Michigan Law
University of Michigan Law School

RICHARD PRIMUS
Professor of Law
John Simon Guggenheim Memorial
Foundation Fellow in Constitutional Studies

625 South State Street
Ann Arbor, Michigan 48109
Phone (734) 647-5543
raprimus@umich.edu

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The Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Senators:

I write to you concerning the pending Supreme Court case of *Ricci v. DeStefano*, which has attracted attention because Judge Sonia Sotomayor participated in the proceedings below. Six years ago, I identified the legal problem that *Ricci* presents and wrote the first (and to my knowledge only) scholarly article analyzing it.[1] Given my connection to the subject matter, I have followed the *Ricci* case closely. I now offer the analysis in this letter to assist the Judiciary Committee in its consideration of Judge Sotomayor.

The deep problem in *Ricci* is the relationship between two elements of antidiscrimination law: the aspiration toward color-blind decisionmaking and the concern with facially neutral practices that have disparately adverse impacts on people of different racial groups. Sometimes these two elements of antidiscrimination law are understood to work together, and sometimes they are understood as operating in separate spheres. What has not been generally recognized, however, is that the two might also come into conflict with each other. That conflict is what drives the *Ricci* case.

Given existing law, there is a clear answer to the question of what a lower-court judge should do when faced with the problem in *Ricci*. The answer is that the judge should deny the plaintiffs' claim. That is what both the district and circuit courts did in *Ricci*, and it is also what both the district and circuit courts did when the same problem arose recently in Tennessee. But the underlying problem raises sensitive issues, and

[1] See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harvard Law Review, 493 (2003). The article is cited in Judge Calabresi's opinion explaining the Second Circuit's decision not to rehear *Ricci*. See *Ricci v. DeStefano*, 530 F.3d 88, 88-89 (2d Cir. 2008).

those issues may become more open for reexamination if the Supreme Court's decision in the case changes the existing legal landscape.

This letter's analysis has four parts. Part I lays out the big-picture problem, which is the tension between the value of color-blindness and the periodic need to reform facially neutral practices that have disparately adverse effects on people of different racial groups. Part II describes the facts of the New Haven case. Part III assesses the Second Circuit's decision. Part IV explains how the Supreme Court's intervention in the case could change the state of the law.

## I. The Big Picture: Color-Blindness and Disparate Impact

The core value animating much of antidiscrimination law is the individualist aspiration that no person be disadvantaged on the basis of his or her race. Accordingly, the law generally requires public officials and private employers to make decisions without respect to the race of the persons affected. That said, a completely color-blind system could not correct hidden or unintentional instances of discrimination, many of which are discovered only by looking at statistical patterns to see the impact they have on people of different groups, considered in the aggregate. (The logic is the same as in the field of public health: we would never discover that heart disease affects more blacks than whites if race were always ignored in medical studies.) Antidiscrimination law therefore tempers the color-blind ideal with color-conscious devices aimed at identifying and remedying certain forms of discrimination.

One such device is the disparate impact standard of Title VII. Under the Nixon Administration, the EEOC interpreted Title VII to prohibit some employment practices that, in the statistical aggregate, affect members of some racial groups more adversely than others.[2] The Supreme Court confirmed this interpretation of the statute in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Some experts at the time thought that the Constitution's Equal Protection Clause embodied a similar disparate impact standard, but the Supreme Court disagreed. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court held that the Constitution of its own force is concerned with discriminatory purposes rather than discriminatory effects. The Court reiterated, however, that Congress was free to enact disparate impact standards as a statutory matter—and the Court was of course aware that Title VII was already functioning with a disparate impact standard. Ever since, this division between the statutory and constitutional realms has been legal orthodoxy: the Constitution of its own force prohibits only intentional discrimination, but Congress may enact impact-based standards as well.[3]

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[2] See EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3 (1970).

[3] As presently codified, Title VII prohibits any employment practice with disparately adverse effects on members of different racial groups, unless the employer demonstrates that the practice is required by business necessity and the practice cannot be replaced by different practices having less, or no, disparate racial impact. See 42 U.S.C. § 2000e(2)(k).

Over the decades since *Davis*, the Supreme Court's interpretation of Equal Protection has become more uncompromisingly color-blind. Among other things, the Court has sharply limited, though not quite eliminated, the permissible scope of race-based affirmative action, even when intended to cure prior discrimination. During the same period, the Court also narrowed the scope of Title VII's disparate impact doctrine, but Congress pushed back in the Civil Rights Act of 1991,[4] and since then the Court has been content to let Congress decide the scope of that statutory standard. Until now, the Court's increasing preference for color-blindness has not been deployed to question the validity of disparate impact law under Title VII.

In 2003, however, I pointed out that if the Court pursued the color-blind vision of Equal Protection to its logical ending point, it might eventually find an actual conflict between Equal Protection and Title VII's disparate impact doctrine. The full analysis is complex, but the basic intuition can be summarized in a few sentences. Administering a disparate impact doctrine involves classifying employees into racial groups and measuring how particular employment practices affect the groups differently. Any remedy that a court orders in a disparate impact case is likely to alter the racial composition of the workforce. These features are part of disparate impact doctrine by design: there is no way to get the benefits of a disparate impact doctrine without them. But if Equal Protection had zero tolerance for race-conscious decisionmaking, these features of Title VII would be unconstitutional, and disparate impact doctrine would be invalid.

When I published my analysis, experts in the field overwhelmingly took the view that the Supreme Court would never take the color-blind idea so far as to strike down Title VII's disparate impact doctrine. Liberals and conservatives alike largely agreed that I had shown a conceptual tension between Title VII and the new interpretations of Equal Protection, but they also believed that the tension would remain at the conceptual level only. The acceptability of statutory disparate impact doctrine had, after all, been orthodox legal thinking for decades. Rather than expecting the Supreme Court to push its color-blind approach to the point where disparate impact doctrine would have to go, the consensus view was that the Court's investment in the color-blind ideal was balanced by its acceptance of the disparate impact doctrine in statutes like Title VII.

*Ricci v. DeStefano* may be the occasion for a change in that equilibrium: the Supreme Court may be poised to curtail the scope of disparate impact doctrine in the name of increased colorblindness in the law. If that happens, it will be a significant departure from prior doctrine.

## II. *Ricci v. DeStefano*: The Problem

The core conflict in the New Haven case is exactly the one described above. And the facts of the case present that conflict in a highly charged way.

[4] See Civil Rights Act of 1991, § 105.

In 2003, the City of New Haven administered written tests to firefighters seeking promotion to the ranks of Lieutenant and Captain. Nine black firefighters did well enough to qualify for promotion. In the aggregate, however, white applicants passed the test at a much higher rate than black applicants—nearly double the rate for the Lieutenant's exam and even more than double for the Captain's exam. Under longstanding EEOC guidelines, if applicants from one racial group pass a written promotion test at less than four-fifths the rate of applicants from a different racial group, there is prima facie evidence that the test has an unlawful disparate impact under Title VII. New Haven's test fell far below the four-fifths ratio. City officials accordingly had two choices. They could withdraw the test, or they could prepare to defend it in court. Faced with this choice, and knowing that a Title VII plaintiff would be able to make a prima facie case on the basis of these statistics, city officials withdrew the test, saying that they would find a different way to decide whom to promote.[5]

Considered strictly, the City's decision to throw out its test did not deny anyone a promotion. The test results would have determined eligibility for promotions, but the actual awarding of promotions would have required a further step. Moreover, it is still possible that people who would have been promoted under a system including the test will still be promoted in the end under whatever new system the City implements. That said, the City's choice to throw out the test did disadvantage the firefighters who would have been eligible for promotion under the test. They are not as close to promotion today as they were before the test was thrown out—and, in all likelihood, at least some of them have a smaller chance of being promoted in the end.

A group of those firefighters brought suit in federal district court. (One plaintiff was Hispanic; none was black.) According to the plaintiffs, the City's decision to throw out the test violated both Title VII and Equal Protection, because it aimed to alter the racial allocation of the promotions.

The district court rejected the plaintiffs' claims, and a panel of the Second Circuit affirmed. The three judges on the panel were Judge Rosemary Pooler, Judge Robert Sack, and Judge Sonia Sotomayor. The panel's opinion was for the court rather than signed by a particular judge. Normal practice in the Second Circuit is for the presiding judge—here, Judge Pooler—to draft such opinions.

## III. The Second Circuit's Decision

As a matter of existing legal doctrine, the Second Circuit's decision was clearly right. The plaintiffs' Title VII claim, if credited, would make Title VII a statute at war with itself. And the Equal Protection claim, if credited, would mark a radical departure from the relationship between Equal Protection and disparate impact as that relationship has been understood since *Davis*.

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[5] Whether the City's subjective motivation for withdrawing the test was wholly to comply with Title VII or partly to comply with Title VII and partly to advance other agendas is a source of controversy. As explained in Part IV, one way that the Supreme Court could dispose of *Ricci* is by remanding to the District Court for a resolution of that question.

*A) The Title VII issue*

The plaintiffs contend—and with some justice—that the city made a racially motivated decision to throw out the test. But there are different things that that contention might mean. Clearly, the City made its decision in consequence of learning how many people from each of several racial groups might be promoted if it stuck with its test. Without more, however, that kind of race-conscious decisionmaking is not illegal under Title VII. After all, Title VII affirmatively encourages employers to keep track of the racial impacts of their promotional criteria and to change criteria that have disparate racial impacts. In other words, administering a disparate impact doctrine inherently requires this kind of race-conscious decisionmaking. It would be odd, therefore, for such decisionmaking to violate Title VII; indeed, it would make Title VII a self-contradictory statute, requiring and prohibiting the very same behavior.

In theory, the law could permit employers to use race-conscious remedies for disparate impact problems only after those problems had been officially identified by court decree. Such a regime would aim at giving employers the minimum possible scope for race-conscious remedial action, and there is a plausible rationale for that aim. Race-conscious remedies are sometimes appropriate, but to the degree that they are necessary evils, it might make sense to constrain employers in this way.

In fact, though, the law has made a different choice: Title VII doctrine encourages employers to cure disparate impact problems voluntarily, without incurring the expense of litigation and the humiliation of being found liable for discrimination. The rationale for this choice lies partly in the premise that much disparate impact discrimination is unintentional. Given that premise, one good use of Title VII is to bring disparate impacts to light and nudge employers to do better without having to run the gauntlet of litigation. And even in cases where disparate impact findings arise from hidden *intentional* discrimination, there are advantages in permitting employers to reform voluntarily without have to be identified as wrongdoers in court. If a business or a municipality is willing to fix the problem, the Supreme Court has reasoned, there is wisdom in welcoming its cooperation rather than putting it on the defensive.[6]

*B) The Equal Protection issue*

The central idea of the plaintiffs' claim, however—that they have been disadvantaged by a race-conscious decision—is not a trivial one. Given the ideal of color-blind decisionmaking, the intuitive distaste for such decisions is easy to understand, and that intuition has increasingly informed Equal Protection doctrine in recent years. That said, interpreting Equal Protection to vindicate the plaintiffs' claim would go

[6] In Justice O'Connor's view, this rationale was strong enough to justify letting employers practice straightforward affirmative action without falling foul of Title VII. See *Johnson v. Santa Clara*, 480 U.S. 616, 652-53 (O'Connor, J., concurring in the judgment). If the rationale is strong enough to justify a more overtly race-conscious practice like affirmative action, it is strong enough to justify compliance with the more subtly race-conscious demands of the disparate impact standard.

beyond anything that the Court has yet done. At its core, such an interpretation would signal that actions inherent in the administration of a disparate impact doctrine amount to unconstitutional discrimination. In other words, it would imply that Congress lacks the authority to include a disparate impact doctrine in Title VII, and that would uproot nearly four decades of settled law.

The plaintiffs are correct that there is a tension between disparate impact doctrine and an uncompromising ideal of color-blindness. Disparate impact is a color-conscious doctrine that requires courts and employers to make certain decisions based on the racial effects of employment practices. The color-blind ideal, however, is only one part of Equal Protection, and Equal Protection has never taken that ideal all the way to its extreme. For example, the Supreme Court agreed with my own institution, the University of Michigan Law School, that limited race-conscious decisionmaking can be appropriate in the context of university admissions.[7] Not everyone agreed with that decision, of course, but it is clearly the law. And even people who would prefer a more strictly color-blind regime in that context agree that color-blindness must *sometimes* be balanced against other public values. Nobody thinks, for example, that a police dispatcher violates Equal Protection when she tells patrol officers seeking a suspect that they are looking for a white woman, or a black man, as the case may be. In sum, the color-blind ideal is an important part of Equal Protection, but some forms of race-conscious decisionmaking are permitted or even affirmatively recommended. Ever since *Griggs* and *Davis*, it has been settled that a racially conscious disparate impact standard is an appropriate part of statutory antidiscrimination law.[8]

It should not be surprising, therefore, that when *Ricci* was litigated below, the law of the Second Circuit included prior cases upholding municipal employers' race-conscious interventions to prevent written tests from causing Title VII disparate impact problems. One instructive decision is *Hayden v. County of Nassau*, 180 F.3d 42 (2d. Cir 1999). *Hayden* involved a police department test that had been designed to afford county officials a great deal of flexibility to avoid disparate racial impacts. The test had 25 sections. The sections could be scored independently, and it was not necessary to include all 25 sections to reach a statistically valid result. In other words, it could have been a valid measure of job qualification to give a test that contained only sections 1-10, or only sections 11-20, or only the odd-numbered sections, *etc*., so long as a sufficient number of sections was used. County officials thus had many options for how to use the test as a basis of promotions, because counting the scores for one set of sections might yield a different set of highest-scoring applicants than counting the scores for a different set of sections.

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[7] See *Grutter v. Bollinger*, 593 U.S. 306 (2003).

[8] Because the propriety of Title VII's disparate impact standard has always been a matter of consensus, the Supreme Court has never had occasion to spell out the doctrinal mechanics of reconciling that standard with Equal Protection doctrine. There is more than one way that such a reconciliation might work, and the relative merits of different possible reconciliations are a legitimate subject for technical debate. See Primus, 117 Harvard Law Review at 498-501, 515-51, 563-66, 585-87 (2003).

After the test was administered, graders examined the results section by section and assembled a combination of nine sections that yielded statistically valid results while minimizing the disparate racial impact of the test. Quite clearly, the choice of those nine sections was race-conscious in the same sense that New Haven's decision to throw out its test in *Ricci* was race-conscious: county officials chose the sections they did in large part because choosing those nine sections yielded an appropriate racial distribution of candidates with passing scores.

A group of police officers who had taken the test brought an Equal Protection challenge, which the Second Circuit rejected. As the decision explained, it was surely true that the officials in *Hayden* had considered race. But they had done so only as was necessary to prevent a disparate impact actionable under Title VII. Given *Hayden*, and given that no panel of the Second Circuit may overrule the decision of a prior panel, it is hard to see how the judges in *Ricci* could have reached any other result.

The Second Circuit is not unique. In my own home circuit—the Sixth—a case presenting the same problem was recently decided in exactly the same way. The police department of Memphis, Tennessee gave a written test as part of deciding on officer promotions. The test had a disparately adverse impact on black applicants. City officials threw the test out, saying they would find a different process for promoting police officers. A group of applicants sued, alleging discrimination against them, and a panel of the Sixth Circuit rejected their claims. Indeed, the Sixth Circuit considered the decision sufficiently unremarkable so as to deal with the matter in an unpublished summary order. See *Oakley v. Memphis* (6th Cir., unpublished disposition, Sept. 8, 2008).

## IV. The Supreme Court's Intervention

The job of the lower courts is to apply existing doctrine. On that understanding, the Second Circuit's decision in *Ricci* and the Sixth Circuit's decision in *Oakley* were not only correct but clearly so. That said, it is foreseeable—even likely—that the Supreme Court will go the other way. The Supreme Court is less bound by precedent than any other federal court, and its interpretations of antidiscrimination law have for some time been showing increased skepticism toward any form of race-conscious decisionmaking, even in the pursuit of remedying discrimination. How the Court handles this case may largely depend on whether those Justices who favor a more aggressively color-blind approach to antidiscrimination law consider *Ricci* an appropriate vehicle for advancing that interpretation.

I briefly consider three possible dispositions: affirmance, reversal, and remand.

(1) Affirming the Second Circuit's decision is the disposition that would do the least to disturb the existing state of the law. If the Court affirms, the decision would probably signal a limit to the Court's trend toward insisting on increasing color-blindness in antidiscrimination law. (Reading that meaning into an affirmance would be contingent, however, on assessing the Court's decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*, where the conflict between color-blindness and

longstanding statutory antidiscrimination standards is presented in the context of the Voting Rights Act.) But there are reasons to think that affirmance is unlikely, including the mere fact that the Court granted certiorari. One should always be wary of reading too much into a decision on certiorari, of course. But in the present case, the Court granted review without a clearly developed circuit split. In the absence of a division of authority in the lower courts, discretionary Supreme Court review suggests that there are Justices who are eager to weigh in on the question. And there would be little need to weigh in simply to endorse the view that both circuits to address the issue so far have taken.

(2) If the Court reverses the Second Circuit, *Ricci* will mark an expansion of color-blindness and a contraction of Title VII's disparate impact doctrine. Such a decision would be a change from existing law, but it would be a change continuous with the direction in which the Court has taken Equal Protection doctrine in recent years. If the Court is inclined to continue that line of development, and there are reasons to think that it is, then whether it does so in this case might principally depend on whether the majority of Justices considers *Ricci* a good vehicle for pressing the point. Here it matters that several of the plaintiffs are sympathetic characters, such that vindicating their claims has the ring of rough justice. The Court understands, of course, that the law sometimes requires results that seem to frustrate rough justice, and often for good reason. And one ought not to think that the Court's job is to do justice in each individual case rather than doing what the law requires. That said, the Justices also know that when doctrine is going to change, it is helpful to present the change as being in the service of rough justice in the particular case. It should therefore not be surprising if the Court takes an aggressive posture, alters the doctrine, and reverses the Second Circuit. If it does, there could be far-reaching consequences for disparate impact law (and, depending again on the interaction between *Ricci* and *Northwest Austin Municipal Utility District No. 1*, on antidiscrimination law more broadly). Exactly what those consequences might be would depend on how ambitiously the Court writes its opinion, and it may take some time for lower courts to work out the implications.

(3) Alternatively, the Court might take a more statesmanlike approach and decline the opportunity to remake a settled portion of the law. One good way to do that would be to accept the suggestion of the Solicitor General and remand the case for further fact-finding in the District Court. As the Solicitor General's brief explains, the District Court did not conduct a mixed-motive analysis, inquiring into the possibility that the City's decision to throw out its test was prompted partly by the need to comply with Title VII and partly by less admirable motives, including the racial dynamics of New Haven politics. The failure to conduct such an analysis is not a failing of the District Court: the plaintiffs did not clearly advance a mixed-motive argument, and a court is not bound to identify and resolve issues that the parties do not raise. But the Supreme Court is free to raise the issue and ask that it be resolved, and doing so might offer a way of disposing of this case without upsetting existing bodies of legal doctrine.[9] And it is a principle of

[9] If the District Court on remand were to find that the City was motivated partly by racial considerations outside of what Title VII's disparate impact doctrine requires, it could impose liability without truncating Title VII. If the District Court were to find that the City's motive had been solely to comply with Title VII, however, the fundamental legal conflict might have to be addressed after all.

good judicial craft that courts should think hard before deciding what does not need to be decided, or what does not need to be decided today. That said, one should not count on the Court's taking this way out. Having granted certiorari, the Court might want to resolve the issue that attracted its attention.

Even if the Court does take an aggressive stance, however, a decision reversing the Second Circuit would be no ill reflection on the eight judges who decided *Ricci* and *Oakley* in the courts below. Those judges—two at the district court level, and six at the circuit level—were unanimous in the view that an employer may voluntarily abandon a test once it becomes apparent that that test has a disparate racial impact actionable under Title VII. They were unanimous in that view because that was the correct understanding of settled law prior to the Supreme Court's intervention in *Ricci*. If the Supreme Court announces new doctrine, it will then be the duty of the lower courts to apply the law in its newly changed form. But lower courts do not have the duty to anticipate the Supreme Court's new legal interpretations. Their responsibility is to apply the law as it stands when cases are before them.

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I hope that Members of the Committee will not hesitate to call on me if I can be of further assistance.

Sincerely,

Richard Primus
Professor of Law
John Simon Guggenheim Memorial
Foundation Fellow in Constitutional
Studies

cc: Hon. Herb Kohl
Hon. Orrin Hatch
Hon. Dianne Feinstein
Hon. Charles Grassley
Hon. Russell Feingold
Hon. Jon Kyl
Hon. Charles Schumer
Hon. Lindsey Graham
Hon. Richard Durbin

Hon. John Cornyn
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