiers” inherent in applications in the university admissions process).

206. *See, e.g.*, Carbado & Harris, *supra* note 153, at 1198 (discussing Justice Stewart’s dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980)); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742–43 (2007).

207. *Watson*, 487 U.S. at 987. *Cf.* Carbado & Harris, *supra* note 153, at 1139–42 (discussing affirmative action in the context of Michigan’s Proposal 2 and California’s Proposition 209). *But see* Int’l Firefighters Brief, *supra* note 89, at 5 (claiming that this argument itself, not Title VII, creates further “racial politics”).

208. *See supra* notes 174–180 and accompanying text.

209. *See supra* notes 92–94 and accompanying text. In contrast, facially-neutral practices—specifically employment or promotion tests—seek to reward merit and ability. *See generally* Brief for Industrial-Organizational Psychologists as Amici Curiae Supporting Respondents at 10, *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 796281 (citing 29 C.F.R. §§ 1607.14(B)(3), 1607.14(C)(4)) (2009) (“It is a fundamental precept of personnel selection that an employment test should be constructed to measure important knowledge, skills, abilities, and other personal characteristics . . . needed for the job.”). A focus on racial equality in results undermines this American core value: meritocracy. Carbado & Harris, *supra* note 153, at 1141–42.

210. *See supra* note 92–94 and accompanying text (discussing the Uniform Guidelines).

While, admittedly, America is currently far from being truly color-blind, racial preferences are not the appropriate means to achieve a color-blind world.²¹¹ As articulated by Chief Justice Roberts, the way to stop discrimination is simply to stop discriminating on the basis of race.²¹²

ii. Whether Title VII Evidences the Will of the People Is Irrelevant

Proponents of Title VII point to the public's support of affirmative action programs as justification for the Act's legitimacy.²¹³ However, it is important to recall that a proper analysis of Title VII's constitutionality begins with the strict scrutiny analysis mandated by the Equal Protection Clause, not by asking whether the government action is wanted or publicly supported.²¹⁴ Only after Title VII has passed strict scrutiny can the "public support" argument hold any weight and, even then, only if the Court finds that following public opinion is a compelling government interest. Thus far, however, the Court has never recognized bowing to public opinion as a compelling government interest.²¹⁵ A simple showing of Title VII's support by the public is therefore not a justification in itself for upholding the Act in the face of a constitutional challenge.²¹⁶

iii. Employer Freedom Cannot Come at the Cost of Constitutionality

Proponents of Title VII argue that the Act places the power of remedying discrimination in the hands of private citizens,

211. See *supra* note 82 and accompanying text. Cf. Carbado & Harris, *supra* note 153, at 1194 (noting the argument that "the assertion that race should not matter is a *means* to get us to that *end*") (emphasis added).

212. See *supra* note 82 and accompanying text. Cf. Carbado & Harris, *supra* note 153, at 1205 (discussing Justice Harlan's dissent in *Plessy* and pointing to the color-blind nature of the Constitution).

213. See Shuford, *supra* note 203, at 525 (claiming "some seventy percent" of Americans support affirmative action).

214. See *supra* notes 168–73 and accompanying text (discussing the Fourteenth Amendment's applicability to Title VII); *supra* Section III(d)(i) (outlining the strict scrutiny review process).

215. Limited authority arguably exists that the Court has found compliance with a presumptively valid federal antidiscrimination law to be a compelling interest. See *supra* notes 77–85 and 173 and accompanying text. However, compliance with a federal antidiscrimination law is very different than following public opinion. This difference is crucial, as the constitutionality of the federal antidiscrimination law itself is at issue.

216. *But see* Mahoney, *supra* note 73, at 1587–94 (exploring the proper relationship between judicial choices and public opinion).

enabling the growth of liberty through a conscientious marketplace.²¹⁷ Title VII is said to leave management prerogatives undisturbed to the greatest extent possible.²¹⁸ While the ability of employers to proactively end discrimination in the workplace is arguably necessary for the realization of a truly color-blind society,²¹⁹ this ability should not take the form of a “blank check to discriminate” against one race for the benefit of another.²²⁰

As discussed in the previous section, a proper analysis of Title VII’s constitutionality begins with strict scrutiny analysis, not with asking whether government action should promote employer freedom. Only if promoting the freedom of employers to end discrimination in their workplace is itself a compelling government interest could this argument in favor of Title VII pass muster.²²¹

iv. An Interest in Diversity Does Not Warrant Title VII

Proponents of Title VII seek to extend the Court’s equal protection jurisprudence in the education context to the employment context, arguing that diversity itself is a compelling interest.²²² They argue that a diverse workforce promotes cross-

217. *See, e.g.,* Davis, *supra* note 84, at 996–97 (noting the “power of this remedy rests in its source”); Shuford, *supra* note 203, at 530 (highlighting the voluntary nature of Title VII).

218. Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioners at 10, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 507013 (citing Local No. 93, Int’l Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 519–20 (1986)).

219. *See, e.g.,* Davis, *supra* note 84, at 996–97 (discussing the benefit of employers actively seeking to end discrimination).

220. *Cf. Savage*, *supra* note 10, at 20 (noting Chief Justice Roberts’s questioning that Title VII’s disparate-impact provision is a “blank check to discriminate”) (internal citations omitted). Private employers arguably have more freedom to discriminate in the workplace than do public employers. *See* Police Organizations Brief, *supra* note 63, at 22 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279 (1986)). Because this Note focuses on the constitutionality of Congress enacting Title VII, the ability of private employers to act and Congress’s ability to regulate that private action is beyond its purview.

221. *See supra* Section III(d)(i) (outlining the strict scrutiny review process). Resolution of this argument follows the previous analysis outlined in Section III(e)(iv).

222. *See, e.g.,* Davis, *supra* note 84, at 1054 (arguing the workplace offers a “unique setting to advance integration” and diversity). Davis does however recognize the specificity of the Court’s rationale for recognizing diversity as a compelling interest in higher education, including the Court’s emphasis on the First Amendment. *Id.* at 1051. Proponents of Title VII’s disparate-impact provision make a similar argument that an employment decision outcome that reflects the racial consistency of society, not merely intent, matters. *Id.* at 1054. Responding to this argument is beyond the scope of this Note.

racial understanding and even enhanced productivity.²²³ However, this diversity justification is based on a belief in racial, ethnic, and gender differences that is fundamentally at odds with Title VII's insistence that individuals be judged individually and without regard to stereotypes.²²⁴

Further, reading *Grutter* so that the Equal Protection Clause allows discrimination in the name of diversity is hardly justified in the employment context.²²⁵ The *Grutter* Court found that because the mission of a law school is not only to educate students, but also to train students for “work and citizenship” and cultivate future leaders, a “critical mass” of diverse students was necessary for the effective achievement of the law school's mission.²²⁶ *Grutter* made clear that it only stood “for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate.”²²⁷ For employers such as fire departments, whose mission is not to educate but to ensure public safety, diversity, while desirable, does not rise to the level of a compelling interest²²⁸ necessary to withstand strict scrutiny.²²⁹

v. The Disparate-Impact Provision Is Not Necessary to “Smoke Out” Discrimination

Finally, proponents of Title VII's disparate-impact provision argue that the provision is “simply an evidentiary tool used to identify genuine, intentional discrimination—to “smoke out,” as

223. *Id.* at 1051.

224. Clegg, *supra* note 112, at 984–85. The diversity justification is also fundamentally at odds with the promise of the Equal Protection Clause. See *supra* notes 57–62 and accompanying text.

225. See Clegg, *supra* note 112, at 984 (arguing *Grutter* is inapplicable).

226. *Grutter v. Bollinger*, 539 U.S. 306, 331–34 (2003).

227. Brief for the Concerned American Firefighters Association as Amicus Curiae Supporting Petitioners at 7–8, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 507010 [hereinafter Concerned Firefighters Brief] (citing *Grutter*, 539 U.S. at 306) (arguing *Grutter's* holding is “unavailing” in the employment context).

228. See, e.g., *id.* at 7–8 (internal citations omitted). But see, e.g., *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003) (finding a compelling operational need for a diverse police department in a racially divided major American city). While a detailed study of the duties of firefighting are beyond the purview of this Note, some have argued that a firefighter's mission is concentrating on fighting fires and is therefore much different from the mission of a police officer. Concerned Firefighters Brief, *supra* note 227, at 9.

229. See *supra* Section III(d)(i) (outlining strict scrutiny review process). Resolution of this argument follows the previous analysis outlined in Section III(e)(iv).

it were, disparate treatment.”²³⁰ They argue that “there will seldom be ‘eyewitness’ testimony to the employer’s mental processes,”²³¹ and the best evidence of intent will frequently be objective evidence of what actually happened.²³² As discussed previously, to the extent Title VII holds intentional discrimination unlawful, whether from direct or circumstantial evidence, it is consistent with the mandates of the Equal Protection Clause.²³³ However, the aspects of Title VII that stretch beyond intentional discrimination are problematic and because the disparate-impact provision is not “narrowly tailored,” it fails strict scrutiny review and is therefore unconstitutional.²³⁴

Proponents of Title VII make an additional related argument, warning that removing the disparate-impact provision of Title VII will silence legitimate discrimination claims.²³⁵ They argue that the laws regulating discrimination should be flexible rather than overly demanding.²³⁶ While it is certainly important that the Courts continue to provide relief to victims of intentional discrimination,²³⁷ strict scrutiny application is not fatal in fact.²³⁸ Victims of discrimination can find refuge within affirmative action law, but they must do so without infringing on the rights of others and within the bounds of the Equal Protection Clause.

230. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

231. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). *Cf.* Shuford, *supra* note 203, at 526 (arguing Title VII’s purpose is to recognize existing barriers that would otherwise be hidden).

232. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). *Cf.* Banks, *supra* note 63, at 1102 (“[D]isparate impact prohibits those practices whose racially skewed burdens suggest that unconscious bias may have played a role.”).

233. *See supra* Section III(d) and accompanying text (examining the disparate-treatment provision).

234. *See supra* Section III(d)(ii)(b) and accompanying text.

235. *See, e.g.,* Banks, *supra* note 63, at 1095 (arguing the absence of the disparate-impact provision in Title VII will make “the hurdle of proving discriminatory purpose . . . so daunting that virtually no claim will surmount it”).

236. *See generally* Rojas, *supra* note 54, at 143 (highlighting benefits of a flexible legal system to address discrimination).

237. *Id.* (noting the importance of a welcoming legal system in ending discrimination).

238. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

IV. CONCLUSION

*In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.*²³⁹

The framers of the Constitution and of the Fourteenth Amendment had no doubts as to why racial discrimination was morally wrong: “[R]acial discrimination treats the accidental feature of race as an essential feature of the human persona.”²⁴⁰ Further, they knew that if the words “all men are created equal” were to have any meaning, the Fourteenth Amendment’s promise of equal protection must apply to every individual, regardless of their race or the purpose for which the government action at issue was taken.²⁴¹

The Court’s opinion in *Ricci* leaves little doubt that the Court’s commitment to equal protection is no different from that of the original framers.²⁴² Further, at least a majority of the Court recognizes the conflicting mandates of the Equal Protection Clause and Title VII and the pressing need for reconciliation.²⁴³ When the proper case²⁴⁴ comes before the Court, the Court would be well-advised to analyze the constitutionality of Title VII under a proper strict scrutiny review.²⁴⁵ More importantly, if the Court is truly committed to the color-blindness mandated by the Equal Protection Clause and if this nation’s promise that “all men are created equal” is to hold meaning, the Court must strike down the disparate-impact provision of Title VII.²⁴⁶

239. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

240. Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 15, 49 n.132 (1997).

241. Compare *supra* note 2 and accompanying text (Declaration of Independence) with *supra* notes 57–62 and accompanying text (Fourteenth Amendment). Cf. Erler, *supra* note 255, at 49 n.132 (arguing race discrimination violates the principles of the Declaration of Independence).

242. Compare *supra* notes 240–41 and accompanying text (framers) with *supra* Section III(c) (current Court).

243. See *supra* Section III(c) and accompanying text.

244. “Proper” is used in this argument to mean a case which brings forth Justice Scalia’s question and where the petitioner’s claims cannot be dismissed at a statutory level. Cf. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (holding based on petitioner’s Title VII claim and not addressing petitioner’s Equal Protection Clause claim).

245. See *supra* Section III(d) and accompanying text.

246. See *supra* Section III(d) and accompanying text.

The way to stop discrimination is simply to stop discriminating on the basis of race. The question, however, is not whether the majority of the Court believes this notion, but whether they are principled enough to apply it.²⁴⁷

247. Cf. Chemerinsky, *supra* note 143, at 423 (“[I]t is hard to imagine that there would be five votes for such a radical change in the law.”); Kimberly J. Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 873 n. 529 (2010) (“[G]iven the refusal of the remaining justices to join his concurrence, Justice Scalia might not be able to garner enough votes to make his view the law of the land.”).